SOME THOUGHTS ON THE LIMITS OF LEGAL REASONING

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Legal reasoning may be defined denotatively as any kind of reasoning used in any stage of the legal process. It ranges from the framing of constitutions and statutes, edicts and decrees to the reasonings and decisions of judges, and to the pleadings and briefs of attorneys, as well as to whatever takes place in the enforcement, application and invocation of the law. It is clear from this definition that whenever reasoning takes a legal form it is either part of the governmental process, as in the functioning of legislatures, executives and courts, or else is related to it as in the cases of pleas and complaints.

It is this reference to government that makes a real definition of legal reasoning so difficult, for effective government is never simply a matter of word or thought, but rather it is a thing essentially composed of action and will. Not only its power, but its existence itself is revealed in sanctions and enforceable commands; its emblem is the sword, not the scale. In short, government is a force, but it is a force tempered by form, or rather by several forms, each of which is somehow allied with the traditional functions of government, the legislative, the executive, the judicial. It is in the exercise of these functions that reasoning (or reasonings) come to the fore, and through the understanding of their different purposes that it becomes properly differentiated. As to the element of force itself, at the same time that it is ever present, it silently slips into the background, ready to act, but not, hopefully, always ready to be noticed.

It is reasoning, of course, which gives law, whatever its form, its definition for while force is the substance of law, the ordering of society its function, its meaning and definition is its form. And, if we wish to discover or to set limits to the law, we can only do so by an examination of the kinds of

reasonings implied in its definition and in the exercise of its primary functions.

In terms of the three primary functions of government, the legislative, the executive and the judicial, it is the legislative which is always logically prior, and is sometimes empirically so. Even the most specific edict of a tyrant is issued in the context of a broadly based and general policy, whether or not openly expressed or publicly promulgated. But policy in this sense is either equivalent to or has all the force of law, for it sets the terms (whether in a broad or narrow sense) of a community's direction, actions, and relations. Executive and judicial actions and decisions presuppose policy, whether it exists in the declared form of a legislative enactment, or in the mind or speech of an administrator or judge.

In effect legislative enactments are policy decisions. It should be remarked here that for the purpose of this paper, which is to sketch a logical schema, legislatures are not to be looked upon as entities which are set apart from the body of the community in which they exist and with which they are identified. The further question of whether the executive and judicial functions exist in the same or a separate body as the legislature, or whether the legislature is the cockpit of competing interests is not now discussed, since it is not the intention of this paper to study the various historical, and sociological forms and questions of government. Rather legislatures are the community as a whole as it actively engages in determining and pronouncing policy, which then issues from it as those forms of law which we recognize as statutes and enactments. As such they are embodied power; to be otherwise is to reduce them to the expression of wishing as a grammatical exercise. Governing is never hand wringing. They are embodied power, which is to say a kind of force; but they are never force gross and undetermined. Determined and limited as they are to specific fields and well defined areas of action, at the same time that they are products and kinds of force, they are the outgrowth of feeling or even of mind in the sense of a more or less discriminating intelligence at work. Statutes are always framed in terms of a specific area of reference, such as

defence, education, health and so on. Thus, in order to do its job no law can be simply a segment of power, it must also express knowledge, belief, even impulse, emotion and wish. It does this in its guise as a stetement to be verified or disputed. As a statement it is subject, as is also the process which gave rise to it, to all the sorts and kinds of proof that there are. But in every such statement there hides a wider category or generalization. What is meant is this. A law is not alone a directive to action, but it is itself individualized in its terms of reference. In this context specificity and individuality are neither contradictories nor contraries of the general, rather they restrict the general to its meaning in terms of cases, occasions, and events. The question to ask if the wish is to set limits to the law is what kind of category related to the causes which result in the law is implied or held in mind, what kind of universal hides in the particular statement. As concerns policy, then, any member of these latter may very well play a role equal or superior to that of any other member. But only as abstract theory. For purely logico-deductive reason can only operate within a universe which lends itself to their use, as in Plato's *Republic* or some other such utopian program.

In the actual conditions of affirming a human present or planning a human future, which is what legislative policy making essentially is, logico-deductive reasoning and references are either ancillary or nonexistent. Medical science may speak with authority on the safety of abortion, moral philosophy may tell whether forbidding it violates privacy, and so on, but while any or all or some of these may in any particular vote help determine the mind of the legislator, the necessity itself is never a matter of logic. Their role in lawmaking is instrumental rather than causal. The legislator in puzzling the matter out for himself may also determine his alternative courses of action not so much by attention to what is scientifically viable but to what is emotionally appealing or fearful, or, as is most often the case, to what he considers practically desirable and effective. (i.e. in terms of votes, popularity, and the rest). Again, apart from utopian republics and theocracies there is no necessary relation between the rightness (or effectiveness)

of law and an ultimate goodness. In practice, and in its own time and in its own way each community finds it possible to exist with its own standard of goodness and rightness: goodness and rightness of this kind represent no ideal limits and cannot represent ideal limits, representing as they do, only the terms of action which restrict themselves in turn to a limited range of consequences and relations, the further and more remote effects of which are not always forseeable and are not necessarily desirable.

Ideally it would be possible to identify law with goodness (that is, with morality in the Aristotelian sense) if the community with which the law identifies, had goodness as its aim, and morality as its principle. But this need not be so either in logic or in fact. There is no reason, whether descriptive or abstract, why a community should be based on any particular moral values, or identified with any set of moral values at all. This is most clearly seen where morality lies in the breast of the individual person. In the every day world of public facts people are united in communities through all sorts of concerns, and through all sorts of moral values, or through no moral values at all. Even where goodness is a shibboleth, there often is little or no public agreement upon its interpretation. Law is defined through goodness only as a means to the latter and where the reasons for goodness are otherwise justified.

Law is unlimited in its potentialities, (though its potentialities are not those of science nor knowledge, since law is not necessarily identified with nor derived from either) just so far as it represents and expresses the thoughts, reasons, beliefs, attitudes, wishes, and purposes of the community. For the same reason it is also limited, for it can extend no further than their boundaries.

Legislative action based upon such factors, then, can issue as law, but it can only be based upon them as instruments. As concerns the law itself, they dictate neither its form nor its purpose. Law as a thing apart from its antecedents can no more guarantee or produce the good than can the surgeon's knife recovery.

Perhaps the double use of the term 'authority' in connection

with law will best exemplify the intended meaning of this paper. In the first sense law is said to be authoritative as it bespeaks wisdom, knowledge and skill. In the second sense it is authoritative because it is the public voice of the community and the primary origin of sanctions. Hopefully, the two senses will coincide in any instance of law. To what extent and with what success in any time or place the reader alone can decide. In any case, it is plain that to look for the limits of law is to look for the limits of its authority in both senses.

If what has just been said is granted, then it becomes clear that while law may make use of the fruits of any theoretical or practical science, it is yet neither to be identified with them, nor is it their outcome. For not only may it be the result of passion or feeling, as opposed to knowledge, but, more than that, its heart is forever in the wish and only sometimes in the wisdom of a community.

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