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LAW AND THE DEMOCRATIC STATE*

RT. HON. LORD RADCLIFFE, G.B.E.†

WE HAVE BEEN ACCUSTOMED to thinking of Law as an institution which justifies itself by its evident connection with what is wise, what is equitable, what is fair — in short, with all that range of epithet that seems to make it consonant with the dignity of a decent man that he should be ready to obey the Law and to adjust his conduct according to its requirements. And this readiness is looked for from him, even to his own detriment, even without the eye of authority or of his neighbours upon him. It is that belief that has made Law, with all its imperfections, a potent bond of society. With all its imperfections, it has been thought to represent certain principles of conduct, of human relationship, which have a permanent validity and which do not admit of alteration or reversal by any process of law-making or “law-giving,” as it is quaintly called. If one could not hold that belief, it would be impossible, for instance, to regard the study of Law as a study of one of the great Humanities — a feat of memory, an amusing intellectual exercise, a study of social phenomena: all that, if you please, as well as useful vocational training — but not an initiation into one of the great Humanities, as our ancestors thought it to be. The Elizabethans, as you know, regarded a young man’s admission to an Inn of Court in London as equivalent to the undertaking of a University education. The comparison is misleading, unless one allows for the limits of University education in the sixteenth century and remembers that an Inn of Court could serve

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as a school of manners as well as a school in the stricter sense; but at least it serves to show that modern English society has at its base the idea that a study of Law is worthy to serve as an introduction to civilised life.

I spoke first of the study of Law, since I am speaking to members of the Faculty of Law in the University of Birmingham. But Law must justify itself, too, and justify itself afresh to each new generation, as the bond of a society of free men. Unless they can accept it willingly and see it — not in every detail, but in general aspects — as informed by a spirit that is worthy of their respect, that carries indeed some sense of a majesty entitled to their reverence, the bond of society is most disastrously loosened. It is very hard to see any relation between the petty and often dreary details that make up Law in practice and any elevated conception of duty to which men's hearts can respond. But it is not novel to sigh: "To discern the law of God and the law of reason from the law positive is very hard." In many cases it can only be a question of Yes or No, not a question of right or wrong. Yet it is the vital task of anyone who deals with Law, judge or legislator, to relate these very details to some system of ideas that is of greater value than themselves.

I do not think that contemporary society is sufficiently alive to the danger of putting Law upon the assembly line. Respect for Law for its own sake is a slow growth. It does not come naturally. It has arisen out of many centuries of customs and beliefs and ideas which have gradually deposited the legal frame as something upon which the flesh of society can fittingly hang itself. The vice of our modern democratic societies is that they trade upon the long estab-

lished reputation of Law while they often market what are but shoddy goods.

Another Name for Statute Law Than "Law" Itself?

This is not a subject which is helped by metaphors. The point can be put in a question: have we not come to a time when we must find another name for statute law than Law itself? Para-law, perhaps, or even sub-law? Of course I am forcing the issue, since many of the great landmarks of our social history have been placed by statute law and could have been placed by no other means. But I am exaggerating deliberately, in order to suggest to you two matters for your consideration. One is that we may need to review the usual line of division which puts on one side orders and regulations and, if you please, by-laws, and on the other Acts of Parliament and "judges' law." The former are commonly felt to be entitled to a lower status of authority despite the fact that both have to be obeyed. The formal ground of distinction is that the maker of orders and regulations enjoys a delegated authority within a prescribed field, whereas the legislative body itself possesses independent authority and there are no limits to its field. Incidentally, in countries which enjoy the bracing restraints of a written constitution this contrast loses its force. It is interesting to speculate whether democracies organised on this pattern are not likely to preserve a more vivid sense of the status and authority of Law than countries such as our own in which the principles of Rousseau seem at last to have found a home. But, however that may be, I want to stress the very great difference in psychological impact between law which is currently made before your eyes by people whom you know, as it were —

orders in other words — and Law which is declared and interpreted as something established in the very bones of your society. For the present purpose the comparative excellence of the two sources of law is irrelevant. It is the respective methods of creation that matters. Indeed we may assume as given that the intended purpose of statute law is to correct or supplement the Common Law when it is inadequate or has gone astray.

The Effect of Whiggism

And the second matter for consideration is this. So far as this country goes, it is only within, say, the last three generations that it would not have seemed absurdly provocative to dwell upon the kind of theme that I am illustrating. The Whig theory of the relationship of Parliament to the general civil law of the land established itself so firmly in men's minds that it held its place some long while after the Whigs themselves had ceased to be a dominant force in political life — unless you think that Whiggism must always be a force in political life, but that it appears from time to time under other titles and with a different vocabulary. What do I mean by Whiggism? Probably not what a historian means. I mean a general way of thinking which, accepting the obvious necessity that there should be a supreme authority to make new laws for society from time to time and that the authority should be kept reasonably representative, holds that there should be a strong preference for a society in which each man is left so far as possible "to work out his own salvation." I have borrowed the last phrase, I suppose, from Methodism. It is historically incorrect. But I think that our own times may have to face the question whether such a phrase

does not more truly express what best there is in the Whig theory than the principles with which it was more currently associated, that trade will not prosper under Government regulation, that power corrupts, that the institution of property is the foundation of civil society, etc. It is enough for the moment to point out that, so long as any recognisable theory persisted that gave common law and statute law a working relation with each other, there was nothing incongruous in using the one word Law to comprehend the corpus that consisted of the two. Each existed to supplement the other. Indeed, if you took a very ancient branch of the Law, such as the law of real property, a lawyer might well have to pause and think twice before he remembered whether some particular rule was laid down by Act of Parliament or was a native growth of the common law. The history of judicial interpretation of statutes serviceably illustrates the point. Even as late as the eighteenth century it was still possible to question whether there were not some rules of the common law which no Act of Parliament could overrule. This speculation may seem vain to us, but it would not have surprised a mediaeval lawyer. Putting it aside, the Law Courts followed two main lines of approach. One was to give a decidedly cool reception to any statutory provision which appeared to interfere with existing rights or to impose new liabilities — the so-called "strict" method of construction. The other was to rationalise freely for the sake of "harmonising" the provisions of a statute; a process which not infrequently resulted in an Act of Parliament being made to say, not so much what its makers had intended it to say, as what the judges of the day thought that a properly conceived Act

ought to have said. Both methods of interpretation may have been carried too far, though they did good as well as harm: but at least they were an honest recognition of the fact that statute law and common law ought each to be regarded as sharing the same nature with the other. It is only in quite recent times that the vitality of the judicial contribution to statute law seems to have declined into a patient exposition of the apparent. One can hardly be surprised, considering the density of the jungle which one is asked to treat as a wood. I noted that last year the Judicial Committee of the Privy Council was still able to quote:

It is in the last degree improbable that the legislature would overthrow fundamental principles "infringe rights" or depart from the general system of law without expressing its intention with irresistible clearness.¹

I am glad that this principle can still be treated as a reality in the application of statutes within the Imperial system, but it is, all the same, a large claim on the part of the courts to require a sovereign legislature to state explicitly what it may not even be concerned to understand.

Have we not then come near to a time when Law means little more to anyone than the vast and complicated mass of things that he is compelled to do or not to do by virtue of some Act of Parliament or some order or regulation which an Act of Parliament has wished upon him? And, if so, can we expect people to care greatly what the Law does or does not require of them, except so far as for practical reasons they have to find out, to their peril or to their advantage? And can we expect people to give any willing adherence to such a system of law, except again for purely prac-

tical reasons: which, in this case, means in order to keep out of trouble? I wish that our leaders would think more attentively about these things before they categorise our democratic civilisations so easily as "the Free World." I know that it is held to make a vital difference that our system is imposed upon us by a representative law-making body which is liable to be changed from time to time by the process of popular election. But we may find we have comforted ourselves too long with the enormous simplifications that are involved in this defence. When the control of the law-making body must be entirely in the hands of one of two political parties, each of which, for the sake of survival, is forced to require an orthodoxy of political conduct and opinion from all its members; and when, in order to be elected at all, each party must devise for the electorate a programme of action calculated to appeal to the material interests of the greater number; it becomes increasingly unlikely that any general belief will survive to teach us that the system of law by which we are governed bears a recognisable relation to those ideas of equity and wisdom which most men would wish to see imprinted on the fabric of society. This gloomy conclusion does not bear upon the policies of any one party. It is a criticism of a social theory to which the system itself subscribes.

A Lost Clue

Something has gone wrong. Some clue has been lost. I do not say that because I quarrel with the content of our laws today or doubt that they represent a great improvement on the past. But what does seem to me to have become pretty plain is that the popular democracies cannot go on for long in the way that they have been doing,

¹ MAXWELL, INTERPRETATION OF STATUTES 81 (10th ed. 1875).

in which legislation is not only regarded as being an expression of the popular will but is regarded as needing no other justification than that it is such an expression, and at the same time retain a system of law which enjoys the prestige and the intellectual content of what stood for Law in the older forms of their society. We can put it this way: they will need their police forces and their magistrates, but they can hardly find much place for judges.

I speak as if that were necessarily a sign of deterioration. Perhaps, however, I am influenced by professional feeling which leads me to interpret as decay what is nothing but a natural change. Indeed, I think that a lot of people would disagree with my diagnosis and would say that it is inherently a better state of things when the Law can constantly be moulded and remoulded at short notice to accord with contemporary social needs and social feeling. I think that I should myself agree with much of that if I understood what it meant or where it was to take us. In the end I believe that it comes down to the old philosophical question which has divided Europe in modern times: is Law to be thought of as an expression of the general will of society, the better law the more flexibly it changes in response to that changing will; or may we, however imperfectly, try to relate it to some other, more constant, less mundane, authority? Many modern societies have gone very far in pursuit of the first alternative, often for the best motives and often in such a way as to produce the most benevolent results. And often, fortunately for human nature, either alternative has recommended the same practical course of action. But it is just that mundane view of Law which has effectively weakened the growth that we ought to have seen of the authority of

International Law. For it is in the nature of things that that Law can only bind those who will allow it an origin that shares something of the divine. And, *pace* Rousseau, expressions of the general will of a single organised society make a deity so homely that there are few will do it reverence. Lawyers at any rate are condemned by the nature of their study to take a view one way or the other, and to make a choice between the two alternatives. Since I think that the first is in truth an impious view, since I believe that it sets up the image of man in place of the image of God, I would like to urge the second upon you as your choice: and to make some suggestions as to the consequences that should follow.

Law — A Depreciated Currency

Certainly it is a general feeling today; not merely a misgiving among lawyers, that Law as it is in our present time is not quite the kind of thing that we want to regard as Law; a feeling that the currency has somehow been depreciated. It expresses itself in various forms: complaints that there is a great deal too much law, that it is expressed in incomprehensible forms, that the Parliamentary system for the production of statutes is highly defective, that the ordinary citizen's rights are at the mercy of an insensitive bureaucracy of civil servants. Every one of these complaints could be made good to some extent, but I do not pause to enlarge upon what is already familiar, as familiar as the explanations why these things must be so: the increasing complexity of social organisation, the necessity of social and economic planning for a society constituted as ours is, the sheer pressure of our circumstances. Just as town life has always needed more regulation by authority than life in the country, so, we

may say, the whole of England is today a species of town, or, to be quite up to date, a form of conurbanisation. And there is a great deal of truth in this too. But in a sense all of this, both complaint and explanation, is a description of symptoms and is not an analysis of causes. I think that the cause itself must be stated in very general terms. It is that the kind of law that you get in a country depends upon the kind of theory of society that seems to be at work in most people's minds, and the ruling theory has undergone a very great change in this country without any general recognition of the necessary consequences for what we used to describe with some pride as the "rule of law."

Do not let us therefore waste our energies by picking the wrong enemy. You would think, from the way that many people have talked, that the future of Law in this country depended upon the case of *Crichel Down*.² Now I think that *Crichel Down* was a diversionary skirmish indeed, but certainly nothing like a major engagement. It illustrated in rather dramatic form a truth which hardly requires much drama to illuminate it — that the remote exercise of authority has a tendency to weaken the sense of personal responsibility and that, in consequence, individual rights and claims are apt to get steam-rolled in the pursuit of a general policy. Anyone who has held high office in a large administrative organisation would confirm the difficulty of avoiding this tendency in himself, if indeed anyone does wholly avoid it. But these are facts of human nature. When they have

been stated and allowed for, we are still going to have government and bureaucracy and administration, because we must, and the "rule of law" is not vindicated in any substantial sense by the discovery that from time to time somebody in a large office has not been as careful as he should have been of individual rights. There is a dangerous strain of escapism in all the agitation about *Crichel Down* and the sins of bureaucracy. It may turn out that there are much greater sins at large among legislators and lawyers.

Watchdogs Against Encroachments?

Perhaps there is some instruction to be got from asking what is the origin of the belief so widespread among lawyers that they are the watchdogs of the private citizen against encroachments of the Executive. I do not want to asperse its utility: better be guardian for some purpose than none. But I think that it must originate in a state of society very different from that which is established today. I take it to be derived by historical descent from the seventeenth century and the Parliamentary struggle against Charles I. Each of us is a little Pym. And it is very true that the core of Parliamentary opposition to Stuart autocracy was a legal opposition, an opposition of lawyers based on law. It does not matter for the present purpose that, according to some recent historians, their law itself may have been somewhat of the subjective order and those ancient liberties of the subject which the Parliamentary lawyers fought to vindicate were neither as ancient nor quite as much liberties as they would have had the public believe. At any rate, they were heroes and their principles and beliefs did in effect triumph with the Revolutionary Settlement of 1688-89. The terms of that Settlement were the work of Lord Somers,

² Public inquiry ordered by the Minister of Agriculture into the disposal of land at *Crichel Down*, presented by the Minister of Agriculture and Fisheries to Parliament by Command of Her Majesty, Cmd. 9176 (June 1954).

himself a lawyer. The popular interpretation of what it stood for was that the rights and liberties of the individual citizen were guaranteed from arbitrary interference at the instance of Government or State, and that the power of making or dispensing with laws was safe from abuse, because it was henceforth to be safely at home in King and Parliament. There were even some who thought — mistakenly — that the new Constitution achieved a separation of the legislative, executive and judicial powers. Hence the shape of the Constitution of the United States. But by the beginning of the nineteenth century the experiences of George III and George IV must have made it clear that there was in fact no Separation of Powers, and that the only means by which the Crown could pursue a policy of its own, should it desire to do so, was by working through a dominant party in Parliament, not in spite of Parliament. By now the question has ceased to be anything but academic. The historic possibility of a clash between Executive and Parliament has become an impossibility. There is nothing left but the political party in control of the House of Commons for the time being and having at its disposal by virtue of the control an unrestricted legislative power. In the exercise of that power it can override all individual rights and liberties, personal or proprietary, and it can make and dispense with laws. No wonder that the old respect for Law has begun to wear a little thin when we can almost hear the clatter of the printing presses that make and unmake it as we watch.

If, however, we look to what lay at the heart of the seventeenth-century struggle between Crown and Parliament, it appears that what was at issue was not so much the constitutional place of the Executive in the

government of the country as a contest between two rival theories as to the nature of society and of Government in relation to society. There was nothing mean in the conceptions of Charles and Laud and Strafford, each of whom was to die on the scaffold for his form of belief — in many respects their ideas were more elevated than those of their Parliamentary opponents, less selfish and partisan. It is not a mean thing to say and think that Government is a divine responsibility. But what they claimed, and what was denied to them, was that there was no Law that could stand against the decision of the sovereign power — the historic claim of every tyranny, however benevolent. “Kings, being absolute rulers, have naturally full and free liberty to dispose of all property whether in the hands of clergy or of the laity.” That is Louis XIV speaking, a classic exponent of autocratic theory. But does the current interpretation of the rights and duties of the sovereign party in the House of Commons lead to any very different conclusion? Yet it was because that theory of Government was decisively and, as we thought, finally rejected, that it was possible to speak of liberties of the subject, of the rule of law, and to regard a detached and impartial system of law as one of the cherished institutions of the country. It may have been much less than that in the past, but the question is whether it ever can be as much as that in the future.

To Choose While the Choice Remains

Ultimately it becomes a question of faith, and the essential thing is that, if we are to choose, we should choose with our eyes open and before things have gone so far that there is no longer any choice. Before I

end, I would like to mention one or two considerations which I believe that history has shown to be the recurrent issues that must be faced. I am speaking only disconnectedly.

First, is Law made for men or men for Law? If you are clear in your mind that it is better for a man's moral nature that he should do the right thing, of his own choice and not under compulsion of others, you will realise that every additional legal compulsion, however "right," reduces his field of choice and impairs his true development. And you will be chary of accepting the claim that a thing is so "right" in itself that men must be made to do it for its own sake. For that is to give a greater value to the abstraction than to the individual persons involved in it. When I was young and read in John Stuart Mill, I think, that it was a positive injury to a man to deprive him of the possibility of free choice and therefore of moral action, I read it with a smile of pleasure at a good debating point, while wondering at the odd ideas that philosophers think up. Now I have come to believe that it is a profoundly true observation, the truth of which is painfully visible in some aspects of contemporary society. Yet how much of our legislation is ever purged by this test? It has been well said that Law is made for individual men and women and not for things, whether it be things of property or those more beguiling general substantives which cloak the realities of human beings. None of these things matter in the last resort except as they serve to retard or to forward the development of individual persons.

Secondly, autocrats who regard themselves as interpreters of the divine will, and democratic legislative chambers who regard themselves as expressing the "general will"

or the "will of the people," are notoriously careless of means in the light of ends and of individual rights in the light of the general advantage. But an English lawyer is trained to recognize that means may be as important to the cause of justice as ends; indeed that, in a sense, there can be no just ends where just means have not been employed. It is an impiety to think that the ends of human society are finite or that they can be finally assessed in terms of human welfare. I think, therefore, that lawyers have something of importance to say to society, not something that is merely professional or technical, when they say that men must not be vain enough to think that just ends can be arrived at by any process that is a denial of just means. But in saying that, lawyers sometimes risk a misunderstanding. Society is not going to be saved by importing the forms and rules of judicial procedure into places where they do not naturally belong. On the other hand, its ways may be sweetened by a more lively recollection that there are certain rules of dealing between man and man, rules of fair conduct and good breeding, which are just as valid for the powers of Government as they are for the court of law or ordinary private life; and by the further recollection that courts of law have a long and accumulating experience in working out and giving shape to those rules.

The Relation of Institutions to the State

Lastly, Law must have a theory of the relation of institutions to the State. Put it this way: do they exist by sufferance, claiming what is merely a provisional and subordinate loyalty from their members, or is their life and authority full and independent within their own field? Certainly, the English tradition has rested on the belief that

in society a man has many loyalties and many masters, and that the richness of social life depends on a just recognition of these varied claims — school, church, university, neighbourhood, industrial association, voluntary association of every kind and for every purpose. Of course, this sort of social federalism, if I may so call it, does not make for the most efficient government. It is not “streamlined” in the sense of those who think that they can safely apply a conception of mechanical quality to the life of society. And so it is threatened from those quarters in which a belief in efficiency is a substitute for a belief in value. It is threatened too by that academic arbitrariness which seeks to reduce the infinite complexities of human life to a series of logical propositions. And yet, surely in this of all things, the English tradition is soundly based which sees in state power an agent for harmonising and reconciling conflicting loyalties, not a conqueror that supersedes them. It ought not to be necessary to say more when one speaks in a University, since the independence of the university function, even in the days of ample state subvention, is so honourably established in this country. But even that, apparently, would be discarded at short notice if some of the recent comments of the House of Commons Public Accounts Committee were to be attended to.

I do not believe that a theory of the independence of Institutions is anything different from a theory of personal liberty. It is a pity that so much emphasis, following a false lead from the United States, has been thrown upon the merely personal aspect of liberty. It is all very well to speak of the right of free association. That is the personal side of it. But the rights of the association are equally important and equally

entitled to respect. Unless they are respected and allowed a free growth within their own field, there is no real scope for that individual freedom which in truth is nothing in itself unless it be that very thing by which the human spirit drags itself towards its own perfection.

I have come to the end, as I was afraid that I should, with nothing said except generalities and platitudes, and nothing more to my credit than that I have brought them together in some order of arrangement. My excuse is that what is a platitude to one who is trained in Law can still be something of a mystery to someone who has not that training. And today, I think, the history and traditions of English Law have not much meaning for those in whose hands is placed the effective control of this country. The remedy for that is not that more people should be taught law, but that lawyers should take a larger part in the conduct of public affairs. That itself will not come about by learning Law only. Just because it is, as I said at the beginning, one of the great Humanities, its study perpetually transcends its own limits and leads outward into other fields of human thought. There is a vast amount of hard and specialised knowledge that has got to be mastered; but, for all that, we look to the University Law Schools to see to it that the study of English law does not decline into that excessive introspection which contemplates only its own internal process. When you read Law then, try to read it side by side with other studies without which it is not fully understood — political philosophy, political economy, social and political history, perhaps, most of all, general history. For it will be brought home to you, I think, that while the forms in which the human dilemma

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