JURIDICAL REASONING VERSUS POLITICAL THEORY

W. J. STANKIEWICZ

Juristic thinking has clearly had a significant impact on popular conceptions of political theory. It is not the political theorist's but the jurist's conception of sovereignty that is usually put forward. The jurist's views on equality find their way into most discussions of democratic theory, and the most common view of the relation between State and society is the juristic idea of the State as a coercive institution, whose members are motivated by the pleasure-pain principle which — if properly manipulated by the State — can be used to solve all social problems.

The influence of juristic thinking is rather surprising considering its unsatisfactory theoretical assumptions, the manifest difficulties inherent in its interpretations, and the obvious advantages of the alternatives presented by political theory. Thus the jurist has to presuppose a State in order to establish law, which then defines the State and is itself the 'sovereign'; somehow we are expected to believe both that the sovereign law derives from the citizens and that the law they decree must be enforced on them: 'obligation' does not exist in juristic thinking. Juristic theory has some plausibility with respect to such irregular forms of government as dictatorships. The State is then considered 'given' and the government as something that imposes its will on the community: the community must be coerced into respecting that will. But then it is difficult to see how the law could be sovereign. In a democracy the theory loses its logic. When it is possible to think of law as sovereign — as in a democracy, where in theory it expresses the will of all — it is not possible to understand its coercive nature. (As an expression of the community's will, it would not need to be accompanied by sanctions.) Thus, juristic reasoning leads to a curious situation: if one thinks of the law as coercive, one cannot possibly think of it as sovereign; when one sees it as sovereign, one cannot possibly see it as coercive.

And yet for the jurist one of the essential characteristics of the law is coerciveness. A decree which is not accompanied by sanctions is not, it would seem, a law; the sovereign's commands must entail sanctions in order to be laws: a simple "No Trespassing" sign is not a law. The political theorist, on the other hand, is disturbed by a conception of law and order which disregards obligation. He cannot regard the State as a purely coercive system. (He cannot, for instance, believe that the sovereign power is capable of coercing its coercive agents — army and police — into being coercive in a certain desired way.) Furthermore, emphasis on coercion implies the existence of the pleasure-pain principle of motivation — a conception of human nature that few social scientists would hold today. Yet this view remains a popular conception among those members of the general public who are strong advocates of the "law and order" response to social problems. This is no longer true of those actually responsible for maintaining law and order, but since it is extremely hard to change the nature of the legal order, our society has had to evolve techniques of circumventing the law. Modern courtroom procedure is becoming ritualistic with respect to the carrying out of sentences. Most of us know that "Ten years, hard labour" does not mean "ten years" and most certainly does not mean "hard labour"; but not as many realize that in our society the court's sentence really amounts to a technique for assigning to some members of the community the responsibility for certain other members' behaviour. Prison officials have a great deal of discretion. Many long-term 'prisoners', despite the court's sentence, are not held in prison. The prison sentence means only that for a period they are subject to the authority of a person appointed by the court. We have retained the form of the traditional system which sees all aberrant behaviour in terms of crime and punishment, but we have adapted its nature to the non-realized need for ensuring the official supervision of certain individuals. This development has been prompted by the breakdown of the family, which has greatly increased the number of persons who have never acquired a sense of social responsibility.

It appears that the legal order with its emphasis on coercion is not really the system we are using to maintain law and order. We have continued to use the framework of the old system in the sense that we have extracted an element which society considers essential, namely responsibility. The practice of assigning to social workers temporary authority over individuals has developed because coercion — the juristic view notwithstanding — is not a supreme 'norm' of democratic society. A democratic society, like any society, must have a system of law, but it must adapt the latter to its normative system rather than vice versa. This, at any rate, is the political theorist's view.

The jurist's emphasis on sanctions leads to the curious contradiction that, while sanctions have an order, the system of law has none. Sanctions form something like a hierarchy — extending from a reprimand from the bench to the death penalty — which gives an indication of their relative importance. This is not true of laws: we can perceive their order of importance only by looking at the corresponding sanctions. As a result, obedience to the law is made non-rational, except in terms of self-interest. One is not permitted to agree or disagree on the basis of principle. Instead, the law invites an act of calculated self-interest: either weighing one's chances of escaping the penalty for breaking it, or comparing the personal advantage of violating it with the disadvantage of penalty. The law never raises the standard moral issue of normative conflict: "does norm X or Y apply in situation Z?" Furthermore, there is a great reluctance to allow the legal order to make any pronouncements on society's norms. This is because there is no faster way to destroy a norm than to incorporate it into the legal system, whereby the possibility of rational adherence is removed.

(We do not know how to inculcate norms so that they are held as part of a rational pattern resting on the definition of the self. Unfortunately, when the law attempts to promote the type of behaviour which would occur if everyone held the same norms in the same way, it shifts the issue from the relation between the individual and the universe — in which

norms define the individual — to the relation between the individual and society, in which the normative code is restrictive and threatening rather than, 'defining'. So long as the law presents itself as a supplementary set of norms necessary for social life no harm is done, but if the legal code presents itself as the normative set which outranks any other normative set — "the law must be obeyed" — it undermines the concept of norms and that of individuality. The law demands that norms never 'define' the individual but express only his desires. The issue raised by law is self-interest: "Is it to my advantage to observe the law ?" It is obviously sometimes to one's advantage to break particular laws if one can do so undetected. One will take one's chances about undermining society just as one will take chances about escaping punishment. This is precisely the problem with the juristic view. It invites a calculated risk and many persons are willing to take it. The normative code of society, on the other hand, invites risk-taking not for the sake of self-interest but with a view to the self-fulfilment resulting from adherence to what defines the self.)

It is also possible to regard the legal order as a system for making norms relativistic .In the past, jurists heartily denied this view; they tended to see the legal system as a reflection of natural law in the social order. This was possible because legal sanctions could be regarded as forming a sort of hierarchy presumably reflecting the hierarchy of norms in natural law: for instance, a "fate worse than death" was possible in the mediaeval world when torture was an accepted part of judicial procedure. The growth of humanitarianism badly muddled the sanctions and hence such normative order as the law had. Today jurists are among the chief exponents of relativism. The nature of law is such that they are committed to it. Political theorists — as opposed to political scientists — are not. To make such a comparison should prove useful to political theorizing. It is quite likely that a close analysis of juristic thinking and its consequences may clarify the nature of political theory and its relation to normative orders.

Political theory has always emphasized some form of nor-

mative hierarchy containing a supreme good and some ultimate norm or norms. Presumably, theories of society which do not contain such a structure — as is true of those that attempt to make the State the supreme good and obedience to its law the ultimate law — are not political theories; rather they are juristic theories about the role of law. Such theories say nothing about normative conflicts, because the concept of law has no place for a hierarchical structure: 'equality' is an essential attribute of the law. Should a man attempt to plead that in breaking one law he tried to conform to another — a common plea in ethics — according to law his plea must be dismissed or judgment suspended until the matter is cleared up. The law must always apply as it stands and the jurist's duty is to express the provisions of the law so that obedience becomes purely a matter of self-interest, untainted by moral considerations. Ethical considerations threaten the legal structure.

Thus the question of 'freedom' cannot be tackled by a jurist, even if he happens to live in a constitutional democracy. The meaning he must give the concept is different from that given by the political theorist. In the United States it was, for instance, possible for jurists in the nineteenth century do decide that a slave who had escaped must be restored to his owner, constitutional statements about freedom notwithstanding. Because the legal constitution does not have a hierarchy of norms — 'freedom' and property rights are on the same level — the jurists could make such a decision with a sense of acting in the interest of justice. (Although the particular problem posed by the Dred Scott case has been eliminated by the abolition of slavery, the courts are still plagued by questions of a similar nature: thus, a democratic court has no right to interfere with the religious beliefs of a Jehovah's Witness who denies a blood transfusion to a child on the grounds that he 'owns' his children. There is no satisfactory way for the jurist to decide such questions, because he is not permitted to believe in a normative hierarchy. Often enough, however, he resorts to a substitute by appealing to the 'intent' of the law which as a rule refers to the normative hierarchy operating within society.)

The gap between the political theorist and the jurist becomes apparent when we consider the thought of Thomas Hobbes, who in many respects can be regarded as the father of modern political thought. It is not so much the theory of sovereignty which is his most significant contribution, as his view of the State as something resting on free choice. Previous theorists had allowed some measure of choice under certain conditions — as when the laws of the State failed to accord with the laws of God — but Hobbes made life in society a matter of choice for all those willing to ask why it was that the State had authority. He supplied an answer by referring to a self-imposed hierarchy of values which is never given up. Such authority as he recognized is the logical consequence of the hierarchy of values — not something imposed on man by a hypothetic social contract in the past or some wielder of power in the present. This authority is never independent of the hierarchy of values which created it. It is not itself a new form superseding the old or ranking higher than the latter: it is the social expression of internal hierarchy.

To the jurist, however, 'authority' is conferred by office — a position implied in Professor Perelman's view that "not everyone is entitled to modify a law that is considered to be unjust. In order to act as a judge or a legislator, one must have authority. Those who do not have that authority can merely attempt to influence the holders of judicial or legislative power." (Chaim Perelman, "Justice and Reasoning" in *Law, Reason, and Justice,* ed. by Graham Hughes, New York University Press, 1969, p. 211.) No question is raised as to how the office acquired 'authority'. Here social organization is divorced from all other considerations in a way which political theory cannot accept. If an 'office' has the kind of 'authority' that allows it to decide questions which in other circumstances are left to the individual's conscience, the theorist must insist that there is a theory to bridge the gap.

University of British Columbia