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The Pervasiveness of Law

A plausible case could easily be made for saying that this book is unnecessary, that law needs no introduction. For, unlike such deep and incomprehensible mysteries as the calculus, semiotics, or catastrophe theory, law is something with which we grew up. Even quite young children, long before they take up shop-lifting, or driving uninsured mopeds, or scrumping apples, are at least familiar with the criminal law, with its court dramas of wickedness and tragedy, its parables of right and wrong, its fearsome denunciations of cruelty and greed. They know only too well what becomes of the likes of Mr Toad and others who violate the more serious rules of social behaviour, once they fall into the hands of the stern and brutal minions of the law. The tales they read, the movies they see, the television they watch, familiarize them with a whole range of conceptions intimately related to the existence of law – pirates and robbers and highwaymen and outlaws in the world of imagination; people who offer sweets and rides in cars, or break into the school over the weekend, at a level closer to reality. They even know, through the story of Robin Hood, that the law can be looked at not as a good thing but as a system of oppression.

Older children and adults know much more than this. In particular their conception of the law is not limited to cops and robbers, for they know that the criminal law forms only a small part of the world of the law and the lawyers. For as we grow older we become familiar with government. And modern government,

which obtrudes into a host of everyday activities which have nothing directly to do with crime, operates, at least in large part, through law. In particular it involves the making of new laws and the repealing of old ones, so that elections, which in democracies can change governments, are fought over legislative programmes, and promises of reform of the law embodied in party manifestos. We come to know too that the business of government involves the continuous administration of laws, for example the laws under which unemployed people are entitled to benefits from the state, or the laws which govern immigration into the country from abroad. We learn that many familiar institutions, such as Parliament, the BBC, the Central Electricity Generating Board, the universities, the local councils and a host of commercial companies, are all creatures of the law, with structures and powers and responsibilities ordained by laws.

Though everyday life may rarely if ever have brought most citizens into contact with criminal law, motoring law apart, few can have escaped involvement of some kind with such laws as the tax laws, the laws saying when shops may open, and what age you have to be to purchase liquor, or the laws requiring you to have a passport to travel abroad. Indeed the range of subjects regulated in one way or another by laws is quite extraordinary. There are laws regulating family life (you must not marry your grandmother and if you try it does not work); laws protecting bats from disturbance; laws catering for the welfare of breeding ospreys and for those who wish to have their ears pierced; laws saying that sheep must be dipped whether they or their owners like it or not; laws governing the provision of exits from village halls, and laws requiring food manufacturers to list those awful additives they put in our food, E102 and so forth. Such a list could be extended indefinitely, and there exist comical collections of weird laws, such as the law in Kansas, USA, which forbids you to keep a mule on the first storey of a building, presumably because one once fell out on the mayor. It takes some ingenuity to think of any field of activity which is not in some way or other legally regulated. Sleeping perhaps? Well, no, for you must not sleep whilst driving; and there is a case in the law

reports dealing with an American serviceman called Boshears who killed a prostitute, so he said, when he was fast asleep. It caused him some surprise when he woke up, and he managed to convince a jury of this to the amazement of the trial judge who had told the jury (nod nod, wink wink) that if this was so the crime of murder had not been committed, or indeed any other crime, though perhaps a person who made a habit of this might infringe some law or other.

The superabundance of laws reflects today a faith in what can be achieved by them which at times seems to have got quite out of hand; law is the panacea for all social ills. So we have laws to promote racial harmony, and good sex education, and equality between the sexes, and safety at work, and to stamp out insider trading on the Stock Exchange, all admirable ends, and indeed laws to further social justice generally, if only we could all agree on what that requires. And a whole bevy of laws now exists throughout the world to ensure that everyone obtains their human rights, though it must be admitted that these laws do not seem to be conspicuously successful in all parts where they apply, as Amnesty International continuously points out. Never can there have been a time when law was so popular. Hardly a day passes without a call for new laws to stamp out this or that, or further some supposedly desirable end.

We are all, then, aware of the pervasiveness of law. Law, like the air we breathe, is all around us; it is with us from the cradle to the grave, and indeed beyond, grave-robbing being an offence, and wills being enforceable by law. But it is with law as it is with air: most of us know very little about the stuff. Why do we need it, why, for that matter, does there seem at present to be plenty of it about? Is all this talk about acid rain and lead pollution to be taken seriously? Are the sheep near Sellafield wise to take such deep breaths? So it is with the law. People can work all their lives in Imperial Chemical Industries as research chemists, or as receptionists, or whatever, without the slightest knowledge of company law. We can all write cheques without studying the law of negotiable instruments. With minds uncluttered with the legal niceties of the definition of murder or manslaughter, we

can keep our hands off our irritating colleagues' throats, and if we do lose our self-control and engage in homicide the reason for this lapse is rarely to be sought in a lack of legal expertise. Though taken for granted, there is something paradoxical about this phenomenon: a society dominated by laws, but one populated by individuals most of whom have only the sketchiest knowledge or understanding of the institution which so pervades their lives. How can this be?

IS LAW PERHAPS UNIMPORTANT?

One possible explanation is that the law is less central to social life and organization than its pervasiveness would suggest. This, at first sight, seems quite a plausible explanation, especially if we concentrate attention upon those branches of the law which are concerned with the prohibition of grossly anti-social behaviour, that is to say with serious crime. Homicide may serve as an example. The law governing homicide, that is killing, is extremely elaborate; it is concerned with murder, with manslaughter, with child destruction, which most people have never heard of, and with other forms of killing which are highly controversial, such as abortion. There exists not only a number of categories of homicide, but in addition a variety of defences to charges of homicide. For example, 'provocation' can reduce a charge of murder to manslaughter, as can a plea of 'diminished responsibility' arising from mental disturbance. Self-defence is a complete answer to a charge, and its precise scope is therefore critically important and carefully worked out; for example, the law says that in the street you must back away from trouble, but in your home, which is your castle, retreat is not required. Hence in Texas murderers, knowing that this rule, exported there, is taken very seriously by jurors in that rugged part of the world, if they are prudent always drag their victims, as soon as life is extinct, into their sitting rooms to lay a basis for their defence. The exact status of some defences is controversial; for example, ought it to be a defence to a charge of murder that the killer was

threatened by another that he himself would be killed if he did not kill an innocent victim? Judges have disagreed on the scope of this defence of 'duress'. Some would not allow it in a murder case at all, viewing it as a terrorists' charter. Other judges think it too harsh to call someone a murderer if all they were doing was saving their own life, albeit at someone else's expense. At the moment the official legal view is hostile to this defence, but this may well change. Then there are many rules governing trials for homicide and the sentences which can be passed and the arrangements under which these sentences are served. Large books can be written on the whole subject, and are.

But common sense would suggest that the vast majority of people refrain from assassinating their acquaintances for reasons which owe nothing to the law. They never feel the urge, or feel squeamish, or think it morally wrong, or even believe that they will go to hell when they die if they have taken a human life. In a real sense the law of homicide is wholly irrelevant to most citizens, and conceivably its threats are not very effective on the rare occasions when other social controls over homicidal behaviour are in danger of breaking down; though of course there is no way of being sure how many potential murderers are kept on the straight and narrow each year by the law.

But obviously law is only one of the mechanisms of social control; how we behave is dictated by habits, by traditions, by inherited or instilled inhibitions, by ideals and values, by moral and religious beliefs, by fear of social disapproval, by the desire to be approved of and loved. The heavy hand of the criminal law seems to operate only at the margins of social life, not the centre. But a moment's reflection will suggest that this does not mean that the law of homicide is therefore entirely unimportant. For unfortunately some people do commit murder, and some murderers, such as the Yorkshire Ripper, can have a very serious effect on everyday social life, producing conditions of widespread fear. It is important that society should have some settled way of dealing with such people, something better than the lynch mob and the nearest oak tree, and important too that it should try, through these arrangements, to reduce the incidence

of murder, as far as can be achieved. Even a small reduction is a bonus, especially if you are next on the list. The margins of social life are indeed marginal, but still important.

A second and perhaps better reason why law can be of considerable importance, in spite of the fact that most people know little about it, is apparent when the law has been used to alter normal human behaviour, or set up legally regulated artificial institutions, for example the Board of a newly nationalized industry, such as the National Coal Board, formed in 1947. Fairly recently the law required the wearing of seat belts in cars by front seat passengers; for many motorists this was a new form of behaviour introduced into motoring life by the law. Soon after the new regulation came in, and indeed in many cases before it did, motorists developed a habit of buckling up, and what they now conform to is not so much the law as the habit which conforms to it. Law generates habits and practices, and people can conform to such practices with no precise idea of their legal basis. A society which respects the law, and takes it as a guide, will, when some new legal requirement comes into force, soon establish practices which conform to the scheme of legal ordering and regulation, though most people have little idea of the legal basis for them. In much the same way people can drive cars successfully without being able to give the least account of why the choke is needed to start a cold engine, or what the gears do. Universities provide an example of how law operates in this indirect way in the case of institutions. Like commercial companies, universities have elaborately ordained legal structures, embodied in Charters and Ordinances and Regulations. The texts of all this legal material may run to book size, and in my own time those governing the University of Oxford were largely kept in Latin lest anyone should be silly enough to be tempted to read them. But most students and academics neither know nor care about all this mumbo-jumbo. All they need to know about are the practices which apply to them – how to apply for admission, where to pay fees, how to register for a course, where the examinations are held and when. If they do run into difficulty they consult the experts, who are familiar with the

rules or know where to look them up. It is indeed the existence of experts which is a large part of the explanation for what seemed at first a puzzling phenomenon: the pervasiveness of law in a society in which there is widespread ignorance of law.

SPECIALIZATION AND EXPERTS

Modern societies involve a high degree of specialization, and this extends to the law just as to other important things, such as sanitary engineering. Without elaborate systems of sewage disposal, which we generally take for granted, modern city life would be ravaged by disease and disfigured by squalor, as was the case in the past. In the bad old days before such systems existed it used to be said that the smell of the River Liffey was one of the sights of Dublin, and the Victorian Thames contrived to surpass it in what was known as The Great Stink of 1858. Today all this is past, and there are fish in the Pool of London again. But most of us have done nothing whatever to bring this about; we leave all but the simplest matters involved in setting up systems of sewage disposal and pollution control to engineers, and call in plumbers when something goes wrong. The participation of most citizens in sewage disposal is largely confined to use, flushing, and the occasional employment of the lavatory brush. Where it all goes, or how on earth it gets there, are mysteries over which we do not trouble our heads. It is much the same with the law as it is with the domestic water closet. When a company is being established company law experts may well be consulted, or their books read, to ensure that we get the system right; once the company is operating recourse to experts will be occasional, perhaps only occurring when matters seem to be going wrong, or some dispute arises. Law, as it functions today, is the job of experts, of lawyers, and indeed without lawyers law as we know it could hardly exist, let alone work, any more than could engineering, or medicine, or computing science, or package holidays on the Costa Brava.

In earlier and simpler forms of society this was not the case.

Knowledge of the right thing to do was not confined; outside the supernatural world, to a special class of person, though older males might in such societies be viewed as better informed than the young, simply because of their greater age and experience of life. But today it is no more possible to have a complex legal system without lawyers than it is possible to have *haute cuisine* without French chefs and Elizabeth David. This does not mean that the law is secret, or that professional lawyers alone possess expert knowledge. Knowledge filters through to many others, to tax consultants, to civil servants, to police officers, to social workers, to doctors, and indeed to professional criminals. In the United States, where very serious attention is given to civil rights, penitentiaries sometimes possess excellent law libraries, so that the incarcerated may know their rights under the constitution. Having little else to do but litigate, some felons become highly expert in criminal and constitutional laws and legal procedure. Similarly with cooking there is, mercifully, a diffusion of expert knowledge. So in many private homes there are cook books by experts to be consulted, and excellent meals to be had, and this is so because knowledge of good cooking has filtered through, as if by some miracle, even into the English home. But that is not where good cooking comes from; it comes from experts. Like chefs, lawyers are expert people who devote their working lives to acquiring and selling special expertise to the public, or, as is the case with judges, to the state. And, again like chefs, they also to some extent create what they sell, and do not simply reproduce what has gone before. In doing so they make the law both more complex and, ideally at least, better.

LAW AND ITS FUNCTIONS

Studying the law through taking courses of formal legal education in a university, or polytechnic, is the most painless way of beginning to acquire the expert knowledge which is the stock in trade of the professional lawyer, and in any event formal legal education is required by the bodies which control the admission

of lawyers to practise. But before one sets out to join the club by signing up for such a course it is as well to think a little about what, at least in a general way, the functions of law are or seem to be. In spite of law's pervasiveness not everyone has been encouraged to think much about this, and, so far as school education is concerned, law remains a rather neglected subject.

As is the case with other social institutions the actual effects of law are still not very well understood; we do not know very clearly what differences many laws make to life, for the social sciences, which study such matters, are still not highly developed. If therefore we mean by the functions of law its practical effects, no simple answer is possible. If, on the other hand, by functions we mean the ends which law is supposed to achieve, many thinkers would go along broadly with something like the list of five principal functions which follow. It must be admitted, however, first that with law, as is the case with most social institutions, different people have different ideas as to principal ends for which law exists, or would emphasise some at the expense of others. Secondly, any statement of the functions of law in general has to be expressed, as one might expect, in a very general way. The functions of particular laws may often be set out quite precisely, and may not be controversial at all.

The principal functions of the law are, I should suggest, to be sought in the resolution of conflict, the regulation of human behaviour both to reduce conflict and to further social goals, the distribution of powers, the distribution of property and wealth, and the reconciliation of stability and change. These five general functions can now be examined in a little more detail.

THE RESOLUTION OF CONFLICT

We regularly associate law with the notion of order, as in the catch-phrase 'law and order'. Order is threatened by disputes and conflicts between individuals and groups, particularly if these degenerate into violence. Even a vegetable marrow competition will collapse if the contestants push and shove too much, or, as

they are said sometimes to do in Yorkshire, shoot at each other's marrows at night with shot guns. Law provides a formalised mechanism for resolving conflicts, employing that most typical of all legal institutions, the court.

We may dream dreams of human societies in which there are no conflicts, and therefore no need for means of resolving them. Those of the political right tend to romanticise about such utopias in the past, in the good old days of Victorian values for example, whilst those of the political left place Shangri-La in the future, when capitalism has collapsed, a sense of community is restored and everyone contributes to society according to his abilities and receives in return what he needs. The former relate their lost world to respect for law and authority, as essential to social happiness; the latter tend to view law as essentially dispensable, supposing that if the causes for conflict could only be eradicated the need for law would go. Romanticism about conflictless societies has even induced some writers to claim to have discovered actually existing societies of this benign character, as did the late Margaret Mead in her celebrated and entertaining *Growing up in Samoa*, which, when I was a student, was both obligatory reading and received truth. But, as we sadly now know, Miss Mead was taken for a ride by her Samoan informants, an occupational risk with anthropologists, summed up in the West African proverb: 'You do not have to say much to the white man to make him nod his head.' Growing up in Samoa was in fact as rough as it is in England, not the relaxed business depicted by Miss Mead. Real examples of conflictless societies are hard indeed to come by. One claimant, for which I cannot vouch, is the island community of Tristan da Cunha, one of the relics of the British Empire which nobody seems to want. The islanders are said to suppress all social tensions by eating aspirins, achieving harmony at the cost of the highest per capita consumption of salicylic acid in the world. Heaven knows what this does to the linings of their stomachs, but it may save them from courts and lawyers.

If true this story about Tristan has this moral, that courts are only one way of achieving harmony. Indeed many very varied

mechanisms for resolving conflicts have been recorded. Some Esquimaux, when matters become tense, perhaps as a result of sexual jealousy and infidelity, sing obscene songs about each other, turn and turn about, until everyone feels better and can go home or return to the seal hunt. For a conflict is resolved if it ceases to have a disruptive effect, however this is brought about. Similar practices, which transform the underlying dispute into a less damaging traditional and acceptable form, survive today; think of formalised abuse in family rows, or listen to the radio when transmitting a lively House of Commons debate, or Prime Minister's question time. It sounds like a zoo, but may be valuable for all that, for we are assured that Members of the House repair afterwards to the bars to drink together in a friendly manner.

More elaborate mechanisms for getting conflicts to go away may include the use of an agreed umpire, a mediator, or an arbitrator. The *umpire* simply regulates the way the obscene singing goes on, for example making sure that turns are taken. A *mediator* actively intervenes to seek a compromise or some agreed solution. An *arbitrator* is someone who, with the consent of the parties, actually decides the dispute. With arbitration we are close to *adjudication* and the idea of a court. Courts, which involve adjudication, differ from these other mechanisms in four important ways.

First, they have *authority* to intervene and decide what is to be done even without the joint consent of the parties. So courts can only exist in societies which recognize hierarchies of power; they cannot exist in societies which are wholly egalitarian, where nobody, outside the family, has power over anyone else. Second, they *decide* who is right and who is wrong, and what is to be done. They do not simply *suggest*, or *recommend*, or *persuade*. In so far as their authority is voluntarily accepted as legitimate, this presents no problems, but if someone refuses to knuckle under the whole system of adjudication is under threat. Hence courts only exist in societies where there are very powerful motives for submission to them, and in the modern world this means that their authority is backed by force. There must be both a general

acceptance of the idea that resort to a court is the proper way of settling disputes which cannot be settled in some other way, and coercion of those who reject the authority of the system. Third, courts are thought of as standing outside the conflict, and as deciding or adjudicating upon the dispute objectively, by reference to some standard which existed before the decision and will continue to exist after it. If the court says the plaintiff is in the right, this is because he really is, in a timeless sense, in the right, not because the judge happens to be friends with him, or thinks that from his point of view this is the best solution. This objectivity is something which helps to secure submission to the decision; it is to be submitted to because it is right. Early courts solved the problem of objectivity by channelling the decision up to an omnisicient God, who, being in possession of all the facts, knows the guilt or innocence of a person accused of crime, for example, and revealed the truth through such mechanisms as the ordeal. The accused person might have to carry a hot object, blessed by the priest, a certain number of paces; if his hand healed then this showed that God exonerated him. In civil cases the same basic technique employed the formal battle, in which God would intervene to see that right prevailed. In more modern times objectivity is sought in the idea that cases must be settled rationally, that there must be good reasons for deciding the dispute one way rather than another, reasons which will apply to all similar cases in the future. Fourth, courts as we now know them are run by professional experts, though these may be associated in some way with non-experts, as is the case with the jury.

If courts are to be recognizable institutions, distinguishable from birthday parties, or debating clubs, they have to follow settled procedures; it is these procedures which mark a court off from a lynch mob. Since it is of the essence of these court procedures that they differ from other social reactions to trouble the law becomes viewed as a distinct and separate segment of social life. Today legal procedures regulating courts, which are extremely complicated, are still of paramount importance in the practice of the law; in earlier times the law which the experts

administered consisted of virtually nothing else. For these early courts accepted whatever social rules of behaviour, standards of right and wrong, and ideas of who is entitled to what, existed in the society in which they operated. So much was taken as given. Courts simply tried to pick up the pieces when trouble broke out, by establishing and following settled *procedures* which helped to bring a dispute to the point of resolution in a tidy way.

When law is at this stage of development it is merely remedial. The law does not lay down standards of proper social behaviour; it merely provides ways of going about things when, through neglect of proper standards, things go wrong. This aspect of law survives, and even today we can look at much of our law as remedial only. Take again the example of homicide. It is surely a distortion to think that it is the law which tells us not to murder; we know that already. Instead the law sets out in detail what is to be done about it if somebody does murder. Again the law does not tell us to drive on the left of the road; the rule is traditional and conventional, and part of being British. The law does however have a lot to say about what is to be done if we drive on the right and have an accident. We may say that law of this remedial character, which concentrates upon procedure only, is engaged in merely *reinforcing* standards of behaviour which exist quite independently of it, being based upon custom or convention or ethics or religious belief. It does so by setting out a sequence of appropriate reactions to misconduct and wrongdoing. Those who murder are to be arrested, brought before a magistrates' court, committed for trial at the Crown Court, tried by a jury in accordance with the rules of criminal evidence, if convicted sentenced to imprisonment for life, given a chance to appeal, et cetera.

From merely reinforcing existing standards, it is a short step to refining them. Instead of the courts simply saying what is to happen to murderers, the experts who deal with murderers may begin to develop their own ideas as to what is to count as murder. They begin to sharpen up customary or conventional or ethical conceptions and standards; they begin to develop their own definitions of murder. In the common law system this began

when jury trial began to supersede divine and therefore infallible modes of trial, for jurymen could obviously make mistakes. The experts become nervous about leaving to the laymen the whole business of adjudication, for example not only the decision as to what the accused had done, but also whether it ought to count as murder. So they began to take over the job of adjudication, at least in part. Thus what is to count as murder becomes a matter for the experts to settle, what we call a question of law.

With this development the law takes on a new character, becoming concerned with the substance of social ordering, not merely with the processes of dispute resolution. Under the guise of merely making more precise conceptions which exist in popular consciousness quite independently of the law, such as theft or robbery, the lawyers, and the law, are now specifying standards of right and wrong behaviour, for it is what the lawyers say is theft or robbery which is, so far as courts are concerned, what matters. This leads to the development of what are called legal concepts, concepts which differ from lay concepts in sharpness and scope.

Murder is a typical example of such a legal concept. The everyday idea of a murderer is vague and centres around the notion of a deliberate, premeditating, killer. Such is the murderer of detective stories, or the murderer who, in our imagination, lurks in the woods at night. The legal concept of murder is much wider. Thus it includes a person who keeps watch whilst someone else does the killing. It even includes people who do not mean to kill anyone at all, but merely to injure other people seriously. Nor does the law require any premeditation in the sense of planning. Many killings which count as murders in the law arise out of sudden quarrels and loss of temper, often in domestic situations, without any prior planning at all. There is a sense in which some such killings are really accidental. Although the matter is currently controversial, the law has in the past even counted as murder killings which were accidental in an even stronger sense, in that the accused had no intention even to injure. This used to be the law when death accidentally occurred in the course of a robbery, or a rape,

or an illegal abortion; it was automatically murder. Even very recently the law was equally harsh on those who took serious risks in illegitimate enterprises; they could be convicted of murder even though they never meant to hurt anyone at all. So lawyers' murder, and layman's murder, were not the same thing at all, though they overlapped.

The process which creates legal concepts, and distinct lawyers' ideas of right and wrong, and of who is entitled to what, leads to a separation between legal standards and other standards; we can lump together these other standards and call them popular moral standards. Matters of right and wrong, of who is entitled to what, deal with the substance of social order, and legal standards of this character are called standards of ***substantive*** law, as opposed to standards of procedure only. The experts who run the courts, the lawyers, when they justify what they do, do so by reference to a body of ideas which they have themselves developed and elaborated, and which comes to be seen as distinct from popular moral standards. It is this distinct body of ideas which is what lawyers mean by the law. The significance and importance of these ideas depends, in the first instance, not upon their being accepted by society at large, but upon their being accepted by the experts.

We often think of law as a body of rules, rather like school rules, telling us all, as citizens, how to behave, and what will happen if we do not. But this is not the way lawyers primarily think of their law. For lawyers the function of law is to tell *them* how to behave in settling what people's rights and duties and obligations and liabilities are. The elaborate body of general principles, the more detailed rules and the exceptions to them, the definitions of terms and significant distinctions, the practices and conceptions which to lawyers constitute the law, are there to provide lawyers with ways of analysing problems, and ways of rationally justifying decisions as to what is to be done by courts about them. Law is for lawyers.

Courts, where these special ideas develop, are like other social institutions in being much influenced by tradition, by what has been done in the past, by the way matters have, as it is said, always

been done. So one way of claiming objectivity in the law has always been to say that the decisions taken are in line with how things have always been. The alternative has been to claim, more simply, that the decision in question is rational in itself. The practice of justification in a world which combines traditional procedures (how we go about things) and traditional or supposedly intrinsically rational rules of decision (how disputes should be analysed and correctly resolved) creates the artificial world of legal categories, into which disputes and quarrels may be translated and, so translated, authoritatively determined.

THE DIRECT REGULATION OF BEHAVIOUR BY LAW

Once the lawyers get into the game of refining existing ideas of right and wrong, and entitlement, it is a further short step, though one of critical importance, to using the coercive power of courts, and the respect which may exist for them as objective deciders, to initiate deliberate change in the standards of behaviour, or rules of entitlement, existing in society. This may involve either changing old rules, or introducing quite new ones. An example of the latter would be a law introducing an income tax. This step gives rise to legislation, deliberate law making, and to legislatures, bodies with admitted power to make laws, whose force as law is conceived of as depending not on the justifications which are offered for it, but upon the authority of the source from which it comes, often called the will of the legislature. Law ceases to be something which just exists, it becomes something which can be made. Legislatures everywhere develop out of courts, and even today the British Parliament, our principal legislature, is properly called The High Court of Parliament. This name, which has persisted, reflects the original chaaracter of the institution as an adjudicative body. The evolution of law making is assisted by the very blurred and indistinct line which exists between the work of a court in saying what the law, as something existing objectively, is, and, by authoritatively determining what it is, actually creating law. With avowed law

making comes the institutional division between courts, which continue to claim that they merely say what the law, objectively, is, and law-making bodies which do not make this claim.

Most human societies, at most stages of their history, have had little explicit and avowed law making. What law making there has been may have been viewed as merely correcting defects in the working of the law, rather than changing it. But today legal machinery is employed on a massive scale to govern society by the deliberate making of new laws, which are then enforced by officials working, ultimately, through the courts. So courts have come to be the servants of legislation, and law, once viewed as a means for resolving trouble in a society whose broad structures were given and part of the natural order of things, comes to be viewed as a mechanism for changing and improving the world.

Modern government of course employs other weapons as well as law – exhortation, the manipulation of public opinion by press releases, leaked information, advertisements such as those used in the campaign to restrict the spread of Aids, and what the Cabinet Secretary has called the 'economical use of the truth', not to mention occasional bribery and bullying. But its principal avowed mechanism is the law. So the rise in the scope of government has gone hand in hand with a massive rise in law making. With this too comes a new conception of law as an instrument for change, for reform, for improvement, for producing a different sort of society. Objects currently pursued through the mechanism of the law include the reduction in unemployment, the improvement of health, the happiness of animals, the encouragement of scientific research, the reduction in the frequency of erotic thoughts (called by lawyers libidinous thoughts), the preservation of fish stocks, and in general what is called the regulation of the economy. Law has come a long way from its modest beginnings as a means of keeping the peace.

LAW AND THE DISTRIBUTION OF POWER

Courts, as we have seen, entail an unequal distribution of power in society. The authority of a court consists in its superiority over the litigants. If you go to court you can see this inequality dramatized and symbolised by wigs and gowns, and peculiar architectural levels, and Royal Arms, and an amazing amount of deferential behaviour, bowing and scraping and standing up and sitting down. It may be that all this symbolism helps to generate, through what is called the majesty of the law, submission to the system.

Early societies, such as that in which the common law originated, as well as providing for the administration of justice through courts also organized war and taxation, and these divisions of government again involved hierarchies of power, with generals to command armies, and tax collectors to bring in the money. Today, with the extension of government, a host of officials possess special powers denied to the rest of us. Think of policemen and policewomen, chief constables, building inspectors, ministers of the Crown, customs officers. Officials only are officials because they possess special powers conferred by law. Legal rules specify, with a greater or less degree of precision, who they are and what these powers are. In this way the law prescribes the structures of authority through which government, as we know it, is carried on.

Here as elsewhere in modern society there is much specialization of function. Instead of everyone in government being a jack of all trades there are ambassadors and health officers and coroners, all with their own role and set of powers, and, often, duties too. This makes possible another feature of the system. The inequalities of power only apply to part of the official's life, the official part. The British Ambassador in Paris is my superior when it comes to issuing me with a replacement passport, but if he tries punching me on the nose when we meet on holiday in Cornwall he will find that for that purpose we remain equals. This is what is meant by the rather misleading expression

'equality before the law'. The fact of the matter is that people are not equal before the law, and if they were we would be living in a state of anarchy, and not under government by law at all. What is meant is first that we think of unequal powers as exceptional departures from a natural state of equality, and, second, that there is no class of persons who are in every aspect of their lives, or even in most, specially privileged, so as to be generally above the law. Even to this there are curious exceptions. The Queen herself is, as things stand, above the law; that is why she pays no taxes. And foreign diplomats, under what is called diplomatic immunity, are too. One of the problems this causes is that diplomats from some countries pay little attention to parking regulations. But being immune from the law does not make them immune from the Denver Boot, which is enthusiastically affixed to their vehicles by traffic wardens so as to bring home to them that law and reality are two different worlds.

Not all powers conferred by law are governmental. Parents have power over their children, property owners over their property, and by agreement and collaboration, which lawyers call *contract*, private citizens can establish little commonwealths – golfing associations for recreation, political pressure groups like the Campaign for Nuclear Disarmament, philanthropic societies dedicated to the welfare of children such as the National Society for the Prevention of Cruelty to Children, frivolous organizations like the Permissive Society – each with its power structure of presidents and chairpersons and treasurers and committees. The law reinforces these relationships of power. Thus parental power is protected by the punishment of kidnappers, property owners by the restraint of trespassers, club structures by the incarceration of treasurers who run off with the funds. The law also sets limits to its involvement; hang gliding is one thing, murder incorporated quite another. Relationships of power are also involved in employment contracts, and here in modern times there has been much legislation modifying the power relationships which would exist if purely market forces were allowed to operate.

THE DISTRIBUTION OF WEALTH AND ENTITLEMENTS

Closely associated with the distribution of power is the distribution of wealth, that is to say allocating things which people want and value, such as houses and cars and pet dogs and jobs and copyright in video recordings and holidays in the sun. One principal body of law engaged in this business is the law of property. This provides rules which can be applied to determine what is mine and what is thine, rules determining what sorts of things can be mine or thine (no slaves are allowed today though they once were), rules saying how things become mine or thine (if you hit a pheasant on a motorway can you pick it up and cook it?), and rules as to how things, once mine, become thine (for example by being left to you in a will). The law does not simply allocate forms of wealth, such as paintings by Pablo Picasso, which could exist and be physically possessed and defended and used even without law. It also seems to make certain forms of wealth possible which could hardly exist without law. This is particularly striking in the case of what is called intangible property, such as copyright in a movie. Copyright only has a value, so that it can be sold, because the law protects it. It is hard to see how it could be defended without the organized protection of the law. A strong and vigilant person could keep a tight grip upon something tangible and keep others off it, but it is hard to see how anyone could protect his copyright by physical force; he would need to be everywhere at once. In modern society much wealth consists in intangible property, as the affluence of pop stars shows; it is by selling copyright that they acquire Rolls-Royces.

The rules of property law are extremely complicated and need to be, because of the complexity of life, as may be illustrated by the following problem upon which I was once consulted.

A shooting club had by contract acquired the right to shoot pheasants on some farmland adjacent to the home of a schoolteacher, who strongly objected to blood sports. One of the shooters fired at a wild flying pheasant which was at that

moment above the farmland but, at the moment of firing, altered course to head towards the schoolteacher's property; the hapless bird was hit and fell into the schoolteacher's garden, but the precise moment of its decease was not known; it may have died in flight or perhaps on striking the ground, or even languished for some moments thereafter. The shooter demanded the right to collect 'his bird' which had, through its own perversity, landed in the garden but had, he claimed, been killed on the farmland. The schoolmaster refused permission, saying the bird was either his, or belonged to nature, and expressed himself in no uncertain terms on the subject of blood sports. The shooter ignored him, pushed him away, entered the property and removed the bird, offering with mock humility to pay for any damage he might have caused. The schoolmaster sued him for trespass, and reported him to the police for theft, poaching and assault. Tempers ran high on both sides. The law has to have some sort of answer to such a problem, and one that is consistent with other answers it gives: devising one is inherently tricky and complex.

Yet in spite of the complexity both of the issues and the law the practices associated with property ownership are so well understood and established, and the allocations of property so generally respected, that the need to consult experts occurs remarkably rarely. Lawyers only feature prominently in the transfer of landed property, the making of wills and in the more important transactions involving companies. As for the courts they are involved in property disputes very rarely indeed. Given the law, most disputes are settled by negotiation, in the knowledge that a solution by litigation is always a possible last resort.

The law of property is not the only branch of the law which deals with the allocation of wealth. The law of contract regulates and polices transactions in which it is agreed that property shall be exchanged, as in a sale. Indeed many forms of wealth consist in the benefit of a contract. The whole institution of credit – and remember that it is credit that is used to pay for much of what we acquire, from refrigerators to houses – depends upon contractual

obligations. No doubt in a world peopled only by saints whose word was their bond we could have credit without law, but in the real world which contains villains too, the legal coercion of the disreputable underlies the faith we put in the system.

Property rights and contractual rights are obviously forms of wealth; so too are rights under trusts. So the branches of the law which deal with these rights are plainly concerned in the business of wealth allocation, and indirectly the allocation of power, for the ownership of property brings power with it. It is not quite so obvious that the law, whenever it restricts our freedom to do as we wish, is in a sense determining the distribution of wealth. For example, if the law forbids me to sell heroin, it prevents me from selling my services as a drug pedlar, at which I may be very good, and condemns me to the more modestly remunerated life of a university teacher. Again if you live in an old house which has been officially listed as a Grade I historic building, the law severely restricts what alterations you may carry out; if you want to add a new floor you may be prevented from doing so. In this the law is taking away from you something you value, and giving the public, or your neighbours, something which they may value, the pleasure of looking at a beautiful building, or preserving for future generations the chance of living in one. They have not paid for this. Of course the law may actually enhance the value of the property; either way it has economic effects. Again if a law is passed allowing an airline to fly low over my home and abolishing my previous right to sue the airline for nuisance, the value of my house drops and the airline gains: its costs of operation fall. So there has been a transfer of wealth, a change in previously existing entitlements. Whether this is just or desirable depends upon how you view the distribution of wealth before the transfer was made, and what force you give to the reasons for the transfer. Problems of this sort are often talked about in terms of a conflict between individual interest and the public interest, but really the conflict is simply between individuals. There is no such animal as 'the public'.

THE RECONCILIATION OF STABILITY AND CHANGE

One of the most paradoxical features of law is that it operates both as a means of preserving the status quo and as a means of introducing deliberate change in our social arrangements.

Like so many features of the world we live in, such as our roads, our homes, our religious beliefs and our language, law is essentially a tradition, that is to say something which has come down to us from the past. Some features of the law derive from the very distant past indeed. In English law, for example, the terms which are in use for talking about property rights in land are medieval; most of them would be perfectly intelligible to a fifteenth-century lawyer. So lawyers when they are being technical do not talk of *landowners*, but of *tenants in fee simple absolute in possession*, of *fees tail* and even more mysterious entities such as *possibilities of reverter*. There is even a poem about some of them:

> Fee simple, and the shifting fees,
> And all the fees in tail,
> Are nothing when compared to thee,
> Thou best of fees, female.

Again much of the present structure and language of contract law is even older than that, and was derived by a roundabout route from the writings of lawyers in the Roman Empire; of course there are other branches of the law, for example welfare law, which have a very much shorter intellectual history. The traditional character of the law does not mean that the law is necessarily inconveniently archaic, any more than the English language suffers from its inheritance from the past, though it may happen in the law that old rules survive when the point of them has long gone. This comes about when lawyers become victims and not masters of their tradition. One of the skills of a great judge is an ability to make the new wine come out of the old bottles, ideally without people being too aware of what is going on.

Although today there is much talk of governments changing the law, this does not affect the traditional character of law. For the vast bulk of the law soldiers on under successive governments, little altered; there is neither the time, the inclination, nor the need to change it. Furthermore there is usually some group which does well out of the law as it is, and seeks to maintain its advantageous position. Law then is one of the mechanisms which contribute to the rule of the past over the present. So it is that I own my house now, today, because I bought it under a mortgage *in the past*, and the relevant law has remained the same. It would be most inconvenient if this were not the case. This stabilising influence of the law to some degree benefits everyone; imagine if the rule of the road kept changing each week. But it also has its dark side. For example, in a society in which wealth is unevenly distributed, and this is true of all modern societies, whatever the system of government under which they operate, the law's protection of property rights obviously in a sense favours the haves over the have nots. Even the have nots will own some property, and benefit from its protection, and the less property you own the more critically important its protection becomes. Elaborate theories exist which claim that in the long term everyone benefits from stable property rights – for example, allowing people to keep what they have earned may provide incentives to individuals to work hard and create more wealth, from which the whole society benefits in the end. Not everyone finds these theories very convincing; one problem is that the protection of property rights always has to start from some initial distribution, and its effects are conditioned by whatever this was. As a bitter Texan farmer is said to have remarked recently, 'You can make a small fortune in farming, so long as you start with a large one.'

In so far as law protects the status quo its operators, the lawyers, represent a conservative force in society. But the law does and has to change, and in the process rights and entitlements and power are reallocated in society. Avowed change by legislation, and the more gradual and largely unavowed change by the development of the law by the courts, are both

mechanisms for peaceable and regular change in response either to movements in opinion or political activity. Changing the law through mechanisms provided by the law is an alternative to the *coup d'état*, or to thoroughgoing revolution, and also an alternative to situations in which, although there is no revolution, social harmony breaks down. So not only courts but law itself is a mechanism for the resolution of conflicts within society. Examples of very important legal changes in Britain include the passing of the 1832 Reform Act, which, arguably, headed off the threat of violent revolution, or the introduction of the modern Welfare State by the Labour government of 1945. Change of a dramatic nature by court decision is better illustrated by American history, for in America the system of government both inhibits legislative change and gives a greater role to the courts. A striking example is the decision of the US Supreme Court in the case of *Brown* v. *The Board of Education* in 1954, which ended racially segregated public education, and, along with other factors, appears to have dramatically improved the lot of black Americans in the southern states, though its effect upon the educational system was not entirely as expected. If societies are to prosper, stability and change have to be reconciled, and one function of the law is to effect this reconciliation by channelling change through peaceable procedures.

LAW, VIOLENCE AND COERCION

If these, or something like them, are the principal functions of law a word needs to be said about its methods. As we have seen and can see every day of the week, citizens in the main co-operate with the law, albeit sometimes after a little prompting, such as the final demand from the Electricity Board. Even those who get into trouble with the law almost all co-operate at some point or other; they may come quietly when arrested, or confess all, they go peacefully to prison or even, in the awful days of capital punishment, to the scaffold. Albert Pierrepoint, our last

hangman, records that he only recalled one hanging at which the victim, a German spy, resisted violently. Many historical examples exist of condemned individuals who, in their last speech, extolled the justice of their sentence, and an early seventeenth-century example exists of an individual who, when his hand was cut off, waved the bloody stump, fresh from the boiling tar, in the air crying, 'God Save the Queen.' No doubt one reason for this is that people do accept the idea that they ought, morally, to obey the law and conform to its demands, even against their own immediate self-interest. There are no doubt other reasons. A legal system is in deep trouble if this voluntary acceptance begins to fail. One way the law fosters it is by presenting itself and its authority as legitimate, its decisions as fair and just, its rules and doctrines as wise, its judges as honourable, unbiased and humane, if stern. Hence it is that a great deal of legal activity involves justification. The law also must present itself as embodying irresistible power, so that resistance to it is pointless. Hence the general rule of the police – never get into a fight unless you are sure to win it. There is even a grim legal maxim followed in the old court of Chancery expressing this idea: 'Equity does nothing in vain.'

But there will always be individuals who are not prepared to conform, whether it is because they are bad, or bloody minded, or selfish, or perhaps because they genuinely believe that the system lacks moral authority, or that some particular law or legal decision does. All legal systems whatsoever make provision for this problem by the use of coercive force or the threat of it. Only occasionally do we see this in operation, for example during the miners' strike when films of police charges filled the television screens. But the possibility is always there.

Coercive force is not the same thing as punishment, though some punishments have involved force, for example flogging. Taking this disagreeable example, the *punishment* was the flogging; the *coercive force* is the violence used to compel the wretched individual to be flogged. The abolition of violent punishments, such as flogging, branding, amputation and hanging, has not in any way abolished the use of coercive force to

secure submission to the law. Try persistently playing a trombone in the Court of Appeal (Criminal Division) and see what happens to you after the initial courteous request to desist has failed.

Of course it is not the law, some bloodless abstraction, which will drag you off; officials exist whose job it is to do this. What the law does is to establish rules which differentiate between legitimate violence (warders dragging a convicted bank robber to the Black Maria) and illegitimate violence (the robber fighting back). It does this by banning all violence and then making exceptions, here an exception in favour of the warders, who cannot be sued or prosecuted for what they do. This is sometimes put by saying that the law, or the state, *monopolises* the use of violence. But this is a mistake; much violence occurs in boxing or rugby football quite lawfully. What it monopolises is the decision as to when violence is allowed, and its decision is self-interested. The law is allowed to use violence but others, as a general rule, are not, and you are never allowed to use violence deliberately against the law.

Many students find the idea that the law is itself backed by force or threats of force, applied most obviously by the police, a disagreeable idea; they feel that law ought to be in its very nature at odds with violence, and this feeling may explain the tendency to play down this embarrassing fact about the law. The problems associated with the policing of inner city areas, and the disturbances which have occurred in some of them, have recently highlighted both the law's ultimate dependence upon coercion and the unhappy results which follow when policing by consent appears to have broken down, and the use of coercive force becomes more regular. But isolated uses of coercive force, which occur all over the country every day of the week, do not in the same way obtrude upon our attention.