Law, Arbitrariness and Ethics

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I

MODERN developments in politics, normally characterized in terms of the issue between democracy and dictatorship, have in fact raised again in a renewed form that basic conflict of the seventeenth and eighteenth centuries between arbitrariness on the one hand and the rule of law on the other. In terms thereof there have been re-examinations, from various points of view, of a series of interconnected issues: the essential nature of constitutional government, the function of force in political affairs, the proper sphere of governmental authority, the necessity and limits of discretion, the sphere of reason in politics, the basis and applicability of an adequate political ethics, and the essential nature of law and its relationship to society.

Such renewed interest in basic issues is, no doubt, heartily to be welcomed. The recognition that the fundamental problem *is* that of arbitrary versus responsible government, rather than the question of different ways of institutionalizing the latter, is pure gain at a time when democracy is peculiarly endangered from within by ancient, and increasingly irrelevant, dogmas concerning the patterns necessary for the securing of its purity. For these are, in practice, all too often encumbrances, calculated to ensure only its ineffectiveness as government.

Yet, paradoxically, the return to the great issue of those centuries, now an international rather than a purely internal matter, may itself give a new lease on life to those very dogmas, which, after all, evolved from the particular solution then proffered. That solution, confused and philosophically inadequate though it was, was not essentially dangerous for simpler societies, and indeed gave a necessary, strong support to a relevant program for human freedom. But, in our current, complex world, its philosophical inadequacies, revived, constitute a genuine threat to necessary governmental power, and so to the very freedoms it once espoused. Essentially, the political and legal thought of that time threw out the baby with the bath. It not only

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included a theory of consent as a necessary basis for legislative institutions if they were to produce valid law, with a doctrine of limitation on legal action in order that the individual might best develop as a social personality; it also promoted a very different doctrine of non-government, or of the desirability of governmental impotence. This was perhaps an historically usual swing of the pendulum. Against the absolute state was erected the absolute individual; and against the arbitrary anarchy of one was asserted the nominally philosophical, but actually no less arbitrary, anarchy of all individuals. Fortunately necessity and common sense, as saving graces, prevented the attempt to follow logic to the bitter end.

Interestingly enough, this whole type of analysis rested not only on an atomic psychology, relationally conceived, with the twin corollaries of a non-societal state of nature and of social contract, and a consequent perversion of the concept of natural law, but also on an acceptance of the theories of the nature of power propounded by Machiavelli and Hobbes. Hence power was the enemy, and powerlessness the cure. Consequently individual rights were interpreted absolutely, as against man's enemy, the state, and so to be beyond social control, since the state, with government as agency, was not a genuinely desirable and necessary organization to promote human well-being. Where it regretfully had to be accepted, it must be shackled. The separation and the balance of powers, as well as, in our own case, the division of powers, were all nominally intended to prevent abuse of power and to ensure either effective, or responsible and rational, consent. They were devices to ensure powerlessness and create a no government's land for individual freedom, conceived as self-regarding, and not, as it became, a sphere of irresponsible, or at least unconstitutionalized, power. *A fortiori*, the idea of executive discretion was rejected, and with it any concept of leadership. Where there *had* to be government, there also had to be insurance that the executive power, whether located in individual or group, be strictly subordinated. Policy-makers *had* to be uncertain of their chances of getting their policies accepted, as well as impotent to supplement and effectuate them, if accepted, in terms of their own will and experience.

Now, despite the development of industry, the growth of corporations, and the emergence of the social welfare state, these ideas did not die. In certain respects, indeed, they proliferated and were extended to new spheres, where the conflict of philosophies became more fundamental and led to strange cross-purposes in action. Theo-

ries of representation, nominally devised to attain better government, were conceived in terms of a more adequate mirroring of diverse groups for aesthetic contemplation. They gave assurance of impotence in government, and justified much of the Fascist criticism of democracy—though not, it is perhaps wise to add, the proffered cure. Attempts to achieve direct democracy were largely calculated to ensure powerlessness on the part of government, diffusion of responsibility, lack of positiveness on the part of leaders, and failure of continuity in policy. Finally, the denial of discretion to the executive power was extended to the administrative sphere, with a complete misunderstanding of what its purpose was. Though rights were modified and re-allocated in terms of social welfare concepts, there developed a tendency to look on this dubiously, and even to oppose individual to social rights, with an insistence that the latter must not trespass on the former. Not all of these developments, it must be insisted, were deliberately conceived in diminished state terms. Many, on the contrary, were intended to secure better and more extensive government. But the issues were not thought through, and the earlier ideas were subtly, and often subconsciously, interwoven with new concepts. Even when the new state, and its different concept of law as regulation and promotion rather than restraint on government, had become the norm of actual practice, the old idea survived as a widely accepted basis of criticism.

It is in this context that the current world struggle becomes so vital for political and legal philosophy, but also, potentially, so ambivalent. For the threat of totalitarian power, more dangerous than earlier absolutism by reason not only of its scope and ambition, but also of its proclaimed anti-rationalism, may lead to emphasis on the distinction between power tamed and power untamed, with a thorough acceptance of the duty of government to govern, the necessity of leadership, the need for the positive state, and the recognition that responsibility, and even responsiveness, do not have impotence as their corollary. This, surely, is the sound doctrine underlying earlier struggles against Stuarts and Bourbons. *But* the very horror inspired in lands still free by Hitler's power regime may also tend to beget a re-acceptance of past errors, with unending repetition of the eighteenth century words of that great nineteenth century liberal historian, Acton, that "power corrupts, but absolute power corrupts absolutely". That concept, surely, is dually false, and rests on a non-sociological concept of power. Though power *may* corrupt, it is necessary to

create; while absolute power, save in a very specific and carefully defined sense, is a logical and sociological impossibility. The problem always is to generate, utilize, and direct power, while devising means to eliminate or minimize its potentialities for corruption.

That this danger is not chimerical is shown by various recent analyses, in which one finds, for example, power and law treated as antithetical, rights conceived as beyond the purview of society, and arbitrariness identified with discretion. A detailed criticism of various typical arguments might be revealing. It seems, however, more significant to propound certain theses which make possible a necessary discrimination between constitutional and arbitrary government but remove the false alternatives of corrupt power or pure powerlessness. These theses, it may be stated at the outset, vary in generality and significance. Some are necessary to effective analysis of law and politics at any time; others are peculiarly applicable to our own situation. Yet all seem equally necessary for the purpose at hand.

II

Man is a social and political animal. This adage, old as Aristotle, is rarely overtly denied. Indeed, it receives universal lip service. Yet the consequences are frequently not fully drawn. Indeed, not seldom, the individual is treated as though he were an isolated atom, with society at most a sum in addition. This view is a perversion of the concept of personality. It conceives of the individual as himself a number of qualities, independent of social experience, to be protected in their timeless completeness, at least and until they in some way become perverted and interfere with similar characteristics in others. Such a theory, apart from any manifest discrepancy with experience, is, of course, essentially a static one. It emerges in response to the idea that the individual, being a social animal, is merely a creature of determining causes impinging on him. To avoid this difficulty the original statement may be rephrased as follows: man is a particular individual, possessed of personality, living in a society, having a particular experience involving interactions with his fellows and with his environment, possessed of various powers developed in that society, pursuing various purposes conceived in terms of that experience, including reflection thereon, and forever involved in the changes of a dynamic situation of which he is an active part.

For our purposes the implications of this are rather clear. The

individual himself cannot be conceived as powerless, or as a being whose powers, when exercised, do not affect others. Nor can government be conceived as power unconditioned and uncontrolled, nor governors as men possessed of absolute power in a relationship of completely arbitrary command and absolute subjection. Power relationships are of the essence of society, though power is generated through purposes conceived by men in terms of their interrelationships in a situation always changing.

This, of course, must not be taken to imply that the powers of each individual are equal, that the congeries of powers at the command of government weight equally all purposes, or that all purposes inspiring the exercise of power by individuals, groups, or governments themselves, are equally good. Nor must it be assumed that power, when exercised, will always achieve the purposes intended. What is emphatically asserted is that powers and purposes are involved in all social relationships, that the exercise of the one produces continuous changes, that these in turn modify the formulation of the other, and that that modification reacts once more on the use of power.

Judgments, then, of particular types of regimes and a classification thereof cannot rest simply on contrast between the absence and presence of power. It might, of course, rest on a view as to where the power or powers in society ought to reside, in terms either of particular purposes and interests or of a rational concept of the conditions necessary for the attainment, given the existing potentialities, of a general well being, or at least for the taking of the next step thereto. It cannot, however, involve a view that government ought to be powerless. It might conceivably rest on the concept that there should be no government, though this would presumably imply a breakdown at least of that society. But government by very definition must imply power. And, given government, the relevant questions are concerned, first, with the sources generating that power and the way in which they function, and secondly, with the problem of what functions government itself ought to perform.

As a corollary to this, it is manifest that power cannot be made antithetical to law. The attempt to do so generally rests on a concept of rights and duties statically conceived. Law is equated with contract or quasi-contract, and contract is held to rest on mutual interest, which is led to imply an absence of power. Yet, quite clearly, what is really assumed here is an equality of power of discrete par-

ticles. But one may note in practice that the performance of contracts is secured, insofar as one can extract them at all from the ultimate compulsion of law, only where the passage of time does not change interests, powers, and purposes of the parties. Moreover, the theory of law as contract, and the implicit denial of sanction as an essential element in law, rest on a mechanistic, pre-evolutionary set of concepts. Life is essentially dynamic, and even where the interests of contracting parties had a foundation of equality, in necessarily developing situations these interests may so change that the power relationship is unequal, and fulfillment will depend on a socially created power extraneous to both, yet sanctioned by forces within society in terms of purposes held significant. Further, one should note that law as contract, conceived of as opposed to power, rests on theories of social contract, now discredited, and of tacit consent. These exclude from the picture both criminal and regulative law. Law, in short, is a corollary of government and a product of power. One may ask whether particular laws are desirable, and one may even question the appropriateness to existing conditions of a particular legal scheme. One may also suggest the need for different political institutions in order to achieve socially desirable laws. But one cannot equate law and powerlessness, or power and absence of law.

Hence, too, it is impossible to analyze governments, and approve and disapprove regimes, on the basis of an antithesis between rule of law and rule of men, unless that be carefully defined to mean a contrast between governmental power exercised subject to certain legal procedural checks and similar power not so subject. Then it may prove a useful basis of classification. It may also provide a principle for moral judgment, though it is desirable to suggest that, in a world where the choices presented vary widely from time to time and place to place, it may not always be immediately relevant. It may, however, still be valuable as a criterion or *sigupost*. A rule of law system may be, in ethical terms, better, and so may constitute a purpose to be striven for even where immediate situations do not allow its achievement consistently with the securing of other, more primary, goods. Unfortunately the phrase is often taken more literally, and it is assumed that there is a choice between having men or having law rule. Yet it is surely obvious that men, individuals, alone act, exercise powers, and make decisions. To argue otherwise is to indulge in the fallacy of the reification of abstractions with, in this case, law conceived anthropomorphically, and so to commit the very type of error

of those regimes against which the doctrine is presently directed. Out of this same antithesis, moreover, may arise disputes as to whether men are creatures or creators of law; and therein are hidden constant dangers of ambiguity. Finally, it is above all the ideas of a rule of law which lead to attacks on discretion *per se*, and to its confusion with arbitrariness. Intended to ensure rational behavior on the part of governors via answerability to a supposedly unchanging rationalistic law, it becomes a weapon for preventing adaptation of behavior in making and applying law by the use of intelligence to meet changing needs and conditions. Indeed, though on the surface the statement is paradoxical and self-contradictory, one might venture the judgment that the rule of law concept has habitually been used to prevent the rule of law. It would be better, then, to abandon the phrase entirely, and to endeavor to state what sorts of legal, customary, constitutional, and professional checks on various governmental powers are desirable in general, or under specific conditions; to examine how far they exist and how far they may be brought about, and to analyze the basic power-purpose relationships necessary for their security when achieved.

The preceding analysis has endeavored to suggest that the social character of man implies the inescapability of power, that the maintenance of particular societies requires organization of power, in terms of purpose. This in turn makes state, with government as instrument, a necessary institution; government implies power, not powerlessness; and laws are at once the product of powers and rest for their effectiveness on power. *But* it is not less important to emphasize what is not implied. First of all, there is intended no implication that social coherence is a matter of brute force, or that purposes, ethical in character, are ruled out. Indeed, it is against this view of power that the argument has been directed, just because such a view leads to the meaningless choice between "naked power" and philosophical anarchy, and denies at once the social-dynamic character of human existence, and the ambivalence of human nature therein demonstrated. Rather, the statement of the omnipresence of power is tautologous. Such tautology would be pointless were it not for the failure on the part of various analysts to be aware of it. When, however, it has been recognized as such, the road is opened for effective analysis of types of power, or judgments of possibilities under given conditions of organizing, developing, and applying them in various ways, and for the establishment and use of ethical criteria of actual

power situations. Then, and only then, can force, as physical compulsion or the threat thereof, be estimated in terms of its scope, effectiveness and desirability.

Similarly, while it has been necessary to insist that law involves power, there is intended no implication that all power, or all governmental applications of power possessed, necessarily constitute law. Nor is there any implication that force, a particular type of power, either is or ought to be the only consideration or basis in the making and application of law. By the same token, however, it is equally not *assumed* that law is the *only* desirable type of social control, or that government should rely on it alone as an instrument for effectuating policy.

III

Law cannot be divorced from ethics, but is not identical with it. Much ink has been spilled in discussion of whether law must be conceived of as itself an imperfect embodiment of ethical purposes, with justice as its necessary aim, or whether, on the contrary, law is simply what the courts enforce or the rulers of a society, endowed with effective political power, choose to command and are able, through the use of all instrumentalities at their command, to get accepted or to enforce by penalties where they encounter non-acceptance. In support of the former position, it is urged that the ultimate purpose of man is a rational welfare through the attainment of harmony with his fellows, that the state is a means thereto, that justice, variously defined but always involving some concept of rule of principle, as against whim, and normally using some idea of equality as its criterion, is the basis of judgment of that means, and that law is its expression. Hence any product of the state claiming to be law, by being so named, is subject to informed judgment as to whether it is in fact just. If weighed in that balance and found wanting, it is not valid law. This, no doubt over-simplified, is the basis of higher, and of much natural, law doctrine. This analysis, then, leads to judgments both of total systems of law and of particular statutes and decisions. These judgments, when unfavorable, profess to mean not only that the law or laws judged are ethically bad, but that, being bad, they are not really law. The latter position tends to be so interpreted that it is maintained that law is simply the product of effective authority, however constituted, that whatever that authority commands is law,

and that the moral issue is strictly irrelevant. Law is law, even when confessedly and professedly immoral.

It is from the first of these positions that it is immediately necessary to dissent. For essentially it ends in a dangerous identification of ethics as a criterion and direction post with law as instrumentality for following the path; it denies validity to non-static imperfection, and results in the same error as the power-law antithesis. More moderately, it denies validity to laws which fail to advance along that path, and does so, normally, on the basis that the potentialities of a particular society are unlimited. At its most modest, it recognizes the particular limitations of such societies, but then denies that laws are law if they involve wrong ethical choices within the limitations, with a view to the next step. Even this last, though it approaches more closely to a sound analysis, is essentially misleading. For, apart from its leading to the dangerous inference, where it concerns particular laws, that ethical wrongness thereof justifies disobedience and destroys obligation, and apart from its weakening the attempt to organize power in terms of purpose to repeal existing, and promote new, laws (a covert consequence of the denial of legality to laws) it destroys the whole significance of the distinction between *is-ness* and *ought-ness*, misinterprets the function of ethics as a rational construct, historically-empirically based, and erects law from instrument to end, with that end achieved wherever law is genuinely law. Moreover, by curious paradox, it gives aid and comfort to its opposite, namely, that whatever is law is right, which is an easy step from "only that is law which is right".

Ethics, then, as a system of norms rationally organized, and based on the evidence of experience of purposes, the conditions of their attainment, the basis of their adequacy, and the reasons, internal and external, for their failure, is a proper and necessary criterion for the judgment and evaluation of legal systems, of individual laws, and of their relationship. But such judgments concern rightness or goodness, and not legality. It is necessary, before such norms can be relevantly applied, to estimate the particular situation and the possibilities within it. Otherwise the judgment, however clearly it maintains the distinction between law and ethics, remains utopian. It is ineffective in re-interpreting men's purposes, in organizing, and in directing them. It is also simply irrelevant as a judgment of the law itself, and of the exercise of law-making and law-applying power. Essentially it is necessary to estimate as carefully as possible the total situation, in

terms of the trends at work, the possible alternatives present, the purposes professed, and the actual and potential organization to effectuate them. Thus, while one retains the criterion of a universal ethic, one is prepared to make a judgment of existing laws on the basis of the practically possible, as well as to see what new laws are desirable.

If, however, law is not itself ethics, the above analysis implies that it is purposive. All those who make law in any sense are engaged in the business of creating, adapting, and correcting an instrument (not the only instrument) by which to achieve purposes conceived by them to be goods. It is in this sense that law is basically related to ethics. Now, while the means-ends relationship is a continuum (the fundamental reason why a universal ethic cannot be applied as criterion apart from practical judgment), it is important to note that laws are not the purposes they are intended to achieve, far less embodiment of what ought to be pursued. Hence various judgments of laws, or of a legal system, may be made. First is the judgment of ends professed or implied. But this is in its nature a judgment of the adequacy of a particular ethic, and not of law. To be adequate, it must take into account the prevalent cultural situation, and the potentialities within it. Secondly, however, comes the judgment of the adequacy of laws to achieve purposes intended. This may be a judgment of the appropriateness of means to ends deemed good. It may also be a judgment of the adequacy of means to achieve ends judged not good, but held as goods by the law-making authority in the specific case.

There are two significant points here. First, while law's effectiveness involves a series of power relationships, those making law have purposes, conceived as goods to be achieved, a matter which the simple command theory fails to stress. And second, the possibilities of effective achievement depend on the degree of consonancy of those laws, not only with one another, but also with the purposes and motivations of those affected. These latter are themselves pursuing purposes, adequate or inadequate, and the success of law depends on their power, that is, on the nature of their actual purposes. In this context it should be noted that, while part of that power is not capacity to organize and bring pressure to bear, incapacity to function effectively to achieve the very purposes deemed good by those making law also constitutes power. It is precisely here, too, that the significant relation of myth and propaganda to law arises. The effectiveness of law may depend on the possibilities of creating changed

motivations, and this possibility is itself a function of habit and the mores on the one hand, and of aspirations and frustration thereof on the other. Further, while the success of law thus rests in part on the creation of degrees of consonance of purpose of law-making authority and those to be subjects of law, that is, on the generation of effective power, it is also true that laws themselves may create changes of purposes and evaluations, within limits. It is in this sense that it is possible to make men "good" by law.

Law, then, (a) arises out of purposes, goods, professed by those making it, (b) depends for success on power engendered, which involves purposes, motivations, and so on, of those to whom it applies, and the power, including adaptability, at their command, and (c) is subject to the dual ethical judgment of the soundness of purpose and the appropriateness of technique thereto. While law is thus not ethics, and while it is to be judged by ethical criteria, a negative judgment itself always implies, if sound, that, given the situation, the law is wasteful in terms of the potentialities present and involves unnecessary frictions, and insofar as it itself makes men "good", is destructive of human well-being by eliminating possibilities until then present of taking the next step towards achievement of a rational ethic. It may further, on occasion, include a prediction of ultimate failure of the particular law or legal system through its lack of consonance with minimal aspirations and basic motivations present in the society, and so a ceasing to be law.

An important converse of this is, of course, that moral judgment, however correct, is not law; it is necessary for it to attain law-making power in order to become that. That ethical teaching may itself create such power, under appropriate conditions, is no doubt true. It is no less true that when law, judged bad on grounds suggested above, has itself changed men's purposes, or has been made effective by other instruments of influence changing them, the possibilities of the next step are altered. This does not mean that the moral judgment of the new legal situation, or of the historical development producing it, is mistaken; world history is not world right. But an existing situation is a limit, and a moral judgment unbacked by power, and not creating power, is futile in making or unmaking law. A judgment of badness is not a denial of legality.

This, however, is not to accept the theory of law as command. For, as urged above, not only are purposes of the maker involved, but also effectiveness depends on the creation of a total power leading to their

achievement or approximate achievement. This implies no denial of the force element in law, nor an assertion that law is only law when voluntarily obeyed. The necessity of enforcement does, manifestly, indicate a lack of agreement on purposes between enforcer and enforcer, and to that extent implies a failure, from an ideal viewpoint, of the law-maker. But, by reason of the very imperfection of men, which itself necessitates law, force, and the recognition in moral judgment of the particular situation and its possibilities, necessity of enforcement does not destroy the validity of the law, but, insofar as successful, rather asserts it. In short, the real criterion of the effectiveness of force here is whether the amount and frequency of application are such as to involve an effective furthering or a frustration of the general purposes of the makers. Nor is any general or *a priori* judgment here possible, even for one type of law. One can readily suggest limits. At the extreme, it would be impossible to arrest, convict, imprison, or put in strait-jackets everyone, and it would certainly frustrate any purpose of the ruler or rulers. Essentially the possession of authority is meaningless unless that authority results in moving people so to act that the total achievement roughly approximates the ends desired. Here it is that the type of law becomes significant: most of criminal law, for instance, is intended to prevent behavior of certain kinds, and to do that alone, whereas the law of contract, and similar parts of the civil law, are primarily intended to encourage people to undertake activities of their own with assurance as to probable outcomes, and to give protection if they are disappointed by their fellows. Most modern regulative law is rendered useless if there is need for frequent punishment of offenders, and even passive non-cooperation with its positive purpose, though short of punishable disobedience, may render the law useless. In all these cases, of course, the application of force may prevent repetition by the offender and may influence others towards observance. But its powers in this respect may differ vitally in different cases. The fear of enforcement, if that be a dominant motivation, will have very different values, from the law-maker's viewpoint, where prevention of action and promotion of action respectively are involved. Finally, while it would be unwise to develop a force fund theory, the effective limit of force in achieving obedience to any specific law consonantly with purpose is to be measured by the degree to which its use, in a total situation taken statically, lessens the amount available for dealing with other offenses.

IV

Law is not the sole instrument of control by government, but is a necessary one. It has already been implied that the analysis of law as command is inadequate in anything save a formal sense, because much of law is regulative-indicative, intended to achieve positive action for the fulfillment of the makers' purposes and to make clear to those concerned the choices of ways and means selected out of the existing possibilities. (No theory of sovereignty is here implied. The maker may be a court, and the purposes may be a reading and assumption of supposed purposes in those to whom the rule is applied, or in the surrounding society.) Similarly, the requirement of normal obedience in the orthodox theory is but an indication of the relations of power, purpose, and motivation here analyzed.

That theory, however, usually includes a statement as to the need for generality for the existence of real law, and, combined with that, a similar statement as to the duty of law to treat equals in some way equally. This is significant for two reasons. First of all, it clearly emphasizes the possibilities of individual command and decision without reference to any principle priorly knowable to the objects thereof. Thus it admits the capacity to use force in an arbitrary manner, and without intent to create principle. Such use of force is of course not non-purposive from the point of view of the one giving the orders or doing the act. It is, however, arbitrary just because it involves non-predictability from the point of view of either those affected or others who feel that they might be affected by similar acts. Here several observations may be made. First of all, a consistent use of force in a series of situations may itself create a very considerable degree of predictability. This may not produce a genuine rule-of-law state, in the wider sense of that last term, since the ruler or rulers so acting may switch the basis of their behaviour with impunity, or at least without being subject to effective criticism and judgment therefor, or to any techniques for enforcing responsibility. Nor will they be involved in so doing in an overt *coup d'état* or faced to the same degree with a threat of revolution as they would be where there was not a like scope for arbitrary acts of force. Nevertheless, continuity of this sort itself creates a situation that, in certain respects, approaches law, though insofar as this is true, the immediate value of arbitrariness to its possessors may well be decreased. For, secondly, the random and unpredictable use of force from the point of view of its victims may

itself be an effective technique for accomplishing certain purposes, and conceivably even for getting a form of behaviour on the part of the ruled, making for greater acceptance either of existing or of subsequently created law. For, while the sanction of fear may aid in the enforcement of a known law by permitting calculation, the fear of the unknown is far more profound, and may lead to the establishment of habits of not doing a whole variety of things through the uncertainty as to whether they might be such as would conflict with the purposes of the authority having force at its command. The ethical judgment that such absence of law is bad, itself rests, then, on the considerations that either predictability in particular or in general is superiorly effective in achieving purposes, or that the purposes to be achieved by arbitrary force are inadequate ones, given the kind of society in existence and the possibilities within it for the fulfillment of individual diversities of personality consistent with the maintenance of the particular organized society. It is, it may be noted, only in these terms that one can effectively maintain both the desirability of a rule of law state and the relativity of form, organization, and use of authority to time and place.

Secondly, then, the requirements of generality and equality are statements that the essence of law is the creation of predictability. Generality manifestly does not mean that laws are all made with a view to all persons in a community. Rather it does mean that rules are laid down which the authority making them states will be applied to all those who fall within the classification indicated, and by which they may, until those rules have been changed by known procedures, not necessarily formal, roughly calculate their behaviour, in terms of interest, on a basis of rights and duties. In this sense one may note that generality might cover purely individual behaviour, were the individual to be a well defined and recognizable class. Similarly, equality is but a statement of like treatment in similar cases to be accorded to all who do fall in such a class. For the existence of law, then, one needs normally knowable techniques of making rules intended to offer bases for prediction, since these are pre-conditions for the recognition that the orders or regulations given are intended as rules. In addition, one needs a sufficient degree of clarity in the laws themselves to make meaningful prediction possible. One needs, no less, known organs and procedures for determining disputes when individual predictions actually made differ, and there must clearly be a point of final reference if predictability is to continue. It is perhaps these needs that are at

the foundation of doctrines of sovereignty, though one should note that in the present statement no attempt is made to insist on *a* sovereign, in the orthodox and monistic sense, as a basis of law.

Now, just as it is possible for rulers to desire the arbitrary use of force to achieve certain purposes, so it is necessary for them to create very considerable spheres of law as predictability if their power is to be effective. This, at least, is true under modern conditions, or in any society where the rapid tempo of life, the range of possible choices, and the accustomedness to a *variety* of behaviour patterns, are essential features. Where these dynamic conditions do not prevail, customary behaviour patterns will themselves constitute a kind of law which those possessing power also take for granted, and, insofar as they do not wish in terms of purposes to break those patterns, their regimes can be largely force ones. But current Western society is precisely not of this type, and the essential need of those possessing power is to create arrangements whereunder men will act positively with a knowledge of what alternative actions will bring forth. It is just because the uncertainties involved in pure force which is unpredictable cannot be confined within a neat sphere, and most clearly cannot have isolable psychological effects not transferable to the rest of the behaviour pattern, that it is possible to give a rational condemnation of arbitrary government. Put positively, of course, this involves a judgment that, from the point of view of success in utilizing men's potentialities, as well as from the point of view of welfare possible within the situation described, such arbitrary regimes are ethically and practically inadequate.

It is this analysis, too, which underlies the statement that anti-rationalist totalitarianism must either abandon its essential characteristics or in the last analysis return to the dark ages. Here it may be specifically stated that the above argument involves a denial that certain parts of totalitarian law are law at all, and the denial is made, not on the ground that they are not consonant with a higher law, but on the very basis that they do not make predictability possible. One has essentially no real law where decisions are made in terms of the intuition of rulers or their instruments, and where particularly one finds no discretion on the part of judges, but a complete power to decide beyond and apart from any rules by other authorities who make courts mere mouthpieces of their intuitions or desires. The fact that such activities are called law is simply an indication of a recognition by those in power of the attachment to the term by those they

rule, and of the desire on their part for the predictability that it represents. It is an attempt to persuade men of the presence of what is not present in order to facilitate the work of arbitrary government, to diminish the frequency of necessary use of force *per se*, and to bring into being attitudes which will increase the effective power available for the pursuit of the purposes held by those authorities.

V

Arbitrariness, as above described, is not synonymous with discretion, limited by rule, within a constitutional state. The suggestion was made above, that, where arbitrary force prevails, law as predictability is absent. Judges, far from possessing discretion within professional mores and training, are effectively deprived thereof, and become automatic mouthpieces for arbitrary will. This does not imply that judges are in this situation in all spheres. It has already been urged that, under modern conditions, a ruler or rulers with the desire and need to create unpredictability in some spheres to achieve their ends will also find it necessary to ensure the very opposite in others if they are to make power effective. Nor is it to be inferred that some judges (and the same will apply to administrators) may not, in certain spheres or cases, themselves be principals or voluntary agents, with power, supporting the system, and consequently promoting unpredictability. But, insofar as this is true, their functioning is not in terms of professional competence.

Yet the fundamental question of why discretion, by judge or administrator, is not itself arbitrary and does not create the same type of unpredictability, remains. Essentially the answer is that, while a large degree of predictability is necessary to evoke activity by individuals in a dynamic and complex society, that very activity produces novelty in inter-relationships. The consequent changing facts, and the potentialities arising out of them, create situations where *stare decisis*, in the broadest sense of failure to change and adopt law legislatively, administratively, or judicially, will frustrate the pursuit of purposes changing in their very pursuit, and will do so largely by non-adaptation of techniques and instruments. In this sense perfect predictability would, by an interesting paradox, destroy the very purposes which necessitate conditions for rough prediction, and would lead, not to the rule of principle, but to its absence. That is, here also we need natural law or universalist ethics, with a changing content, or

relativity of application. An absolutist ethic, that is, a decalogue or the laws of the Medes and Persians, is to be condemned just because it fails to allow principle to prevail. This is the element of truth in the celebrated doctrine of Maine concerning the movement of society from status to contract, though his actual formulation of it actually aided in turning eighteenth century atomism into dogma, and helped fix the idea of a permanent sphere of individual rights and the concept of law versus discretion. For, while the historical generalization made by Maine has no universal validity, and while contract is too narrow and misleading a term to describe the non-static, instrumentalist, reason-using technological society, it is in a general way true that the Western world has developed an increasing tempo of activity and greater complexity, breaking Bagehot's "cake of custom". It is this that has made decalogues inapplicable and that necessitates increased individuation of treatment if principle is to prevail, and that makes desirable new types of discretion.

Today, then, men necessarily live in a situation where the future is uncertain, where their pursuit of purposes would make absolutistic certainty a hindrance, and where short-range prediction is alone possible or desired. The demand for the rule of principle is, at bottom, a demand for continuity, and for knowable limits which permit some calculation of probabilities. It involves, too, a wish for decision in terms of informed awareness of relevancies. Yet at the same time it is accompanied by an actual demand for discretion in decision. The sense of possible control, of shaping the future, makes appeal to principle an appeal not to set standards, but one for a favorable evaluation of certain judgments, made within the possible predications established, as those which ought to be deemed creatively significant.

It is for this reason that legislation in the formal sense, judicial decision, and administrative law-making decisions, are essentially not dissimilar in character, even though the last two may depend on, and be limited by, the first. Fundamentally legislation involves a summing up of an existing situation, hypostatized, and the selection of certain possibilities within it as desirable ones to further. That judgment is based, no doubt, on the sensitivities and philosophies of legislators, on pressures brought to bear and their evaluation, and on a generally unavowed, and often unaware, recognition of limits. (This, it may be noted, is the essential core of meaning in Dicey's celebrated analysis of the self-accepted limitation of the sovereignty of sovereign legislators.) Quite clearly, there is here a wide range of discretion.

But there is also rule of principle: For laws to be made meaningful, it is necessary that they have that specificity necessary for prediction, either by those to whom they apply, or by administrators who are to implement them. Laws so general that they are meaningless, or can mean anything, are, for practical purposes, not laws, any more than general moral platitudes may be said to be ethics.

Nevertheless, to assure continuity and allow short-range prediction, it is necessary, not only to have laws made which create areas of prediction, but also to be able to predict the limits of selection by those making them. Here the above-mentioned internal checks may appear to be the answer. *But* their operation is not completely automatic. Lack of contact may grow, and power, while not *per se* corrupt, may, under favorable conditions, lead to corruption in its possessors. It is for this reason that principles of responsibility, answerability, and responsiveness are vital necessities for the securing of law at the legislative level, and why free speech, free pressure and petition, and free elections are necessary instruments for attaining a law state. These, it is to be noted, do not destroy discretion on the part of legislators. Rather, the legislative process under constitutional government is perhaps the best illustration of the compatibility of law with discretion, and of the meaning and limits of predictability. The width of discretion, and the degree of generality, at this level are of necessity great. For judgment essentially has to be in terms of wide areas of activity, numerous inter-relationships, and consequently a wide range of potentialities. At the same time energy, knowledge, and hours available are not unlimited. Hence, in the type of society here under discussion, legislation will normally have to involve delegation, and its limit as law in this context is generally meaningfulness as direction-past and boundaries to those charged with the work of individuation (that is, of making applicable to various classes of cases) and with judgment that the boundaries set have in fact been observed.

As we move from the legislative function proper to the making of delegated legislation through administrative bodies to judicial decision and to administrative quasi judicial functioning, the spheres dealt with tend to narrow generality, and principle becomes more particularized and, ultimately, for certain purposes individuated in application. The range of choices is narrow and the requirements for predictability become increasingly specific. At the same time the increase and the numerousness of distinctions to be made make the amount, though not the range, of discretion greater. Or, to put it

otherwise, at the extreme limit the very requirement of principled decision necessitates an estimation of the relevant conditions of each case by itself. It must at the same time be noted that, while this is partly due to specificity of the issue, it is also due to the need for interim change and adaptation in order to avoid the turning of general principles into strait jackets. Yet also, because of the increasing limitation of the sphere of immediate relevance, there is some tendency for particular decisions and lines of decision to create lack of adjustment and integration between discrete fields in all of which such adaptation is going on. Ultimately this leads to new legislation, while, even prior to that, such techniques are prevented from creating maladjustment by the use of executive authority to restrain and harmonize to some extent specific administrative law makings, and so forth, in terms of an over-all discretion whose aim is to give a dynamic continuity to policy in terms of legislation which itself proceeds by fits and starts.

The question arises as to what are the sorts of principles which at these various levels will ensure a suitable determination of the breadth and use of discretion, with the purpose of making that discretion an instrument for assuring the reconciliation of predictability with continuity and the effectual pursuit of changing purposes. While many elements are no doubt contained in this answer, essentially expertness in relation to function and subject matter, together with professional morale, become increasingly the fundamental insurance in this respect, at least when combined with procedural rules themselves devised to facilitate the performance of function, but to prevent the temptation towards arbitrariness. Here it is worth noting that the differences between administrative and court adjudication tend to disappear, though differences in length of professional tradition, in degree of training, and basis of selection of personnel, as well as tenure rights, during a transition stage may cause some difference in degree, with a consequent possibility of admixture at various levels of arbitrariness and discretion. It is this last, together with established ways of looking at things which embody the congealing of principle into dogma, that helps to maintain the equating of rule by principle with courts, and of arbitrariness with other types of decision making. The false antithesis is undermined, however, once it is clearly perceived that the essence of maintenance of principle and the creation of limited predictability by courts rests on discretion informed by functional purpose and professional attitude, and is completely

incompatible with any doctrine of simply finding what is pre-determinedly there, a viewpoint which belongs to a static society with revealed truth covering all situations. This, however, does not mean that checks, balances and controls of various kinds become completely irrelevant. But the problem now becomes one of competences in terms of functions, and of the relationships subsisting between various functions. Thus, just as there may be the necessity, in order to secure meaningful pattern within a total departmental functioning, to have appeals from particular decisions made by experts in terms of principle and discretion conceived against the narrow field of their own functioning to those higher up who have to relate the functioning of the whole organization, if there is to be a meaningful pattern allowing predictability in that sphere, so also the right and need for possible appeal from administrative body to court may be justified in many cases on not dissimilar grounds. This does not mean that administrative bodies may not in any spheres make final decisions any more than it is necessary that there should always be appeal to the highest courts in all cases at the desire of litigants alone. What is manifestly necessary is that there should be rules deciding in what classes of cases such appeals do lie, and where the final decision rests. This itself will not be a final decision for all time. But its principle at any time must involve at bottom a judgment of isolability for predictive purposes of a particular sphere of action, which rests on an estimate of the relative significance of the importance of preciseness via expertise as against the relational problem from the point of view of creating a more general sphere of integrated activity and the predictability connected therewith.

VI

The essential purpose of this paper has been to demonstrate a series of propositions. The first of these was that one could not distinguish between arbitrary and non-arbitrary government in terms of presence or absence of power. The second was that law itself, while not the same as ethics, must not be regarded as the mere production of command backed by force and was not immune from ethical judgment. A third argument was that force could be used on behalf of, or outside of, law. It was then urged that the essence of law is the creation of spheres of predictability, and that arbitrariness is the insurance of unpredictability. At the same time it was pointed out

that under modern conditions the effective use of power necessitates an ability to predict on the part of the governed in at least large numbers of spheres if they are to function so as to allow the rulers to achieve the purposes without which power is meaningless. Finally, it was urged that predictability could never be complete, and that such completeness is not desired or desirable; and in relation to this it was suggested that discretion was not incompatible with law but an essential element in its making and application. The specific problem of the nature of executive discretion and the distinctions between that and arbitrary government were not directly tackled, though the essential answers are implicit. Essentially it is held that executive discretion, like other discretion, is not synonymous with but antagonistic to arbitrary tyranny. At the same time, it is necessary to have organized and directed power for the maintenance of rule by principle as against arbitrariness. That topic, as well as the somewhat different but not unconnected problem of the nature and limitation of rights, must, however, be treated elsewhere.