Philosophy of Law and Human Right -

PHF510 - manual[1] by Grzegorz Trela

Law has been a significant topic for philosophical discussion since its beginnings. Attempts to discover the principles of cosmic order, and to discover or secure the principles of order in human communities, have been the wellsprings of inquiry into law. Such inquiry has probed the nature and being of law, and its virtues, whether those that it is considered as intrinsically possessing, or those that ought to be cultivated by lawgivers, judges or engaged citizens. A dialectic of reason and will is to be found in philosophical speculation about the underpinning principles of law. On the one side, there is the idea that the cosmos itself, and human society too, contain immanent principles of rational or reasonable order, and this order must be capable of discovery or apprehension by rational (or 'reasonable') beings. On the other side, there is the view that order, especially in society and in human conduct, is not found but made, not disclosed to reason but asserted by acts of will. Either there is a 'law of reason - and nature' or there is a 'law by command of the sovereign - or of God'. A third possible element in the discussion may then enter, that of custom as the foundation of law.

Implicit in the opposition of reason and will is the question of practical reason: does reason have a truly practical role concerning ultimate ends and nonderivative principles of action, or is it only ancillary to pursuit of ends or fulfilment of norms set by will? Alternatively, does reason already presuppose custom and usage, and enter the lists only by way of critique of current custom and usage? In either case, what is at issue is the very existence of such a thing as 'practical reason'.

[1] The integral part of this course is Universal Declaration of Human Rights – easy to find even in the internet.

For law is about human practice, about societal order enforced and upheld. If there can be a law of reason, it must be that reason is a practical as well as a speculative faculty. The radically opposed alternative sets will above reason, will oriented to the ends human beings happen to have. Norms and normative order depend then on what is willed in the way of patterns for conduct; reason plays only an ancillary part in the adjustment of means to ends. A further fundamental set of questions concerns the linkage of the legal with the political. If law concerns good order, and if politics aims at good order in a polity, law must be a crucial part of politics; but in this case a subordinate part, for politics determines law, but not law politics. On the other hand, politics may be considered at least as much a matter of actual power-structures as a matter of speculation about their beneficial use for some postulated common good. In the latter case, we may see law as that which can in principle set limits on and control abuses of power. Politics is about power, law about the shaping and the limiting of power-structures. The issue then is how to make law a master of politics rather than its servant.

1 Law as reason

In the Republic, Plato depicts Thrasymachus, proponent of the thesis that justice is the will of the powerful, as being refuted comprehensively by Socrates. The refutation postulates a human capability to discern principles of right societal conduct independently of any formal enactment or legislative decision made by somebody with power. These principles in their very nature are normative, not descriptive. In Aristotle, the same general idea emerges in the form of noticing that whereas much that is observed as law is locally variable and arbitrary, there appear to be fundamental common principles across different polities. Some principles may then be legal simply ‘by enactment’, but others seem to be so ‘by nature’. Explorations of the nature of humans as rational and political animals may then help to underpin the idea of that which is right by nature, but that exploration is more the

achievement of Aristotle's successors in the Stoic tradition than of himself. Roman jurists adapted some of the Stoic ideas of natural law in their expositions of the civil law, and subsequently, for medieval and early modern Europe, the existence of the Justinianic compilation of the whole body of Roman law was held by many thinkers to embody in large measure the promise of law as 'written reason'.

In any event, the greatest flowering of the Aristotelian idea came with its fusion into the Christian tradition in the work of Thomas Aquinas (§13), hugely influential as this has been in the developing of Catholic moral theology in the succeeding centuries. After at least a century of relative neglect among legal scholars, especially in the English-speaking world, the last quarter of the twentieth century has seen a strong revival of the Thomistic approach in the philosophy of law, with contemporary thinkers developing the idea of the basic goods implicit in human nature, and showing both how these can lead to the elaboration of moral principles, and then how positively enacted laws can be understood as concretizations of fundamental principles.

In the seventeenth century, other strands of essentially the same idea had led to the belief, for example, of Hugo Grotius, that basic principles of right conduct and hence of human rights are themselves ascertainable by intuition and reason (compare Pufendorf, S.; Stair, J.D.). Kant's representation of the principles of practical reason is the classical restatement of this position in its most philosophically rigorous form.

In a wide sense, all these approaches may be ascribed to rationalism, as contrasted with voluntarism. For they treat law, or its fundamental principles, as discoverable by rational and discursive means, independently of the intervention of any legislative will. They do not, of course, deny the need for legislative, or adjudicative or executive, will. Even if fundamental principles stand to reason, their detailed operationalization in actual societies requires processes of law-stating, law-applying and law-enforcement. But the issue is whether these are fundamentally answerable

at the bar of reason and practical wisdom (prudentia), or not. To the extent that they are so answerable, we have a concept of some ‘higher law’, some law of reason, by which to justify, to measure and to criticize the actual practice of human legal institutions. If the rational derivation of this depends in some way on a teleological understanding of human nature and its relation to the creator and the rest of the created universe, we may reasonablyenough call this a ‘law of nature’ or ‘natural law’.

2 Law as will

But there is another possible account of higher law. It can be thought of as a law laid down by God for his creation. The divine will, not the divine reason, must be the source of law. It cannot be for created reason to presume to judge of the creator’s wisdom. The omnipotence of the creator entails that the law will be whatever the creator wills it to be, and to be law by virtue of that will, not by any independent reason and nature of things. Indeed, the nature of things will be just what the creator wills it to be, and the names of things will be matters of convention derived from human linguistic usage. Concepts are not essences that guide us to essential meanings. Nominalism and voluntarism are inevitable bedfellows.

It is therefore inaccurate to suppose that the theory of natural law as a kind of higher law presupposes rationalism. There can indeed be a voluntaristic species of ‘natural law’, though the voluntaristic tradition will more likely speak of ‘divine law’ or ‘God’s law’ than of natural law simpliciter. Moreover, one element in the religious upheavals associated with the Reformation was an insistence on the need for unmediated regard to the (scripturally revealed) divine law, rather than to the custom or tradition of sinful human institutions such as the Church. It is not for fallen human reason to set itself above or even beside the revealed will of God. But that revealed will must be received as a law binding above all others.

In this state of things, it becomes questionable whether to accept any human law at all; and, on the voluntarist hypothesis, to see how law other than God's law can have any obligatory force at all. To the saving of human law there are only two possible moves: either it must be shown that God in fact wills our obedience to the very kings and other superiors we actually have (as in the theory of 'the divine right of kings'), or it must be the case that the binding will arises from the consent of human beings themselves, expressed through some original social contract. The divine will then enter the picture only to the extent of making obligatory the fulfilment of compacts voluntarily agreed, a point to which may be added a grimly Hobbesian acknowledgement that covenants without swords are but words, so the true binding force of the obligation of the law will derive from the effective might of the very ruler whom the social compact institutes in that office. In this Hobbesian form, natural law has practically reached a vanishing point (though Locke's response envisages the state of nature as governed by reason in the form of a law of nature, grounding presocietal rights of human beings to life, liberty and estate. The greatest legal expression of the Lockean vision of law, applied to expounding the English common law, is in the work of Sir William Blackstone. The coup de grâce was administered by Hume and Bentham, the latter having as his particular target Blackstone's work. They argue that the social contract is a fifth wheel on the carriage in either Hobbesian or Lockean form, since all the reasons that there are for obeying the law that we have supposedly agreed to apply with equal force even if we did not agree to it, and there is no evidence anywhere of any such agreement as a historical phenomenon.

3 Law as custom

Whence then comes the law? Hume ascribes it to convention and custom primarily, coupled with reflection upon the pleasing quality (the utility) of rigorous observance of customary norms. Bentham and Austin restrict the role of custom or 'habit' to the

issue of obedience. Whoever is habitually obeyed by the many in a numerous society is in a position to enforce their commands by effectively coercive sanctions up to and including death. Thus, do they differentiate the positive law from other forms of so-called law such as scientific law, laws of honour, or personal moral codes. Law is such by command of a sovereign, the one habitually obeyed who habitually obeys no other.

Legal positivism of this stamp is an easy bedfellow with political utilitarianism, and programmes of legal reform. Codification of law is an associated ambition, justified on utilitarian grounds (see Utilitarianism). Codification is also a distinctive phenomenon of the early nineteenth century, product of the Enlightenment critique of the old customs of the ancien régime, though also of spadework in the exposition of civil law partly achieved under the aegis of late legal rationalism. After the Code Napoléon, promulgated in France in 1804, there followed a century of codification and legislative modernization of law in many places, and with this characteristically went approaches in legal philosophy that stress the essential emergence of law from a sovereign's will, or the will of the state as a rational association (in Hegelian vein; see Hegelianism). Nevertheless, this movement produced its own counter-movements, stressing the importance of the spirit of the people as the basis of law, or more prosaically locating it primarily in custom, a view particularly popular in the context of the common law.

Twentieth-century critics of classical positivism accuse its authors of confusing 'commands' with 'binding commands' or of mislocating the roots of legislative authority in mere 'habit', rather than in the 'internal point of view' of those for whom the system within which authority is exercised has normative force. The Kelsenian version of positivism rests it on the necessary presuppositions for a value-free science of law, and other thinkers have pursued furtherthe question of 'legal science'; the Hartian version rests it on the customs of at least the official and

political classes in a state, whose practices concerning the recognition of certain criteria for the validity of legal rules define the ultimate 'living constitution' of a state, its 'rule of recognition'. A notable offshoot of or development from positivistic legal study has been the development of ever-more rigorous approaches to conceptual analysis and categorization, seeking to account for the use of concepts like 'duty', 'right', 'ownership' and others in the framework of general legal norms. Hohfeld's analysis of 'fundamental legal conceptions' has had many followers and critics, and contemporaries in other traditions have taken a somewhat more psychologistic approach to the task.Reflection on legal concepts as institutions or 'institutional facts' has led to developing an 'institutional' theory of law that transforms what was originally a naturalistic conception into a positivistic one.

4 Laws and values

One way or another, whether in voluntaristic versions or in those that place more weight on customary or institutional aspects of law, nearly all forms of or approaches to legal positivism have insisted on the strong value-relevance of positive law. The matter of doubt has not been 'ought laws to be just?', but whether their being just is a condition of their being genuinely legal. The 'scientific' character of pure legal analysis has indeed been contrasted with the exercise of moral judgment or moral sentiment, or the engaging in ideological argumentation, that is involved in the critique of law as unjust or otherwise unsatisfactory from the viewpoint of human needs and aspirations. Some, however, have thought that critique itself can have a scientific or at least an objective basis, grounded in the fundamentals of human nature. Classical utilitarianism and nineteenth-century law reform are a case already noted; they had successors in the 'jurisprudence of interests', and, albeit with certain qualifications, in the later twentieth-century 'economic analysis of law'. The need to subject law to critique is obvious from many points of view, none more urgently than that which takes note of the burdensome impact of legal sanctions on human

happiness and liberty. If laws characteristically carry punishments for their infraction, some theory to justify penal institutions is called for. Whether there are any abstractly stateable limits to the legitimacy of interference with liberty through legal intervention has been another heated debate. Nevertheless, the positivists' claim that they can combine an a-moralistic conceptual analysis of law and its institutions with a readiness for critique of actual laws on moral and political grounds, and with a last-resort readiness to disobey or defy the law when it is unjust to an extreme, has been doubted by some. Gustav Radbruch felt himself driven by his experience of the Nazi years (and also, perhaps, by the implications of the radical voluntarism of Carl Schmitt) to abandon such a claim and to insist on a conceptually necessary minimum of basic justice in anything we can recognize as 'law' at all. The interpenetration of equity with law, and the interweaving of ideas of justice, equity and law, can be taken to point to a similar moral, and idealistic approaches to legal theory give a deeper grounding for such an approach.

5 Law as politics

However, one takes one's stand on will against reason, or on natural law against legal positivism, most of the theoretical approaches so far considered give some way of accounting for the independent existence of law as a distinct social phenomenon. Law's independence, at least when underpinned by an independent judiciary, has been held to promise the possibility of effective control over arbitrary state action while at the same time guaranteeing at least the justice of formal equality to citizens and the degree of predictability allegedly desired by modern rational subjects. Here we have the 'rule of law' ideal that demands government under the forms of law and law in the form of clearly identifiable rules; compare Dicey, A.V.; Fuller, L.L. Yet the mere existence of some body of sacred or secular texts embodying rules of law is not enough for any socially realistic account of law, or for any politically persuasive vision of the rule of law. The statute book is not self-applying or self-

interpreting (compare Wróblewski, J.). To secure the rule of law it is necessary to have prospective rules published to all. But, as L.L. Fuller points out, it is necessary that they be interpreted in a reasonable and purposive way, and faithfully carried into action by the officials of the state whose rules they are. How is this to be secured? Many schools of thought, chief among them the realists in Europe and in the USA, have stressed the widely discretionary character of legal interpretation, both in relation to the general rules of the law, and in relation to the categorization of fact-situations as subsumable under the law for one purpose or another. On inspection, 'facts' can turn out as elusive as 'laws', and the study of legal processes of proof assumes a certain urgency. All in all, it is a serious and difficult question to discern what, if anything, can render decisions reasonably 'reckonable' given the broad discretion vested in those who interpret the law. One form of response has been to find that law is reckonable not on the basis of the official rules and standard doctrine, but rather on the basis of the 'situation sense' of a judiciary with a common understanding of political and policy objectives underlying law. These insights of the 'realists' have been carried forward more boldly by contemporary feminist jurisprudence, one version of which finds social prejudice directing law through the biases of judges. Another version locates an inner masculinity in the legal rules themselves, even and especially at their most abstract; the asserted values of objectivity and impersonality ultimately come under question as presumptions of doubtful desirability. Within more mainstream jurisprudence the developed response to realism has been to work out extended theories of the rule of law, acknowledging that law is more than positive rules but arguing for the existence of other mechanisms within law controlling the role of substantive elements in decision-making. Such responses find a certain coherence within law, but by contrast the more developed critical (including critical feminist) approaches argue that there are central fractures and fault lines within the law, reflecting ultimately competing political visions of

human association, often summed up as individualism versus community-values. Ronald Dworkin's argument for coherence and integrity in law evokes the idea of an interpretive community but seems too readily to assume that for any actual legal order there can be found a single consensual interpretive project, even in principle. Taking an overall view, the project of establishing the rule of law as an independent base for the critique and control of state action is put in serious doubt, since interpretation is through-and-through political; and appeals to the rule of law can themselves be moves in a political game, expressions of ideology rather than of higher values. It may be that in the end legal philosophy is faced, today as at its beginnings, with this dilemma: either legal reasoning and moral reasoning have that kind of in-principle objectivity proposed by natural law theory in its rationalist versions, or the theatre of law is simply a theatre presenting endlessly the power-play of rival wills and visions of the good. Many have sought a third way, not yet with acknowledged success.

References and further reading

Harris, J.W. (1980) *Legal Philosophies*, London: Butterworth. (Straightforward and well-written introduction to issues and schools of thought in philosophy of law.)

Hayek, F.A. (1973, 1976, 1979) *Law, Legislation and Liberty*, London: Routledge & Kegan Paul. (Three-volume critique of the pretensions of constructivist rationalism, whether of utilitarian positivists or of rationalistic naturalists, in favour of a 'critical rationalism' reflecting on the accumulated societal wisdom implicit in an evolved and essentially customary law, and developing an account of the rule of law on this basis.)

Kelman, M. (1987) *A Guide to Critical Legal Studies*, Cambridge, MA: Harvard University Press. (Readable and sympathetic account of, and contribution to, the 'critical' approach that regards all legal activity as intrinsically political - and ideological.)

Kingdom, E. (1991) *What's Wrong with Rights?*, Edinburgh: Edinburgh University Press. (An interesting collection of essays putting a moderate feminist case against the biases inherent in received legal categories.)

Lloyd of Hampstead and Freeman, M. (1985) *Lloyd's Introduction to Jurisprudence*, London: Stevens, 5th edn. (Another useful introduction, supported by many selected texts for reading.)

Rommen, H. (1947) *The Natural Law: a Study in Legal and Social History and Philosophy*, St Louis, MO and London: Herder Book Company. (Full and careful statement of implications and applications of natural law theory from a Catholic point of view.)

Shiner, R. (1992) *Norm and Nature: The Movements of Legal Thought*, Oxford: Clarendon Press. (A more challenging text that deals with the tensions in legal thought between positivist - or voluntarist - and anti-positivist approaches, concluding that the dialectic between them contains a truth available from neither on its own; advanced reading.)