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Law, Legislation and Liberty

A new statement of the liberal principles of justice and political economy

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Volume 1
RULES AND ORDER

Volume 2
THE MIRAGE OF SOCIAL JUSTICE

Volume 3
THE POLITICAL ORDER OF A FREE PEOPLE

F. A. Hayek

ROUTLEDGE

FOUR

THE CHANGING CONCEPT OF LAW

Non ex regula ius sumatur, sed ex iure quod est regula fiat.
Julius Paulus*

Law is older than legislation

Legislation, the deliberate making of law, has justly been described as among all inventions of man the one fraught with the gravest consequences, more far-reaching in its effects even than fire and gun-powder.[1] Unlike law itself, which has never been 'invented' in the same sense, the invention of legislation came relatively late in the history of mankind. It gave into the hands of men an instrument of great power which they needed to achieve some good, but which they have not yet learned so to control that it may not produce great evil. It opened to man wholly new possibilities and gave him a new sense of power over his fate. The discussion about who should possess this power has, however, unduly overshadowed the much more fundamental question of how far this power should extend. It will certainly remain an exceedingly dangerous power so long as we believe that it will do harm only if wielded by bad men.[2]

Law in the sense of enforced rules of conduct is undoubtedly coeval with society; only the observance of common rules makes the peaceful existence of individuals in society possible.[3] Long before man had developed language to the point where it enabled him to issue general commands, an individual would be accepted as a member of a group only so long as he conformed to its rules. Such rules might in a sense not be known and still have to be discovered, because from 'knowing how' to act,[4] or from being able to recognize that the acts of another did or did not conform to accepted practices, it is still a long way to being able to state such rules in words. But while it might be generally recognized that the discovery and statement of what the accepted rules were (or the articulation of rules that would be approved when acted upon) was

a task requiring special wisdom, nobody yet conceived of law as something which men could make at will.

It is no accident that we still use the same word 'law' for the invariable rules which govern nature and for the rules which govern men's conduct. They were both conceived at first as something existing independently of human will. Though the anthropomorphic tendencies of all primitive thinking made men often ascribe both kinds of law to the creation of some supernatural being, they were regarded as eternal truths that man could try to discover but which he could not alter.

To modern man, on the other hand, the belief that all law governing human action is the product of legislation appears so obvious that the contention that law is older than law-making has almost the character of a paradox. Yet there can be no doubt that law existed for ages before it occurred to man that he could make or alter it. The belief that he could do so appeared hardly earlier than in classical Greece and even then only to be submerged again and to reappear and gradually gain wider acceptance in the later Middle Ages.[5] In the form in which it is now widely held, however, namely that all law is, can be, and ought to be, the product of the free invention of a legislator, it is factually false, an erroneous product of that constructivist rationalism which we described earlier.

We shall later see that the whole conception of legal positivism which derives all law from the will of a legislator is a product of the intentionalist fallacy characteristic of constructivism, a relapse into those design theories of human institutions which stand in irreconcilable conflict with all we know about the evolution of law and most other human institutions.

What we know about pre-human and primitive human societies suggests a different origin and determination of law from that assumed by the theories which trace it to the will of a legislator. And although the positivist doctrine stands also in flagrant conflict with what we know about the history of our law, legal history proper begins at too late a stage of evolution to bring out clearly the origins. If we wish to free ourselves from the all-pervasive influence of the intellectual presumption that man in his wisdom has designed, or ever could have designed, the whole system of legal or moral rules, we should begin with a look at the primitive and even pre-human beginnings of social life.

Social theory has here much to learn from the two young sciences of ethology and cultural anthropology which in many respects

have built on the foundation of social theory initially laid in the eighteenth century by the Scottish moral philosophers. In the field of law, indeed, these young disciplines go far to confirm the evolutionary teaching of Edward Coke, Matthew Hale, David Hume and Edmund Burke, F. C. von Savigny, H. S. Maine and J. C. Carter, and are wholly contrary to the rationalist constructivism of Francis Bacon or Thomas Hobbes, Jeremy Bentham or John Austin, or of the German positivists from Paul Laband to Hans Kelsen.

The lessons of ethology and cultural anthropology

The chief points on which the comparative study of behaviour has thrown such important light on the evolution of law are, first, that it has made clear that individuals had learned to observe (and enforce) rules of conduct long before such rules could be expressed in words; and second, that these rules had evolved because they led to the formation of an order of the activities of the group as a whole which, although they are the results of the regularities of the actions of the individuals, must be clearly distinguished from them, since it is the efficiency of the resulting order of actions which will determine whether groups whose members observe certain rules of conduct will prevail.[6]

In view of the fact that man became man and developed reason and language while living for something like a million years in groups held together by common rules of conduct, and that one of the first uses of reason and language must have been to teach and enforce these established rules, it will be useful first to consider the evolution of rules which were merely in fact obeyed, before we turn to the problem of their gradual articulation in words. Social orders resting on most complex systems of such rules of conduct we find even among animals very low on the evolutionary scale. For our present purposes it does not matter that on these lower evolutionary levels the rules are probably mostly innate (or transmitted genetically) and few learned (or transmitted 'culturally'). It is now well established that among the higher vertebrates learning plays an important role in transmitting such rules, so that new rules may rapidly spread among large groups and, in the case of isolated groups, produce distinct 'cultural' traditions.[7] There is little question, on the other hand, that man is also still guided not only by learned but by some innate rules. We are here chiefly interested in the learned rules and the manner of their transmission;

but in considering the problem of the interrelation of rules of conduct and the resulting overall order of actions, it does not matter with which kind of rules we have to deal, or whether, as will usually be the case, both kinds of rules interact.

The study of comparative behaviour has shown that in many animal societies the process of selective evolution has produced highly ritualized forms of behaviour governed by rules of conduct which have the effect of reducing violence and other wasteful methods of adaptation and thus secure an order of peace. This order is often based on the delimitation of territorial ranges or 'property', which serves not only to eliminate unnecessary fighting but even substitutes 'preventive' for 'repressive' checks on the growth of population, for example, through the male who has not established a territory being unable to mate and breed. Frequently we find complex orders of rank which secure that only the strongest males will propagate. Nobody who has studied the literature on animal societies will regard it as only a metaphorical expression when for instance one author speaks of 'the elaborate system of property tenure' of crayfish and the ceremonial displays through which it is maintained,[8] or when another concludes a description of the rivalry between robins by saying that 'victory does not go to the strong but to the righteous—the righteous of course being the owners of property'.[9]

We cannot give here more than these few examples of the fascinating worlds which through these studies are gradually revealed to us,[10] but must turn to the problems that arise as man, living in such groups governed by a multiplicity of rules, gradually develops reason and language and uses them to teach and enforce the rules. At this stage it is sufficient to see that rules did exist, served a function essential to the preservation of the group, and were effectively transmitted and enforced, although they had never been 'invented', expressed in words, or possessed a 'purpose' known to anyone.

Rule in this context means simply a propensity or disposition to act or not to act in a certain manner, which will manifest itself in what we call a *practice*[11] or custom. As such it will be one of the determinants of action which, however, need not show itself in every single action but may only prevail in most instances. Any such rule will always operate in combination and often in competition with other rules or dispositions and with particular impulses; and whether a rule will prevail in a particular case will depend on the strength of the propensity it describes and of the other

dispositions or impulses operating at the same time. The conflict which will often arise between immediate desires and the built-in rules or inhibitions is well attested by the observation of animals.[12]

It must be particularly emphasized that these propensities or dispositions possessed by higher animals will often be of a highly general or abstract character, that is, they will be directed towards a very wide class of actions which may differ a great deal among themselves in their detail. They will in this sense certainly be much more abstract than anything incipient language can express. For the understanding of the process of gradual articulation of rules which have long been obeyed, it is important to remember that abstractions, far from being a product of language, were acquired by the mind long before it developed language.[13] The problem of the origin and function of these rules which govern both action and thought is therefore a problem wholly distinct from the problem of how they came to be articulated in verbal form. There is little doubt that even today the rules which have been thus articulated and can be communicated by language are only a part of the whole complex of rules that guide man's actions as a social being. I doubt whether anyone has yet succeeded in articulating all the rules which constitute 'fair play', for example.

The process of articulation of practices

Even the earliest deliberate efforts of headmen or chiefs of a tribe to maintain order must thus be seen as taking place inside a given framework of rules, although they were rules which existed only as a 'knowledge how' to act and not as a 'knowledge that' they could be expressed in such and such terms. Language would certainly have been used early to teach them, but only as a means of indicating the particular actions that were required or prohibited in particular situations. As in the acquisition of language itself, the individual would have to learn to act in accordance with rules by imitating particular actions corresponding to them. So long as language is not sufficiently developed to express general rules there is no other way in which rules can be taught. But although at this stage they do not exist in articulated form, they nevertheless do exist in the sense that they govern action. And those who first attempted to express them in words did not invent new rules but were endeavouring to express what they were already acquainted with.[14]

Although still an unfamiliar conception, the fact that language is

often insufficient to express what the mind is fully capable of taking into account in determining action, or that we will often not be able to communicate in words what we well know how to practise, has been clearly established in many fields.[15] It is closely connected with the fact that the rules that govern action will often be much more general and abstract than anything language can yet express. Such abstract rules are learnt by imitating particular actions, from which the individual acquires 'by analogy' the capacity to act in other cases on the same principles which, however, he could never state as principles.

For our purposes this means that, not merely in the primitive tribe but also in more advanced communities, the chief or ruler will use his authority for two quite different purposes: he will do so to teach or enforce rules of conduct which he regards as established, though he may have little idea why they are important or what depends on their observance; he will also give commands for actions which seem to him necessary for the achievement of particular purposes. There will always be ranges of activities with which he will not interfere so long as the individuals observe the recognized rules, but on certain occasions, such as hunting expeditions, migrations, or warfare, his commands will have to direct the individuals to particular actions.

The different character of these two ways in which authority can be exercised would show itself even in relatively primitive conditions in the fact that in the first instance its legitimacy could be questioned while in the second it could not: the right of the chief to require particular behaviour would depend on the general recognition of a corresponding rule, while his directions to the participants of a joint enterprise would be determined by his plan for action and the particular circumstances known to him but not necessarily to the others. It would be the necessity to justify commands of the first sort which would lead to attempts to articulate the rules which they were meant to enforce. Such a necessity to express the rules in words would arise also in the case of disputes which the chief was called upon to settle. The explicit statement of the established practice or custom as a verbal rule would aim at obtaining consent about its existence and not at making a new rule; and it would rarely achieve more than an inadequate and partial expression of what was well known in practice.

The process of a gradual articulation in words of what had long been an established practice must have been a slow and complex

one.[16] The first fumbling attempts to express in words what most obeyed in practice would usually not succeed in expressing only, or exhausting all of, what the individuals did in fact take into account in the determination of their actions. The unarticulated rules will therefore usually contain both more and less than what the verbal formula succeeds in expressing. On the other hand, articulation will often become necessary because the 'intuitive' knowledge may not give a clear answer to a particular question. The process of articulation will thus sometimes in effect, though not in intention, produce new rules. But the articulated rules will thereby not wholly replace the unarticulated ones, but will operate, and be intelligible, only within a framework of yet unarticulated rules.

While the process of articulation of pre-existing rules will thus often lead to alterations in the body of such rules, this will have little effect on the belief that those formulating the rules do no more, and have no power to do more, than to find and express already existing rules, a task in which fallible humans will often go wrong, but in the performance of which they have no free choice. The task will be regarded as one of discovering something which exists, not as one of creating something new, even though the result of such efforts may be the creation of something that has not existed before.

This remains true even where, as is undoubtedly often the case, those called upon to decide are driven to formulate rules on which nobody has acted before. They are concerned not only with a body of rules but also with an order of the actions resulting from the observance of these rules, which men find in an ongoing process and the preservation of which may require particular rules. The preservation of the existing order of actions towards which all the recognized rules are directed may well be seen to require some other rule for the decision of disputes for which the recognized rules supply no answer. In this sense a rule not yet existing in any sense may yet appear to be 'implicit' in the body of the existing rules, not in the sense that it is logically derivable from them, but in the sense that if the other rules are to achieve their aim, an additional rule is required.

Factual and normative rules

It is of some importance to recognize that, where we have to deal with non-articulated rules, a distinction that seems very clear and

obvious with respect to articulated rules becomes much less clear and perhaps sometimes even impossible to draw. This is the distinction between descriptive rules which assert the regular recurrence of certain sequences of events (including human actions) and the normative rules which state that such sequences 'ought' to take place. It is difficult to say at what particular stage of the gradual transition from a wholly unconscious observance of such rules to their expression in articulated form this distinction becomes meaningful. Is an innate inhibition which prevents a man or animal from taking a certain action, but of which he is wholly unaware, a 'norm'? Does it become a 'norm' when an observer can see how a desire and an inhibition are in conflict, as in the case of Konrad Lorenz's wolf, whose attitude he describes by saying that 'you could see that he would like to bite his opponent's offered throat, but he just cannot'?[17] Or when it leads to a conscious conflict between a particular impulse and a feeling that 'one ought not to do it'? Or when this feeling is expressed in words ('I ought not to'), but still applied only to oneself? Or when, although not yet articulated as a verbal rule, the feeling is shared by all members of the group and leads to expressions of disapproval or even attempts at prevention and punishment when infringed? Or only when it is enforced by a recognized authority or laid down in articulated form?

It seems that the specific character usually ascribed to 'norms' which makes them belong to a different realm of discourse from statements of facts, belongs only to articulated rules, and even there only once the question is raised as to whether we ought to obey them or not. So long as such rules are merely obeyed in fact (either always or at least in most instances), and their observance is ascertainable only from actual behaviour, they do not differ from descriptive rules; they are significant as one of the determinants of action, a disposition or inhibition whose operation we infer from what we observe. If such a disposition or inhibition is produced by the teaching of an articulated rule, its effect on actual behaviour still remains a fact. To the observer the norms guiding the actions of the individuals in a group are part of the determinants of the events which he perceives and which enable him to explain the overall order of actions as he finds it.

This, of course, does not alter the circumstance that our language is so made that no valid inference can lead from a statement containing only a description of facts to a statement of what

ought to be. But not all conclusions often drawn from this are compelling. It says no more than that from a statement of fact alone no statements about appropriate, desirable or expedient action, nor any decision about whether to act at all, can be derived. One can follow from the other only if at the same time some end is accepted as desirable and the argument takes the form of 'if you want this, you must do that'. But once such an assumption about the desired end is included in the premises, all sorts of normative rules may be derived from them.

To the primitive mind no clear distinction exists between the only way in which a particular result can be achieved and the way in which it ought to be achieved. Knowledge of cause and effect and knowledge of rules of conduct are still indistinguishable: there is but knowledge of *the* manner in which one must act in order to achieve any result. To the child who learns to add or multiply figures, the way in which this ought to be done is also the only way to obtain the intended result. Only when he discovers that there are other ways than those taught to him, which also will lead him to what he desires, can there arise a conflict between knowledge of fact and the rules of conduct established in the group.

A difference between all purposive action and norm-guided action exists only in so far as in the case of what we usually regard as purposive action we assume that the purpose is known to the acting person, while in the case of norm-guided action the reasons why he regards one way of acting as a possible way of achieving a desired result and another as not possible will often be unknown to him. Yet to regard one kind of action as appropriate and another as inappropriate is as much the result of a process of selection of what is effective, whether it is the consequence of the particular action producing the results desired by the individual or the consequence of action of that kind being conducive or not being conducive to the functioning of the group as a whole. The reason why all the individual members of a group do particular things in a particular way will thus often not be that only in this way they will achieve what they intend, but that only if they act in this manner will that order of the group be preserved within which their individual actions are likely to be successful. The group may have persisted only because its members have developed and transmitted ways of doing things which made the group as a whole more effective than others; but the reason why certain things are done in certain ways no member of the group needs to know.

It has, of course, never been denied that the existence of norms in a given group of men is a fact. What has been questioned is that from the circumstance that the norms are in fact obeyed the conclusion could be drawn that they ought to be obeyed. The conclusion is of course possible only if it is tacitly assumed that the continued existence of the group is desired. But if such continued existence is regarded as desirable, or even the further existence of the group as an entity with a certain order is presupposed as a fact, then it follows that certain rules of conduct (not necessarily all those which are now observed) will have to be followed by its members.[18]

Early law

It should now be easier to see why in all early civilization we find a law like that 'of the Medes and the Persians that changeth not', and why all early 'law-giving' consisted in efforts to record and make known a law that was conceived as unalterably given. A 'legislator' might endeavour to purge the law of supposed corruptions, or to restore it to its pristine purity, but it was not thought that he could make new law. The historians of law are agreed that in this respect all the famous early 'law-givers', from Ur-Nammu[19] and Hammurabi to Solon, Lykurgus and the authors of the Roman Twelve Tables, did not intend to create new law but merely to state what law was and had always been.[20]

But if nobody had the power or the intention to change the law, and only old law was regarded as good law, this does not mean that law did not continue to develop. What it means is merely that the changes which did occur were not the result of intention or design of a law-maker. To a ruler whose power rested largely on the expectation that he would enforce a law presumed to be given independently of him, this law often must have seemed more an obstacle to his efforts at deliberate organization of government than a means for his conscious purposes. It was in those activities of their subjects which they could not directly control, often mainly in the relations of these subjects with outsiders, that new rules developed outside the law enforced by the rulers, while the latter tended to become rigid precisely to the extent to which it had been articulated.

The growth of the purpose-independent rules of conduct which

can produce a spontaneous order will thus often have taken place in conflict with the aims of the rulers who tended to try to turn their domain into an organization proper. It is in the *ius gentium*, the law merchant, and the practices of the ports and fairs that we must chiefly seek the steps in the evolution of law which ultimately made an open society possible. Perhaps one might even say that the development of universal rules of conduct did not begin within the organized community of the tribe but rather with the first instance of silent barter when a savage placed some offerings at the boundary of the territory of his tribe in the expectation that a return gift would be made in a similar manner, thus beginning a new custom. At any rate, it was not through direction by rulers, but through the development of customs on which expectations of the individuals could be based, that general rules of conduct came to be accepted.

The classical and the medieval tradition

Although the conception that law was the product of a deliberate human will was first fully developed in ancient Greece, its influence over the actual practice of politics remained limited. Of classical Athens at the height of its democracy we are told that 'at no time was it legal to alter the law by a simple decree of the assembly. The mover of such a decree was liable to the famous "indictment for illegal proceedings" which, if upheld by the courts, quashed the decree, and also, brought within the year, exposed the mover to heavy penalties.'[21] A change in the basic rules of just conduct, the *nomoi*, could be brought about only through a complicated procedure in which a specially elected body, the *nomothetae*, was involved. Nevertheless, we find in the Athenian democracy already the first clashes between the unfettered will of the 'sovereign' people and the tradition of the rule of law;[22] and it was chiefly because the assembly often refused to be bound by the law that Aristotle turned against this form of democracy, to which he even denied the right to be called a constitution.[23] It is in the discussions of this period that we find the first persistent efforts to draw a clear distinction between the law and the particular will of the ruler.

The law of Rome, which has influenced all Western law so profoundly, was even less the product of deliberate law-making. As all other early law it was formed at a time when 'law and the institutions of social life were considered to have always existed and no-

body asked for their origin. The idea that law might be created by men is alien to the thinking of early people.'[24] It was only 'the naïve belief of later more advanced ages that all law must rest on legislation.'[25] In fact, the classical Roman civil law, on which the final compilation of Justinian was based, is almost entirely the product of law-finding by jurists and only to a very small extent the product of legislation.[26] By a process very similar to that by which later the English common law developed, and differing from it mainly in that the decisive role was played by the opinions of legal scholars (the *jurisconsults*) rather than the decisions of judges, a body of law grew up through the gradual articulation of prevailing conceptions of justice rather than by legislation.[27] It was only at the end of this development, at Byzantium rather than at Rome and under the influence of Hellenistic thinking, that the results of this process were codified under the Emperor Justinian, whose work was later falsely regarded as the model of a law created by a ruler and expressing his 'will'.

Until the rediscovery of Aristotle's *Politics* in the thirteenth century and the reception of Justinian's code in the fifteenth, however, Western Europe passed through another epoch of nearly a thousand years when law was again regarded as something given independently of human will, something to be discovered, not made, and when the conception that law could be deliberately made or altered seemed almost sacrilegious. This attitude, noticed by many earlier scholars,[28] has been given a classical description by Fritz Kern, and we can do no better than quote his main conclusions:[29]

> When a case arises for which no valid law can be adduced, then the lawful men or doomsmen will make new law in the belief that what they are making is good old law, not indeed expressly handed-down, but tacitly existent. They do not, therefore, create the law: they 'discover' it. Any particular judgement in court, which we regard as a particular inference from a general established legal rule, was to the medieval mind in no way distinguishable from the legislative activity of the community; in both cases a law hidden but already existing is discovered, not created. There is, in the Middle Ages, no such thing as the 'first application of a legal rule'. Law is old; new law is a contradiction in terms; for either new law is derived explicitly or implicitly from the old, or it conflicts with the old, in which case it is not lawful. The fundamental idea remains the same;

> the old law is the true law, and the true law is the old law. According to medieval ideas, therefore, the enactment of new law is not possible at all; and all legislation and legal reform is conceived of as the restoration of the good old law which has been violated.

The history of the intellectual development by which, from the thirteenth century onwards, and mainly on the European continent, law-making slowly and gradually came to be regarded as an act of the deliberate and unfettered will of the ruler, is too long and complex to be described here. From the detailed studies of this process it appears to be closely connected with the rise of absolute monarchy when the conceptions which later governed the aspirations of democracy were formed.[30] This development was accompanied by a progressive absorption of this new power of laying down new rules of just conduct into the much older power which rulers had always exercised, their power of organizing and directing the apparatus of government, until both powers became inextricably mixed up in what came to be regarded as the single power of 'legislation'.

The main resistance to this development came from the tradition of the 'law of nature'. As we have seen, the late Spanish schoolmen used the term 'natural' as a technical term to describe what had never been 'invented' or deliberately designed but had evolved in response to the necessity of the situation. But even this tradition lost its power when in the seventeenth century 'natural law' came to be understood as the design of 'natural reason'.

The only country that succeeded in preserving the tradition of the Middle Ages and built on the medieval 'liberties' the modern conception of liberty under the law was England. This was partly due to the fact that England escaped a wholesale reception of the late Roman law and with it the conception of law as the creation of some ruler; but it was probably due more to the circumstance that the common law jurists there had developed conceptions somewhat similar to those of the natural law tradition but not couched in the misleading terminology of that school. Nevertheless, 'in the sixteenth and early seventeenth century the political structure of England was not yet fundamentally different from that of the continental countries and it might still have seemed uncertain whether she would develop a highly centralized absolute monarchy as did the countries of the continent.'[31] What prevented such develop-

ment was the deeply entrenched tradition of a common law that was not conceived as the product of anyone's will but rather as a barrier to all power, including that of the king—a tradition which Edward Coke was to defend against King James I and Francis Bacon, and which Matthew Hale at the end of the seventeenth century masterly restated in opposition to Thomas Hobbes.[32]

The freedom of the British which in the eighteenth century the rest of Europe came so much to admire was thus not, as the British themselves were among the first to believe and as Montesquieu later taught the world, originally a product of the separation of powers between legislature and executive, but rather a result of the fact that the law that governed the decisions of the courts was the common law, a law existing independently of anyone's will and at the same time binding upon and developed by the independent courts; a law with which parliament only rarely interfered and, when it did, mainly only to clear up doubtful points within a given body of law. One might even say that a sort of separation of powers had grown up in England, not because the 'legislature' alone made law, but because it did *not*: because the law was determined by courts independent of the power which organized and directed government, the power namely of what was misleadingly called the 'legislature'.

The distinctive attributes of law arising from custom and precedent

The important insight to which an understanding of the process of evolution of law leads is that the rules which will emerge from it will of necessity possess certain attributes which laws invented or designed by a ruler may but need not possess, and are likely to possess only if they are modelled after the kind of rules which spring from the articulation of previously existing practices. We shall only in the next chapter be able to describe fully all the characteristic properties of the law which is thus formed, and to show that it has provided the standard for what political philosophers long regarded as *the law* in the proper meaning of the word, as contained in such expressions as the 'rule' or 'reign of law', a 'government under the law', or the 'separation of powers'. At this point we want to stress only one of the peculiar properties of this *nomos*, and will merely briefly mention the others in anticipation of later discussion. The law will consist of purpose-independent rules which govern the conduct of individuals towards each other, are intended to

apply to an unknown number of further instances, and by defining a protected domain of each, enable an order of actions to form itself wherein the individuals can make feasible plans. It is usual to refer to these rules as abstract rules of conduct, and although this description is inadequate, we shall provisionally employ it for the purpose in hand. The particular point which we want to bring out here is that such law which, like the common law, emerges from the judicial process is necessarily abstract in the sense that the law created by the commands of the ruler need not be so.

The contention that a law based on precedent is more rather than less abstract than one expressed in verbal rules is so contrary to a view widely held, perhaps more among continental than among Anglo-Saxon lawyers, that it needs fuller justification. The central point can probably not be better expressed than in a famous statement by the great eighteenth-century judge Lord Mansfield, who stressed that the common law 'does not consist of particular cases, but of general principles, which are illustrated and explained by those cases'.[33] What this means is that it is part of the technique of the common law judge that from the precedents which guide him he must be able to derive rules of universal significance which can be applied to new cases.

The chief concern of a common law judge must be the expectations which the parties in a transaction would have reasonably formed on the basis of the general practices that the ongoing order of actions rests on. In deciding what expectations were reasonable in this sense he can take account only of such practices (customs or rules) as in fact could determine the expectations of the parties and such facts as may be presumed to have been known to them. And these parties would have been able to form common expectations, in a situation which in some respects must have been unique, only because they interpreted the situation in terms of what was thought to be appropriate conduct and which need not have been known to them in the form of an articulated rule.

Such rules, presumed to have guided expectations in many similar situations in the past, must be abstract in the sense of referring to a limited number of relevant circumstances and of being applicable irrespective of the particular consequences now appearing to follow from their application. By the time the judge is called upon to decide a case, the parties in the dispute will already have acted in the pursuit of their own ends and mostly in particular circumstances unknown to any authority; and the expectations

which have guided their actions and in which one of them has been disappointed will have been based on what they regarded as established practices. The task of the judge will be to tell them what ought to have guided their expectations, not because anyone had told them before that this was the rule, but because this was the established custom which they ought to have known. The question for the judge here can never be whether the action in fact taken was expedient from some higher point of view, or served a particular result desired by authority, but only whether the conduct under dispute conformed to recognized rules. The only public good with which he can be concerned is the observance of those rules that the individuals could reasonably count on. He is not concerned with any ulterior purpose which somebody may have intended the rules to serve and of which he must be largely ignorant; and he will have to apply the rules even if in the particular instance the known consequences will appear to him wholly undesirable.[34] In this task he must pay no attention, as has often been emphasized by common law judges, to any wishes of a ruler or any 'reasons of state'. What must guide his decision is not any knowledge of what the whole of society requires at the particular moment, but solely what is demanded by general principles on which the going order of society is based.

It seems that the constant necessity of articulating rules in order to distinguish between the relevant and the accidental in the precedents which guide him, produces in the common law judge a capacity for discovering general principles rarely acquired by a judge who operates with a supposedly complete catalogue of applicable rules before him. When the generalizations are not supplied ready made, a capacity for formulating abstractions is apparently kept alive, which the mechanical use of verbal formulae tends to kill. The common law judge is bound to be very much aware that words are always but an imperfect expression of what his predecessors struggled to articulate.

If today the commands of a legislator often take the form of those abstract rules which have emerged from the judicial process, it is because they have been shaped after that model. But it is highly unlikely that any ruler aiming at organizing the activities of his subjects for the achievement of definite foreseeable results could ever have achieved his purpose by laying down universal rules intended to govern equally the actions of everybody. To restrain himself, as the judge does, so as to enforce only such rules, would

require a degree of self-denial not to be expected from one used to issuing specific commands and to being guided in his decisions by the needs of the moment. Abstract rules are not likely to be invented by somebody concerned with obtaining particular results. It was the need to preserve an order of action which nobody had created but which was disturbed by certain kinds of behaviour that made it necessary to define those kinds of behaviour which had to be repressed.

Why grown law requires correction by legislation

The fact that all law arising out of the endeavour to articulate rules of conduct will of necessity possess some desirable properties not necessarily possessed by the commands of a legislator does not mean that in other respects such law may not develop in very undesirable directions, and that when this happens correction by deliberate legislation may not be the only practicable way out. For a variety of reasons the spontaneous process of growth may lead into an impasse from which it cannot extricate itself by its own forces or which it will at least not correct quickly enough. The development of case-law is in some respects a sort of one-way street: when it has already moved a considerable distance in one direction, it often cannot retrace its steps when some implications of earlier decisions are seen to be clearly undesirable. The fact that law that has evolved in this way has certain desirable properties does not prove that it will always be good law or even that some of its rules may not be very bad. It therefore does not mean that we can altogether dispense with legislation.[35]

There are several other reasons for this. One is that the process of judicial development of law is of necessity gradual and may prove too slow to bring about the desirable rapid adaptation of the law to wholly new circumstances. Perhaps the most important, however, is that it is not only difficult but also undesirable for judicial decisions to reverse a development, which has already taken place and is then seen to have undesirable consequences or to be downright wrong. The judge is not performing his function if he disappoints reasonable expectations created by earlier decisions. Although the judge can develop the law by deciding issues which are genuinely doubtful, he cannot really alter it, or can do so at most only very gradually where a rule has become firmly established; although he may clearly recognize that another rule would be better, or more

just, it would evidently be unjust to apply it to transactions which had taken place when a different rule was regarded as valid. In such situations it is desirable that the new rule should become known before it is enforced; and this can be effected only by promulgating a new rule which is to be applied only in the future. Where a real change in the law is required, the new law can properly fulfil the proper function of all law, namely that of guiding expectations, only if it becomes known before it is applied.

The necessity of such radical changes of particular rules may be due to various causes. It may be due simply to the recognition that some past development was based on error or that it produced consequences later recognized as unjust. But the most frequent cause is probably that the development of the law has lain in the hands of members of a particular class whose traditional views made them regard as just what could not meet the more general requirements of justice. There can be do doubt that in such fields as the law on the relations between master and servant,[36] landlord and tenant, creditor and debtor, and in modern times between organized business and its customers, the rules have been shaped largely by the views of one of the parties and their particular interests—especially where, as used to be true in the first two of the instances given, it was one of the groups concerned which almost exclusively supplied the judges. This, as we shall see, does not mean that, as has been asserted, 'justice is an irrational ideal' and that 'from the point of rational cognition there are only interests of human beings and hence conflicts of interests',[37] at least when by interests we do not mean only particular aims but long-term chances which different rules offer to the different members of society. It is even less true that, as would follow from those assertions, a recognized bias of some rule in favour of a particular group can be corrected only by biasing it instead in favour of another. But such occasions when it is recognized that some hereto accepted rules are unjust in the light of more general principles of justice may well require the revision not only of single rules but of whole sections of the established system of case law. This is more than can be accomplished by decisions of particular cases in the light of existing precedents.

The origin of legislative bodies

There is no determinable point in history when the power of

deliberately changing the law in the sense in which we have been considering it was explicitly conferred on any authority. But there always existed of necessity an authority which had power to make law of a different kind, namely the rules of the organization of government, and it was to these existing makers of public law that there gradually accrued the power of changing also the rules of just conduct as the necessity of such changes became recognized. Since those rules of conduct had to be enforced by the organization of government, it seemed natural that those who determined that organization should also determine the rules it was to enforce.

A legislative power in the sense of a power of determining the rules of government existed, therefore, long before the need for a power to change the universal rules of just conduct was even recognized. Rulers faced with the task of enforcing a given law and of organizing defence and various services, had long experienced the necessity of laying down rules for their officers or subordinates, and they would have made no distinction as to whether these rules were of a purely administrative character or subsidiary to the task of enforcing justice. Yet a ruler would find it to his advantage to claim for the organizational rules the same dignity as was generally conceded to the universal rules of just conduct.

But if the laying down of such rules for the organization of government was long regarded as the 'prerogative' of its head, the need for an approval of, or a consent to, his measure by representative or constituted bodies would often arise precisely because the ruler was himself supposed to be bound by the established law. And when, as in levying contributions in money or services for the purposes of government, he had to use coercion in a form not clearly prescribed by the established rules, he would have to assure himself of the support at least of his more powerful subjects. It would then often be difficult to decide whether they were merely called in to testify that this or that was established law or to approve of a particular imposition or measure thought necessary for a particular end.

It is thus misleading to conceive of early representative bodies as 'legislatures' in the sense in which the term was later employed by theorists. They were not primarily concerned with the rules of just conduct or the *nomos*. As F. W. Maitland explains:[38]

> The further back we trace our history the more impossible it is for us to draw strict lines of demarcation between the

> various functions of the state: the same institution is a legislative assembly, a governmental council, and a court of law . . . For a long time past political theorists have insisted on the distinction between legislation and the other functions of government, and of course the distinction is important though it is not always easy to draw the line with perfect accuracy. But it seems necessary to notice that the power of a statute is by no means confined to what a jurist or political philosopher would consider the domain of legislation. A vast number of statutes he would class rather as *privilegia* than as *leges*; the statute lays down no general rules but deals only with a particular case.

It was in connection with rules of the organization of government that the deliberate making of 'laws' became a familiar and everyday procedure; every new undertaking of a government or every change in the structure of government required some new rules for its organization. The laying down of such new rules thus became an accepted procedure long before anyone contemplated using it for altering the established rules of just conduct. But when the wish to do so arose it was almost inevitable that the task was entrusted to the body which had always made laws in another sense and often had also been asked to testify as to what the established rules of just conduct were.

Allegiance and sovereignty

From the conception that legislation is the sole source of law derive two ideas which in modern times have come to be accepted as almost self-evident and have exercised great influence on political developments, although they are wholly derived from that erroneous constructivism in which earlier anthropomorphic fallacies survive. The first of these is the belief that there must be a supreme legislator whose power cannot be limited, because this would require a still higher legislator, and so on in an infinite regress. The other is that anything laid down by that supreme legislator is law and only that which expresses his will is law.

The conception of the necessarily unlimited will of a supreme legislator, which since Bacon, Hobbes and Austin has served as the supposedly irrefutable justification of absolute power, first of monarchs and later of democratic assemblies, appears self-evident only if the term law is restricted to the rules guiding the deliberate

and concerted actions of an organization. Thus interpreted, law, which in the earlier sense of *nomos* was meant to be a barrier to all power, becomes instead an instrument for the use of power.

The negative answer which legal positivism gives to the question of whether there can be effective limits to the power of the supreme legislature would be convincing only if it were true that all law is always the product of the deliberate 'will' of a legislator, and that nothing could effectively limit that power except another 'will' of the same sort. The authority of a legislator always rests, however, on something which must be clearly distinguished from an act of will on a particular matter in hand, and can therefore also be limited by the source from which it derives its authority. This source is a prevailing opinion that the legislator is authorized only to prescribe what is right, where this opinion refers not to the particular content of the rule but to the general attributes which any rule of just conduct must possess. The power of the legislator thus rests on a common opinion about certain attributes which the laws he produces ought to possess, and his will can obtain the support of opinion only if its expression possesses those attributes. We shall later have to consider more fully this distinction between will and opinion. Here it must suffice to say that we shall use the term 'opinion', as distinct from an act of will on a particular matter, to describe a common tendency to approve of some particular acts of will and to disapprove of others, according to whether they do or do not possess certain attributes which those who hold a given opinion usually will not be able to specify. So long as the legislator satisfies the expectation that what he resolves will possess those attributes, he will be free so far as the particular contents of its resolutions are concerned, and will in this sense be 'sovereign'. But the allegiance on which this sovereignty rests depends on the sovereign's satisfying certain expectations concerning the general character of those rules, and will vanish when this expectation is disappointed. In this sense all power rests on, and is limited by, opinion, as was most clearly seen by David Hume.[39]

That all power rests on opinion in this sense is no less true of the powers of an absolute dictator than of those of any other authority. As dictators themselves have known best at all times, even the most powerful dictatorship crumbles if the support of opinion is withdrawn. This is the reason why dictators are so concerned to manipulate opinion through that control of information which is in their power.

The effective limitation of the powers of a legislature does therefore not require another organized authority capable of concerted action above it; it may be produced by a state of opinion which brings it about that only certain kinds of commands which the legislature issues are accepted as laws. Such opinion will be concerned not with the particular content of the decisions of the legislature but only with the general attributes of the kind of rules which the legislator is meant to proclaim and to which alone the people are willing to give support. This power of opinion does not rest on the capacity of the holders to take any course of concerted action, but is merely a negative power of withholding that support on which the power of the legislator ultimately rests.

There is no contradiction in the existence of a state of opinion which commands implicit obedience to the legislator so long as he commits himself to a general rule, but refuses obedience when he orders particular actions. And whether a particular decision of the legislator is readily recognizable as valid law need not depend solely on whether the decision has been arrived at in a prescribed manner, but may also depend on whether it consists of a universal rule of just conduct.

There is thus no logical necessity that an ultimate power must be omnipotent. In fact, what everywhere is the ultimate power, namely that opinion which produces allegiance, will be a limited power, although it in turn limits the power of all legislators. This ultimate power is thus a negative power, but as a power of withholding allegiance it limits all positive power. And in a free society in which all power rests on opinion, this ultimate power will be a power which determines nothing directly yet controls all positive power by tolerating only certain kinds of exercise of that power.

These restraints on all organized power and particularly the power of the legislator could, of course, be made more effective and more promptly operative if the criteria were explicitly stated by which it can be determined whether or not a particular decision can be a law. But the restraints which in fact have long operated on the legislatures have hardly ever been adequately expressed in words. To attempt to do so will be one of our tasks.