

The Relationship between Law, Justice and Power
University of Prishtina

I. You need power to control a society

A. *The senseless order* does not consistently pursue any rational purposes

“Someone who openly claimed to rule only by brute power and without regard to any rational scheme of value could not be understood to be ruling through, far less under, law.” (Neil MacCormick)

The German legal philosopher, Robert Alexy, describes the senseless order as one in which ‘a group of individuals is ruled that neither reveals consistent purposes of the ruler or rulers nor makes a continuous pursuit of the subjects’ purposes possible.’ In this state of affairs, those with power do whatever they want, without any logic or consistency to their actions. This, Alexy contends, is self-evidently not a legal order.

B. *The predatory order* admits that its purpose is the exploitation of its subjects. The only purposes the predatory order promotes are those of the rulers.

Alexy argues that if the rulers in a senseless order adopt a set of rules which prohibit their subjects from using violence and establish a hierarchy of rules so that there is now some consistency to the rules, this predatory order is still not a legal system if its sole, and avowed, purpose, is the exploitation of its subjects. Those subjected to this predatory order are merely treated as objects by it. They are in the same position as those treated as outlaws, helots (in the system of Sparta), or chattel-slaves (in the system of slavery in the Southern United States of America). Alexy allows, in this case, for the possibility that amongst the rulers themselves it may amount to a legal system, but denies that it amounts to a legal system vis-à-vis the subjects. The American legal philosopher, Philip Soper, agrees with Alexy that for those who are treated by a legal system only as its objects, ‘the system is indistinguishable from a purely coercive regime’. The person treated as a helot or chattel-slave does not experience the rule of law. He or she knows only the violence of the slave-master.

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C. *The managerial order* issues orders which only bind the workers and do not bind the managers. The only purposes the managerial order promotes are those of the managers (Lon L. Fuller).

The American legal philosopher, Lon L. Fuller discusses another kind of social order, the managerial order. This is the kind of social order which exists in a factory. Fuller suggested three differences between a managerial order and a legal system. First, in a managerial order only the subjects are bound by the rules whereas in a legal system the ruler is also bound. Second, the directives issued by a manager are followed by those subject to them in order to fulfil the manager's purposes whereas laws are given that they may be followed by subjects in pursuit of their own ends. Third, whereas a manager's prime concern is with his subjects' relations towards him and only secondarily with the inter-relationship between his subjects, the law-giver's focus is the reverse. As a result, whereas a law-giver will issue general or generalizable rules, a manager will only have reason to issue general rather than specific directives if to do so is, in the particular case, more expedient. Moreover, there is no strong reason why the manager should himself act in accordance with general rules.

Therefore,

‘the subordinate has no justification for complaint if, in a particular case, the superior directs him to depart from the procedures prescribed by some general order. This means, in turn, that in managerial relation there is no room for a formal principle demanding that the actions of the superior conform to the rules he has himself announced; in this context the principle of ‘congruence between official action and declared rule’ loses its relevance.’¹

If Fuller is right in his description of a managerial order, this is a description not only of the kind of social order that exists in a factory, it is also a description of the kind of social order that exists in a concentration camp or an extermination camp such as Auschwitz.

D. *The legal order* claims that its rules are of benefit to its subjects. Its rules allow both rulers and subjects to pursue their purposes.

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Here is the key claim which turns a system of social control into a legal order, into a legal system: the rulers must claim that the rules are of benefit to those who are subject to them because they can be followed and will be followed by all those to whom they apply. This claim that the law is of benefit to its subjects marks a key difference between a managerial order and a legal system. In a managerial order the rules exist only to promote the interests of the managers; in a legal system the rules exist to promote the interests of the subjects.

“Between a tyrant and a prince there is this single or chief difference, that the latter obeys the law and rules the people by its dictates, accounting himself as but their servant.” (John of Salisbury)

II. Why do the powerful choose to use law to control a society?

“Force without justice is tyrannical. Justice without force is contradictory, as there are always the wicked; ... And so it is necessary to put justice and force together; ... And so, since it was not possible to make the just strong, the strong have been made just.” (Blaise Pascal)

A. Using soldiers and police to enforce obedience is expensive and, beyond a certain point, unstable

Enforced obedience requires far more intensive maintenance than voluntary obedience. Were force required to be used in order to enforce each and every aspect of each and every law it would be impossible. Imagine the cost if, instead of having traffic lights, the police had to decide when each and every car on the roads in Prishtina was allowed to move through each junction. Imagine what would happen if each and every contract signed between two business people had to be enforced through the courts. The courts would soon have a backlog of at least 100 years' worth of cases.

Having to enforce obedience is expensive. Having to enforce obedience is also unstable. If you have too many soldiers, the risk is that those soldiers will seize power. In the Roman Empire, it was often the Roman legions which decided who the Emperor should be.

The fall of the Berlin Wall, and the collapse of the Soviet communist regimes in Russia and elsewhere show that no matter how many soldiers and people you have, if the people are determined enough, a government will not last.

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The French philosopher, Jean-Jacques Rousseau, said this: ‘The strongest man is never strong enough to be master all the time, unless he transforms force into right and obedience into duty.’

‘Lord Hailsham once said that “the rule of law is a confidence trick”. What he meant was that the rule of law depends upon public confidence and public acceptance of the system whereby Parliament makes the laws, the courts enforce them and the vast majority of citizens accept them until they can get them changed.

B. People are more likely to obey a rule if they understand its purpose and even more likely to obey a rule if they think that it is just

Obedience can be induced through the constant repetition of threats of enforcement. This is, however, inefficient, expensive and unstable when compared with the alternative of securing voluntary obedience through persuasion and education.

Why are there speed limits when driving on the roads in Kosovo? What is the purpose of those rules?

In England, a contract, an agreement, does not have to be in writing, but a contract to buy and sell land does have to be in writing. Why do you think there is a difference between those rules?

‘Conformity with the law can in some measure be secured by force, but a society will be more unified and stable if people believe that their laws make a legitimate moral claim on their obedience.’

C. Therefore, rulers have an incentive to present their rule as being of benefit to their subjects (even if their aim is only to create a false consciousness in their subjects)

The *perceived* justice of the law’s rules is key to their social effectiveness.

Rulers *want* their subjects to obey the laws voluntarily.

- Widespread voluntary obedience is necessary in order for law to be effective in stabilizing expectations.
- Widespread voluntary obedience is necessary in order to control the level of violence within a society.

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- Widespread voluntary obedience reduces the number of disputes which require judicial resolution.

D. The constraint of plausibility on the vision of justice which rulers present to their subjects means that the laws adopted look *as if* they had been adopted by a social contract (Alasdair MacIntyre)

The Scottish philosopher Alasdair MacIntyre has argued that even where the justice imposed on a society is a justice of strong, in which the strong seek to pursue their own interests most effectively, the outcome ‘will always be *as if* justice was the outcome of a contract, an episode of explicit negotiation’. Because ‘the rules will have to be at least minimally acceptable to almost all [in such a society] for them to function as rules of justice for any extended period of time, ... this will characteristically involve that some of the same constraints are imposed on those who are relatively rich and powerful as well as on those who are relatively weak and powerless.’

Roman domination of the ancient world, though consistent with many horrors, was constrained in some respects by the façade of Roman law, by the claim that Rome was bringing the benefits of peace, civilisation and security to its conquered peoples.

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In order to persuade their subjects to obey, rulers must present a vision of justice which the subjects will understand, and have a significant incentive to present a vision of justice which the subjects might want to accept.

In his 2006 book, *Why People Obey the Law*, Tom R. Tyler has convincingly demonstrated that a belief that the law is legitimate is far more effective than a fear of punishment in persuading subjects to obey the law.

Rulers do not just seek obedience, they crave voluntary obedience. They do not simply present a conception of deep justice as an object for their subjects to comprehend; they proclaim it as a social vision which they want their subjects to accept.

American sociologist Harold Berman claimed that: ‘Law has to be believed in, or it will not work.’

III. What the consequences of using law to control society?

Law is a system of norms that claims to be morally correct (Robert Alexy, *The Argument from Injustice: A Reply to Legal Positivism*)

“Justice without force is impotent” (Blaise Pascal)

In order to found a new regime, rulers must dispose of sufficient power. Beyond the mere appropriation of power, there are three further moves which must be made to move from *de facto* political control to government according to law.

Law must make an appeal to justice:

- The claim of authority: “Do this because I said so”
- The claim that the law is substantively just: “Do this because it is the right thing to do”
- The claim of allegiance: “Do this because everyone else will be doing it”

A. *The claim of authority*: The law has been determined by those with the right to do so. The first move is to legitimate their rule by appealing to something which is intended to resonate with the political community, whether a dynastic claim, an appeal to culture, tradition, language, nationality, religion or to values such as progress or civilization. It may even be something as unsubtle as the right of conquest. Whatever the basis of the appeal, the *de facto* ruler calls upon his opponents and their supporters to lay down their arms and recognize his right to rule. Rulers must make a claim of authority. Although the terms ‘legitimate’ and ‘right’ used in the above discussion indicate that we are here in the presence of terms capable of a legal meaning, we are still at the pre-legal stage. When usurpers such as Edward IV and Henry VII took to the throne in England or Philip V invoked the Salic law in France, their dynastic appeals were not made in accordance with a strict and pre-existing legal order. They were invitations to their subjects to acknowledge the justice of a new legal order.

B. *The claim of substantive justice*: The law that has been determined is morally correct, so that it would either be right, or at least not wrong, to obey it.

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The second move is the claim to be ruling justly. The new ruler not only claims the right to govern, but makes a commitment to govern justly. This is the claim of substantive justice. Hart drew attention to this claim when he pointed to the semantic distinction between what people mean when they say that have ‘been obliged’ to do something and what people mean when they say that they are ‘under an obligation’ to do something.

Governments have guns, and they will use those guns if they cannot persuade their subjects to obey their rules. But governments do not only say “Do this because I tell you to”; governments also “Do this because it is the right thing to do”.

C. *The claim of allegiance*: The law is of benefit to those who are subject to its rules because those rules will be followed by all to whom they apply.

“there is a kind of reciprocity between government and citizen with respect to the observance of rules. Government says to the citizen in effect, ‘These are the rules we expect you to follow. If you follow them, you have our assurance that they are the rules that will be applied to your conduct.’” (German sociologist Georg Simmel)

- 1) It is possible for subjects to follow the rules (and this implies that the rules are intelligible and coherent);
- 2) Subjects can expect others, including the authors of the rules, also to follow the rules;
- 1’) Subjects will be protected from violence if they act in accordance with the rules, and
- 2’) Subjects are entitled to legal redress if others, including the authors of the rules, act violently towards them otherwise than accordance with the rules.

Where the claim to allegiance is made, the rulers are claiming that they and their subjects will act in accordance with the rules and that if they wish to change the rules they will do so in accordance with the procedures (however rudimentary) which have been laid down.

Compliance by the ruler with the declared rules therefore constitutes the key distinction between a legal system and a regime of managerial direction. In terms of the four propositions which make up the moral commitment to rules, it should be noted that managerial regimes, both benign and malign, can comply with (1). It is (2), (1’) and (2’)

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which are not necessary features of managerial direction. Claim (1) is even present in the regimes of managerial direction to be found in concentration or extermination camps. However, like other regimes of managerial direction, the rules in such a camp are not a legal system because (2), (1') and (2') are absent.

What distinguishes a legal system from other forms of social order is that a legal system protects its subjects against lawless violence. As Fuller says:

Surely the very essence of the Rule of Law is that in acting upon the citizen (by putting him in jail, for example, or declaring invalid a deed under which he claims title to property) a government will faithfully apply rules previously declared as those to be followed by the citizen and as being determinative of his rights and duties. If the Rule of Law does not mean this, it means nothing.

We can therefore measure the extent to which a country enjoys the benefits of the rule of law by asking four questions:

- is it possible for subjects to follow the rules? (claim 1);
- can subjects expect others to follow the rules? (claim 2);
- will subjects be protected from violence if they follow the rules? (claim 1');
- are subjects entitled to legal redress if others act violently towards them otherwise than in accordance with the rules? (claim 2').

I was hearing yesterday about a situation in which someone who is an expert in computer-aided design won a contract to do some design for a big company. He did good work but the big company has refused to pay him. He has followed the rules (claim 1) and he expected the big company to follow the rules (claim 2) but it did not do so. Can he afford to go to court to force the big company to pay him? How long will that take? Those are questions about claim 2'.

A commitment to law is a commitment to governing in accordance with rules. This restricts the freedom of manoeuvre of rulers who must now at least appear to be acting in accordance

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with the rules until such time as the rules can be changed. A commitment to law is also a commitment to enforcing the rules. This restricts the freedom of manoeuvre of subjects who are now at risk of being restrained by the rulers if they act otherwise than in accordance with the rules.

IV. Three levels of justice

In my view the most important formulation of justice is *suum cuique tribuere*. It is justice to give to each what is due to them (Ulpian, a Roman jurist born in Tyre in Lebanon)

- A. *Shallow Justice*: the rules are applied consistently. Like cases are treated alike. The rules apply to both the powerful and the powerless. Everyone is given what the rules promise to give them.

Shallow justice is the justice which is immanent to a legal system: it is justice according to law. Justice according to law occurs when rulers govern in accordance with the rules which have been laid down. Justice according to law occurs when rulers enforce the rules which have been laid down.

The American philosopher Nicholas Wolterstorff, in his memoir, *In this World of Wonders*, describes a conversation with Carlos Hernandez, head of the Honduran NGO Sociedad má Justa, in which Mr Hernandez told him that ‘the deepest cause of injustice in Honduran society is that the laws are often not enforced. Though the laws, in general, are quite good, public officials often do not enforce them, especially in the case of crimes against the poor.’

- B. *Deep Justice*: the vision of justice which underlies a particular legal system, giving an account of what is due to each of its subjects.

Deep justice is the sense of how people deserve to be treated, which gives rise to expressions such as ‘It’s not right’ or ‘That’s not fair’. Ideas of deep justice are ideas about right and wrong, entitlements and liberties, worth and value, about goods and goals, which generate expectations about how people will behave.

The Marxist slogan: ‘From each according to his ability, to each according to his need’ might be one conception of deep justice. The utilitarian principle: what is just is that which achieves the greatest happiness for the greatest number, is another.

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By contrast, ‘A fair wage for a fair day’s work’, ‘Sexual relationships should be exclusive’, ‘Workers deserve to be paid a living wage’, ‘The market should decide the level of top executives’ pay’, ‘Children need regular contact with their fathers even if their parents’ relationship has broken down’, ‘Healthcare should be free to all at the point of need’; these are not comprehensive conceptions of deep justice but rather fragmentary impressions.

By appealing to a comprehensible conception of deep justice, rulers make voluntary obedience to the law possible; and by rendering that conception of deep justice plausible, rulers encourage voluntary obedience. Convinced obedience is best of all because of its reliability.

The means by which rulers seek to transform their status from that ‘powerful people who can *oblige* you to comply with their will on pain of unpleasant consequences into those who can create genuine obligations on the part of their subjects, is by appealing to deep justice.

The French philosopher, Jacques Ellul, has said: ‘The truth is that the ordinary citizen is largely ignorant of law’s complex reality and what is important is that which the average person sees and understands of the law, the vision he has of it’. Securing assent to a plausible conception of deep justice is likely to be easier and more effective than informing subjects fully about the details of all the legal rules which apply to them.

English legal philosopher, Nigel Simmonds, argues that acting in accordance with the purpose behind a rule is inherent in the practice of rule-following. He insists that ‘if we are to have a real understanding of what [a rule] requires of us, so that we can guide our conduct by it, we must be able to grasp the values or objectives that the rule serves, and to see how the rule fits intelligibly into some possible pattern of life.

Rulers who are constructing an account of deep justice therefore face conflicting imperatives. On the one hand, they need to justify their power and position. On the other hand, they would like to secure as widespread assent to their conception of deep justice as possible. This means that, in most cases, they must have regard to the existing notions of deep justice within the community of their subjects. A conception of deep justice is plausible if there is a degree of fit between the conception and the way the world is seen by those who are invited to accept it.

Rulers invite their subjects to accept that they are being treated by the law as they deserve to be treated. Rulers know that where that appeal fails, ‘when people believe that law is

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arbitrary, immoral, or serves the interests of some limited group, they will try to ignore or evade it.’

C. *True Justice*: what is *really* due to people.

The deep justice to which law appeals may be racist, nationalist, sexist or prejudiced against those of the lower classes or castes. People may be taught at home, in schools, in their work, and by the government things that are false about how much they are worth. Women may, for example, be indoctrinated into thinking that they are worth less than men. People belonging to one ethnic group or religion may be taught that they are worth less than those from another ethnic group or religion. The poor may be taught that their poverty is their own fault.

True justice is objective justice; justice based on reality.

V. Judging Law’s Claims

“however great the aura of majesty or authority which the official system may have, its demands must in the end be submitted to moral scrutiny” (H.L.A. Hart)

- A. To what extent does this system keep its promises? To what extent are the rules applied consistently and to everyone?
- B. What is the vision of justice which justifies the rules in this system? Do the rules fit that vision of justice or do the rules (or their application) distort and undermine that vision?
- C. To what extent is this system *really* just?

VI. Conclusions

- A society does not have to be ruled by law
- To the extent that a society is ruled by law, its subjects are protected from violence, able to pursue their own purposes, and to flourish
- But there is always the temptation for rulers to use law to stabilise their power and to use a false vision of justice to delude their subjects

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- The rule of law is strongly correlated with freedom, economic prosperity and other benefits of development (Gary Haugen and Victor Boutros, *The Locust Effect*; The World Bank)
- Genuine flourishing in a society depends not only on shallow justice but on a vision of deep justice which approximates to true justice

Biography

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¹ Fuller, *The Morality of Law*, 208-9.