

## SOVEREIGN AUTHORITY AND THE FUNCTION OF LAW IN A DEMOCRATIC SOCIETY

The assertion that the law must be obeyed is often identified with the assertion that in every state there must be a sovereign authority, or is at least made a corollary of the theory of sovereignty. However, a little reflection shows that this view is narrowly juristic and incompatible with the classical conception. Hobbes himself allowed for resistance to the law which did not constitute a denial of the principle of sovereignty.

The argument that the concept of authority requires us to obey the law —authority being first defined as that which must be obeyed— and that such authority is necessary to social order —authority now being defined as that which needs to be obeyed— attempts to reduce the question of authority to a simple confrontation between order and anarchy. The rational man is presumably expected to prefer order and by his choice give the authority he recognizes power to coerce his irrational fellowman. Such a simplification of the concept of authority ignores the real problem, which is that a rational man who begins with the premise that order is preferable to anarchy can nonetheless legitimately resist some decrees of an authority he otherwise recognizes; in effect, he denies that an authority is that which always is, or must be, obeyed. Hobbes had the rational man do this when his own life was threatened, a view which seems to me to mistake the very logic of sovereignty. The problem of authority and sovereign power is not that of deciding when a particular kind of self-interest should overrule the general self-interest that establishes sovereignty. A single exception based on self-interest provides an argument that destroys sovereignty as a normative system. The moment we talk about norms, as we necessarily do when we talk about sovereign authority, we must observe the basic normative law that we cannot make an exception of the self. To do so is to deny that we are talking about norms we recognize. If the question of authority is seen as representing in any way, at any time, an opposition between self and sovereign,

the sovereign is effectively denied the king of authority essential to his existence. If obedience had to be coerced, as it would be where a conflict of interest between self and sovereign was possible, the sovereign would lack the power to coerce which comes from the fact that he is obeyed.

The view that the law must always be obeyed would produce such a situation. In effect it is a denial of the classical concept of sovereignty: that is, it substitutes sovereignty of the law for sovereignty and in so doing undermines the argument for sovereignty as applied to the law. Kelsen's argument for this legal sovereignty is that there must be a norm of norms, so that conflicts about norms can be settled. Obviously, if this norm of norms is that the law must be obeyed, it cannot serve its function of settling conflicts within the system. By professing to see the problem of authority as the problem of anarchy versus order, then, we create anarchy by destroying the ordering principle. «The law must be obeyed» says nothing about conflicts over the nature of laws themselves.

A similar situation arises when we attempt to view the problem of political authority as one of obeying or not obeying the law: when, in effect, we pretend that acceptance of the concept of an ultimate decision-maker is the same as accepting the proposition that the law must always be obeyed since the law represents the command of the decision-maker. The alternatives here, too, are represented as anarchy and authority. But this is not the problem as most of us see it. The problem is what to do when a conflict arises between what the state says must be done and what our conscience says should be done; this will occur frequently in a political order such as democracy, which recognizes the validity of the individual's norms as well as those of the state. We cannot say that the law must always be obeyed without denying the premise about the validity of private conscience. We simply ignore the problem by so doing and give an interpretation to sovereignty that for most members of a democracy would effectively destroy their sense of obligation. A state in which the sovereign's decision always invalidated the claims of conscience would not be democratic and hence for the democrat would have no claim at all upon him: the sovereign power would invalidate its claim to sovereignty and would thus promote anarchy. Those who argue for the authority of the law overlook the fact that acceptance of the decision of an ultimate decision-maker is not the same as saying that the law of the state must always override the claims of conscience. The sovereign is not the law and must not be identified with it. He is 'above' the law in the classical conception; which is another way of saying that the sovereign—as well as subordinate authorities in the system—does not and must

not take sides in conflicts between the norms of the individual and those prescribed by the state. If he did, no one with respect for the individual would submit to the jurisdiction of the state. The phenomenon of those who are opposed to certain laws submitting the question of their resistance to the courts would not occur and every question of conscience would become an issue of anarchy versus order. Because too many in authority view the question of authority in this way, there has been a drift toward an anarchistic outlook among members of the public; the latter have been forced to view the question this way and have naturally preferred their own norms to those of others. Thus, a fear of anarchy can create the very conditions it fears. Not until we can trust the sovereign authority to be absolutely impartial in regard to disputes between normative orders can we overcome the problem of civil disorder we ourselves create by misunderstanding the nature of sovereignty.

In whose interest should the law function in a democratic society—in the interest of society or the individual? The issue is that of the relationship between ethics and law, in particular of ethical-humanitarian principles posed by democracy and the emerging duality of jurisdictions within the legal system (legal «sub-systems»). Ultimately, the problem is that of sovereignty.

Today we are generally aware of the discrepancy between the law and ethics. This has not always been so. Earlier societies were less troubled on this account. Law tended to be «customary» and so did ethics. The very fact that Justice could be popularly visualized as a blindfolded figure symbolizing an ideal indifference to individual status—resulting in equality before the law—suggests that the «ethical» question about law has traditionally concerned the rights of the community vis-a-vis the privilege of some individuals rather than the rights of the individual vis-a-vis the law. Abstract justice was expected to be above considerations of privilege, to be strictly egalitarian, even in a non-egalitarian society. Democracy changed the concept of justice by requiring that the scales of justice weigh not just evidence of guilt against innocence but the rights of the individual against those of the community. This despite the fact that it is not possible for the law to allow the needs of the individual to be given equal weight to those of the community: the law is there to deny just such a proposition.

Consider, for example, the firebug or pyromaniac. Though some arson is the result of a calculated attempt to defraud insurance companies a good deal represents the well-known psychological response to frustration. A judge may be quite aware of this. Yet, even if he chose to adopt

the role of a psychiatrist and refused to condemn anyone for what lay beyond the rational control of the accused, he could not possibly dismiss a case on the grounds that a fine or jail term would serve no useful purpose. No matter what the causes of the crime, or how far beyond the control of the individual they are, arson —like murder and other crimes defined by law— cannot be tolerated. The act itself must be condemned and so consequently must the individual. No matter how understandable his behaviour may be from the psychological point of view, it must receive legal condemnation or law ceases to function in the interest of the community. It is precisely this point that distinguishes law from ethics: the law by virtue of being law must decide beforehand whose interests are to be served, what they are and what responsibility means. Ethics does not have a ready-made answer to these questions.

Modern democracy, however, has revealed a remarkable adaptability in coping with the difficulties posed by its normative assumptions. We have retained the traditional legal system with its bias in favour of the community but supplemented it with another legal jurisdiction (a «sub-system») biased in favour of the individual. This has been done by setting up parole and rehabilitation procedures to deal with the problems of those found guilty under the old system. These new procedures however undermine the very rationale of the latter.

The links between the traditional legal system and ethics have been rather close considering the assumptions that the law must make regarding what is «right», what is «good» and what is «responsibility». Although it necessarily has to assume that it know the good (=the law) and that «responsibility» must mean «guilty as charged», it has on the whole taken into account the ethical concept of diminished responsibility and recognized the ethical problem implicit in the concept of a hierarchy of value. (Thus, because of their nature, certain acts require more severe condemnation and the sanction prescribed must reflect this). However, due to its egalitarian —or community-versus-the-individual— bias, the legal order by itself has not been able to fulfil the requirements of democratic ideology. We have had to retain the old system of deciding guilt and innocence by «due process of law», but we have also had to develop a «rehabilitative» system with its primary concern for the individual regardless of the intent of the law that found him guilty. Despite their frequent disclaimers, social workers are not primarily concerned with protecting society —presumably the courts have already made a decision on that issue by the verdict «guilty»— but with discovering the motives of the individual and returning him to society as soon as possible. Their bias

is that of relativistic ethics. Their training makes them deny that the rights of the community must override those of the individual. Their training in the social sciences requires them to see the individual as a non-responsible agent, outside the bounds of legal responsibility. Their duty is to see that despite the court's verdict, the individual returns as soon as possible to the community without a social stigma of guilt, or even an inner sense of being guilty.

Public protests from some jurists indicate that they are quite aware of the incompatibility of their own view of the law and that of social workers; yet the larger consequences of the new legal «sub-systems» developed by democracies await analysis. Ultimately, as has been said, the problem is that of sovereignty. What is happening is that sovereignty is being shifted from the central (or federal, as the case may be) power to local communities: no matter what the former prescribes, it is possible for the latter to nullify the effects of legislative or judicial decisions by nullifying the sanctions. Unless we accept the sovereign authority as an impartial arbiter in the emerging conflict between jurisdictions entrusted with legal decisions, we cannot solve the problems created by legal «sub-systems».

W. J. STANKIEWICZ

*University of British Columbia*

