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THE CHALLENGE OF THE RULE OF LAW*

W. Burnett Harvey†

THE lecture last week considered the Rule of Law concept in historical perspective. Aside from its possible, highly restricted connotation of public order maintained by the force of politically organized society, three basic meanings or emphases were identified in discussions of the Rule of Law: first, certain constitutional principles, particularly those ascribed by Dicey to 19th-century Britain; second, certain valuable procedural safeguards of a fair trial; and third, those asserted universal and perhaps immutable principles, derived from God or Nature by the rational faculties of man, available to guide and, in some views, to invalidate positive legal action. Without denying the significance of any of these emphases, I suggested certain criticisms as relevant insofar as any one emphasis is advanced as the sole definition of the Rule of Law, and that concept, in turn, is offered as a general safeguard against abuses of the power of the modern state.

Today the analysis of the Rule of Law will be continued, but from a somewhat different perspective. I hope to come somewhat closer to the heart of the problem which underlies thought and discussion about the Rule of Law and then, proceeding functionally, synthesize a concept somewhat more responsive to the needs of that basic problem.

Initially, it seems essential to consider what is meant by law, if the "Rule thereof" is to mean anything. This necessity is regrettable, for the literature overflows with much good ink spilled over this question. The discussion of the meaning of "law" has often been acrimonious and frequently arid. Why then must it be prolonged? Cannot this definitional problem be set aside so that we can get on with our chores?

In Shakespeare's *Verona*, Juliet inquires of Romeo, "What's in a name? That which we call a rose — By any other name would smell as sweet." The obvious good sense which underlies the question and comment is very appealing. Why not conclude that definition may properly be stipulative, and if anyone questions

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what we mean by "a rose," solve the problem demonstratively by pointing out—"This thing, this complex of stem, petals and fragrance, is what I refer to by the verbal symbol 'rose.' You may call it by a different name if you choose." In these circumstances, surely misunderstanding should disappear even if the questioner would have chosen to refer to the same physical phenomenon by another verbal symbol.

When we come to the term "law," the definitional problem is complicated by two facts of profound significance. The first of these is that our term, our *definiendum*, does not have a physical counterpart or referent which exhausts its meaning. No one can point to a thing and say "That's what I mean by 'law.'" We might say that the term "law" is an incomplete symbol — only in part is its referent a physical thing or act; in large part the referent is an abstraction or generalization from immediate experience. Thus the referent of the symbol "law" is an intellectual construction, and hence it is vastly more difficult to achieve clear understanding by a stipulative definition. The second complicating fact is that the verbal symbol "law" is an old one and has a meaning or set of meanings prior to any stipulative definition now proposed. A lexical approach to definition is therefore feasible, and if this approach is ignored in proposing a stipulation, the chances of misunderstanding and real communication failure are much increased.

Several discrete meanings of the term "law" are identifiable, some of which were referred to in the previous lecture. The most important follow in capsule form. To be mentioned and put aside immediately is the meaning of "law" in the natural sciences. In that context "a law" is only a descriptive generalization. It summarizes observed experience and suggests, subject always to the improvement of observation and measurement, that in the future similar phenomena under similarly controlled conditions will behave in the same way. Implicit in such a "law" is nothing of an "ought" quality, except perhaps in the colloquial sense in which "ought" is the language of prediction — for example, in the seasonal statement: "Mickey Mantle *ought* to hit well over .300 this year."

Throughout those meanings of the term "law" now under consideration, there is ordinarily, if not always, present, expressly or implicitly, a quality of "ought," a sense of imposed guidance for volitional creatures able to act contrary to the "ought."

By and large, then, the various discernible meanings of "law," relevant here, are based upon its normative or "ought" quality and differ primarily with respect to the source and validity of the "ought." Thus the extreme exponents of natural law insist that nothing can be law unless it is in accord with universal norms deriving their "oughtness" from Nature, Reason, or God. The positivist, on the other hand, finds the "oughtness" in the threat of a sanction applied by a political superior. Therefore, he defines law as the "command of the sovereign" (John Austin) or an officially formulated hypothetical judgment linking a conditioning circumstance with a conditioned consequence (Hans Kelsen). Others, like the Austrian jurist, Ehrlich, and the anthropologist, Malinowski, find "law" in the inner ordering of society, deriving its sanction and validity from unofficial, social processes.

But enough of such a review of meanings, which are offered only to suggest the lexical possibilities. I would suggest for use here a meaning of the term "law," coterminous with none of those suggested earlier and radically different from some. Adhering firmly to the positivistic tradition, I would define law as a specific technique of social ordering, deriving its essential character from its reliance upon the prestige, authority, and ultimately the reserved monopoly of force of politically organized society. This definition excludes from the concept of law such patterns of social organization in the quest for and distribution of goods as Malinowski observed among the Trobriand Islanders, interesting and important though they are. At the same time, this definition rejects the hypothesis of Natural Law that nothing is law unless it conforms to a certain order of values. Falling outside the scope of this definition also are the views of those positivists who survey the legal order and define law exclusively from the perspective either of a sovereign legislature or of the courts. Under the definition proposed, the constitution, a statute, the judgment of a court, the order of an administrative agency, and the action of the cop on the beat are all examples of law, for each brings to bear systematically the politically organized force of society to order human conduct.

Some may protest that under this definition the racist enactments of Nazi Germany or the suppressive regulations of The Union of South Africa are just as much law as the American Labor-Management Reporting and Disclosure Act of 1959. This is true. Law, as here defined, has no moral or ethical coloration. Law, *qua*

law, is simply amoral. Does this proposed definition of "law" leave available then any meaning for the Rule of Law other than that of public order preserved by state force? A consistent use of terms would seem to suggest a negative answer to this question. Therefore, I would prefer to consign to limbo the term Rule of Law and seek a useful conceptual framework for evaluating and criticizing the legal order.

Having postulated an essentially positivistic conception of law, I would, however, immediately abandon traditional positivism. To analyze and rationalize the linguistic and conceptual machinery of the positive legal order is an important task for the legal philosopher. It is, however, only one part of the job and today the less important part. The most pressing task which confronts jurisprudence today is the development of a viable basis for criticizing, evaluating, guiding, using, accepting, or ultimately rejecting the positive law.

If law be viewed from this perspective, what bases for evaluating it are available? Three such bases or modes of evaluation are worth brief consideration.

First, law may be evaluated by reference to the standard of utility. "Utility" for this purpose should not be equated with a Benthamite calculus of pleasure and pain. "Expediency" might be substituted for "utility" if it could be drained of its Machiavelian overtones. The Germans have the best word, "*Zweckmaessigkeit*," the appropriateness of means to ends, but it doesn't translate economically. A simple illustration may serve to clarify this point. Assume we have a saw which we want to evaluate by the first suggested standard. Relevant questions would deal with the appropriateness of its weight, length, pitch of the teeth, and keenness to its purpose as a hand-held cutting tool. On this basis, it might be called a good saw or a bad saw. This evaluation would ignore the use to which such a saw might be put, whether by a skilled surgeon amputating a gangrenous limb or a sadistic murderer disposing of his victim. Similarly, law is a tool, a technique. It can be deemed good or bad by this amoral test of utility, or appropriateness to whatever end may be posulated, to which the law is merely a means.

It is worth observing at this point that evaluation by the standard of utility has some distinct advantages, or perhaps presents fewer difficulties than some other types of evaluation. In the language of philosophy, utility poses a problem of "mediate" rather

than "immediate" or ultimate values. The problem assumes or postulates a certain end or objective and merely inquires what is the most useful means of achieving that end. Two persons may appear to be sharply divided on an evaluative problem but if, preliminarily, they can agree on a common objective envisioned, an ultimate value shared, they may have reduced their difference to much more manageable proportions. At such a point, scientific investigation may be undertaken and rational discourse employed in seeking agreement on the best means of achieving the postulated objective. Such approaches to the resolution of dispute are not available, however, if the controversy relates to a choice of ultimate values. A great many of the divisive axiological problems in the legal order can be reduced effectively to this mediate level and thus made tractable. Thus this first standard is, I believe, a significant one.

In the second place, "law" can be evaluated by the standard of legality or, perhaps more accurately, of consistency. Hans Kelsen has taught us that the legal order is hierarchical and that pyramiding from the basic or *grundnorm* are other norms representing various stages of progressive concretization. Any subordinate norm is law, according to Kelsen, if made in accordance with the superior norms in the hierarchy. While helpful, the picture Kelsen paints of the legal order is too symmetrical, too internally consistent, to account for all significant experience which for me is encompassed by law. Modifying Kelsen's "Pure Theory," I would therefore suggest that many things are "law," which are not authorized by the higher norms. An illustration may be found in the recent study of the administration of criminal justice in the United States, conducted by the American Bar Foundation. The study showed that in a certain precinct of a large city, police officers systematically conduct unprovoked searches of persons on the streets. To me, this police conduct is "law," since it is a technique of ordering or controlling human conduct used by persons who have or appear to have official force behind them. Yet unquestionably most of these searches are illegal under the guarantees of the state and federal constitutions. In appropriate instances the "law" as represented by this police conduct may be evaluated in relation to higher governing norms with the conclusion that the former is "illegal" or "inconsistent." This may be a significant evaluation. The hierarchy of norms which permits it usually reflects impor-

tant judgments as to how the state force shall be distributed, channeled, and controlled. It is worth noting, however, that this evaluation is not exhaustive, and further assumptions are needed if "legal" or "consistent" is to be equated with "good," and "illegal" or "inconsistent" with "bad."

Third, and finally, is that sort of evaluation we may call "ethical." At this level, the adjectives "good" and "bad," "right" and "wrong" may be employed most significantly. It is this type of evaluation that is today of paramount importance in the perplexities of determining what the Rule of Law means.

The fundamental difficulty here is to identify and delineate what ultimate values we accept in making an ethical evaluation of law. In determining those values, scientific processes and reflective thought can make a significant contribution. They can spell out the logical consequences of various value postulates and identify the value postulates implicit in different courses of legal action. Value acceptances can be dealt with as facts. Through careful empirical investigation we can determine what values are in fact accepted and the extent of their acceptance in any particular society at a given time. But the purest scientific method cannot make ultimate value choices for any man or group of men, nor can it provide verification of the choices actually made. In the final analysis these choices depend on the individual's own *Weltanschauung*, his belief as to the nature of man, his place in the universe and in society. Each individual makes these value acceptances in the light of his religious convictions, his education, and his experience in society. Ultimately, however, each one must recognize that at this level he stands on faith and not on knowledge in any verifiable or transmissible sense.

This view of the nature of ultimate value choices is not offered in any sense of futility. I believe that in the Judeo-Christian tradition of the West there are broad areas of significant agreement on ultimate values. Obviously such an *a posteriori* approach does not serve to *prove* or to *verify* the values agreed upon, but such agreement in fact has great practical significance for the legal order.

An exhaustive catalog of these common value acceptances is not necessary here. A few, however, should be mentioned. First, is the value of man himself, of the individual as a creature of dignity and essential worth. Corollary to this are the values of liberty and equality which are nonetheless significant because it is difficult to

define them with precision or to determine their specific scope. Also basic to this value structure is some degree of assurance of the material requisites of a decent life. Finally, but not last among these fundamental values in the Judeo-Christian tradition, is the opportunity for people to participate significantly in the control of their government.

In considering the means whereby the awesome power of the modern state may be channeled, I believe our primary attention should be on the ultimate values we, the inheritors of the Judeo-Christian tradition, accept and intend to preserve. All else may be considered then as mediate values, as means to secure desired ends. To be sure the various concepts of the Rule of Law suggested last week are in a sense value-oriented. But too often value postulates were submerged. Each concept thus presented the risk of attributing ultimate importance to certain techniques which are often useful to preserve essential values, but are also usable in a legal order which casts the dark shadow of tyranny. Instead, therefore, of any one of these concepts of a Rule of Law, I would posit the Ideal of Just Law, using "just" in its broadest inclusion to comprehend a viable balance of our fundamental value acceptances.

In the light of our shared agreement on basic values and our centuries of experience with government, is it not possible to be more specific and suggest certain techniques which may maximize our chances of securing and maintaining this Ideal of Just Law? I believe we can and that these techniques should include the following:

First, a written constitution postulating certain fundamental rights of men. Certainly such a device is not essential to the attainment or preservation of the Ideal of Just Law, but there appears to be a widening perception of its utility to that end. For example, in addition to the 18th-century American Bill of Rights, the 20th century has seen the European Convention on Human Rights and new constitutions like that of the Federation of Nigeria.

Second, there is the device which, among the followers of Montesquieu, is called a system of checks and balances. To be sure, the necessities of modern government preclude the complete compartmentalization and separation of the three basic powers. Probably this has always been true. As my colleague, Hessel Yntema, has recently observed, "Montesquieu's conception was more realistic, namely, that there should be no such combination of power

in one political organ, a total merger of the judicial with the executive or legislative functions for example, as to imperil political liberty."¹

Implicit in any viable system of checks and balances is the idea that the actions of individual officials and governmental organs are to be judged by reference to legal norms which have been articulated and promulgated with reasonable clarity. Insofar as Dicey and Hayek, in their discussion of the Rule of Law, emphasized the importance of formal definitions of governmental function and clear-cut allocations of power, we can endorse their views. To be sure, the requirement that governmental interference be supported by law imposes in itself no substantive restraints on government, nor does it determine how power and function will be allocated among the facilities of government. It is, nevertheless, of profound significance for two reasons: first, it provides a basis on which the action of one agency can be reviewed and checked, and second, it opens up to popular inspection and political response many of the most critical decisions affecting the incidence of public force.

The third technique, critical to the maintenance of the Ideal of Just Law, comprehends those devices for regularized and reliable modification of official action by the assertion of individual grievances and popular demand. The unifying idea here is the ultimate responsibility of government to its citizenry, but this is manifested at two distinct levels. The first level involves ordinarily assertions of the interests of individuals and subgroups as defined by the prevailing general law. The technique or device which experience has proved essential to protect these interests is a full and fair hearing before an impartial and competent tribunal. In a sense, the existence and function of such a tribunal might be subsumed under the principle of checks and balances. That principle, however, normally suggests only intra-governmental restraints. The important point here is that the tribunal checks and balances other centers of official power on the initiative of private citizens who feel aggrieved. It should be clear that my emphasis is not on the importance of an independent judiciary for the settlement of private disputes. Rather, it is on the existence of tribunals

¹Yntema, *The Crossroads of Justice* in 6 CURSOS MONOGRAFICOS (Academia Interamericana de Derecho Comparado e Internacional) 109, 130 (1957).

to review official action. Such tribunals may be the ordinary courts extolled by Dicey, but they may just as appropriately be specialized administrative courts like the Conseil d'Etat in France.

The second, but by no means lower level of governmental responsibility to its citizenry, involves those orderly and conventionalized processes by which officials are replaced and laws changed to reflect changing patterns of social interests, values, and needs. It is not exaggeration to assert that the Ideal of Just Law cannot be maintained over extended periods if governmental response to changes in the dominant values and interests of the community either depends on paternalistic voluntarism, or can be secured only by violent revolution in the face of the enormous power advantages of the modern state.

So far I have spoken only of devices or processes available for making government responsive to the people. It remains tragically true that these devices lose their significance and may ultimately disappear or be seriously distorted if they are not cherished and used by a concerned and informed citizenry. In the final analysis, the preservation of our fundamental values depends on the devotion of the people, of you and of me. No matter how balanced and ordered the formal structure of government, how competent and impartial the courts, how open and uncoerced the polling places, the Ideal of Just Law is beyond the grasp of a society that is unwilling to seek it with a full share of its creative energy and devotion.

It is evident, I am sure, that most of the discussion thus far has been negative in thrust, negative in the sense of being concerned to limit, to restrict, the exercise of official power. This negativism is characteristic of most thinking about the Rule of Law or of government under law. It is clearly revealed by Professor Harry Jones when he lauds "the healthy suspicion with which the sturdy citizen of a free society should regard officialdom and all its works."² This suspicion and the safeguards it may bring into being are important. I believe, however, they are only a part of what is needed.

An affirmative aspect of the Rule of Law or, preferably, of the Ideal of Just Law exists side-by-side with the negative aspect. Professor Henry Hart, speaking at the bicentennial celebrations of the birth of Chief Justice John Marshall, stated the thesis well. He said:

² Jones, *The Rule of Law and the Welfare State*, 58 COLUM. L. REV. 143, 146 (1958).

"The political problem is *not* simply negative. It is a delusion to suppose, as so many people have, that if only you can prevent the *abuse* of governmental power everything else will be all right. The political problem is a problem also of eliciting from government officials, and from the members of the society generally, the affirmative, creative performances upon which the well-being of the society depends."³

I do not mean to suggest that governmental intervention, official management, is a panacea for all our ills. I do mean to say that in our complex technological society we will encounter problems which demand for solution more vision, more resources, more discipline, and sometimes more altruism than can be expected from individuals or voluntary associations. When such problems are encountered, I do not believe we should be deterred by any of the usual scare labels from using the resources of government and the instrumentality of law as a means to social progress. The result of such use may be a Cocoa Marketing Board to provide for the orderly disposition in international commerce of Ghana's principal export commodity. It may be a Tennessee Valley Authority to facilitate the economic development of a vast region. Particularly in the less developed areas of the world, such an affirmative response of government to pressing human needs seems to provide the only hope of bringing together sufficient capital resources to remove, through economic development, the grinding heel of poverty from the majority of the world's people.

In my previous lecture, I referred briefly to the concept of the Rule of Law developing under the leadership of the International Commission of Jurists. In general, it corresponds to the ideas I have advanced. If you have not already studied them, I commend to you the Commission's Declaration of Delhi and the supporting resolutions of the study committees.⁴ In brief, the Rule of Law is viewed there as a complex of value acceptances and of practical institutions and procedures which "experience and tradition in the different countries of the world, often having themselves varying political structures and economic backgrounds, have shown to be essential to protect the individual from arbitrary government and to enable him to enjoy the dignity of man."⁵ It is worth noting

³ HART, *Comment*, in GOVERNMENT UNDER LAW 139, 141 (Sutherland ed. 1956).

⁴ Reprinted in J. Int'l Comm. Jurists, vol. 2, no. 1, pp. 7-18 (Spring-Summer 1959).

⁵ Marsh, *Editorial*, *id.*, vol. 1, no. 1, p. 3, 6 (Autumn 1957).

that while safeguards against official abuses are emphasized, the affirmative responsibility of government to secure conditions in which men can, in dignity, work out their destinies is also recognized.

In this brief series of lectures, an effort has been made to indicate the nature of the present challenge to law and responsible government and to suggest lines of fruitful response to that challenge. The response is needed from all men everywhere, but I believe the legal profession has a special responsibility toward fulfilling the Ideal of Just Law. We in the teaching branch of that profession must respond with programs contributing to a broader perception of professional responsibility and to a deeper awareness that the legal order must justify itself in terms of the uniting values in our society. Whether we lawyers, practitioners or teachers, will respond, or how, I cannot know. The tasks are awesome, and in many respects we are called by confusing voices across uncharted seas. I only hope we will answer that call in the spirit of the aged Ulysses, who could not rest content with victories already won but was impelled to exhaust his energies, even his life, in new probing of the Unknown. Thus I conclude with his words as he addressed his mariners before departing:

Come, my friends,

'Tis not too late to seek a newer world.
Push off, and sitting well in order smite
The sounding furrows; for my purpose holds
To sail beyond the sunset, and the baths
Of all the Western stars, until I die.
It may be that the gulfs will wash us down;
It may be we shall touch the Happy Isles,
And see the great Achilles, whom we knew.
Tho' much is taken, much abides; and tho'
We are not now that strength which in old days
Moved earth and heaven, that which we are, we are—
One equal temper of heroic hearts,
Made weak by time and fate, but strong in will
To strive, to seek, to find, and not to yield.

