WHAT IS LAW ? — BEYOND SCHOLASTICISM

Bentley Le Baron

The question "What is law ?" may be taken in at least two ways. First, it might be taken as a search for a *definition.* That is, a search for an identifyng characteristic or set of characteristics which all laws and all kinds of laws are deemed to have in common. Such an inquiry too easily becomes formalistic, abstract, content-less: in short, another scholasticism. Students of positivist legal theory may be forgiven if they sometimes come to feel that perhaps the real nub of the matter is eluding them in just this manner.

A corrective to positivistic scholasticism may be found in a different approach to the question. Suppose "What is law ?" is taken not as a request for a definition, but rather as an inquiry into the social functions of law. In that case, the question may be translated "What roles do laws play in our culture ?" or "What are the purposes of law ?" or "What consequences does law have for the way we live ?" On this showing, law *is* what it *does,* and our task is to examine what it does. Obviously, in this light, the content of the law will be at least as important as its form.

The difference between these two approaches — let us call them the formal and the functional approaches — may be illustrated by three contrasts: positivist versus natural law jurisprudence; positivist versus sociological jurisprudence; positivist versus Marxist jurisprudence. It is the latter contrast on which I wish to focus, but first a brief mention of the other two.

For present purposes, I take John Austin and Hans Kelsen as paradigm cases of the positivist position. Austin answers the question "What is law ?" with stark, formal simplicity: it is the command of the sovereign. (The substance or content of the sovereign's command is quite irrelevant: law is *whatever* he commands.) It is obvious how an effort to fit all law into

this formula quickly degenerates into scholasticism. Difficulties in identifying the sovereign; in forcing all actual laws into a "command" model; in maintaining a viable distinction between obligation and coercion, between authority and mere power: these and other difficulties are ably documented by H.L.A. Hart in *The Concept of Law* and elsewhere. But Hart does not raise the question which I am raising here, namely, whether identification of law with its social functions might be more illuminating than any formalistic definition, however sophisticated. Indeed, I find this a lingering problem with Hart's own formula ("law is a union of primary and secondary rules"), though it must be granted that in *The Concept of Law* and elsewhere he does demonstrate considerable sensitivity to problems of substance and function.

Kelsen's pure theory of law is about as scholastic as jurisprudence can get. He answers the question "What is law ?" with two interlocking definitions: law is a conditional stipulation of sanctions, and law is a *system* of rules, ultimately derived from a "basic norm". He is quite deliberate about his formalism; he says explicitly that "legal norms may have any kind of content" ([1]). Again, there is a difficulty in fitting all existing laws into these formulae, for many laws do not have any obvious sanctions attached, and there are important differences between laws with sanctions (e.g. criminal law) and those without (e.g. constitutional law). Furthermore, investigation of the "basic norm" is ruled out of jurisprudence, just at the point where it threatens to bring content back into the discussion.

Natural law theory, that of Aquinos for example, provides us with a corrective to the positivist approach. True, Aquinas agrees with Austin that law may take the form of commands, and he agrees with Kelsen that it is hierarchical, systematic, and often has sanctions attached. But for him the crux of the matter is *purpose,* or *function.* Law is to be understood as a pattern for correct development toward true being, or fulfilment. The law of the stone is toward fulfilment of its being; similarly the law of a tree, a dog, or man. Now fulfilment of being, for man equally with dogs, trees, and stones, entails

preservation of being. But in man's case it entails something more, namely agency or choice, hence freedom. Law, for men, is that pattern of development which leads toward freedom, justice, and other human goods. The purpose or function of law is to help man reach his proper end. And law *is,* essentially, what it *does.* Its "essence" is not contained in a merely formal definition; necessarily, it requires of us an investigation of content.

Undoubtedly natural law theory has its own difficulties, which I do not propose to raise here. But I note that, despite its difficulties, some scholars persist in finding natural law somehow more satisfying than positivism — intellectually as well as morally — and I suggest that we *ought* to find it more satisfying in that it insists on maintaining the dialectic between form and content which positivism would let wither. I find it encouraging that Professor Hart has found it necessary to make at least a gesture toward natural law, even though its content remains, in his version, little more than the expediencies of group survival ([2]). Distant as it is from the "full development" of which Aquinas spoke, at least Hart's natural law does turn our attention again to the functions of law in fulfilling human needs.

The contrast between positivist and sociological jurisprudence may be understood in similar terms. That is, sociological legal theory, like natural law theory, insists on a dialectic between form and content; it refuses to concede that a formal account of legal rules, by itself, is a helpful answer to the question "What is law ?" In the writings of Holmes, Ehrlich, Llewellyn and others we find a continuing preoccupation with the purposes, functions, and content of law — what it actually does to us and for us, how it grows out of a culture, how it reflects and is reflected in men's behavior. The formal side of things is not neglected, but neither is it abstracted out of a living context. Law is mediated by morality; "logic" by "judgment" respecting "social advantage" (Holmes). "Positive law" must be mediated by "living law" (Erlich). "Paper rules" are mediated by "real rules" (Llewellyn). In short, the abstract formalism to which law is reduced by the positivists is perhaps

a triumph of elegance, but it is the elegance of death. It is (to borrow Hegel's analogy) "a skeleton with little pieces of paper stuck all over it"; the problem is that all the flesh and blood have been removed ([3]).

On this particular question, Marxist legal theory sides with natural law and sociological theory, which is to say that it too focuses on what law does, on its social functions. It too insists that form be mediated by content. This is apparent at first glance, even in Engel's definition of law as a tool of the ruling class for suppressing class enemies, a definition echoed by Lenin and put to work by the Bolsheviks during their first few years of power. We are rightly sceptical of so simple a formula — for example, its assumption that *all* content is "class" content — but at least it resists the trap of formalism. Furthermore, Marxism contains a built-in corrective to simplistic definitions: namely, historical analysis. Properly speaking, a Marxist can not content himself with sweeping generalizations, but must attempt to give a detailed account of the ways in which particular laws are used by particular men to further their class interests, in any particular time and place. He will examine the content of law, both manifest and latent; its purposes, both manifest and latent; its consequences, both manifest and latent. All this, in answer to the question "What is law ?"

I attribute the above view of law to Engels, its major proponent, though it is put forward by Marx too, in some of his more "popular" pamphleteering. But there is another and more interesting view of law, also put forward by Marx (in a more philosophical mood), and extended by the distinguished Bolshevik jurist Yevgeni Pashukanis, in his *General Theory of Law and Marxism* ([4]).

Marx is most concerned to show what law is within what he calls "civil society", or, if you like, bourgeois society. Two of the outstanding characteristics of this kind of society are its extreme individualism, and the competetive, commercial spirit which dominates relations between sovereign individuals. Basic social relationships are confrontation and exchange. And bourgeois law reflects these characteristics; it treats individuals as separate, ultimate, self-sufficient monads, abstracted out

of community; thus it validates and reinforces the complex of tendencies which Marx calls "egoism". Law, on this showing, is essentially a device for regulating affairs and settling disputes between competetive "economic" individuals. It is *not,* essentially, a device for imposing the will of a superior onto an inferior. Therefore contract, together with other categories of what we call "civil law", may be taken as a paradigm; this in contrast to the categories of crime and punishment and the "criminal law" paradigm suggested on one hand by Austin's command theory and on the other hand by Engels' "tool of the ruling class" theory.

Parenthetically, it turns out that there is really no conflict between the two accounts of law which I am attributing to Engels and to Marx. They are seen to be a single theory when it is understood that on either account law is monopolized by a single class (in this case the bourgeoisie) for its own purposes, and is *imposed* on the proletariat. The prime purpose of law is regulation of competition within civil society, but when an underclass comes into being — "in" but not "of" civil society — then a secondary purpose of law is the exploitation and oppression of that class, to maintain the economic and political power of the dominant class. In other words, Engels is reminding us of how law appears from below, from the proletarian viewpoint, while Marx is giving an account of its functions within civil society, where the good burghers use it to regulate their own affairs.

At this point let us move on to Pashukanis. He develops the view (also found in Marx) that a social order which leaves class conflict, "egoism" and the market behind will also leave "law" behind. In other words, he wanted to convince his fellow Bolsheviks that law is fundamental to bourgeois society, and useful in a transitional period, but that the idea of a "socialist legality" is incoherent. Let me reformulate the argument thus: the past has known, and the future will again know, social orders which are not hyper-individualistic, competetive, commercial. Certain societies have been cohesive, organic, cooperative. In the past, this cohesion has been based on common allegiance to tribal, caste, or feudal structures, but in the future

it may be based on common commitment to something like that which Marx calls "species being" — i.e. a genuine socialist consciousness and community. Such societies should have little or no need for law in the bourgeois sense. This is not to say that a community can get along entirely without social rules, but rather that it might get along without the kind of rules demanded by civil society, the kind characteristic of the bourgeois epoch in history, which Pashukanis wants to label "law".

Let us be slightly more specific as to the substance of law, on this view of things. We have seen that the fundamental relation in civil society is not superior to inferior, but equal to equal, not obedience but competition. The rules which reflect this relation are not essentially decrees or commands, but formulations of rights and duties. But these rights and duties are of a particular kind; they are not such as would work toward community, for they are in a strong sense anti-social. They are designed precisely to encourage and protect *individuals,* in their relations of buying and selling, profit-making, and possessing. Men are conceptualized (in civil society) not as beings who need to nourish and sustain one another, but as beings who live at one another's expense, and who therefore require minimal safeguards against one another. In law, they are conceptualized as juridical subjects confronting other juridical subjects, on the basis of abstract equality and abstract justice, which is what the law provides.

Needless to add, Marx and Pashukanis find serious fault with this kind of society, and the law which mirrors it; "civil society" must be taken as a somewhat ironic label. One problem is the lack of relation between individual and community, already mentioned. Another is the essentially commercial spirit of the entire order, which ultimately transforms into commodities the men who's entire universe has been made into a market-place. Another problem — of particular concern from the standpoint of legal theory — is that a gap is opened up between theory and practice. That is, in theory the law applies equally to equals, but in practice a large class is excluded from equal participation in civil society, and the continuing fiction

of equality then becomes a device to obscure the real state of things. So far as the proletariat is concerned, the equal justice, equal freedoms, equal rights and duties, so bravely guaranteed in law, are hollow. Law itself (for them) becomes hollow, merely formal, devoid of real content. Or, rather, it now has real content for the ruling class, and hypocritical, mystified content for the oppressed class. For the latter it is a snare and a delusion, since it does *not* reflect the condition of *their* life, namely inequality, unfreedom, injustice.

The "republic of the market", Pashukanis observes, conceals the "despotism of the factory". That could be translated: "equality before the law conceals inequality and social evil behind the law". It is evident that, whatever its limitations, the Marxist account of law is not merely formal. It addresses itself very specifically to questions of social function, showing what law does for us and what it does to us. It investigates form (rule, logic, system) in reciprocal relationship with content (purposes, consequences). In these important respects it stands with natural law and sociological jurisprudence, over and against positivism.

Whether or not one agrees with a Marxist analysis, it must be admitted that it is a rich and provocative one, a "full" rather than an "empty" account. It will not easily be convicted of scholasticism, in its answers to the question "What is law ?" It is "of consequence", in that it refuses to answer that question without investigation of the ways in which law is intertwined with the whole pattern of who we are and how we live.

Brock University, St. Catharines,
Ontario, Canada

NOTES

(1) Hans KELSEN, *General Theory of Law and State*, New York: Russell & Russell, 1961, p. 113.

(2) H. L. A. HART, *The Concept of Law*, Oxford: The Clarendon Press, 1961, Chapter IX.

(3) Walter KAUFMANN (ed. & trans.), *Hegel: Texts and Commentary*, Garden City, N.Y., Doubleday, 1966, p. 78.

(4) English translation by Hugh W. BABB in *Soviet Legal Philosophy*, Cambridge, Mass: Harvard University Press, 1951.