THE ONTOLOGY OF LAW AND ITS IMPLICATIONS FOR CONTEMPORARY ANGLO-AMERICAN JURISPRUDENCE

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The essential question of contemporary Anglo-American jurisprudence is what constitutes a good legal decision.[1] This focuses directly on judicial reasoning and indirectly on the sources of law and the ultimate sense of law, as rules, principles, or social morality, for example. In this it is consistent with traditional jurisprudence, which since Bentham has eschewed ultimate metaphysical questions in favor of the positive, the realistic, or the normative. Thus, in a sense contemporary jurisprudence, in asking for the basis of a good legal decision, is finalizing its own tradition, for judicial reasoning lies at the very center of law seen variously as a system of commands, types of rules or a normative order. These different positive analyses of law were rendered more humanly mecaningful by the realistic emphasis on the actual systematic processes of dispute resolution, where rules are made and norms enforced, particulary in view of the very power of the judiciary in the American political system. What the law is, therefore, is known through the facts of its application in the judicial process. This is represented as its essential place in human existence. Its imperative, normative, and systematic nature cohere around the case.

However, the determination of issues in the case is a second order representation of real events objectified by the proceses and conceptualisations of the law itself. Thus, the parties themselves are primarily the objects of rules, norms, and the system, and secondarily, its subjects are citizens belonging to the entire political order. But if we stand back from our involvement with the law as it is represented to us, there reappears the background of law present in our everyday life against wich law as adjudication and enforcement stands out. The ontology of law, as a metaphysical enquiry, brings out the fullness of the law's reality by putting its objetive manifestations

[1] R. Dworkin, *Taking Rights Seriously*, 86 (Harvard 1978).

into the overall perspective of their relationship to human being. It cannot be doubted that even analytical positivism, let alone natural law, has metaphysical foundations.[2] The problem though is twofold; to bring out the ultimate basis of law today, that is, the conditions of the facts of law, and to articulate the means of access to its essence, since the appearance of law as a positive fact is supported by a legal reasoning that reduces the experience of law in its disposition to rules, systems, and norms. Thus, the ontology of law goes beyond the facts of law and does so by questioning the very form of legal reasoning itself.

If we ask how do we know that law is a normative system of rules and principles, we also need to ask why it is obvious that is so. It is true that order is maintained by way of rules or principles which are ethical expressions of means towards political ends. But we only know that because that is what we live through and it is obvious that it is so only because we do not stand outside the professional and self-contained reality of law as it is represented to us. The ontology of law does not contradict the description of law as a normative system of rules, it only questions it at its basis so as to bring out what is hidden behind what appears as given reality that we may put into perspective the whole of law, its lawfullness, and not be deceived by the distorting appearance of the tip of the iceberg. Therefore, if we question law at its foundation we cannot approach it as part of the real world, a datum of science, nor as a concept, a grammatical move in the linguistic performance of existence. It is less objetive than such a fact but more real than a mere idea. The actual and the normative lie in a continuum of our experience. What we can do is question our very assumptions in thinking of it but this involves starting not with it on a factual level but with ourselves and the way we stand towards it.

It is not so much a question, therefore, of the polarity of natural law and positive law, or legality and justice as the relationship between existence and essence, that is, fact and value, process and presentness, is and ought. These are the forms in which we think of our experience of law as represented by the facts of the judicial decision. But the condition of our experiencing law, whether reduced to the judicial decision or theorised as positive rules as opposed to natural ideals, is our very human being. The ontology of law begins with our way of being, not the law itself.[3] This is the background to the given reality of law today. For example, law as an ordering system responds to a

2 R.M. Unger, *Knowledge and Politics*, ch. 3 (Free Press 1975).
3 M. Heidegger, *Being and Time*, §3-4 (Harper & Row 1962).

human need for security in the face of uncertainty. This uncertainty is part of the ontological basis of law. Thus, rules themselves are not decriptive propositions but conditional hypotheticals. They are uncertain, too, before we see them positively, normatively, or realistically. The contingency of existence is not made redundant by the control of rules and a legal system; rather it inspires its shape, and not by way of rules rather than ideals but through an intermediate process.

Possibly, the emphasis today on rules and systems rather than principles and social morality expresses a profound sense of human insecurity in the nuclear age. Nevertheless, our way into the basis of law is through our own experience. Certain aspects of this discovered by existentialism provide our starting point.[4] Thus we are irreducibly thrown into life. It is a challenge from which we cannot escape. We must choose even as we act. Our guiding value is the authentically meaningful life. This is a project thate ends only in death for we constantly reorient ourselves to events as they emerge out of the invisible openness of the future so that each time we set up new conditions for the experiencing of anything else. Yet, this is not absurd any more than it is determined. It is ambiguous. We are free to make meaninfgul our existence and are made meaningful by our choices. Ontalogical structure and presence are qualities of the same moment. The process is reversible. The facts of law are not there determining our experience of law. They are facts because we stand towards them in a subject-object relationship. But from the point of view of our existence, there is, prior to the concept of law as rules, norms, or systems, a realm of our being in the presence of law which we experience as necessitating authentic choices about ourselves and our world. We are in law before we reflect on its presence. It permeates our whole being as a way of dealing with the openness into which we are projected. It is as if we thought an iceberg floated on the sea rather than in the sea. We are beings in law before we see law presented to us as rules, systems, or norms, or represented in the judicial decision.

The ontology of law, therefore, reveals us to be more than objects of rules of law and more than subjects of systems of law. Nor does the normativity of law describe our experience of law for we are not so much bound or obligated by it as responsible for it. Moreover, it is not as it is represented to us in the fit of rules and principles for

4 For one of the very few useful articles in this area, see Blackshield, "The Importance of Being: Some Reflections on existentialism in Relation to Law," 10 Natural Law Forum 67 (1965).

the disposition of situations or cases, nor is its presence in our lives described fully by rules, norms, or systems, for we experience the presence of law in-between the objective facts of legal reality and the law's own subjective application of its correspondences, as the difference between lawyer's law and the freedom, equality, or fairness of life as ordered by law. This in-between is our being in law that is the primordial encounter of existence with the choice between order and chaos as conditioned by the uncertainty of our ever being on the way. The fundamental question of ontology concerns the structure of this way of being in law. This is fundamental to jurisprudence for it is also the background to traditional jurisprudence which is obscured and unquestioned in its focus on the analysis of the facts of law rather than our experience of law. For example, the legal decision is not only made by the judge in a disposition. People make legal decisions. In fact, an institutional perspective blinds us to the human perspective for we think in terms of sharpening the issues of law, establishing the facts, and marshalling the applicable principles and rules as if law only came alive in the adversarial process. But in domestic situations, for example, it is often better not to approach resolution as a contest and to leave unsaid or unchallenged the significance of certain facts. The whole dispositive process assumes the veracity of facts proven in court, whereas reconciliation turns more on giving and forgiving. At best this is an interpretation, a second-order representation of reality already closed off from the experience.[5] Resolution of disputes by mediation or conciliation is effected by the parties not an adjudicator, just as legal decisions are basically human not official.

Not only is our experience of law therefore not necessarily concerned with the judicial reasoning of rules, systems, and norms, but we make legal decisions not on the basis of pre-existing rules, but on the understanding of each separate situation in the light of the ontological structure of order and, moreover, that understanding is a personal responsibility of the actor each time, including the judge.[6] We cannot hide behind the law any more than it can hide behind itself. When we act, though our action may not be predicated legaly or illegaly at the objective level of dispositive law, yet at an ontological level it may be as much legal as moral, religious, or political. These are the ways we may be. Litigation is the last resort of being in law

5 Northrop, "The Mediational Approval Theory of Law in American Legal Realism," 44 Va. L. Rev. 347 (1948).

6 Cohen, *Existentialism and Legal Science*, 34, 115 (Oceana 1967).

because it is only the tip of the iceberg. By the time a decision in a case has to be made the human experience of law has already been thought through many levels of law. Thus, the question of the status of international law is less than a linguistic quibble. The rules of international law are indeed of secondary import to the parties' choices and strategies. The significance of this is not at the factual level that international law is not coercive or even that states are not bound by it, but that, insofar as acts affect others' freedom to be or deny mutual respect or undermine reciprocity, they are already legal in a sense. Before the objective facts that describe law are presented to us, we have experienced law as a particular way of being in the world with others whenever we act in terms of social order. It is international law in fact which most stands in need of ontological foundation. In national law we simply need to see it.

Law is not an act of will or the product of reason, it is fundamentally a realm of experience. This experience is not coherent because of the fear of sanctions or the guidance of conscience but because of our sharing a way of life. At an ontological level law is not an instrument to be used for certain ends or the signs guiding us to those ends, it is the way of choosing itself, the very process of choosing between order and chaos. Whether security is more fundamental than other needs in the face of existential uncertainty is not important here but approaching it that way will reveal the essence of law. Thus, in religious experience we are faced with the confrontation between the visible and the invisible, reality and the unknown, and we choose truth. In moral experience we confront our self and others and we choose authenticity. In political experience we confront others and the whole and we choose the common welfare. When we are confronted with self and the whole, that is as individuals in community rather than as a political community of individuals, we choose order. The experience of law therefore, at an ontological level concerns social order, not political, moral, or religious needs. What the facts of law may be are necessarily conditioned by this social order. Therefore, the philosophically significant facts of law are not the objective rules, systems, and norms whereby the social order is maintained and redressed for the needs of truth, authenticity, and welfare, but the effective and experienced facts of that order, that is, the way law responds to the relationship of law to morality, the source of legal obligation, and the nature of justice. These are the problems of law as seen by modern legal theory. But ontologically the presence of law is felt through the structure of freedom, fairness, and equality, as it is realized in social order, not only through rules, systems, and

norms, but also in our very way of choosing order authentically, respectfully, and reciprocally. This is our form of life. Our experience of law is a reversal of our usual thinking. Rules are not directed towards freedom, fairness, and equality as values, rather freedom, fairness, and equality are the essential foundations of law, or reasons for law, however free, fair, or equal the system may be or whether it represents law as external and coercive, political not ethical, or concerned only with maximizing welfare. Such facts are conditioned by the way we choose order.

That this is so may be seen from the history of the philosophy of law where the perennial questions concern not the objetive facts of the form of law's appearance but what justice is, how we are obligated, and how separate law is from morality. This is what law is. It is rules, norms, and systems and also it is a social order of a certain justness, bindingness, and morality. These are the facts of law. Ontologically, law is what this means to us. We may know it to be rules, norms, and systems but we experience it as an already existing resolution of choices of the realization of justice, bindingness, and morality in favor of social order. Law and legal theory are alienating, repressive, and partial. They are uprooted from our being and a distortion of the way we are in the world. We are not realized through the law as an expression of social ordering; rather are we made free and equal within it. The emergence of the positivistic analysis of the facts of law and the obscuring of a methaphysical or non-rational dimension to law are relative to a transformation in our way of being in law. When custom was replaced by legislation, law was externalized into an act of representative will. As law became a sovereign command, its bindinguess was less a matter of nature than a political fact; similarly, its justice was a political end, its morality a matter of extra legal concern. Once law became thought of only as rules, systems, and norms, the human being's moral, political, and religious needs became represented to it as objects of its facts and subjects of its political process disposed of together in the case.[7] Hence, the contemporary emphasis on the judicial process as the focus of law's political realization. Justice is welfare. Coercion obligates. Morality does not necessarily overlap with law. These are the given facts of law, their sense lies in the cases. This is the nature of legal reasoning.

The foundations of this, though, are not just obscured by history. They lie sedimented beneath our very way of thinking of law. Thus, when contemporary jurisprudence searches for the final reason of

[7] Balbus, "Commodity Form and Legal Form: An Essay on the 'Relative Autonomy' of the Law," 11 Law and Society Rev. 571 (1976).

legal validity or the basic norm of law, it always comes face to face with the question of whether social morality constitutes fundamental legal principles or only validates them.[8] There is no way out of this except into a metaphysical enquiry, for social morality is a conceptual representation of our shared form of life which we experience as a way of being free, fair, and equal. The idea of social morality expresses confusedly not so much the source of law or the original overlap between law and morality, but the dynamic or self, others, and society. It is how we think of the we in us. It is through liberty, equality, and fairness that we meet the challenge of our need for security in the face of an uncertain existence. Social orders is constituted by our choices. We choose in different ways. In the presence of law as a way of being and choosing we act authentically, respectfully, and reciprocally. This is the ontological level of law at which freedom, fairness, and equality are constituted. At the philosophical level of the facts of law we choose welfare, cohesión, and certain values. This validates freedom, fairness, and equality as a structure of experience because it is what law is used for. At the level of law as rules, norms, and systems, we choose liberty, equality, and fairness because of the demands of the problems of legal obligation, justice, and the relationship of law and morality. We know this, we experience the former and we are the first.

For us today, law is not "ars boni et aequi" or "humanarum atque divinarum rerum notitia" but a way of being in the social world, that is, choosing order and structuring it as freedom, fairness, and equality. For modern legal theory, this suggests that the relationship of freedom, fairness, and equality forms the matrix for acting jurisprudentially, that is, practical reasoning in law is based on respect, reciprocity, and authenticity. It also suggests that a prime focus of study should be how such frameworks of experience evolve and change and, in particular, how in the nineteenth century liberty, equiality, and fairness came to be thought of as democracy, welfare and rights, and equality thought of as the supreme value of the system.[9] As much as equal respect expresses the basis of modern legal rights it presupposes the form of society as ordered by law and politics. The relationship between society and political society is

8 Cf. Dworkin, "Philosophy and the Critique of Law," in R. Wolff (ed.) The Rule of Law, 154, 156, 163 (Touchstone 1971). Dworkin, "Social Rules and Legal Theory," 81 Yale L.J. 855 at 867 (1972). Dworkin, *Taking Rights Seriously*, 177.

9 See, Kennedy, "Form and Substance in Private Law Adjudication," 89 Harv. L. Rev. 1685 (1976) and Fletcher, "Fairness and Utility in Tort Theory," 85 Harv. L. Rev. 537 (1972).

that of liberty and that of society and law is that of fairness. Underlying fairness, liberty, and equality, however, is not just respect, but reciprocity and authenticity. This is more than a conceptual framework or guiding values; this is the way we are in law at the most fundamental level choosing social order.