

LAW, FORCE AND OBEDIENCE

A major question which has agitated the minds of jurists and philosophers throughout the ages is : why do people obey the law? Here we do not go into the other equally perplexing question: what is law? For the time being we understand by 'law' the positive law, the law laid down as well as the customary law. A medley of opinions is discernible on this point. In the first half of the 19th century, John Austin defined law as command given by a sovereign who may be a King or council or parliament. Such a command in his view is backed by coercion so that any person who violates the law would do so on pain of some suffering provided by the law. Thus the fear which the law, by its coercive power, strikes in the heart of the people is what makes the people obey the law. Proceeding logically, if we remove the element of fear from the law, it would not be obeyed as there would be no deterrence. In other words, if a law is made but without sanction, it would be disobeyed. But is this true? Are there not instances in our legal system where there is practically no sanction and yet the law is obeyed. The law may provide for making wills and yet a person may not like to make a will. The electoral law may provide for franchise but if an elector does not want to exercise his or her right to vote, there is no sanction attached for non-exercise of one's vote. And yet such a law may be fully obeyed. Can one argue that, probably, what is necessary is that the legal system as a whole should be supported by sanction, though some law or some provisions of some laws may not be followed by sanction? In other words, the necessity for having sanction arises for a legal system but not necessarily for every law of the system. Assuming this may be true, would it be a proof of the fact that the obedience of the legal system is obtained by the sanction or fear? What about the instances where people knowingly and voluntarily disobey the law though they are aware that they are running the risk of undergoing the coercion? In fact, the protesters offer themselves to be arrested for disobeying the law. In such

cases, is the fear not adequate to deter them? Can there be anything more precious than life? Even death sentence is not adequate to deter people from carrying on trafficking in drugs. What will produce more fear to deter them? If nothing, what is the legal system doing to cope with the situation? Does it mean that the fear element is over-emphasised in our theory?

Professor Goodhart thinks that it is not fear by which people are guided in obeying the law. Some people are good enough to obey the law irrespective of the fact whether the law is followed by sanction or not. Such people know that it is good for them to obey the law of the land and they thus obey it. The central thesis he advanced in his famous Hymlin Lecture, *English law and Moral Law* is that law is obeyed because of its obligatory character. He says,

"Austin found the key to the science of jurisprudence in the word command: I suggest that a more correct view is to find it in the word obligation."¹

He states that the feeling of obligation is based on the general law-conviction which itself may be based on the vague feeling of duty arising from the habits of people. One's feeling of reverence may join with the feeling of duty. Thirdly, people may obey the law realising that it is essential to do so otherwise there would be anarchy as without fixed rules, civilized life would come to an end. Finally he opines that law may be obeyed because of its moral aspect. People obey the law because they regard it as their moral duty to obey it. It is their firm conviction that it is morally good for them to obey it. And so they obey it. From where do they get this conviction that it is morally good for them to obey the law or morally bad to disobey it? He explains that in every society, howsoever far back we trace the organization of society anthropologically, it is essential that people have some shared moral ideas as to what is good and what is bad. For ages, established custom was accorded unquestioning obedience and people would follow it with full reverence.

¹Goodhart, A.L., *English Law and Moral Law*, 1953 p. 19.

'Custom is the king' was regarded as a time-tested and well tried maxim. In the rudimentary forms, it was custom which was the law; written law or positive law as we know it today is of later occurrence.'

It is said that it was in the 16th century A.D. that the term positive law came to be used. During the feudal times, custom reigned supreme so much so that even written law had to conform to the custom and if it contradicted the custom it must give way to it. The respect which the custom enjoyed in the eyes of the people was transferred to the law with the passage of time and the same has been carried forward throughout the ages. So in the modern man's conscience, there is a place for law-observance as an integral part of their moral consciousness. It is this moral consciousness by which they are mainly motivated to obey the law rather than the sanction provided by the law. In other words, as long as the law is such as can claim people's moral feeling in its favour it will be obeyed? Of course, every law may not be a good candidate for such a claim. Supposing a law is made that old people above the age of eighty be killed, will the people give their moral blessing to such a law? Obviously not. Such a law may not only be not obeyed but be disregarded blatantly, howsoever severe penalties be attached to its breach. Professor Goodhart's theory hints at an essential point which is generally ignored by the Austinians, namely, that the moral quality of the law is a significant aspect which has direct bearing on the question of obedience. Bentham is said to have raised, after reading Helvetius's *De L'esprit*, the question if he had a genius for anything. "Have I a genius for anything? 'what can I produce?' were important questions, and no less important was, 'what of all earthly pursuits is the most important?' Helvetius gave the answer, 'legislation'; for the legislator had the possibility of being both 'moralist and educator - in his power was the determination of the conditions under which man should live, and the consequent determination of what the plastic mind of the babe should develop into. 'And have I indeed a genius for legislation? I gave myself its answer, fearfully and tremblingly - yes!'"²

²Everett C.W., *Jeremy Bentham*, p. 18.

By the same token the Austinian jurist should be seriously mistaken if he takes it for granted that the sanction alone is adequate to command obedience of the people. For instance Professor Goodhart observes:

"Fear may produce obedience to a command, as in the case of a bandit but it cannot bring about a sense of obligation. If we do not understand this distinction then we cannot differentiate between rule by force and rule by law."³

In fact, we have already noticed from the above that moral courage overrides even the most brutal force; there are people who may lay down their lives but would not obey a law they think is morally unjust. The behaviour of such men clearly shows that mere force may not be good enough to secure obedience. Karl Olivecrona discerns this point clearly when he observes:

"Positive law, so the argument runs, assumes the character of real and true law only in so far as it possesses binding force; and binding force it can only have if and when it is inspired by certain fundamental values which compel the obedience of rational, civilized men."⁴

"The traditional dichotomy of 'law' into natural and positive law has been more or less definitely abandoned. It is being superseded by the idea that true law is to be distinguished from mere decrees of power through its intrinsic quality. Positive law is held to be really binding only in so far as it possesses this quality. The values in question afford a measure for judging positive law and a ground for rejecting enactments that violate the fundamental principles based on these values."⁵

Professor Goodhart's point can be seen from another angle. When he says that fear may produce obedience to a command but it cannot bring about a sense of obligation, he is pointing out the difference between the two states of mind : (1) obedience without liking to do so or hating to do so and (2) obedience with willingness. In the first case, there may be

³*Id.* at. 27.

⁴Karl Olivecrona, *Law as Fact*, 1971, p. 49.

⁵*Ibidem*.

obedience but the effect of such obedience on the individual is negative whereas in the second case, the individual internalizes the essence of the law and, therefore, it has positive effect on him. After all, no act of ours is without effect on us, on our development and future actions. Looked at from this point of view the desirable obedience to law is that which is voluntary and with the full cooperation of the inner mechanism because it is only in this situation that the obedience may be good both to the lawgiver as well as to the ruled. In the other case, it may be good to the one, to the lawgiver, but not so to the individual. It may be visualized that there may be situations where the law is good for both but there is hiatus because of the lack of understanding. The person obligated perceives the law in a wrong way and hence he resists the law mentally, if not physically. Misconception or wrong perception may be due to various factors : lack of comprehension of the law, prejudice against it, bad propaganda against the law, bad reputation of the law enforcement agents etc. It is the duty of the lawgiver to remove such factors which cause misapprehension in the minds of the people before the lawgiver can expect obedience to it from them.

Form and Function: As Karl Renner in his seminal study, *The Institutions of Private Law and their social Functions*, 1949, has shown that the form of law may remain unchanged but its function may change due to changes in the economic substratum, and thus cause a tension between the form and function. It is necessary to design a suitable form of law to enable it to perform the required function. Obviously, law-makers are called upon to examine the relationship between the form and the intended or actual functions performed by the law so that the law may be obeyed as it becomes a serviceable tool. This also implies the need to examine the form of law enacted in the past to bring it in accordance with the substratum which might have changed over the time. Judges must also play active role in the areas where the tension between the form and function has increased and the form must give way to the required function of law. The form is itself of no use if it fails to perform the desired or required function.

Degree of Artificiality

Positivists explain that law is obeyed because of the habitual obedience of the people and also because of the fear of sanction. James Bryce says that law is complied with by people, amongst other matters, by sheer indolence. Most of the people do not want to deviate merely because they find it convenient rather than inconvenient to obey. Some modern thinkers also opine that people also obey the laws because of their enlightened interests; they know that it is to their advantage to obey the law. It was Lowie who observed that the unwritten laws of customary usage were obeyed far more willingly than our written codes. Though Malinowski⁶ criticises the words "willingly" and "spontaneously", there is no denying the fact that customary laws or rules were obeyed whereas modern laws are often said to be more observed in disobedience than in obedience. Why is it so? It seems that the degree of artificiality which exists in modern laws explains the situation. Customary law developed or arose out of the real acts of the people; life went like that and so law was fashioned out of the clay of real life. This cannot be said about the laws produced or enacted in a modern state. The sheer magnitude of the laws, rules, regulations and notifications is such that it is not possible for an expert, let alone an ordinary citizen, to know what these are. Then how can we expect people to obey them? Very often the laws are changed, amended so frequently that even judges, advocates and litigants find it strenuous to keep pace with the law. What about the judge-made law which is widely spread through the law reports? The primitive man could state the whole customs to another fellow being in a short time as the law was simple and customs patterned on the acts which were performed by the people. In a modern society laws embody an element of artificiality in another sense; the law may look like a robber who expects us to deliver him our property or possessions without anything in exchange and that too on pain of suffering.

⁶Malinowski, B. *Crime And Custom in Savage Society*. Ch. III.

As Hart says that the gunman situation is writ large in a modern system; people do not find any positive interest to their advantage in obeying the law. They have to obey because of some element of fear which arises because of the organized force of the State. A law which is based on positive gain to its follower, would be gladly observed with no or little disobedience. Take for instance, the rule that those who stand in a queue get served in a post office. People would like to queue up rather than stand in a crowd haphazardly because they realise that it is much quicker and more peaceful to get one's turn in this way. They do not need any sanction to make them stand in a row. What about a law which says that you pay so much tax on so much income. Does an individual see the positive gains in paying the right amount of tax to the state? The answer is in the negative and hence the tendency to avoid paying taxes or paying much less tax than what is really due. One feels that the state is robbing the individual without giving him anything in exchange. Some may pay the full amount of tax thinking that the state is after all doing so many good things with the tax payer's money. But the number of such people is always insignificant. Such laws appear to the individual as antagonistic to his interest. He is all the more infuriated when he finds that some people get privileges or exemptions. This artificiality which exists in laws of a modern state explains people's disaffection for the laws. In other words, if a state wants its laws to be fully observed it is imperative for it to design laws in such a manner that they contain little or no element of artificiality. Then and only then can it expect that the laws so made are well observed. The very wording of the law should be such as to lead the individual to see his own clear welfare in the observance of it. Then only those who are completely blind to see their own interest would infringe the laws.

The idea of reciprocity. Malinowski observed in his study of the Trobriand society:

"There is in every act a sociological dualism: two parties who exchange services and functions each watching over the measure of fulfilment and the fairness of conduct of the other."⁷

⁷Malinowski, *Crime and Custom in Savage Society*. 1970, p.26.

In Malinowski's view the customary law of the Trobriands is based on reciprocity. An individual does something for another person or a group of persons on the clear practice of getting something or services in exchange of it. One gives a gift to another on the practice of getting either a gift or some services either immediately or after sometime. Someone may offer a basket of fish to another for helping him in his work. In a simple society, the customary law is mostly based on mutuality, mutual gain. In a complex society like ours the aspect of mutuality in numerous instances of the laws is non-existent with the result that a person who is obligated to do one thing or the other feels that he is forced to do a thing by the state without any mutual obligation on the part of the state. The role of law in such a situation is emptied of its true essence and is reduced to mere extortion or exploitation. And the people, when they realize this character of the law, react to it with disdain, overt or covert disobedience. When acts of disobedience become an avalanche, it is a beginning of a revolt against the law and authority.

Laws adapted to life:

Malinowski's observation on the state of law in a savage society is again instructive. He observes:

The true problem is not to study how human life submits to rules - it simply does not; the real problem is how the rules become adapted to life.¹⁸

The main point which emerges out of this statement that human life is supreme, is this that for its unfoldment and development it is in need of law and it will accept a law which helps it. In other words law makers need to look at the stage of development and discern the real need of the life of the people. Laws which step in the process of development to fulfil a real need of the people are likely to command obedience. Law makers should be men of wisdom with deep insight to see the need of the people before they make a law which they want to be obeyed.

¹⁸*Id.* at 129.

Ignorance and obedience: Probably the modern state secures observance of laws, amongst other things, by keeping the masses in the dark about its real deeds. Particularly, in states which are marked by corruption, it would be a strong tendency on the part of the government to keep in tight secrecy such information as reveals underhand dealings either with other states or private bodies because, if the people come to know of the real doings, they may detest and disapprove of them and consequently may refuse to obey the laws to demonstrate their protest. Once disobedience appears in one segment it may spread to the other and thus the legal machinery may be adversely affected.

Social orders without sanction: To the question whether there are social orders without sanctions, Kelsen replies that moral order is usually considered such a social order. He says:

"In order to judge the possibility of a sanctionless moral order, it must be noted that: if a moral order commands a certain behaviour, it commands simultaneously that the commanded behaviour of the one subject is to be approved by the others, the opposite behaviour disapproved. If somebody disapproves the commanded behaviour or approves the opposite behaviour, then he behaves immorally and must himself be morally disapproved. Approval and disapproval by the fellow members of the community are sensed as rewards and punishment and may therefore be interpreted as sanction."⁹

Does the enforcer stand brooding : A view is expressed by many writers that since sanction or force behind the law is rarely used and numerous legal transactions succeed without ever bringing the sanction into play, is the enforcer not standing and brooding in the air? Cowan has given a personal example to illustrate this. He says :

"I have entered into a myriad of contractual relations in my time: countless purchases, infinite number of bus rides, taxi trips, train and ship voyages. I have walked into restaurants innumerable and dealt with an indefinitely large number of legal relations involving real and personal property, sales, bailments. I have been a trespasser

⁹Kelsen, H., *Pure Theory of Law*, 1970, p. 27 - 28.

countlessly often, a tolerated intruder, a licensee, a social guest, a business invitee, I have used and caused a myriad of defective products, and suffered interminably from badly performed services. I have leased out let leases, bought chattels that might extend from Maine to California if placed end to end (I have often wished they were). And I have never sued nor been sued in my life. And most of the people I know have not either and neither have their friends. All of this I have experienced as a regime of law, yet where was and is the force? One would say in reply, that it is latent or virtual, that it is there without our noticing it, an omnipotent force compelling obedience."¹⁰

The argument runs that if the number of transactions which are actually enforced is an infinitesimal fraction of the total number of transactions, is there still any point in believing that it is force or sanction which makes the people obey the law. Is it the mere idea of force which has such a strong magic? Or has the role of sanction been exaggerated? Do we fulfil our legal obligations because of the fear of sanctions? Once the sanction behind the law is removed, would people indulge in breaches of the law? The answers to these questions are hard to come by. It is only on a view of human nature that one may tend to conclude one way or the other.

Law or Force: If we assume that the role of law is instrumental in inducing normative behaviour and thus bringing about conformity to norms which are necessary to keep a society together, then the force behind the law is destructive of the quality of law and the more the force the less is the law. The role of law is positive as long and as far as it is obeyed without force and to the extent the force is used to enforce the law, it is the force and not the law which is at work. The ideal system seems to be that which requires as little force as possible and as much work by law as possible. The limits of law and force are to be determined by sociological factors of various kinds. It is for the social scientists to guide in the dynamics of law and force. A society which depends only on force behind the law is in effect goaded by force and not so much by law. Such a society is slow to

¹⁰Cowan, T.A., "Law without Force", 59, *California Law Review*, 1971, p. 683 at 690 - 191.

develop, in particular, its human capital, because the task of a modern government in a modern state is not only to develop its natural resources but also to develop its human resources. The real development of man depends not on external force but on internal forces. There are internal forces of man which we may call feelings, impulses, sentiments, instincts or innate ideas. Most of our actions spring from our impulses and feelings from within rather than the external forces. In the development of mankind, the role of other agencies like, culture, religion, morality, education, literature, mass media cannot be under emphasised. Law is a part of human culture which derives its life from all these sources. To think that man obeys the law because of the police force, is a very inaccurate description, if not wholly wrong. In any case, the course of development should be directed in minimizing the role of force and enhancing the role of law without force. To achieve this, efforts are needed to design law in such a fashion that it takes on the role of a friend rather than of a foe. To an average citizen of a country, the law of the land should appear necessary and useful rather than oppressive so that it is obeyed by all without any reluctance or complaint. Then the role of sanction would be pushed to the background and the enlightenment would lead the people forward. Force would give way to law. Then let there be law without force and it would be indeed obeyed by the people. Do we require any force to believe this? If we do, we are governed by force and not by law; we have not yet entered the real rule of law.

Hari Chand*

*Associate Professor,
Faculty of Law,
University of Malaya.

