

THE PLACE OF POLICY IN INTERNATIONAL LAW

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I am delighted to be here and to see so many old friends in the audience. Although I do not expect all of them to look kindly on my "divergent attitude," they are a comforting reminder that our intellectual differences have not precluded friendship and mutual respect.

It has been suggested that I should speak to you primarily as a practitioner who looks at our subject "the place of policy in law" from an international standpoint. That seems natural enough since I have been, as Mr. Schwebel observed, an international lawyer who has served in international organizations since the beginning of 1944. The first such organization which I joined, having left the American State Department, was UNRRA (the United Nations Relief and Rehabilitation Administration). At one time in UNRRA, rather towards the end of my career there, I found myself the acting head of its legal department when a new Director-General appeared in UNRRA, Fiorello La Guardia, better known as the reform mayor of New York City.

When I first met Mr. La Guardia on business in his office, his first question to me was: "Sonny," he said (this was some 25 years ago) . . . [laughter] . . . "are you a hot lawyer or a cold lawyer?" . . . [laughter] . . . I looked at him rather blankly, and he said (I wish I could mimic his New York accent here, but you will have to go on mine), "Well, if you are a hot lawyer, I am going to get myself a cold lawyer; and if you are a cold lawyer, I am going to get myself a hot lawyer." . . . [laughter] . . . This rather dumfounded me, and I said, "Does this mean I am through?" He said, "No, you are not through. But I need both of you. I need a hot lawyer to tell me that I can do what I want to do, and I need a cold lawyer to tell me I cannot do what I don't want to do." . . . [laughter] . . .

Perhaps I should have told La Guardia (but did not) that in the best American law schools, we trained lawyers who could turn hot or cold, as appropriate, though not necessarily on order from above. But let us first consider the unstated premises of La Guardia's attitude. One such premise, clearly, was that most legal questions permit at least two responses. A second was that it is the lawyer's role to serve his client, or more broadly, to serve the ends of the organization. It is apparent, too,

that La Guardia's concern was not with rules of law but with the decisions that had to be taken. These three propositions are a good starting point of our discussion, for they sum up the reasons for a policy-oriented approach to law.

Let me turn for a moment to the role of the practitioner and begin by underlining what you already know—namely, that legal advisers, whether international or domestic, do not live in an ivory tower of pure law and that their principal function is to help achieve the outcome preferred by their clients. To that extent at least, “policy” is not only relevant but often decisive. (This is probably a good time to define what I mean by “policy.” It means in this context preference or preferred outcome, whether expressed as a general goal or a specific result or as a principle of fairness or justice.) When a legal adviser presents or defends a claim, there is no doubt about his role—it is to achieve the results sought by his client. When he acts as a counselor, he advises on ways of using law and on the risks involved in proposed or alternative courses of action. Obviously, in this role as well he must have in mind the goals of his client; and he must consider the causes and consequences of whatever decision is taken and the various factors involved in reaching a solution to the problem. I would suppose that a good English solicitor behaves in as policy-oriented a way as an American lawyer when he is advising a client on the risks and advantages of possible actions.

But a problem arises for the legal adviser when he assumes a somewhat different role (perhaps as part of his counseling) and when as an authority on the law, he is asked for a legal opinion, either to advise his client as to what is the rule of law and whether it applies to given circumstances or—as in my case for many years working for an institution—to give legal rulings with some degree of authority in, one might say, a quasi-judicial capacity.

It is in this situation that the legal adviser is faced sharply with the issue that is before us—the relevance of policy. He is not being asked to argue a case or to design a legal strategy to attain his client's ends; he is called upon for an opinion or ruling on the applicability of law or, more precisely, on the existence of a legal obligation or a legal right. It is moreover expected that he would provide an “objective” decision, that is, one that does not simply reflect his own likes or dislikes but is well founded in “law.” He is in that respect in the same position as a judge or, for that matter, a disinterested and objective scholar. Would it not

compromise the integrity of his function if he permitted "policy" to influence his decision as to the existence of a legal obligation or right?

To explore this further, let us come back to one of the assumptions underlying Mr. La Guardia's view of hot and cold lawyers—namely, the assumption that legal questions can often be answered either way. Now, that is hardly news. We all know that two equally competent and intelligent judges can disagree and often do. The reasons for this are clear enough to anyone who has studied and practiced law. He knows that in many situations and in virtually any complex matter, a choice appears to be necessary between competing rules or principles—that is a commonplace in international law. It is also evidence that the terms and concepts of legal prescriptions are, in Professor Hart's useful phrase, "open-textured"—they permit varying interpretation or they call for judgments on which reasonable men can differ. Then there are the cases, so familiar in international law, in which there is no clear workable criterion for determining whether practice has been sufficient in scope or duration or *opinio juris* to constitute law. All of these conditions can be illustrated at length, and no doubt they can be stated more elegantly. But this hardly seems necessary in this audience. All of you surely recognize that international law is characterized by what may be called "pervasive ambiguity" and that its practitioners are involved in a continuous process of choice giving rise to conclusions on which learned and expert opinion will differ.

If this is the case—and I assume we all agree on that—are there objective legal grounds on which such choices must rest or is it inevitable that one must have recourse to considerations of policy to resolve the issues presented? It is at this point that we come to a fork in the road—to a divergence between those who view law primarily as a system of rules (which I take to be the prevalent and tenaciously held British view) and those who view law primarily as a process to attain social ends (a position that is at least widely held in the United States). The rule-oriented lawyer (the legal positivist) draws a clear and sharp distinction between law and policy, between rule and discretion. His concern is with law, not social ends. He may rely on general principles and broad standards or on what Hart calls master "rules of recognition," but they will all have to meet the criteria of specific rules and be used in the same way. (I shall explain later why I think this is wrong.)

But before doing that, I should point out that even rule-oriented lawyers recognize that in at least some cases (and probably in a great many

cases in international law) the issue cannot be resolved solely by reference to rules of law or master rules of recognition. In these cases, the position of the rule-oriented positivist is to conclude that the decision has to be made on political grounds, or to put it in another way, that it is a matter of discretion which falls outside the domain of law. I would suppose that most of you in the audience find this approach entirely acceptable, clear and sensible. It is the time-honored English view of law and it runs through the legal opinions of British government law officers and practitioners.

What is wrong with it? Why do many Americans reject it? It is, after all, an approach that seems to have all the virtues of clarity and good sense. Moreover, it allows the lawyers to speak with certainty about the "law" and when the law is contradictory or fragmentary to leave the issue to someone else—the politician or the political organs. Yet for all its clarity and persuasiveness, the positivist approach is, I suggest, inadequate. It is defective as a description of the process of applying law and it is defective as an approach to a more rational use of law (or, more precisely, to enhancing the use of the legal process to achieve its social ends). Let me try to explain briefly this rather sweeping criticism.

I submit that it is a defective approach because the sharp separation it makes between rule and discretion and between law and policy does not adequately describe or account for the actual process of applying law. The legal process, whether on the domestic or international plane, cannot be reduced solely to applying rules. (By rules I mean specific decisive norms that either apply to the case in hand or do not, such as the rule that any state may bring a dispute to the Security Council or that nine votes are needed to adopt a resolution.) For one thing, it is evident that the body of norms involves more than rules in the sense just defined. It includes standards and purposes that are in their form and function quite different from rules. Such standards may take the form of concepts such as "proportionality," "territorial integrity," "unjust enrichment," or they take the form of broad principles. Not infrequently they are expressly called "purposes"—as in article 1 of the Charter. Whatever their form, they embody policies and social values. Their function in the legal process is to express the ends to be attained. They may also be regarded as manifestations of a more general or underlying value (as, for example, "territorial integrity" may serve the goal of stability).

Now, here we come to an important point. Because these are policies

(ends or values), they do not function precisely as rules do. In the case of a rule, we can say that it either applies or does not apply: to use an example cited above, either nine votes are required for a resolution in a given case when the rule applies or they are not because the rule does not apply. On the other hand, a policy is to be given weight and taken into account along with other policies, some of which may contravene that policy. For example, there is the policy in the Charter principle of self-determination, but that principle has to be given consideration along with other policies; say, territorial integrity and maintenance of peace. Even when a principle has a high priority and appears as an unqualified obligation as, for example, the duty to settle international disputes by peaceful means, it may be qualified or limited by other principles applicable to the given situation. In short, the policies I am talking about are not absolutes or categorical imperatives.

Now, I would not suggest that British lawyers—even though rule-oriented—are unaware of the kind of principles and concepts that I have just mentioned or that they do not use such principles and concepts when necessary to fill a gap or resolve a conflict in rules. But I believe that their positivist doctrinal and jurisprudential outlook leads them into difficulties. When they treat the principle or concept as legal (if, for example, it has been expressed as a principle in a treaty), they then rely on it as if it were a specific rule to be applied categorically. This is rigid and inappropriate. In many cases it does not work precisely because the principle needs to be considered with other contravening principles. This has the effect of reducing its categorical character. Consequently, the principle is down-graded; it is no longer treated as a legal rule but labeled a political goal or a discretionary policy. The lawyer may take comfort in a feeling that he is tough-minded in using only those norms which can be applied categorically and decisively. Yet by relegating other principles and purposes to the political realm, he excludes from the legal process the most important normative considerations. Moreover, by characterizing such principles (or policies) as political or discretionary, he implies they are to be applied as the political organs wish. The effect is often to reduce the lawyer to the minor role of a seeker of precedent or a draftsman of other people's formulas.

On the other hand, if we take as our starting point the idea of law as a process to achieve common values, it is much easier to perceive the lawyer as one who not only seeks for and applies rules, but who concerns himself with achieving decisions that serve the ends or policies of the

community. This approach is far more deeply accepted in American thinking than in British. This is, perhaps, a consequence of the fact that the legal profession in the United States has long performed what we would call a policy role. De Tocqueville observed in the 1830's that the American lawyers ran their communities and that they filled somewhat the role of the French aristocracy and the British squirearchy. For whatever reason, American lawyers throughout the 19th and 20th centuries have been leading participants in the management of private business as well as leaders in government. They have naturally seen policy to be part of the law and, the other way around, have seen law as serving policy. The fact that the United States was a country of many jurisdictions probably helped to point up that choices had to be made by courts and lawyers between competing principles and goals. That general outlook is amply reflected in the judgments of the Supreme Court of the United States which has long been explicit as to the social interests and the values involved in interpreting the language of the Constitution. It is no surprise that the philosophers of law in the United States—Oliver Wendell Holmes, Roscoe Pound, Cardozo and Llewellyn—should have placed their emphasis on law as social engineering, as an instrument to achieve the political and moral ends of the community. The policy-oriented approach is thus in the mainstream of American legal thought. (Our distinguished friend, Myres McDougal, is in that great tradition and has added richly to it.) In short, there is a significant difference between that American way of looking at law and the characteristic British approach—whether held consciously or not—of viewing the law primarily as rules and leaving the policies to someone else. I could, had I the time, give many examples of how that divergence has led to differences in practice.

Let me now turn to the difficulties and objections to policy-orientation, especially in regard to international law. These difficulties will doubtless be mentioned by Eli Lauterpacht and David Johnson, but I should like to point them out first and then comment on them. As you will see, they are not straw-men. Nor do I expect to sweep them off the board. They are interesting, not simply as points in our debate, but because they bring out some of the most fundamental problems in international law today.

One objection is that the legal adviser (or judge, for that matter) is not qualified and not authorized to decide on the basis of extra-legal standards. It is not his metier to enter into politics or sociology; he is

not expected to do that; and moreover, it is "undemocratic" if he does it in place of a legislature or political body.

The second objection is that policy, at least on the international level, cannot be reliably ascertained unless it has actually been embodied in reasonably specific terms and accepted by the international community as a whole. The equivocal rhetoric used in many international declarations and often in treaties would not (it is said) reveal agreed policy, especially when states are divided in their ideology and basic values.

Finally, there is the point that Rosalyn Higgins raised: namely, that the use of policy inevitably involves subjective choice, an irreducible subjective choice, by the decision-maker and thereby opens the way to partisan or arbitrary decisions or, at best, decisions based on the preference of the adjudicator rather than the community.

Let us comment on these objections.

My answer to the first objection has already been given in part, in my discussion of the American approach to law as a process for attaining our social ends. The experience in the United States shows that there is no inherent professional reason why lawyers cannot or should not identify and give effect to social ends and policy objectives. If that is not done, the legal process—in both its legislative and "applying" function—tends to be reduced to technical and verbal analysis that thins out and trivializes the role of the lawyer. Such technical analysis can leave out all that gives significance to the "rule of law." It can cover up and obscure the meaning of legal decisions behind technical formulas that do not reveal their relation to the social ends and community values which they may serve or impede. As many of our Supreme Court judges have felt, it is far better for judicial decisions to bring out clearly and explicitly the ends and interests served than to disguise them as technical matters. Can this also be done in international law? One answer is that many of the great international lawyers—and I would mention here especially Sir Hersch Lauterpacht—have done just that with consummate skill and learning.

This brings me to the second difficulty. Can we really identify purposes and policy on an international level when the world is so deeply divided on social ends and values? Wilfred Jenks who is better aware than any of us of the pitfalls in determining international policy has declared that such policy can only be "the policy of the law and not of any individual, government or school of thought which claims to be above the law." Let us consider here what meaning can be given to the

“policy of the law” in its international sense. I assume that Jenks would embrace in that conception the purposes and principles which have been set forth in the major international instruments of our time: the United Nations Charter, the several widely ratified treaties of a constitutional or lawmaking character, and the declarations of principles adopted by the overwhelming majority of states in the United Nations. I would suggest, and I suppose that Jenks would agree, that the policy of the law also includes those concepts and principles of justice and equity that have been accepted as a result of state practice or as general principles common to most states. One thinks of Jenks’ own significant contribution in *The Common Law of Mankind*. In short, the “policy of the law” must be perceived in its full sense, not limited to positivist concepts of rule alone, but broadened to include the values expressed in purposes, principles, concepts and standards. As I have already said, this would comprehend not only the expressed principle or concept but also, when appropriate, the social value that may underlie it.

However, we must be on guard against assuming (as Lasswell has warned) that universalized rhetoric means universalized conduct. Perhaps the hardest problem is to assess the glittering generalities and self-serving declarations and to decide when they are merely words and when they represent the policy of the community. At the same time, we must bear in mind that because there are principles and purposes (and not rules in the sense I defined earlier), they are to be given weight even if it cannot be shown that they are strictly observed. We must not fall into the trap of legal positivism and exclude principles and purposes because they do not have the effectiveness of rules or the requisite pedigree. Taking this approach, I would submit that there are rich sources of international policy that can be identified and validated by evidence of their acceptance as values and aims by the large community of states. (There are also smaller groups, regional or functional, for which international policy can be operative, though not globally accepted.)

I come now to the objection that the introduction of policy considerations opens the door to arbitrary or partisan legal rulings. What I have just said about validating policies by the behavior of states indicates that we must not confuse such policies with our subjective preferences. The key point is that the identification of international (or regional) policies requires an objective, factual assessment. It is therefore subject to independent control and ascertainment. (Parenthetically, I would reject the idea that when we talk of communal values, we are entering into ethics

and therefore ultimately into individual choice. In most ethical systems, there is the possibility of rejecting community values for "higher" reasons. My submission here is that we are seeking to apply communal values as they actually exist and can be objectively validated.)

When I suggest that we can ascertain and validate international policies or community values, I do not mean to imply that this is an easy task. True, it may not be difficult, as I have already indicated, to identify the major purposes and principles that are embodied in declarations and treaties or accepted in practice. But what is enormously difficult is to apply these purposes and principles in concrete cases. We see this exemplified in the most recent conflict now in the headlines where the principle of self-determination and perhaps the "law" against genocide are in conflict with the injunction against intervention in domestic affairs and the widely held principle of territorial integrity which runs against the dismemberment of existing states. Which international principle or policy should prevail cannot be found through texts or precedents alone. That demands an ordering of values and an assessment of facts which are not to be found in international instruments. The same kind of difficulty may arise in less momentous cases involving decisions that have to take into account a range of conflicting policies and principles.

Whatever organ or individual that faces such decisions will inevitably be influenced by its or his own values and perceptions of the values of others. But even when one concedes that human beings cannot entirely escape their bias, it does not follow that the choice is logically a subjective matter, as if it were a matter of taste. The point is that such choice among competing values is in principle a choice that must itself be made or justified on grounds of the values of the community and not those of an individual or an individual government. This is the case if we are concerned with law in the sense in which I have used it and not merely with national interest or pure politics.

E.H. Carr (if my memory serves me) once observed that when we read English history we must remember that Namier was a conservative and Trevelyan, a Whig. Admittedly, it is well to keep that in mind. But we would not conclude from that that Trevelyan's history is more correct because we might share his "whig" predilections. The fact that we are aware that historians have bias does not mean that we concede that history is subjective (notwithstanding Namier's witty comment that historians imagine the past and remember the future). Most of us, I believe, would consider that the tests or criteria of truth in history are to be

found in facts that are independent of our own view of them. This is essentially the same point I am trying to make about the ascertainment of international policy. I do not concede its ultimate subjectivity (though it may be that on this point I diverge from Professor McDougal and Rosalyn Higgins).

Let me move away from this philosophical and abstruse level to a much more personal aspect (but one which flows from the foregoing point). One of the objections that can be raised against the policy-oriented approach is that it is presumptuous and even arrogant for lawyers to apply policy. It is pointed out with telling effect that such policy-oriented lawyers have somehow found that the policy of the international community conforms miraculously to the policy of their national government or their ideological conceptions. I am not going to deny this, but only suggest that one can probably show that the rule-oriented lawyers who eschew explicit policy orientation also come out in the same way. That this is a widespread infirmity of lawyers and human beings only underlines the need for stressing the objective aspect and for asserting the importance of disciplined professional inquiry. That aim is not served if we say that policy is separate from law and that the two domains are autonomous. By treating policy as always discretionary or as political, we tend to weaken the restraints on arbitrary and partisan decisions.

As one who has tried for more than a quarter century to ascertain and apply the law on an international and impartial basis, I can say that it is possible to repress one's subjective preferences and to decide on the basis of considerations that may not be personally acceptable. Disciplined inquiry, supported by a sense of humility and modesty, is essential. With such discipline—and modesty—it may be within our capacity to develop a truly international legal process which takes full account of the aims and common interests of mankind. Unless this is done, international law will become less and less significant, reduced to word-chopping and rhetoric—the lawyer only a “mouthpiece” or notary, incapable of dealing with the real issues involved in developing and applying law. But by openly and explicitly recognizing that law is a process for serving social ends and that international policy is relevant, and indeed inseparable from law, the international legal profession can develop its capacity for disciplines and rational decision-making and thereby make a significant contribution to building a more decent and secure world.