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Law in a Reign of Terror

Alan Watson

I

From David Daube I learned Roman law and many other things: *inter alia* that accepted doctrines and approaches need continual re-examination, that research in one field may illumine another, that limitations because of one's background or upbringing, or in one's academic skills affect one's judgment,¹ and that the connection between life and law is more complex than is usually supposed. A paper dedicated to a beloved and revered master may properly strike a more personal—though not less scholarly—note than is usual; especially when the theme concerns tyranny and the recipient has experienced tyranny and withstood it mightily.

II

A few years ago I published a book, *The Nature of Law*,² which was activated primarily by three long held beliefs. First, law is a means, not an end in itself; and legal rules, principles, decisions do not come into being without some purpose. The end envisaged for a legal rule or decision may be immediate—to give financial compensation to a particular victim of negligence, for instance—or more remote—to promote general happiness or bolster the economic dominance of the ruling class, for example—but that does not concern us here. What, in my opinion, does matter is that a general

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1. For an express statement see D. Daube, 'Fashions and Idiosyncracies in the Exposition of the Roman Law of Property' *Theories of Property*, A. Parel and T. Flanagan, eds., (Waterloo, Ont. 1979), p. 35; also R. Yaron (a fellow disciple), 'Semitic Elements in Early Rome' *Daube noster*, A. Watson, ed., (Edinburgh, 1974), pp. 343 ff at p. 346.
2. (Edinburgh, Edinburgh University Press, 1977).

theory of the law that excludes consideration of what a law does ignores the heart of the law. Secondly, law is a human construct, a concept, and as such can best be analysed cross-culturally. Just as an analysis of the concept of religion would be unduly limited, unbalanced and probably misleading if it were restricted to an examination of 'orthodox' Christianity and did not consider primitive Christianity, Hinduism or Buddhism, so it is over-narrowed and distorting to restrict one's enquiry on the nature of law to the modern Western legal tradition. Thirdly, a complete theory of law may be descriptive and be restricted to what law is, not also what law ought to be; or alternatively, a theory of law must keep rigorously apart what law is from what law ought to be. Since law is a means, one might claim that a complete theory of law may be restricted to what law does, not also what law ought to do; and the theory must then keep rigorously apart what law does from what law ought to do.³ It is dangerous in the extreme, I believe, to attribute to law, as it is, the characteristics of law as it ought to be and give law, as it is, the appropriate respect and obedience. *Habent sua fata libelli*: alas, readers seem not to have noticed my aim of demystifying the law.

The present paper builds on my book and may be regarded as an appendix or as an additional chapter. Its theme is that in actual fact the nature of law is highlighted when it is used by tyrants. Since I rely on my conclusions in the book for what is necessary for, or typical (for Westerners) of, law I have to refer constantly to the book, but the paper should be comprehensible by itself and is basically independent. Indeed, there is a positive advantage in keeping the book and the paper distinct. The conclusions in the book on the necessary and typical features of law were reached without dependence on the appearance of law in a tyranny. And the book is not used here to justify arguments about law in a tyranny.

III

In *The Nature of Law* I argued that the sole necessary and distinguishing feature of law was the availability of an institutionalized process that had the specific object of inhibiting further unregulated conflict; and I offered as a definition of law:

Law is the means adopted to institutionalize disputes and to validate decisions given in the appropriate process, that has the specific object of inhibiting further unregulated conflict.⁴

Thus, the appropriate or applicable legal rules need not determine the outcome of the process nor need the facts be established and the law applied to them. But a claim of this thing we call law is necessary to bring the process

3. Cf. *Nature of Law*, pp. 4ff.

4. *Nature of Law*, pp. 1ff.

into being and the law is used to validate or justify the decision. (By process I mean what Westerners would regard as the trial, but the notion is wider.)⁵

During a Reign of Terror, such as occurred in the French Revolution, in the Soviet Union under Stalin and in Nazi Germany, the process with its validation from legal rules becomes more prominent, the application of legal rules to facts less so. Very great attention may be paid to having the decision validated by the law. In 'show trials' above all, the appearance of correct legal behavior by the authorities is maintained. The accused may be tortured or brain-washed until they confess to crimes (they did not commit) established by law, and the confession will justify the verdict. There is a link between tyrants' appalling behavior and their sense (or need) of dignity, decorum and honor. They meet their need by using law. The process, I argued, has the specific object of inhibiting further unregulated conflict. That is again nowhere clearer than in show trials for political crimes in a Reign of Terror. Not only are the accused certain to be condemned to a punishment so severe that they cannot be a threat to the order of the State, but the process is meant to teach others, who will learn what the State regards as disruptive of order, and will know that the State is able and willing to restrain disruptive behavior. For the educating role of the process, intended to inhibit further unregulated conflict, the guilt or innocence of the defendants is irrelevant.⁶

I also argued that there is a complex but not arbitrary relationship between law and force or violence. Law (at any rate, in the case of a territorial State) relies for its existence on its support from violence; or, at least, to be effective law is usually supplied with support by violence. Again, law determines what violence is lawful and what is unlawful. It is the strongest force, or the force that controls or keeps in check other forces that fixes both what is law and what the law is, and also what violence is outside of the law. This has to be, precisely because the institutionalized process—which is the distinguishing feature of law—has the specific object of inhibiting further unregulated conflict. The process cannot achieve this object unless it is backed by the strongest force.⁷

In a Reign of Terror the naked violence backing the trial is very obvious (both to the insider and the enquirer at a distance) as is the fact that the process is in the hands of the strongest force. In a special sense law is connected with violence in this instance since law is being used as a weapon by the greatest force precisely to weaken other forces.

A further feature of law, I claimed, is that law is treated as worthy of respect, independently of any quality inherent in the rules themselves.⁸ This

5. *Nature of Law*, pp. 31ff.

6. For the situation where a government wishes to incite dissidents to internal violence see *Nature of Law*, p. 14.

7. *Nature of Law*, p. 73.

8. *Nature of Law*, p. 114ff.

manifests itself in various ways during a Reign of Terror. First, the powerful State prefers to make use of law and legal process to crush its enemies when it could just as easily proceed simply by exercising violence. 'Just as easily' in this sentence requires immediate qualification in a way that brings out vividly the power, value or nature of law. The words 'just as easily' apply only to the crushing of immediate enemies. Additional courage is required from tyrants who use open, naked violence: the color of law provides legitimation. Victims of naked violence receive more sympathy than victims of law: law is respected. The notion 'Law must be obeyed' will deter some from attacking a government, when they would feel justified rebelling in the presence of open governmental violence. Secondly, the person, with a role in the trial, whether as judge, prosecutor or defense counsel, fulfills his office with complete seriousness as if unaware, as some may well be, that any law involved is unjust and biased, the charges unfounded, the evidence fabricated, and the verdict inevitable. Thirdly, an accused may respond with shame—even if the charges are unfounded, just as if he were guilty of betraying the revolution.⁹

This curious respect for law because it is law, independently of its qualities, emerged in a marked way after Iranian revolutionaries seized hostages in the American embassy in Teheran in 1979. The involvement of the Iranian government in the seizure and retention of hostages was contrary to both Islamic law and International Law. The Iranians repeatedly threatened to put Americans on trial as spies. They wished, in fact, to provide a legal justification for their behavior. The threat of such a trial produced a sense of outrage among the American people, different from but possibly as great as any threat simply to kill the hostages. The sense of outrage was, I suggest, partly a response to the idea that law would be abused but possibly even more to the anxiety that the Iranian government could make the seizure seem legal under Iranian law.

Yet another marked trait of law is the great scope that it gives to discretion, whether the discretion is that of the parties, the judge or the executive.¹⁰ Nowhere is legal discretion more marked than in a Reign of Terror when free play may be given to favored individuals to commit certain crimes when others may be arrested and severely punished for trivialities.

Finally, justice is one thing, and legal rules and their application quite another. Nowhere else than in a Reign of Terror is the absence of a necessary connection between law and justice so potent.

IV

In *The Nature of Law* I said a little about obedience to the law and about the relationship between law and justice. I would like to add to that account.

9. For examples for this paragraph see e.g. R. Conquest, *The Great Terror*, (London, Macmillan, 1968), pp. 82ff, 116f.

10. See A. Watson, 'Comparative Law and Legal Change' *Cambridge Law Journal* 37 (1978), pp. 313ff at pp. 328ff.

There was, I maintained, no inevitable connection between law and justice though law has an inherent tendency towards the moral.¹¹ For the latter point I argued *inter alia* that to institutionalize disputes, to validate decisions on the disputes, to inhibit further unregulated conflict are all moral objectives; that most legal rules when they are made, and legal decisions when they are pronounced, have no direct effect for good or evil on the legislator or judge who will accordingly choose for justice (as he sees it) rather than injustice; that even in a tyrannous state the tyranny need be apparent in relatively few laws, and that law is society's attempt to institutionalize justice. In addition, I argued, when a legal system is thought unjust by the members of the society, then the decisions made in the processes lose public support, and the processes cannot fulfill their essential function of inhibiting further unregulated conflict. (All this, of course, depends on the absence of the availability of even greater force on the side of the state.) For John R. Lucas this is to put the cart before the horse: 'Legal processes are not governed by the rule of law in order to secure public acceptability, but are accepted by the public, if they conform to the rule of law, because that, in the public understanding, is part of the nature of law'.¹² Elsewhere he shows that for him there is a conceptual link between the statements 'This is the law' and 'This ought to be obeyed'; and thus for him an unjust law is law—since 'many injustices ought to be put up with'—but a very unjust law is not law because 'grave and gross injustice strikes at the *raison d'être* of law'.¹³ The problem of the connection between obedience (which occupies an important place in thinking about law), justice and law is crucial but no positivist could easily accept the notion that a very unjust law is not law.¹⁴ I would prefer to build on a foundation laid by Francis Bacon:

In civil society either law or force prevails. But there is a kind of force that apes law; and law sometimes smacks more of force than of legal equity. The source of injustice is therefore three-fold: mere force, wicked ensnarement in the guise of law; and savagery of law itself.¹⁵

In the absence of law there can be no justice: not in the sense that there can be no theory of what it is to be just; but in the sense that in civil society there can be no assurance or faith that other persons will act justly, and no recourse against injustice except force. But law also can be used unjustly or be itself unjust. Hence law is a necessary but not sufficient condition of justice in society.

But law is a necessary condition for justice in society only because it provides a framework of order. Fundamentally that is to say law is about

11. Pp. 125ff.

12. *Philosophica*, 23 (1979), pp. 45f.

13. *On Justice* (Oxford, Clarendon Press, 1980, p. 123).

14. Though that may be a failing in legal positivism.

15. My translation of Aphorismus 1 in his *De Justitia Universali*.

order not justice.¹⁶ It is primarily in the connection between order and law rather than between justice and law that we should cite any discussion of obedience and law.¹⁷ The argument may be set out briefly in three series of propositions. To begin with

1. Law is essentially about order.
2. Order is a good; but a relative rather than absolute good.
3. Law is habitually obeyed.
4. Law ought to be obeyed insofar as the obedience is conducive to order and insofar as the order in this instance is a good thing.

The second set of propositions is:

- a. Justice is a good, and injustice is an evil.
- b. Law has a tendency towards the just.
- c. Just law ought to be obeyed.

The third set of propositions results from combining the first two:

- i. An unjust law ought not to be obeyed if disobedience would have no effect upon order.
- ii. An unjust law ought not to be obeyed if disobedience would have an adverse effect upon order and if, in this instance, the order is a bad thing.
- iii. An unjust law ought to be obeyed only if the harm resulting from any disobedience to order, which in this instance is a good thing, is greater than the harm resulting from the injustice.

If the above argument is correct then there is, even apart from the internal view of those controlling the legal system, an obligation to obey the law, and this obligation is a moral one, but it is not absolute. There is, therefore, a conceptual link between the statement ‘This is the law’ and ‘This ought to be obeyed’. But the link may snap on occasion—or frequently, in a Reign of Terror—without the law ceasing to be law.¹⁸ There is no need to claim *lex injustissima non est lex*.

V

Habent sua fata libelli. May readers draw their own conclusions from the fact that the nature of law emerges with great vividness under the Reign of Terror.¹⁹

16. *Nature of Law*, passim.

17. *Nature of Law*, pp. 127f.

18. At least this is so for positivists.

19. I am grateful to my friends, Calum Carmichael and Dru Cornell, for helpful criticism.