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On legal systems

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The idea that a legal system is analogous to a mathematical or a logical system is so alien both to customary law and to law deriving from a sovereign authority that it can be viewed only as a late conceptual development, which presupposes that a considerable amount of theoretical work had already been accomplished.

History informs us that in primitive societies under the sway of custom and religion there is much difficulty in distinguishing *law from morality and religion*. When established laws and institutions are unable to curb the rise of conflict and controversy, and one would like to avoid resolution of the latter by violent means, recourse for resolving legal disputes in order to reestablish social harmony can be had by appealing to a recognized authority of either political or religious origin. What characterizes law in this initial phase is the presence of a legal authority created to alleviate the inadequacies of customary rules, and to bring conflicts that tend to become aggravated to an agreeable settlement. To avoid the outbreak of fresh conflicts in related cases, as well as a purely arbitrary solution, it is important that the judge's decision creates a precedent which will be honored in years to come and be acknowledged as binding law. This process gives rise to a particular conception of justice conceived as regular, uniform, and bestowing equal treatment in basically similar cases. It is this equality before the law that guarantees the impartiality of the judges and assures the maintenance of the social order. Needless to say, in order for the rule of law passed down in the decision to be sufficiently forceful and convincing, it must not be considered iniquitous or unreasonable by the group it concerns. Social pressures, along with possible future sanctions, will impress the rule of law on the group members. It is in this manner that, arising out of authoritative, precedent-making decisions, a law distinct from the customs, folkways, and religious rituals will gradually be fashioned.

Each time an unexpected situation gives rise to a fresh problem which could trigger off a new conflict, there will be recourse to administrative or judicial authorities to resolve the legal controversy. As far as possible, the ruling handed down must be in keeping with a standing law which is extended by means of analogy, or whose boundaries are limited by justified distinctions. Once the number of authoritative decisions and implied laws make up a sufficiently important ensemble, a class of specialists will gradually arise, whose role it is to compile these rulings, as well as to adjust them to new situations and to supplement them where necessary. Only afterwards will there be established legislative authority, essentially political in nature, although capable of intervening, if need be, in civil and criminal matters.

† The editor regrets to announce that Dr Perelman's distinguished career came to an end shortly after revisions of this article had been completed. The article was translated from the French by Ernest Sturm, University of California, Santa Barbara, CA.



According to this notion, whereby the law is born and gradually develops out of spontaneously-arising conflicts, one may not yet refer to a legal 'system' capable of responding beforehand to any number of questions that might arise. The law, moreover, could only take shape after a lengthy historical evolution during which a great many problems, procedures and techniques would have been resolved and elaborated. The legal tradition of the West was developed from the contributions of Roman and canon law, which were able to inspire and to supplement regional and national solutions. The very notion of a system of positive law was itself a sequel to the publication of theoretical systems of natural or rational law developed in Continental Europe, and conceived under the influence of rationalism upon the model of geometric systems (Grotius, Leibnitz). It is only after the appearance of the treatises elaborated by Domat, Pufendorf, and Wolff in the course of the seventeenth and eighteenth centuries, and only after the great legal codes drafted towards the end of the eighteenth and the beginning of the nineteenth centuries had furnished the elements necessary for a systematic vision of the law, that the exegetical school would develop, from mid-nineteenth century onwards, a comprehensive system of *positive* civil law. This school viewed its legal task as entailing the elaboration of a system of law that could anticipate future problems, do away with legal ambiguities, resolve contradictions, and take stock of potential loopholes. Legal positivism stresses the fact that the finality inherent in law, contrary to either ethics or politics, is neither tantamount to the ultimate accomplishment of justice nor a quest for the common good, but rather a form of legal security guaranteed by a recognized, established order.

We know that this ideal of the systematic elaboration of a static law, analogous to a logical or mathematical system, was challenged as early as the second half of the nineteenth century by teleological conceptions of the law, (law as a tool for achieving certain ends), as in Von Jhering (1918) and Gény, (1919) as well as by sociological concepts which had already been granted recognition during the first quarter of the twentieth century (see Ehrlich, 1918; Pound, 1919-1922; Duguit, 1911).

Why is it impossible for a legal system to become assimilated to a static system, such as a formalized system of logic or mathematics?

To explain this, it must be understood that a formalized system is fashioned with a view to eliminating any potential ambiguity or controversy. To bring this about, an artificial language, whose basic symbols would be fully inventoried, would necessarily have to be constructed. A method for combining these to enable the formulation of correct expressions would also have to be devised. Every one of these symbols, along with the correct expressions derived from them, would be univocal. It is only from this condition that the universal validity of the principle of identity can be stated: if $x = x$ (in algebra) and p is the equivalent of p (in logic), it is because it has been decided beforehand that the variable occurring twice in the same expression must always be replaced by an identical value.

Among the correctly-formulated expressions, some would be dealt with as axioms, that is to say, as basic propositions whose truth-value would require no further demonstration. Likewise, deductive rules would be formulated that would allow the proof of theorems to be derived from axioms, as well as the proof of new theorems from both axioms and theorems that had previously been demonstrated.

A necessary condition permitting such a system to function is coherence, meaning that within the system there must not be affirmation of both a proposition and its negation. Indeed, unless one fails to respect the principle of non-contradiction, one cannot construct a viable formal system; and if a proposition and its negation happen to appear among the axioms or the theorems of the system, there is nothing that would guarantee the truth of the axioms or

the proven theorems, since one of the propositions that has been proven or affirmed would turn out to be false.

The construct, however, would not be complete. It would contain undemonstrable propositions whose truth or falsehood could not be demonstrated within the four corners of the system itself. This sort of proposition is considered independent from the system; one may add it, or its negation, to the system, without causing the system itself to become incoherent (e.g. non-Euclidian as against Euclidian geometry).

A formalized system constructed in a truly rigorous manner, one that imposes symbolic univocity and limits the possibilities of systemic expression and demonstration (unlike a legal system), is isolated from other realms of discourse and cannot interact with elements external to itself (as in a game of chess). We shall see that it is the absence of these conditions that plainly distinguishes a legal system from a formal one.

If, indeed, the one aim of the law is to establish a stable order that guarantees legal certainty, uniformity (equality before the law) and foresight, it can never be isolated from the social context in which it is designed to operate. Even if we recognize the specific role of the law, the desire for legal certainty and social agreement would keep it from neglecting the values it shares with ethics and politics, namely justice and the common good, or the general interest. On the other hand, in cases where the law applies to individuals who are also under the sway of other systems, such as a foreign or a religious law, it could hardly neglect their relevancy. All told, the rigid, and therefore static, nature of the system could not indefinitely resist the changes of a technical and cultural order undergone by society. Indeed, if the law is viewed from a teleological aspect, to wit, as a means to an end for bringing forth a change in the very bosom of a society, it cannot be indifferent to the consequences of its application. To conform to its own mediating role, the law should be flexible and introduce elements of indeterminacy into its structure and formation.

The latter would derive, first and foremost, from the fact that legal rules are couched in a natural language capable of expressing everything, and whose drive towards univocity and the elimination of ambiguity do not, as in formal system, constitute a formal requirement. It is to be expected that these indeterminate elements give rise to varied interpretations which, inasmuch as they favor opposing interests, create conflicts lacking in objective and impersonal solutions. Lest one permit these conflicts to become acute and to go on forever—a situation which might lead to violence—each legal system must be invested with well-established branches to resolve legal controversies and to restore social harmony. Certain individuals or bodies defined by their function would be empowered to make authorized decisions bearing on the interpretation and application of standing rules as well as on the establishment of new ones. The decision-making power bestowed on certain legal branches could be restrained and defined by the rules of the system. To avoid arbitrary rulings, both administrative and judicial branches form a hierarchy; frequently the political powers (legislative and executive) are placed under the control of an independent power such as the judiciary branch in order to prevent the abuse and misuse of power.

Faced with the impossibility of conceiving a legal system as a rigid and static structure whose arguments can be deduced from one another in a demonstrable and impersonal fashion, as in a formal system, Hans Kelsen devised his pure theory of law which views each legal system as a *dynamic* system.

What characterizes this type of system is that every legal decision, be it a question of enacting a law or making a legal or administrative decision, derives from a body empowered to make such a decision. A body so invested is deemed competent for legal decision-making.

Closer scrutiny will reveal that the integrity of the system depends, in the final analysis, on a fundamental norm (*Grundnorm*, as a Constitution) which transforms decisions deriving

from political or religious authorities, such as the national Founding Fathers who framed the first Constitution, into the very basis of the legal system. The dynamic nature of the system is evidenced by the more or less extensive power bestowed on those bodies competent to make legal decisions. This power is most broadly visible in the case of a sovereign Parliament which need give no account to any superior order. For Kelsen, this power in the realm of judicial proceedings remains considerable to the extent that the judiciary is not merely an echo of the law.

Kelsen does admit that the judge has powers he occasionally exercises when the applicable laws appear inappropriate to the case at hand and that, on the pretext that there is a gap or a legal contradiction, he may replace these laws with other rules seemingly more consonant with his notion of legal propriety (c.f. Kelsen, 1967: 248-249).

Yet by refusing to consider value judgements, Kelsen is unable to make a statement about content in either legislative or judicial decisions. Th. Viehweg was right when he said that Kelsen's pure theory had to be supplemented by a rhetorical theory of law which would allow the opening of a dialogue dealing with the respective merits of decisions handed down by the competent authorities [c.f. Viehweg, 1981: 547-551 (special issued devoted to Kelsen)].

Only the rhetorical conception permits a grasp of the role of fiction. A judge, and more often a jury wishing to reach a more equitable decision, will have recourse to a fiction thanks to which it may arrive at the desired solution in a given case without having either to modify the law or replace it by another one. In 1808, an English jury obliged by law to consider the death penalty for anyone committing a theft amounting to forty shillings or over, estimated at thirty-nine shillings the price of ten pounds sterling whose worth actually amounted to two hundred shillings. Thanks to a fiction, namely the false quantification of facts, the jury was able to avoid treating a theft as a grand larceny punishable by death.

Although the judge must apply the law, he nevertheless has at his disposal a stock of techniques appropriate for legal reasoning which allow him, in the great majority of cases, to interpret the law so it may tally with the desired result. The judge's intervention will permit considerations to be introduced into the legal system which are appropriate to the case, to justice and to the general interest, and which, from a positivistic point of view, appear alien to the law. Recourse to hazy notions such as *an act of God*, *state of emergency*, *the maintenance of the public order*, whether national or international, will permit the judges to limit the thrust of accepted statutes for the sake of a more satisfying solution.

It may be noted that such techniques for rendering the legal system more flexible by adapting it to the dominant values of society may be found, in different forms, in systems other than that of Continental European law. In English common law, it is the royal power which, via the medium of the chancery, ushered in equity courts to render more flexible a legal system based on respect for precedents (*stare decisis*). In yet another and very different system, that of Talmudic law, where an unalterable set of rules was deemed directly handed down by God, no subsequent modification could be made; yet the subtlety of the Talmudists, thanks to interpretation, managed to bend an immutable law to changing times and circumstances (c.f. Chaim Perelman, 1979, 1-9).

In practice, a law can only function when favoured by public consensus. Those given the power to reach legal decisions are in every given case obliged to stretch or to limit the range of decisions, so as to avoid unreasonable solutions which, either because of their inequity or because of their inadequate response to the given situation, might upset public opinion. To obviate such undesirable consequences, solutions must be found which outwardly would oppose the letter of the law and introduce a factor of legal uncertainty.

This is why one would normally resort to such means only in cases and in branches of the

law where a concern over legal certainty is overridden by considerations of another order. All the resources of legal reasoning must be marshalled to justify such deviations.

One should recall that, barring adequate agreement, not only legal rules risk the possibility of being challenged, but the authorities who establish, modify, interpret, and apply them as well. The techniques devised by jurists for relaxing the statutes aim at making tolerable legal decisions which could otherwise give rise to violent reactions towards the responsible authorities. Moreover, it is in order to deal with such problems as these, that in many modern legal systems, where rules of criminal law are broken, the public prosecutor assumes the role of judge in regard to the advisability of legal action. It is by such means that, in a number of Western European countries where harsh laws punishing abortion had not been abrogated and public opinion was sharply divided on whether legal action should be brought against hospital personnel implicated in the practice of abortions, that public prosecutors often preferred not to bring charges or simply to drop the case. It may be gathered from the foregoing remarks that the concern with whether or not the consequences are acceptable ones is what clearly distinguishes a legal system from a formal one. This means that despite the view of certain legal positivists, concerns of an ideological, moral, religious or political order can never be extraneous to the law, for they exercise a deep influence on the effectiveness of the system and on the manner in which rules of law are interpreted and applied.

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Editorial note

I had prepared a comment for Chaïm Perelman but was unable to get it to him in time. He seemed to say at the start that the overt structure of the common law is the deep structure of all law. However plausible a proposition this may be it is not what he meant. Moreover, Perelman was familiar with the main common law theorists and would have wanted this misunderstanding removed. I believe this article was stimulated by the retrospective evaluation of Hans Kelsen to which he refers. With Kelsen's pure theory and the European civil law

systems primarily in mind Perelman argues that all highly articulated systems of law (including the English) have similar informal structures regardless of their formal structures. They are dualistic, reflecting the fact that they must accommodate both juridical and political prudence (à la Dicey.) Hence Kelsen's pure theory is one sided. It becomes authentic only if it is leavened with Perelman's own audiential (*New Rhetoric*) theory of law. Such leavening occurs in fact, he argues, even in the most formalistic legal orders and even including the Talmudic tradition.

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