JUSTICE, LAW, AND JURIDICAL DECISION-MAKING

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Once upon a time it was the custom to explain to law students that the law was a logical science, so that, as soon as what the law is on a particular subject had been ascertained from the books, the application of the rule to a specific fact situation followed logically. In form, the process was quite simple: Aristotle's syllogism provided the desired guidance. A legal principle, or, more likely, a legislative enactment, constituted the major premise, or generalization; the specific fact situation was the minor premise, or distributed middle term; and the application of the one to the other, through a correct process of abstraction, resulted in an inevitable conclusion. Mastery of the formula, known as deductive logic, was thought to be the key to success in the practice of law.

In the history of juridical philosophy, the syllogism was usually based upon the unexamined presumption that law and justice are identical. Since justice was the goal that people desired, and law, in theory, the means devised to attain it, manipulation of the syllogism, if skilfully done, was expected to result in justice. More and more emphasis was placed, therefore, on the exact forms the deductive process required, until the notion of justice was all but excluded from legal analysis. Ulpian's definition, *suum cuique,* which would accord to every man his own, or what properly belongs to him, was never completely lost from sight in the West, but its content was left largely unexplored. The notion of justice became, through the centuries, a concept, an ideal, a mere third term in the syllogism, which inevitably resulted by correct deduction from the major and minor premises. Remote from any connection with actuality, justice was treated as an abstraction, without making allowances for the realities of human existence. Today there is manifest everywhere an unrest which often takes shape as a challenge to the legal order, either

with or without accompanying violence. A review of the prevailing presumption about the actual relationship between law and justice would therefore seem to be overdue.

One contemporary writer on the philosophy of law who is quoted frequently, Hans Kelsen, has retained the deductive form, instead of rejecting it. In fact, he has expanded it in such a way as to derive not only law but also the authority of government by means of the syllogism. Professor Kelsen does not look beyond form to consider content, or substance. He seems to treat the legal order and the authority of government as interchangeable. In this way, the enforcement of law by the strong arm of the state is accorded priority in the scale of values, and argument over content is abruptly terminated as irrelevant. It is a view of legislative jurisdiction which is obviously compatible with the theory of legitimacy in government which prevailed in imperial Vienna, and eventually led Austrians to welcome the Anschluss before the fallacies of Nazi legal theories were detected, and grave disillusionment set in. By refusing to examine the major premise for content, a feature of his theory which Kelsen readily acknowledges when he says, almost inadvertently, that his theory has nothing to do with the content of the major premise, the Kelsen reliance on the imposition of a syllogistic formula displays not only an artificiality but also a rigidity far removed from the observed conditions of human living. Furthermore, his failure to consider the relationship between law and justice, by appearing to accept the assumption that they are interchangeable, or equivalent, yields a kind of legal order against which there is, in this post-war period, widespread revolt. The Kelsen theory speaks much about authority, but consistently excludes any concern with justice. In fact, the author published his collected essays under the skeptical title, "What is Justice ?" Obviously his theory of law, logical though it may be, fails to alleviate the sense of injustice which occupies the contemporary world. Notwithstanding Kelsen's reaffirmation, the search for some alternative to Aristotle's syllogism claims increasing attention at present.

A different syllogistic formula has tended to replace Aristot-

le's among those writers on legal philosophy who look to Immanuel Kant as a leader of acceptable thought. Kant's well-known separation of the practical from the speculative in the reasoning process, — based on the distinction he proclaims between will and idea, and his assigning the practice of law to the will category, rather than to the intellect, — has tended more and more through the years since he wrote to deprive law of a needed critique of content. For example, Rudolf Stammler, who tried to effect a reconciliation between Kantian theory and the natural law, led Stammler to devote more attention to form than to substance when he wrote about a natural law with variable content. From such a viewpoint, the next step, — which, particularly in the United States, during the 1920s, claimed to see a revival of natural law concepts — resulted in an obvious though often unnoticed contradiction in terms, and eliminated pretty effectively any consideration of the concrete realities of nature which are made explicit in the very term, natural law. Something more might well have been expected in an age committed to science. However, since the time when Kant wrote, continually increasing stress has been placed, in accordance with the will emphasis, on enforcement and procedures. Writers who find Hans Kelsen's theory plausible, and adopt it for their own, tend to minimize the intellectual aspect by according priority to the force of law. In addition, for an audience that concentrates much attention on freedom of choice, there is little incentive to examine different views of justice, or how its implementation may be made effective. After Kant's time, the inevitability feature of the classical syllogistic logic, which traditionally had led to a conclusion, appeared to become manifest in a conflict of wills and little else, with that party able to make the greatest show of strength, — usually the state, — terminating the arguments. A new form of syllogism would seem to be required to correspond with this shift from conclusion to determination, — or, decision-making. It was Kant's successor in providing the direction Germanic idealism was to follow in modern times, Georg Hegel, who devised the syllogistic formula that has largely superseded Aristotle's.

Familiarly spoken of as Hegel's Triad, or Troika, this formula replaces the major premise, or first term of the classical syllogism, with a thesis, or hypothesis. Since both terms are similarly abstract with respect to reality, there is little to choose between them on this point. It is in the minor premise, or distributed middle stage, that Hegel's formula diverges from Aristotle's. Instead of distributing the elements of his hypothesis according to their particular objectives, Hegel contrasts them, and then denominates his second term, antithesis. It is true that experience shows that the meaning or content of a thesis may often be seen more clearly if the negative, or contrary, aspect is stated with equal clarity. However, the statement of a thesis which is followed immediately by an antithesis introduces at once a suggestion of conflict, and the proponents are seen as adversaries, rather than as collaborators, in the quest for a satisfactory solution. Hegel seems to be looking backward several centuries to Abelard's *sic et non* formulation, with its implications for adversary procedure characteristic of the common law system since the twelfth century, at least. The quest is no longer seen as a cooperative search for truth, — or justice, — but rather as a basis for compromise in a process of conflict resolution.

Inevitability seems to feature Hegel's syllogism no less than Aristotle's. When applied to specific fact situations, the theory therefore appears to yield an enforced reconciliation rather than intellectual assent. This inference is graphically illustrated in the intellectual foundation of Marxian economics, where the conflict between thesis and antithesis is seen as a struggle between the laboring and the capitalistic class interests, — a conflict which is resolved by some sort of compromise that is enforced upon the antagonists through the application of state power. The inevitability feature would therefore appear capable of being speeded up by an effective nudge, although this must surely be wasted effort if the purported resolution, or synthesis, is certainly inevitable as claimed. Hegel's form of syllogism, if it did not in fact give rise to the contemporary struggle in the sequence of cause and effect, seems to provide an

accurate description of the contemporary scene, which has not yet reached a stage of resolution consonant with intelligence.

With some modern writers the quest for an alternative to Aristotle's formula has taken the direction of deeper explorations into mathematical reasoning. This has turned attention back toward Euclid and his equations. Without stopping long over the first principle of reasoning, — the principle of identity, and its corollary, the principle of contradiction, — which could have carried them immediately to an intuition of being, or keener awareness of actualities, even though represented by symbols, the exponents of symbolic logic have been content, for the most part, to concentrate on the phenomena of the variables. This shifted the emphasis a bit away from inevitability, and, in doing so, opened a door toward the expansion of perspectives. From this new position, it has become more obvious that reality seems to change in appearance in accordance with the shift in viewpoints from which observation is initiated. In earlier times this experience was described by saying that the mind gives shape to matter, and therefore mind was all that mattered. Since Einstein recorded his observations, it has been clearer that reality exists outside the mind, that its otherness is one and the same everywhere, and that its variations in appearance amount to nothing more nor less than the different aspects of reality as they are seen from different viewpoints. It is the experience of observing phenomena, — the experience of sense perception, — that is given stronger emphasis in a scientific era, thereby reenforcing that realistic philosophy which holds that "nothing is in the mind that is not first in the senses". Although mathematical reasoning is considered difficult to grasp, because of its concern with abstractions, its ultimate reliance on the equivalence between subject and predicate which is indicated by the active verb, "is", brings the speculative and the practical functions of reason together again, instead of separating them as Kant did. Idealism is supplanted by realism through the reasoning process that finds expression in Euclid's equations, even as the symbols on both sides of the equation lend themselves to a variety of manipulations. Aristotle's syllogism now appears to have greater flexi-

bility than Hegel's, insofar as its premises are open to modification by changing focus from concepts and assumptions to percepts and observations.

The results for law of the proposals to be found in symbolic logic have not yet been worked out. A few writers have been experimenting with non-Euclidean legal thinking. This could, perhaps, lead to a reconciliation of Western with Eastern thought, where sometimes the terms of logic have been variously translated analogically as non-books, or as the void. Although this sounds highly abstract, the fact is that the intellectual governance of behavior, or conduct, in the East, by the traditional teaching of Tao and the Dharma, is apparently no less concrete than the tradition of a law of nature in the West, providing the actualities of observed existence, and not only unexamined concepts about life, are analyzed scientifically. Here, the first principle of reasoning, the principle of identity, furnishes an insight if it be kept uppermost in mind. Recalling that a thing cannot *be* and *not be* at the same time, no matter what pattern the symbols of an equation may take, one is brought back abruptly to actualities by the allusion to thingness. Verification of progress made along this line of reasoning may be found in the revealed scriptural text in which the Creator of the universe, East as well as West, defines Himself in terms of actuality by saying, "I am Who Am". It is in stumbling over the rock of sense experience, denoted by the single word, *being,* that phenomenologists and existentialists, no less than symbolic logicians in the West, and exponents of Enlightenment in the East, can find common ground for agreement.

Perhaps the principal reason that lawyers, judges, and law school teachers so often bypass the speculations to be found in treatises that theorize about law is the tendency of the latter to place emphasis on abstraction, when experience demonstrates that law is in fact quite concrete. The books discuss form almost exclusively. Critiques of content are rare, — as if there is a tacit understanding that discussion of content is outside the law. The missing link in the analysis of the relation of law to life, however, would appear to be more closely connected with content than with form. It is not the skeleton alone

which determines shape but rather the flesh covering the bones which makes a phenomenon recognizable. Content and form together must constitute the subject-matter of law in order for the latter to achieve intelligibility. Further analysis of the phenomenon under observation discloses that law is addressed only to the living. As that perceptive jurist, Eugen Ehrlich indicated, in writing about the Living Law, it is neither the past nor the future, neither memory nor projection, which is directly affected by the application of a legal rule, but only persons in existence while it is in force. It is in the actual conditions within which people operate day by day that the foundations of the legal order are to be sought. This actual manifestation of existent being, and not merely a concept or ideal, is what was originally referred to by the law of nature, or the natural law. To separate form from content can only result in a distorted view, and not in the actual balancing associated with the symbol of justice.

In the task of shifting the philosophy of law away from pervasive abstractions and toward the restoration of realism, the Brandeis Brief (Muller v. Oregon, 208 U.S. 412 (1908) marks the beginning of contemporary progress. Louis Brandeis denied having a philosophy. His goal was justice. As a highly skilful practitioner and successful advocate, he worked within the conventional rules with respect to form, but he used them in an imaginative way, or creatively, instead of merely copying what he found in the books. As a professor of the law of evidence, he knew what the precedents had held admissible under the rule of judicial notice. He reasoned that if judges could take judicial notice of the time of day, or the monthly calendar, they were no less justified in taking notice of similarly established facts, when properly certified by reputable experts in fields other than law, that might be relevant, without the necessity of producing witnesses during trial in court to present relevant testimony of their own knowledge. He therefore included in his brief, in a novel labor law case, not only citations to the legal precedents supporting his argument, but also tables of statistics compiled under official auspices, and asked the United States Supreme Court to take judicial notice

of them. Being persuaded by this argument, the Justices accepted the Brief, thereby marking out a new direction for the common law to take. Although this event occurred more than sixty years ago, the precedent established thereby has not yet been generally adopted in other common law jurisdictions. After Justice Brandeis had himself been appointed to the Supreme Court Bench some years later, he was able to reenforce his own reasoning by a never ending insistence on finding the facts as well as the law. Not always able to convince his contemporaries, he was often in the minority when a decision was announced, and became known as a great dissenter. Eventually the tenor of his dissenting opinions became widely enough accepted by the majority to become the rule. His insistence on fact-finding has now become so well established that his authorship of this modern innovation in legal form is often forgotten or unknown. However the use of the fact-finding technique has proved to be exceedingly valuable in restoring realism to contemporary judicial thinking. It tends to open the whole question of the relation of law to justice for reexamination in a way which professional logicians have not so far met satisfactorily.

The effect of the Brandeis innovation was to shift the emphasis from concepts to percepts. This change in legal methodology corresponds to the advances made through the scientific method when the latter came to rely more and more on optical devices like microscopes and telescopes. Superficial observations by the naked eye are challenged thereby to see more of what nature actually contains. Assumptions and presumptions, no matter how firmly held, nor for how long, are often astonishingly exploded. The important factor is to look, — see how it works. In law, a competent critique of contents no longer looks backward only to the authority of a legal rule, but forward to its impact on the lives of people under the actual conditions in which they maintain their existence. Admittedly facts are selective, due to the limitations on human perspectives that manifestly exist. Since Einstein wrote, it has become much clearer that human comprehension of reality does not meet the poet's yearning to "see life steadily and see it whole",

because man is not created omniscient. His observation of nature is limited in time and space to an aspect, depending upon his viewpoint and what his previous experiences have prepared him to notice. His knowledge of nature expands as he moves even slightly to new viewpoints and encounters new experiences. To the degree that his perspective widens and the aspects of reality that he notices multiply, he becomes more knowledgeable. Much depends upon his own initiatives and choices, but always his perspectives are in fact limited by the conditions of human existence, or the actualities of nature, into which he is born. The conclusions which are induced by his observations of nature are therefore subject to continual revision in the learning process. In shifting emphasis from concepts to percepts, the logic that man relies on tends to shift also, from premises based upon hearsay evidence, and rigid syllogisms, to observations from which tentative conclusions are inferred. There is a turning away from deductive logic toward the inductive.

The fact that conclusions are often held only tentatively by this method, and subject to subsequent revision, does not necessarily lead to uncertainty in the sense of skepticism about the reality of nature. Instead it is more likely to result in humility through recognition of one's personal limitations in arriving quickly at adequate decisions. A good many years ago it was pointed out that law is part science and part art. Insofar as it is based on science, it reaches conclusions about nature that are subject to continual verification. Because these are derived from nature, there is some truth in the judgment formed, and the law has binding force from nature to that extent. Insofar as the law is art, it discloses choice in the means of expression. Since choice between alternatives is a matter of personal selection based upon one's personal scale of values, it is determinative rather than conclusive, and the expression that results is announced at one's peril, with only such binding force as it may have derived from the human will, and not otherwise from nature. This distinction corresponds closely with the well known explication that "one cannot choose what one does not know". It follows that responsibility for choice

depends on the extent of knowledge upon which a selection is made. Freedom to choose between alternatives is recognized, but the various alternatives available for choice are limited by nature as well as by one's knowledge. The incentive to increase knowledge is not only to overcome as far as possible obstacles of ignorance but also to increase freedom in the making of decisions, sometimes spoken of as liberation of the mind. Not doubt, but confidence in acting according to one's conscience is ordinarily induced in this way, the term conscience signifying precisely that one acts or chooses in accordance with the degree of knowledge so far achieved.

Judicial, legislative, or administrative decision-making, when looked at from the standpoint of knowledge rather than will power alone, is seen to be responsible quite apart from the question of authority, or legitimacy in government, that has been Kelsen's chief concern. Jurisdiction, or the obligation to make a decision that is binding upon others appears more closely related to responsibility than the concept of authority conveys. In other words, apparent authority to make a determination which is validly binding as well as just depends much more upon knowledge than upon the arbitrary, or will factor, which Kant considered the important element in a legal decision.

The troublesome question of the relation of law to justice, which challenges the presumption that law is the implementation of justice, whether it is denominated social or not, comes a bit closer to solution when viewed from the standpoint of realism than when justice is considered exclusively as a concept. Reality shows that living persons require concrete apportionments of the resources existent in nature in order to maintain their own existence. Deprivation of these necessities for any reason, or none, is therefore manifestly unjust to the living, since observation appears to indicate that resources sufficient to go around are provided by nature if the supplies are not monopolized unduly, but are fairly apportioned. The closer justice is analyzed in connection with the actualities of nature, the more apparent it becomes that Ulpian's definition,

— to each his own —, aquires validity not from arbitrary allocations or claims, but rather from the actual needs of human beings because of the very fact that they are human. Justice and humanity are therefore seen to be closely related in reality. Until this aspect of justice becomes clear, the law continues to be seen as little more than an abstraction, unrelated to either life or justice.

In summary, the premises upon which this critique is based are:

1) Nothing is in the mind that is not first in the senses; therefore percepts take priority over concepts.
2) One cannot choose what one does not know; therefore knowledge, and intellect, take priority over choice and will.
3) Law is part science and part art; therefore fact-finding of the actualities of life must be soundly established in order that the inferences and implications of the conditions of existence may be adequately expressed in comprehensible form.

   Law, from the aspect of science, relies upon verification, or the quest for truth; it is expressed in the form of conclusions, which may always be corrected or revised when further knowledge is certified.

   Law, in the aspect of art, is dependent upon choice for expression; once the choice is placed upon the record, the decision stands for all to see, and no amendment is possible. The result is a determination, rather than a conclusion, and the selection is made at one's peril.
4) Nature is another term for conditions of existence. It is not perceived by human beings to its fullest extent, but only in aspects. The process of cognoscibility is: a) apperception, or the cumulative previous experience with which one comes prepared to notice or observe new aspects; b) perception, or observation; c) conception, or abstraction; d) judgment, or conclusion, in the quest for truth; e) decision-making, or choice between alternatives, which one makes at one's peril.

5) Life is all that matters; law speaks only to the living. Being is the foundation of life. Action follows being, which therefore has priority in the ontological order. Stated otherwise, one has to *be,* in order to *do.*
Truth and Being are interchangeable.
Beauty and Being are interchangeable.
Good and Being are interchangeable.
Justice and Being are interchangeable.
Things that are equal to the same thing are equal to each other.
Therefore Justice and Good are interchangeable, and the True, the Beautiful, and the Good are one and the same Being, seen under different aspects.

Note: To scholars conversant with the *Opera Omnia* of Thomas Aquinas, these premises will doubtless sound familiar, and acknowledgement of debt is hereby made. Their utilization in the attempt to cast light on the philosophy of law under modern conditions is a twentieth century task.