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## POSITIVE AND NATURAL LAW IN THOMAS HOBBS'S PHILOSOPHY

Thomas Hobbes is one of the philosophers of the law whose concepts are classified differently. He is considered to be a supporter of natural law or a positivistic, depending which of the threads of his work is closely considered or particularly exposed. His name is mentioned in every natural law handbook, where he is presented as a classic of natural laws and, at the same time, regarded by many as forerunner of legal positivism, a doctrine which took its mature shape only in the 19th century. The works of Hobbes do not however 'reconcile' the two mentioned trends, it seems that the 'natural law – positive law' opposition does not have a *raison d'être* according to the philosopher.

The aim of this article is to show that Hobbes might be called, from the today's perspective, a 'super positivistic', and linking him to the natural law trend is only possible within a highly specific understanding of the term 'law' (the law of nature is for the author of *Leviathan* a skill of the mind to recognise the rules which are of crucial importance to the survival of an individual). The philosopher recognises that the basic function of natural law is inventing justification, giving a good reason for building a cohesive system of positive law. Natural law in Hobbes's system has a service function to the state law, it constitutes a peculiar pretext allowing to create an artificial but effective legal order.

Hobbes's considerations concerning the essence of the law occupy a lot of space in his most important works in the sphere of political philosophy *The Elements of Law, Natural and Politic*, *De Cive*, as well as in *Leviathan*, and in *Dialogue between a Philosopher and a Student of the Common Laws of England*, and his other works. According to the author, the starting point of reflection on the issue of the state law is the notion of the laws of nature which he defines as invariable and eternal commands of reason. The path of Hobbes's legal-political considerations is significant: problem of the laws of

nature is always the starting point, and the destination point is the doctrine of absolute sovereignty.

According to the philosopher, humans guided by the laws of nature aim at leaving the innate, primitive state of nature, state of war of everyone against everyone, and passing to an artificial sovereign state which assures peace. The rules of reason, laws of nature are opposed to natural entitlement, human freedom to do everything. To explain the Hobbesian understanding of law of nature it is important to emphasise that the term 'reason' is for him an exclusively formal category, standing for human skill to calculate, to do profit and loss account, and not a habitat of revealed truth and not of substantial dimension.<sup>1</sup> The rules of reason, which Hobbes calls laws, do not contain any reference or metaphysical involvement, according to Frederick Coplestone they are dictates of egoist caution and conditions of national survival, axioms enabling to deduce a society and a government.<sup>2</sup> Hobbes himself calls them *conclusions or theorems what conduceth to the conservation and defence of themselves*.<sup>3</sup>

Striving for peace is the right of nature, and a dictate of reason (in Hobbes's utilitarian hierarchy peace is the chief aim since it leads to good: life preservation) as well as concluding a contract constituting a sovereign state and fulfilling its conditions *that a man be willing, when others are so too, as farre-forth, as for peace, and defence of himselfe he shall think it necessary, to lay down this right to all things; and be contented with so much liberty against other men, as he would allow other men against himselfe*.<sup>4</sup>

Hobbes saw the guarantee of peace in abiding the laws of nature which should be made part of state law and secured by sanction by an efficient legislator. A sovereign, appointed by virtue of a social contract constituting a state – Leviathan, creates a social reality with a common law in force, a reality which is free from countless perils of natural state. The name *Defensor Pacis* coming from the works of Marsilius of Padu is not suitable for him, he is not a defender of peace descending from God, he is the creator of peace on earth, Creator Pacis liberating terrified individuals from the terror of the state of nature, a threat of a sudden death.<sup>5</sup>

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<sup>1</sup> N. Bobbio, *Thomas Hobbes and the Natural Law Tradition*, Chicago 1993, p. 118.

<sup>2</sup> F. Copleston, *Historia filozofii*, vol. 5, Warsaw 2005, p. 36.

<sup>3</sup> T. Hobbes, *Leviathan*, Oxford 1909, p. 122–123.

<sup>4</sup> *Ibidem*, p. 100.

<sup>5</sup> C. Schmitt, *Lewiatan w teorii państwa Thomasa Hobbesa. Sens i niepowodzenie politycznego symbolu*, Warsaw 2008, p. 44.

The laws of nature and the state law are two different kinds of laws distinguished by Hobbes. They are not two distinct or contradictory legal orders<sup>6</sup> in Hobbes's system, therefore classical distinction 'laws of nature – state laws' is inexistent. Laws of nature namely 'laws' dictated by human reason, commands of *natural reason* steaming from a pure calculation, are topical both in the state of nature, previous to sovereign state, as well as in artificially created sovereign state, but they start working after they have been included to the legal order of the state. Only constituting a state and their incorporation into the legal system makes it possible to observe them and allows them to become *sensu stricto* laws.

The law of nature is important, according to Hobbes, only as an impulse leading to formation of a state (state guarantees peace, allowing for a safe existence). When a state is created, natural law is no longer needed – the only functioning law is, as a matter of fact, state law. In Hobbes's system law of nature is not executed, it has only right to potential existence; in the state of nature it does not actually function since it is not secured by sanction, in the sovereign state it becomes part of positive law and functions as one.<sup>7</sup>

Norberto Bobbio, Italian philosopher of the law suggests that referring to natural law while building a doctrine of an absolute state is Hobbes's ingenious contrivance to anticipate future polemics and take away from the followers of natural law their most powerful weapon from the very dawn of the discussion, one of Hobbes's favourite rhetorical tricks was refuting adversaries thesis using their own arguments.<sup>8</sup>

According to Hobbes, a sovereign elected by the will of citizens and acting on their behalf does something more than a simple expression of moral questions. Sovereign decisions, in other words, orders, become a commonly binding law when they are formulated, sovereign shapes and not describes a legal reality. Upon announcement of sovereigns' orders, 'the law comes into being', when by virtue of a social agreement a state comes into existence and a sovereign is chosen, legal order emerges from non-existence – by the power of sovereigns' words.

It seems that Hobbes would be ready to admit that sovereign's orders do not have logical value, sovereign's decisions cannot be false – a sovereign announces only 'the truth', to which he has exclusive right. Sovereign's

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<sup>6</sup> T. Hobbes, *Leviathan*, ed. quoted, p. 236.

<sup>7</sup> See N. Bobbio, *Thomas Hobbes and the Natural Law Tradition*, The University of Chicago 1993, p. 141.

<sup>8</sup> *Ibidem*, pp. 122–123.

decisions are exclusively of creative function. Sentences included in special law registers have descriptive function – they report about facts which exist through sovereigns' will.<sup>9</sup>

By calling certain acts moral a sovereign constitutes a legislative act, a point of reference for evaluation of future behaviour of citizens. This operation is similar to a defining process, which it is in fact. Since the defining process is characterised by arbitrariness, then legislative acts of sovereign are also arbitrary. And if a correctly, even though, arbitrarily formulated definition should not raise controversies or disputes, then legislative acts of sovereign should not become subject of public dispute.<sup>10</sup> Just as correct definitions give birth to reasoning and building of a system of scientific knowledge, legislative acts (laws in which a sovereign says what is good and legal and what is inappropriate and beyond legal order) constitute a foundation of a safe state, create a new social reality. Questioning these acts by citizens is subversive and extremely dangerous for the state order, therefore any critique of the law instituted by a sovereign is excluded in Hobbes's system. There is no room for that also because Hobbes rules out any possibility of an unjust and defective statutory law.<sup>11</sup>

In Hobbes's opinion, creation of law is tightly connected to creation of a state, he looked for the origins of law in inconstant, changing will of sovereign, he deprived them of eternal and invariable character. In the state of nature, *de facto*, law did not exist – at that time there were only natural rights of individuals with any guaranty. On the other hand, in a sovereign state, people renounced lion's share of their entitlements assuming, at the same time, obligations expressed in the form of statutory law, and they did it at the cost of security indispensable for life. The sense of security offered by a state is a *sine qua non* of any human activity, a sudden threat of death is a curse for a human. The power of state protects against domestic war and assures defence in case of an attack from the outside.

The fact that positive law is directly deduced from the first assumption of his philosophy, is the evidence of supremacy of positive law in Hobbes's system. It is the consequence of adopting the same language and entering into a social contract, it is undoubtedly founded on a convention and is of conventional character. For Hobbes a language adopted on the basis of

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<sup>9</sup> T. Hobbes, *Leviathan*, ed. quoted, p. 210.

<sup>10</sup> See *ibidem*, p. 136.

<sup>11</sup> See *ibidem*, p. 163. See also J. W. N. Watkins, *Hobbes's system of ideas*, London 1965, pp. 153–157.

a convention is a factor determining creation of state institutions, law and morals. Invention of language (speech) raised humans over the state of nature and contributed to another invention, a state. Speech invention which fast singled humans out of the animal world allowed for cognition and development of science. Direct outcome of adoption of a language are state and law, artificial creations of humans which contributed to human rationality and morality.<sup>12</sup>

The primacy of positive law may be in the case of the English thinker derived even from formal traits of his works, from his literary mannerism. One of the arguments allowing to describe Hobbes as 'legal positivist' is his loyalty to the rules which nowadays constitute standards of legal positivism methodology. Even though legal positivism is not an action of philosophical positivism (or analytic philosophy) there is much analogy between them, legal positivism refers to methodological rules operating in philosophy of positivism. Zygmunt Ziemiński the author of monograph devoted to understanding of terms *legal positivism and law of nature* emphasises the fact that when describing the first term reference to positivism with all its philosophical senses is useful: *minimalism of ontological assumptions, anti-speculative attitude, empirism, scientism, non-cognitivism in metaethics*.<sup>13</sup> Ziemiński among the traits of philosophical positivism having some common characteristics with legal positivism in some of its versions, mentions also a paradigm based on intersubjectivity or recognising sentences as analytical sentences as well as the tendency to mathematise the obtained results.<sup>14</sup> Comparison of the totality of Hobbes's methodology with the methodology elaborated by positivism shows much similarity which allows to formulate a thesis that attainments of Hobbes's thought in this area were of pioneer character.

The rule of phenomenalism which reduces the difference between 'substance' and 'phenomenon' and eliminates from the field of scientific research every 'hidden existence' and powers like 'matter' or 'spirit' inaccessible to experience, should be included in the most important positivistic doctrines.<sup>15</sup> This rule requires to particularly ardently eradicate from the domain of science all questions which appear as 'metaphysical' and not giving

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<sup>12</sup> See K. Doliwa, *The role of language in the philosophical system of Thomas Hobbes*, in: *Studies in Logic, Grammar and Rhetoric*, 6 (19)/2003, ed. H. Świączkowska.

<sup>13</sup> Z. Ziemiński, *O pojmowaniu pozytywizmu oraz prawa natury*, Poznań 1993, p. 9.

<sup>14</sup> *Ibidem*, pp. 75–76.

<sup>15</sup> L. Kołakowski, *Filozofia pozytywistyczna. Od Hume'a do Koła Wiedeńskiego*, Warszawa 2008, pp. 10–11.

in to whatever control of experiment. Wittgenstein expressed it in a radical way saying that one should remain silent about what should not be said, this imperative validates in science only the utterances which have function of sentences in a logical sense whereas deprives metaphysics of all values, not only cognitive. Carnap presented this rule in a slightly more gentle version stating that metaphysics should be treated as a kind of poetry. Carnap's interpretation does not deprive metaphysics of all value, it is authorised as the poetry is authorised, as far as it is free from cognitive aspirations.<sup>16</sup>

Another fundamental rule of positivism is nominalism connected to the first rule, which excludes existence of general beings and suggests recognising definite objects as unique equivalents of general terms. Knowledge, which is of general character, comes into existence founded on a number of individual facts, arranges them and may be used in practice. It is a system of 'shortened records' allowing to gather and pass it to descendants (it seems that Hobbes understood knowledge this way). Third rule, related to nominalism, takes away whatever cognitive value from evaluative and normative sentences and places them beyond influence of the criterion of truth and falsity. Next principle concerns the conviction that the method leading to scientific cognition is common to all disciplines, and physics may constitute an example of that being a science which methods of description are most precise.

Leading nominalism<sup>17</sup> is one of the positivistic plots in Hobbes thought. It fulfils an extremely important role, Hobbesian philosophy is especially firmly established in nominalist doctrine. In the writings of the English scientific the consequences of 'thinking according to nominalism' are clearly visible, direct implications of nominalist assumptions in the sphere of social-political phenomena, nominalist ontology traces here the optics of such phenomena like accumulation of knowledge, state and law.

Hobbes's struggle with the term of 'causa finalis' and theological attitude was positivistic by spirit. He would speak out especially ardently against the issues marked by metaphysics and was consequently against treating them as scientific. Even though Hobbes conferred the primacy to reasoning as the method of scientific research, he did not belittle the significance of experience, the method of attaining the truth authorised in science.

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<sup>16</sup> Ibidem, pp. 213–224.

<sup>17</sup> Leibniz called Hobbes a "super-nominalist", see A. Biletzki, *Talking wolves, Thomas Hobbes on the Language of Politics and the Politics of Language*, Kluwer Academic Publishers 1997, p. 5.

Just as the positivists, Hobbes struggles in the spirit of nominalism with utterances of metaphoric character (especially omnipresent in 'scholastic jargon') refusing them any cognitive value. A belief that theology (with all its assertions) should be excluded from the field of true philosophy, namely science, is of positivistic character in Hobbes's thought. Other element which allows to perceive positivistic elements in Hobbes works is the issue of the method authorised on the ground of science, firm belief that there exists one method of scientific cognition, adopted from exact sciences, common to all disciplines.

Assertion that all criteria of later positivists can be found in Hobbes's works would be vastly exaggerated, however certainly one can defend a thesis that he was an early antecessor of some significant points of philosophical positivism and that his doctrine announced modern positivism. We think that a combination of pre-positivistic traits in methodology of English philosopher influences his political-legal system; positivistic attitude affected the final shape of fundamental ideas and terms of this system. Hobbes nearly made the assertion about human egoism, which he formulated owing to positivistic method, observation of reality, and reference to empiricism, a starting point of his deliberations about the state and the law. Firm anti-metaphysical orientation of Hobbes is visible in the way he understood the laws of nature; they are not God's commands, universal ideas, rules, breaking of which would lead to sin. As mentioned above, laws of nature were not actually laws for the philosopher; they were dictates of human reason: *lawes of nature are not properly laws, but qualities that dispose men to peace, and to obedience.*<sup>18</sup> Owing to positivistic optics Hobbes perceived law as a system of orders of definitional character. Such a system was to be, according to Hobbes, coherent and transparent and norms of which it was composed (sovereign orders, specific 'definitions') clear and intelligible (sovereign, in case of doubt, applied statutory interpretation).

Attempts to include Hobbes in the natural law trend seem missed, in the light of the above. The creators of philosophy of law before Hobbes recognised the law of nature as rules of exceptional significance, every conception propagating the primacy of the law of nature over the order of the state law are based on the principle *lex iniusta non est lex*. All recognise the thesis that natural law fulfils a function of validation with relation to state laws, and validity of law is made dependant on them fulfilling basic

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<sup>18</sup> T. Hobbes, *Leviathan*, ed. quoted, p. 205.

moral norms having priority in case of a conflict with the norms of the positive law.

The philosophers of natural law are followers of the opinion that these laws have a more real existence and more objective character than state laws.<sup>19</sup> It seems that in their opinion, laws of nature are generalities, universalia – constant and invariable, eternal and absolute moral rules, a perfect model close to the Platonian ‘idea’, of all state laws.

Hobbes certainly was not a platonist; nominalism, a doctrine constituting one of fundamental determinants of positivistic vision of the world appeared in his thought early and was expressed directly. Hobbesian nominalism determines the totality of his philosophical research; the primacy of this conception placing emphasis on economy of thinking and valuing the role of experiment is visible not only in Hobbes reflection devoted to problematic of language – nominalistic orientation of the writer in the political-legal domain.

Hobbes-nominalist does not recognise the existence of general entities, he could not then recognise the existence of natural laws in the sense proponents of natural law did. As a declared opponent of the existence of ‘general things/objects’ he does not accept that laws of nature (as he defined them) bind a sovereign in an absolute way. They are for a sovereign, whose aim is to establish and maintain the peace, a significant indication when establishing state laws, but they do not have a definitely imperative character; theoretically he could give up including them into legal order. Positive laws being the effect of sovereign’s unrestricted will, are in force since he instituted them and not because they are part of rules of the laws of nature.

Hobbesian sovereign is like Wilhelm Ockham’s God – omnipotent and having an unlimited creative power. Establishing positive law constitutes morality in a given community but it is not necessary to define it in a specific way. It is essential that it is relative, it may be subject to changes; sovereign’s order might modify or even invalidate it at any time.

Hobbes’s nominalist cognitive universalism permits to assume that he accepted multiplicity of possible legal orders, every one of them would be equally right if only it allowed to maintain peace in the state. It implies an assumption that there may exist many definitions of ‘justice’ and a criterion of ‘truthfulness’ of each one of them would only be their conformity with legal order created by a sovereign. Such definitions in Hobbes system are

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<sup>19</sup> A. Kozak, *Trzy modele praktyki prawniczej*, in: *Studia z filozofii prawa*, vol. 2, ed. J. Stelmach, Cracow 2003, p. 150.

not subject, as already mentioned, to the criterion of truthfulness and falsity, as expressions of performative character might be regarded as effective or not.

Finally, the law created only when a state has already been brought into existence comes into being thanks to legislative declarations of sovereign; sovereign's words make the law emerge from non-existence and organise reality of a society. Order of a sovereign is from the point of view of Hobbes, and like later in J. L. Austin, a performative statement of exceptional causative power.

To sum up, we would like to emphasise the presence in Hobbes works of multiple motifs which allow to connect it to the pre-positivistic trend and even though philosophical positivism and legal positivism are two distinct doctrines, they share much, which facilitates presenting Hobbes as a precursor of legal positivism and at the same time constitutes a weighty argument against those who want to see in the figure of the English philosopher a partisan of natural law.

In the present text we repeatedly stress the fact that nominalism is an essential element of Hobbesian philosophical system, it influences his understanding of the nature of a state and of the law. Complete understanding of his political-legal thought has to take into consideration his nominalistic cognitive universalism, and attempts to ignore or neglect this aspect of his methodology (and ontology) may distort interpretation of the texts of the English thinker.

Just as modern positivists, Hobbes notices and emphasises the role of convention in formation of legal phenomena; he states that social facts decide about what is a law. From the totality of his thought it results that he adopts a thesis of the today legal positivists that the law has entirely human provenience; after all it is individuals who decide about its existence and final form. Therefore, conceptions presenting Hobbes as a follower of 'natural law' should be rejected; English philosopher proves that the relationship between the law and morality is not of essential character, immanent – a sovereign incorporates the laws of nature into state law making them state laws motivated by rationality and not necessity, his will, coupled with the power of state has decisive importance.

#### S U M M A R Y

The aim of the present study is to determine the relationship between 'the positive law and natural law' in Thomas Hobbes's doctrine. The article shows that positive law is of primary significance in Hobbesian system and solely service functions are ascribed to natural law, the

law of nature appears here as a specific catalyst fostering constituting of a statehood. The only law in the strictest understanding of the word is the state law, the natural law obtains the status of the law only after its incorporation into positive law system. The above thesis is supported by nominalist orientation of Hobbes's philosophy, consequent nominalism excludes giving the law the importance it has in natural law concepts. The text shows Hobbes as a precursor of positivist method which supports the thesis about decided dominance of positive law in his political-legal ideas.