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LAW AS REPRESENTATION OF VALUE*

Jacques Ellul

THE PROBLEM dealt with here is the applicability of law. We know that there is always a distance between the text of a law and its actual application, but the question seems to me not "Why is the law not applied?" but "Why is the law applied?" This question seems to me to contain an indirect response to the recurrent question as to the foundation of law and to hold the possibility of putting this interrogation in a way different from that of the traditional debate; for, in the last analysis, what is astonishing is that a juridical system be generally applied.

I

IF THE LAW were a phenomenon of a metaphysical order or, on the other hand, if it were of a purely sociological order, it would not have any chance of being commonly recognized and applied. It is necessary to note carefully the considerable difference between a juridical system in its relation to individual acts of disobedience, evasions, and frauds; and a juridical system rejected globally by a whole society, from which all of the social groups turn and which finally remains only as an empty corpse placed at the exterior of the social system — for example, the law of the late Roman Empire or the imperial law in medieval Germany. The second case manifests the inapplicability of law, for, whatever the reasons, this law is not applicable and not simply unapplied. In other words, there can be a juridical system accidentally not applied although it is normally applicable, and there can be a juridical system which is fundamentally inapplicable whatever effort and good will are put into it.

Now this character of applicability does not depend upon law considered in itself. No law exists which is metaphysically inapplicable. A perfectly unjust law can be applicable, as, for example, the Nazi law. A perfectly just law, such as Plato's system for Syracuse, can be inapplicable. Applicability also does not depend on the mechanism of the sanctions provided. Some laws with very rigorous sanctions have remained unapplied — for example, the laws on rationing in France from 1940 to 1945. Conversely, some laws without any sanction have been perfectly applied, such as the Roman *leges*

* Translated by the staff of the FORUM.

imperfectae. Moreover, we know that it is not because of the existence of a sanction that we most frequently obey a law, or more precisely, we know that we apply it without asking ourselves a question as to the sanction, in an entirely spontaneous way as if it was self-evidently right to do so. It is not the threat of a punishment which makes us respect the law. Punishment intervenes only in an accidental way, as a minor influence when one is hesitating, "Shall I apply the law or not?" This question is only rarely posed in a conscious fashion. The gangster is outside the legal system, and a sanction scarcely makes an impression on him. "Normal" man lives by a kind of spontaneous adaptation to the legal system.

Yet at the same time, the application of law is not the expression of a pure and simple adaptation of the law to social contexts. This is the thesis of sociologists according to whom the law is finally applied only because it corresponds exactly to what is given economically and sociologically. But this thesis, the exact converse of that of a pure Austinian approach, does not seem satisfactory. The law is not a simple reflection of the economic structure, as the Marxists maintain, nor is it the resultant of an equilibrium between a multiplicity of social groups and tensions. The law is normative, or it has no meaning. To transform it into a simple product of the social context is to deprive it of all normative value, despite Gurvitch's theory on normative fact.¹ If law is the simple expression of an adaptation to society, and so would be applicable by the individual because he himself is adapted to the group, then we could dispense with law. It would have no particular value or importance. It would suffice to content oneself with the adaptation by an individual to the attitudes and behavior of the groups of which he is a part. Then we would have to answer the question, Why since the beginning and in every civilization has man experienced the need of developing a law? It is not an invention which is fortuitous and without significance.

I would also discard a third explanation. It does not seem to me that the law is applicable because it contains some values which are eternal and absolute and at the same time inscribed in the heart of man or in nature in such a way that this agreement assures the applicability of law by man. It seems to me that if we examine the juridical problem in itself, and in all the forms which law has been able to take in the course of centuries and in different cultures, we must escape the theological and metaphysical problem. To escape it is not to deny it, or to take a position against it in adopting a purely naturalistic attitude; but we have to consider the law as it has been and not as we wish that it had been. We have to admit that the Egyptian

¹ GEORGES GURVITCH, *TRAITÉ DE SOCIOLOGIE* vol. 2, ch. 4 (Paris, 1960).

law of the fifteenth century B.C., or the Aztec law, even though they were alien to our values and did not express values we consider to be eternal, were part of the juridical phenomena. Put another way I intend to examine the problem without having to pronounce on the existence or nonexistence of absolute norms or supernatural values which may be inscribed in the law. The law does not seem to me primarily designed to express religious or moral truth. It has its own specific character.

In this domain of values I think it essential to recognize and admit the variability of what we call values. The famous phrase of Pascal on the difference of justice on each side of the Pyrenees is classic.² We know better and better, as history and anthropology reveal the values cherished in different cultures, to what degree values can diverge and how even the same word can receive a different content as time and place vary. It is not sufficient to say that everyone agrees that law expresses justice. What is justice? There is no unanimity of opinion. But I do not need to emphasize such proofs. On the contrary, I wish to distinguish my position from that of a radical relativism. Values are variable according to the culture, but that does not imply that they are a simple reflection, ideological and contingent, of the social environment. There is no automatism of a cultural kind for values. They are not a superfluous product of an ensemble of social relations. In particular, in regard to law, I am certain that those values which appear in all societies are considered by the men of these societies as valid and as possessing a certain force which is expressive, which means something, which even constrains. The values in the law have a true ethical content. I cannot accept the thesis that this view of law is a simple error of man in an infantile stage of his development. Nor can I admit a facile psychologism which sees in these values the mere projection of unconscious impulses. This kind of thinking, which reduces value to an illusory dimension which it would be easy to ignore, neglects a little too easily the global experience of humanity. Humankind is not mistaken in attributing a unique character to its values, although they are variable and without eternal content. To follow some contemporary philosophers in judging mankind as the victim of illusions and, indeed, stupid until our own times is to run the risk of showing that it is we who are, in fact, imbeciles.

Values have a considerable importance though created by man. This creation forces us to acknowledge their variable character, and yet I would say that they are values *because* created by man. If we take man seriously, if we consider him as a subject who expresses himself in history, then we

² BLAISE PASCAL, *PENSÉES* 69 (ed. Brunschvicg).

have to take his works with a decisive seriousness and, above all, the whys of his works, that which expresses at the same time the model, not yet realized, of what he wishes to be, and the imperative in relation to which he judges himself. This is what I term a value. It is this phenomenon of projection of his absolute model and of his self-critical capacity which seems to me justly the admirable element in values, recognizing that in this operation man effectuates an advance which seems contrary to his own nature. Nature impels him, on the one hand, to identify himself with projections which glorify himself, and, on the other hand, to justify his permanence. Now it is precisely this kind of nature which does not permit the creation of values. (I do not prejudice here a supernatural intervention or a reference of these values to something absolute in itself.) In the measure in which these values are a creation of man they evidently depend on circumstances of time and place. They ought to evolve with the society in which a man lives or they represent nothing for a particular man. There is a permanent relation between these values and the sociological context, because in the same measure in which they concern the ethos of man they can only be in a relation which is situated in the time and in the environment where this behavior must take place. Yet these values also, to a degree, express an imperative which is beyond discussion for this particular man — from this point of view they escape the sociologism by which an individual attempts to place himself outside of every culture in order to consider these relativized values as without substance and without significance. Only God could have this point of view, but a sociologist is not God; and what the Bible tells us of such attempts of man is not without significance.

II

LAW IS, above all, representation. Everything depends on the way in which man represents to himself the law in order to obey it. Man never knows in its objective reality the juridical system in which he lives. Man knows only an image, an interpretation of the law. He makes for himself an idea of it which can be completely inexact or falsified, yet it is in relation to this representation that he establishes his own behavior and that he assumes an attitude of adherence or rejection in relation to the law. It is never the law in itself which man obeys, but the law which he represents to himself. He can thus be struck by a profound sense of injustice when the law is applied to him in its reality when he sees it, and therefore lives it, differently. The application of the law by the administrator and the judge depends on the law itself, its objective reality. But the applicability of the law, that is, the

fact that spontaneously, and by a kind of tacit consent, the citizen normally behaves as the law intends, is entirely another thing, and his adherence depends on his representation of it. In relation to it he feels a sentiment of satisfaction or of revolt or of indifference.

The difference between representation and reality is not simply the product of poor information. It is not because the citizen is badly informed of the textual content of the laws that he acts in this way. The phenomenon is more profound: in every case we perceive reality only through our prejudices, images, ideologies, etc., and we cannot distinguish objective knowledge from the interpretation spontaneously furnished by our consciousness. Such interpretation makes a man live in his culture and so in a system of particular law. Thus a system, perfectly satisfying from the point of view of juridical logic or even from the viewpoint of justice, can be instable as it is actually lived by a man. He will do everything possible to escape it, as happened, for example, in the later Roman Empire. On the contrary, a system which is abhorrent in our eyes may be lived as legitimate and acknowledged by the immense majority of citizens, as, e.g., the Hitlerian law. We then can say that the spontaneous adhesion of Everyman, of the average man of a society, is the condition of the applicability of law, and that this adherence depends upon the representation which that man makes of it to himself.

This representation only secondarily bears on the concrete dispositions of the law itself; the representation bears on the values which the man imagines to be in the law. This is the really significant phenomenon: What is it that any man sees in the law of his society as represented value? What representation of value does he make to himself through the law? Anything else is only secondary. Doubtless there is a certain importance that the forms of the law, its procedures, be understandable, that the man not meet the law as an obstacle, not feel himself reduced by it to the state of an object. Indeed, it is not without importance that a man feel a common measure with the law, that it not be for him a totally foreign domain. Finally, it is important that a man have a certain representation of the concrete rules of law. But the representation (true or false, it doesn't matter; what matters is *this* representation) made by a man of the concrete rules is only a reference to a representation of values. When a man represents to himself such and such a procedure and understands more or less well and sees the objective result of it he may say, "That is unjust"; at this moment one could explain to him minutely how this procedure was regular and how one could not do it another way, and not convince him. Yet it is evident that he does not have a clear sense of what justice is and even less of what the law concretely should be in order that one could say of it, "It is just." What is certain is

that in this value judgment on the law on the occasion of a concrete case a man expresses his expectation that the law contain the value of justice, that in living this law one can say, "That is just." At the same time the man expresses his failure to adhere to this law and thereby testifies to this degree of inapplicability in the law. If his sentiment becomes general, if men have this representation of their law, that it is unjust, oppressive, unworthy of confidence, then the law ceases to be really applicable, even if formally and for a time it is applied. A society where the applicability of law no longer holds is a society in danger. There is a kind of sociomoral hemorrhage in a group of this order which cannot be indefinitely maintained on the basis of either a purely spontaneous structure or a purely formal order.

Thus, at the meeting point between the way a man represents the law to himself and the image of himself and his society which he hopes to find in the law, at the meeting point of these two representations, is posed the problem of value in the law as well as the problem of the creation of values. These problems are presented under the two aspects that, as represented, law is necessarily a value and creator of value and that it is the representation of value.

III

"As represented." Again I do not prejudge the problem of "in itself." I do not say "in itself the law is value and creator of value." We never finally know what the law is in itself, and it is not on this notion that its application depends. In men's eyes law is value. It is not an idea, it is not a philosophical analysis which we grasp, it is not simply an accidental phenomenon or even an illusion (as the Marxists would like to have it). In all cultures the law is surrounded by an exceptional prestige, whether it is related to the sacred, whether it is invested with a social respect symbolized in the costume of the judges. Such symbolism is not designed to impose on people, to carry out a bluff; it corresponds to the representation of majesty which the people make of the law.

We see the importance of this sentiment when a citizen feels concretely that the law of his society is justly not a value, because, for example, it produces unjust results or serves to oppress the weak. Then the insignia of the judge strike him as derisory and empty of meaning, and he turns against the judge his hatred and his scorn. Violence becomes the inverse expression of the conviction that law is value. The depth of this sentiment appears when war or revolution is waged "in the name of law." It is a reason for action that man possesses in the deepest being, even if he does not give a clear and

evident content to the notion of law. Among the values which give meaning to the collective life of man, there is law.

It is true that if as a jurist one looks at the positive law, the concrete facts of legislation, and the details of procedure, the weaknesses of our systems, their delays and uncertainties, are apparent. We could not ask a man to sacrifice his life to maintain this positive law. Yet it is positive law which is in man's eyes the law, the value. He does not see an idea, an abstraction. The law as it exists, but taken globally, is effectively seen by Everyman to the extent that it is value. It is as value that the law is applicable and that the citizen is normally, spontaneously, and generally led to obey it. But if the citizen has this global view of the law as value it is not the consequence of an illusion; his view rests on the fact that he expects something: protection, justice, order, truth, principles of behavior, meaning of social actions, etc. In other words, he expects that the law contain values to which he can relate himself and in which he can have confidence. As the law is for man, it is called to create values much more than to create rules, institutions, organizations. The latter are essential for the jurists; their importance is often a cause of misunderstanding between the jurists and the ordinary man. The jurist seeks to refine the rules and to make the norms better. This does not interest the ordinary man. He expects the law to express such and such a value; he does not see it with clarity in such and such an institution. The jurist, frequently obeying his particular logic, leads the law towards more rigorous technicality and loses sight of what is essential, that each rule and each institution be related to a value which is expressly created by the law. The jurist should not forget that the applicability of the law does not depend on him or on the particular value of an organization, but on the adherence which a man gives it because of the satisfaction he experiences in it. Each element of the law must be for the individual a factor in which value appears. In the measure in which this value which man expects from law is present, in the measure in which it varies with the actual psychosociological data, you can say, without entering into metaphysical debate, that the law is, to the extent that it is representation, the creator of value and can only be that. What the law is called to give to man in a given social, economic, political situation is a system of references which permit him to live, to subsist, to find a balance, to defend himself, to affirm himself. It must give a system of references which cannot be purely philosophical; they would be inaccessible to the average man. Nor can they be purely material and political; a man also needs autonomy and coherence. This system of references—real, responding to a concrete situation, armed with a variety of powers of action—must be at the same time a system of ideal morality. Only the law fur-

nishes the man this global totality of great complexity. It is in this sense that I say that law is for man a creator of values.

The law is not merely an expression of eternal values. If it were, there would be no possible evolution, no actualization, whatever specifications of the law were made. The passage from natural law to positive law has never to my knowledge been explained. One reaches only the most risky hypothetical "ought to be." But man cannot satisfy himself with this "ought to be." Yet when I say that law is creator of value I do not speak in the same sense as Kelsen, who used the same formula.³ Three points which distinguish my position from that of Kelsen are these: For Kelsen it is never the content which makes the law but the reality of a system of norms conditioning each other, while for me it is the very existence of these values which makes the law and which determines its applicability as they do or do not bring satisfaction to the men of a particular society. In the second place, for Kelsen the values are legitimately set by the norm when the norm has observed the formal conditions of competence and of procedure set by the anterior norm; for me values are legitimate only when they respond to a totality of data given outside the juridical system. The composition of these data is extremely variable according to the society: they may be religious and spiritual, or moral, or psychological, or economic, or political. Moreover, the form of direct expression of these factors can also vary extremely with time and place: it may be an action at law, or a system, or a philosophy, or a technique, or a revolutionary blow, or a religious pressure or even something else. Finally, for Kelsen the values contained in law are arbitrary, i.e., chosen by a pure act of human will; for me the values created by law can never be arbitrary. When they are, they make the law essentially inapplicable. No doubt there is a place for voluntary creation, since there will be a judge who finally expresses these values in a particular way. It is he who will make an estimate of the extrajudicial factors. It is he who must consequently formulate the values which are necessary for man in this situation. It is he who must find in the arsenal of his juridical technique the means of putting these values into action, and who must bring to the individual the satisfaction of a real representation of these values. But in his decision the judge can be mistaken; and it is finally the individual's adherence to, or the implicit rejection of, the values expressed by the law which teaches the judge whether he is mistaken or not.

We meet here a related problem. The law, from our perspective, is not the sole creator of values. Morality and philosophy are evidently, and ob-

³ HANS Kelsen, *GENERAL THEORY OF LAW AND THE STATE* (tr. by Anders Wedberg, Cambridge, 1949).

vously in the first rank, the great creators of values in a given society. Yet the creation of values in and by law is, in reality, a great deal more decisive. In the creation of values by the moralist or the philosopher there is no risk, no involvement, no counterpart. If they fail, if the values proposed do not correspond in the end to anything for man and are forgotten, there is nothing changed in the society or for the individual. It is a setback on the intellectual plane and at the individual level, nothing more. But in the law we are in the presence of social scales. In a changing situation man must have this resource. He must have a law which is applicable and which responds both to the global structure and to the concrete situation of man.⁴ If the law is mistaken, both society and individual are going to suffer; and history shows us that recuperation from these errors is long, and rectification very slow. The seriousness of the creation of values in the law stems precisely from our not being on the plane of gratuitous and ideological invention, but on the plane of necessity, of collective action and interests. At this level it is no longer possible to formulate some kind of absolute generosity; it would be rapidly exhausted by the conflicts of interests. However brilliant the idea, it would be rapidly destroyed by the mechanism of necessity. In the ever-renewed search by man for values which give meaning to his life the law seems to me to be the privileged place of representation and this experience. We cannot renounce this vocation of the law. But we always come back to this limit: it is a matter of representation, and at this level the experience is not a technical application but a true creation of values.

Not only is the law representation, but it is representation of values; and the applicability of the law depends essentially on this representation. The representation which man makes to himself of the positive law can reach this second degree only in a representation of the values included in this law. The law must contain values, and man must have an image of it. Beyond the objectivity of the law which, as the result of a rigorous analysis by a philosopher or a jurist, contains an expression of the value of justice, there are what Everyman feels as justice and the image which he makes for himself of the content of value of the actual juridical system. In the measure in which the values seen by the law are received for such in the social consciousness and by each member of the group, in the measure in which they have significance for the collectivity and for the individual, in the measure in which there is adequation between what the individual expects of the working of these values and what the law effectively carries out — the group and the individual will accept the law as it is, will adhere to its specifications,

⁴ By global structure I mean the structures (economic, political, intellectual, etc.) corresponding to a given cultural system.

and will recognize it as the normative law of their society. It is in the measure in which the values represented by the law correspond to a representation of values believed in and accepted by each one that, in the end, the law can be respected and, indeed, put into action. It is, in effect, only when there is agreement between the values assumed by the law and the values represented that the law can have a content and an objectivity and become a series of relations. Only the value which is recognized can become the content of the law. For the individual there is finally no other. It is this which establishes the content of a certain action or certain relations which are submitted to law. What is true for the individual is true for groups and the state itself. The law claims a certain conformity to a certain datum, to a certain type, which is considered as invested with a value. It is only in the measure in which the individual accepts it as such that he will live in this conformity. This does not mean that value depends more or less on the fantasies of an individual; in reality we are faced with a profound, slow, and lasting creation. Nor does it mean that we are at the level of conscious decisions and choices. The representation effected is always relatively vague and uncertain, but it implies the possibility of agreement and of adherence. This does not mean that the jurist has to limit himself to hearing what is said and formulating it, or to translating automatically into law every ideological product of his society. There is necessarily a certain tension between what the law must contain as value and the freedom in which the individual would like to live. But the representation of value effected by the individual on the subject of the law should not be such that the individual rejects the law either because of an impossibility of understanding or of execution or because of an absolute separation between the values assumed by the law and those which the individual recognizes as his own. The relation would then be one of pure constraint which, as I have said, is finally untenable.

In the second place, the value represented in the law appears as the common measure, the system of reference, the standard which permits the correct evaluation of a situation or an action. Because we are in an area of men and not of objects, it is immediately understandable that it is impossible to have a system of purely objective references. The situation does not resemble that of a doctor who can establish tables of references or standards of measure which are objective and valid, independent of the opinion of each person. Because the totality of the relation of man with his social group is involved, we are obliged to take as the system of references only what can be a common measure — a communal measure — one to which there is finally a certain measure of agreement. A man feels himself validly judged only if he is judged on the basis of values which he himself admits. If that is not

the case, he can only feel something arbitrary and unjust. When the values contained in the law are represented by the individual to the individual as his own, then these values can help him in giving his own acts a meaning, a note, a qualification. It is no longer that "they judge me by absurd and iniquitous laws." It is "I am about to do something which is unacceptable — to myself." Let us not say that this is a substitute for moral conscience. It is simply that this individual recognizes as legitimate that his act be measured on the basis of an entirely objective rule which he can make subjective because the values given in it are also those which he gives himself.

Finally, it is also in the measure in which law is representation of value that it can play its normative role in the most profound sense. I mean that the law can never be taken as in itself a realization of value. It is, rather, a possibility offered to man to achieve the realization of value. Value can never be considered as an existent, an immutable essence, a preestablished model from which one must begin, still less as a kind of static reality included in the law, a reality which is permanent when it has been correctly formulated and which the individual would only have to contemplate in the law like the models of those symbolic statutes of the nineteenth century representing Justice, Liberty, Peace, in a perfectly immobile situation. In this age a man cannot feel himself moved by these necessarily abstract models. The law, as representation of value, supposes a tension toward an objective to be obtained, a new situation to be created. A man who represents to himself the value included in the law does not receive it as a schema on which he has to model himself, to which he has to conform his person. He receives it as a realization to be achieved, a situation to be created by his own activity. One can sum up his feeling roughly as follows: "If I obey this legal rule which expresses a value which I recognize as mine, then I create a situation of justice or of order or of peace." But he cannot obey this rule if he does not recognize the value it expresses. When the individual is not engaged in passive obedience but in a creation of situations where the values of the law he represents to himself are destined to appear, then the law has fully fulfilled its role.

It is necessary to take care that this is not a game. It is not without importance whether the law does or does not fulfill this role. If the law is not a creator of value, and if the individual cannot represent to himself the values included in the law as his own, extremely serious consequences follow. The first is that there may be two radically separated areas, that of law and that of life. This is not a new problem, but it is a problem often badly stated when one speaks of "the time lag between law and events" or when it is suggested that the separation is chiefly between the law and economic or

political phenomena. If it were thus, a solution would be easy enough. Procedures could be modified, adaptations could be made more rapidly. But it may happen that, when the law is no longer received or understood by the citizens, it remains a closed world, that the norms are only submitted to without being taken up by men. The separation is then not on the level of a divorce between general norms and the concrete situation of a particular individual. What is true in the individual case is true of all the representations of society and law. The divorce between law and life is now situated at the level of these representations. Juridical means cannot now influence these representations. At stake is the global question of law — its principles, its values, its expressions. What is necessary is a total reshaping of law in its foundations, not some fragmentary adaptation to this or that economic or social fact. When such a divorce of law and life has occurred, one is in the presence of a very serious symptom for society and a decisive threat to its duration.

The second consequence, resulting from the first, is that, in the measure in which the individual does not recognize himself in the representation of law, he is obliged to substitute something. Then the creation of another system of values takes place, a creation more or less spontaneous, but negative. It cannot be hoped that, since the values of the law do not satisfy man, he is going to elaborate in his group a new system of values helping him to live. If that were true, we could say that the divorce between the two systems is regrettable, but that in the end something is born giving rise to a new law. The situation is, unfortunately, more complex and treacherous. Man does not remain unharmed in the face of law when he cannot accept the representation he makes of it. This cannot be a matter of simple indifference. To follow the metaphor of divorce, we know that in a divorce ending a marriage the two former spouses who have "to remake their lives" cannot start from a new situation, from zero, as if nothing had happened. In fact, they are going to start with a whole set of disturbances, unresolved internal conflicts, regrets, and hates which have been part of their life. It is the same when a man is divorced from the law of the society in which he lives, when the representation he makes to himself of the values of the law cannot correspond to the values he wishes to incorporate in his life. Then the system which he creates for himself expresses forcefully his detestation of everything which formerly he associated with the law — judgments, administrative rules, attitudes of the police or the bureaucracy. He rejects what would strike us as legitimate often without our understanding why, because he has broken with what he thinks inspires all that, its heart and its reason. His rejection will be the more violent and will seem the more unjust to us

as his new system of values is founded on frustration and resentment. He had hoped and waited for justice, liberty, and peace from the law; he had not found them in it; and he could no longer live with respect for the law, or with respect for society. He expresses now only hate of what should have been and has not been. He will live only in the perspective provided by the impossibility, as he sees it, that the law be anything else but deception, hypocrisy, lying. The system of values of creation is purely negative, and a new law cannot emerge from it. In this situation it is not the individual who has to be reformed. It is the law which has to be radically changed; for in its representation, it is here evident, the law has failed its vocation.