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Meaning of Law in the Common Law Tradition

Anton-Hermann Chroust

THE MEANING OF LAW IN THE COMMON LAW TRADITION

Ever since the Sophists in the fifth century B. C. began seriously to discuss the origin, nature, and function of law, the apparently simple question, "what is law," has been the source of many a heated controversy. The dicta of theologians, the various and often conflicting speculations of philosophers, the theories of sociologists, the opinions of jurists, and the views of political scientists — they all have contributed heavily to make this question an extremely difficult one. Even among renowned jurists and teachers of the law we frequently encounter that confusion about the meaning of law which once solicited from St. Paul the famous exhortation: "Desiring to be teachers of the law, they understand neither what they say nor whereof they affirm." (1 *Timothy* 1:7)

Perhaps the main reason of all this confusion should be looked for in the fact that, in the final analysis, the majority of legal writers use the term law in a rather loose manner. Thus it happens that this term, in order to suit some particular but not always licit purpose, is being employed to mean any one of at least three essentially different things, and at times all three. In this fashion three quite different problems are simply referred to as law, and frequently serious attempts are being made to define all three problems in terms of just one of them.

The oldest and at the same time narrowest meaning of the term law is, historically speaking, that of an aggregate of laws, in other words, the *historically developed and accrued body of authoritative materials of actual decisions of controversies* — the authoritative grounds of and guides to the determination of controversies.

More recent developments in the fields of philosophy and jurisprudence, such as the rise of Neo-Kantianism and

juristic functionalism in general, brought about a radical change in the attitude towards the meaning of law. This new attitude did not concern itself so much with the law as a body of authoritative materials, that is, with what we might call a "state" or actual condition, but mainly thought of the law in the light of certain ends to be achieved by this body of authoritative materials. Thus it came about that the law was interpreted as meaning the *legal order*. Hence law was being understood in terms of a *regime* devised for the adjustment of certain human relations signifying as it were the *control* of certain phases of human conduct through the systematic and intelligent (planned) application of the force of a given politically organized society. It was conceded, however, that any such legal regime requires a number of authoritative materials which in themselves cannot be called a regime or legal order, but are merely one of the elements which constitute this regime or, as some writers have put it, the guides to this regime. Consequently, many subsequent discussions concerning the nature and function of law turned into debates about the nature and function of the whole legal order, that is to say, the *whole regime of social control through law*. Thus whenever reference is made to "law and order," "respect for the law," or the "blessings of the law" we are actually referring to the legal order rather than to a body of authoritative materials.

The further result of the functional attitude towards law is the mounting emphasis upon the administration of law, in other words, the administration of a body of authoritative materials rather than these materials themselves which constitute or, at least should constitute, the guides to or bases of this administration. Thus law came to mean what the late Justice Cardozo felicitously called the "Judicial Process," and what Mr. Landis, the former Dean of the Harvard Law School, preferred to refer to as the "Administrative Process" rather than administrative law. Law, then,

according to this third meaning, denotes a *process* of determining controversies, which process is intended to uphold the legal order or the administrative regime itself. According to this third meaning, however, law would, in the final analysis, actually denote a practically infinite variety of processes as they are actually or "officially" carried on. It would become, as it has under totalitarian governments, but a phase of governmental activity. Consequently, whatever is done "officially" through the medium of such processes would be law.

These are, in short, the three basic meanings of the term law, three meanings, that is, which always must be kept apart. The fact that all three are usually referred to by one and the same term has contributed much to the general confusion which seems to mar most of the discussions concerning the nature of law. Too often certain definitions or inferences are being drawn from just one of these three specific meanings, only to be applied afterwards as defining in a generalized and universal manner the whole subject which in fact comprises all three meanings. Thus it has become a common practice among philosophers and jurists to identify the part with the whole, and the substance with its functions. In some instances, particularly among the so-called social functionalists, the dictates of personal preference or a partisan philosophy have actually become the sole arbiter as to which partial meaning of the complex term law should stand for the whole. Thus even in serious discussions among truly erudite and experienced scholars it has become a regular, although pernicious habit, surreptitiously to switch from one particular meaning of the term law to another and subsequently to define all three meanings in terms of just one whenever this would promote the envisaged line of argument.

Although in our basic definition of law we must always clearly distinguish between law as a body of authoritative materials for actual decisions, the legal or administrative

order, and the legal or administrative process, there is no reason why, by the employment of the idea of "social control through law," we could not unify these three particular meanings into one single over-all meaning; or, as Dean Pound has put it, why we should not conceive of a regime which is a highly specialized form of social control, carried on in accordance with a body of authoritative materials, and applied in a judicial or administrative process. In this manner we are able to bring together into one single integrated and intelligent idea the three specific meanings of the term law without vitiating any one of the three.

The average common law lawyer, if he is at all interested in definitions, will first of all reach for that definition which sees in the law a body of historically developed and accrued authoritative grounds of and guides to actual decisions; the body of authoritative materials for determining controversies. But here, again, we must remember that these authoritative grounds and guides are made up of a number of conceptions such as two "types" of legal precepts, a legal technique, and certain legal and even meta-legal ideas and ideals. For, as Dean Pound sees it, law in the sense of a body of authoritative materials is actually a body of authoritative precepts, developed and applied by an authoritative technique in the light of authoritative traditional — often taught — ideals. Merely to think of law in terms of a body of precepts would be as disastrous as would be any attempt to define law as a mere highly developed or complicated technique or perhaps as the mere manifestation of a particular social ideology of a particular time, place or group. Although all these factors constitute essential ingredients of what we call law, no one by itself and without the other could sufficiently explain the full meaning of law as a body of authoritative materials. For the technique of developing and applying the body of authoritative materials, for instance, in itself is as authoritative as are these precepts. Furthermore, the ideal element of the law, the body of re-

ceived and taught authoritative ideals, is likewise of fundamental importance to our understanding of the full significance of the term law.

Law in its original meaning is a body of authoritative materials for actual decision of controversies. As such it must, first of all, be looked upon as a body of authoritative *precepts*. For a body of precepts constitutes one of the three basic elements of what we call law in the above mentioned sense. The "precept element" of the law itself falls into four distinct categories, namely (a) principles, (b) rules, (c) precepts prescribing standards, and (d) precepts defining conceptions.

Principles in the sense of the law might be best described as *authoritative starting points for legal classification and legal reasoning*. They are used by the jurist to classify and organize the whole of judicial experience, and become operative whenever we are trying to differentiate various cases. The fact is that differences appear among various cases only when we are able to discern a definite principle behind the felt difference. This operation permits us then to compare a certain developed line of experience of actual decisions in some special field of law with some other line of legal or judicial experience in another field. This, again, makes it possible not only to refer certain cases to one general point of departure for legal reasoning, and others again to some other such starting point, but also enables us to discover an even more inclusive starting point of legal reasoning which might embrace the whole field.

Principles and legal conceptions enable us not only to deal with controversies without taking recourse to a mass of legal rules, but also makes it possible in a satisfactory manner to dispose of newly arising problems and cases in case there are no specific rules to be found to settle them. A *legal conception,* therefore, is nothing else than an *authoritative legal category into which a case may be fitted*

in order that certain rules, principles, or standards then become applicable. This is most important in those cases where no definite and detailed consequences are being attached to a definite and detailed situation of fact. Take, for instance, the case of a bailment in general. Here we cannot speak of a definite and detailed legal consequence being attached to a definite and detailed state of fact. Nor can we discover here a definite point of departure for legal reasoning. But there are always certain well defined legal categories into which a case of bailment may be fitted with the result that certain rules, principles, and standards then become applicable.

A *legal rule,* again, is a *precept attaching a definite and detailed legal consequence to a definite and detailed situation of fact.*

A *legal standard* is a *measure of conduct prescribed by law.* For conduct in any form requires an established standard. Anyone who in his conduct departs from an established standard does so at the peril of answering for the resulting damage. There are always various notions connected with the concept of standard, such as the concept of reasonableness, fairness, or "due care" in one's conduct. But there is not and cannot be, a universal precept once and for all defining reasonableness or fairness. For in the law it would be most unreasonable and unfair even to essay the establishment of a universally valid and applicable standard of reasonableness or fairness. This leaves no other way out than to refer the notion of reasonableness or fairness to a conformity of an ideal, to what a reaonable man can be expected to do in a given concrete and, therefore, unique situation.

The *ideal element* in the law also constitutes a vital part of any social order under the rule of law. It contains *the larger purpose of every social control through law* and as such it is a most important background of all interpretation

and application of legal precepts. In his *"The Common Law,"* p. 1, Justice Holmes points out that the life of the law has not been logic, but experience, an experience, that is, which takes into account the felt necessities of the time, the prevailing moral and political theories, and the intuitions of public policy. This ideal element assumes decisive importance whenever the courts are faced with new problems which make it necessary to choose between several equally authoritative starting points for legal reasoning. Here the courts will have to, and actually do, take into account a total and, hence, ideal conception of the social order of time and place. At the same time they have to consider the total legal tradition as to the ultimate and, hence, ideal end or purpose of social control. And this ideal picture of the total social order as well as the ultimate ideal purpose of this total social order, in turn, furnish the courts with that larger ideal background which enables them to interpret and apply legal precepts. Particularly in cases where standards of conduct are to be applied the ideal element in the law is always of crucial significance. Take, for instance, the idea of reasonable conduct. While the law enjoins what is reasonable under certain concrete circumstances, it nevertheless fails to provide us with exact precepts which might inform us once and for all what behaviour is reasonable *in abstracto* and what behaviour is not. Hence the interpretation and, above all, the application of the standard of reasonableness in one instance will be governed by the received social ideal of a particular social actuality, while in another instance it is dictated by the received social ideal of a different social actuality, with the result that we are confronted in what seems to be the same state of fact by entirely different legal results. For what might be extreme carelessness in the forest tracts of the Northwest, such as the throwing away of a lighted match, could very well be the proper or, at least, indifferent conduct in the desert lands of the Southwest. Thus it might be said that the social ideals of time, place,

and particular circumstances, which the courts consciously and even unconsciously employ, give authority and authoritative direction to the application of legal precepts.

Whenever we are speaking of the meaning of law we should also keep in mind the person who is using this term. For it is obvious that the law means something different to different persons, professions, or social groups. Take, for instance, the *average man*: to him, without doubt, law is something like a "rule of conduct" in certain matters, a guide which tells him what to do and what not to do in a certain situation. And, again, it might appear to him as being a threat, or as the late Justice Holmes puts it, as something in which particularly the "bad man" may find a restraining threat. To the *legal adviser,* on the other hand, law or to be more exact, the legal precepts defining conceptions and the principles of law, signify a basis of prediction of "official" action, both judicial and administrative. But a word of caution might be inserted here: It is not the law itself, but the adviser who does the predicting, because the most that could ever be said about the law is that it furnishes us with a *basis* of prediction. To the *lawmaker,* again, law is something that for some definite reason ought to be done or ought not to be done. And because he thinks this he conceives the law as being a command or a threat. To the *judge,* lastly, law means a model or pattern of decision, in other words, a rule of decision.

These four standpoints, although they seem violently to conflict with one another, can nevertheless be brought into harmony. We have merely to remember, as Dean Pound has pointed out, that the judges can for the most part be expected to follow the authoritative precepts, which precepts then also serve as commands or threats, as rules of a definite conduct, and as bases of prediction.

Summing up we might define law as a historically evolved and accrued body of authoritative grounds of and guides to

actual determination of controversies. These grounds and guides may serve as directives for actual decisions, as guides to a definite conduct, or as bases for the prediction of "official" action. This body is, at the same time, a highly specialized instrument of social control within an existing organized and politically developed society — an order, that is to say, which carries on in accordance with a body of authoritative materials applied in a judicial or administrative process. It does so (a) by drawing upon recognized rules in the narrower sense of the term, that is, rules which attach a definite and detailed legal consequence to a definite and detailed situation of fact; (b) by utilizing certain legal principles which are authoritative starting points or bases of legal reasoning whenever a situation arises which is not governed by a rule in the narrower sense of the term; (c) by employing precepts which define certain authoritatively determined legal categories into which a concrete case may be fitted with the result that certain rules, principles, or standards then become applicable; and (d) by applying precepts which prescribe certain standards or measures of conduct relative to the particular instance or individual case and which are, in the final analysis, determined in their application by the particular social ideal of time, place, and circumstance. This body of authoritative materials, moreover, operates through a definite judicial or administrative process; and this process in itself is only an application and development of these authoritative materials through the employment of an authoritative technique which is understood and practiced in the light of certain received and likewise authoritative ideals as well as in the light of a taught and equally authoritative tradition.

Anton-Hermann Chroust.