

IS LAW JUST 'A MEANS TO AN END'?

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This paper examines the claim that law, in complex modern societies, is merely a tool or instrument of private, sectional or governmental purposes. To put matters in perspective, it considers ways in which shared traditions, common values, emotional allegiances and convergent individual interests have been thought, by legal and social theorists, to be foundations for law – the basis of a 'common good' which law serves. The paper argues that these theoretical views remain instructive. In contemporary multicultural societies there are diverse social foundations on which law's authority and effectiveness depend. The conception of law as 'a means to an end' is not adequate to characterise these foundations.

In all modern legal systems, lawyers and politicians have become used to thinking of law as an instrument for achieving chosen purposes – whether these purposes are chosen by government (as public policy) or by citizens, corporations and groups (as private or sectional interests). The idea has become so familiar in Western countries that it is often hard to think of an alternative to it.

The American socio-legal scholar, Brian Tamanaha, has recently tried to show how this idea became established over the past century and a half in the USA. He contrasts it with what he calls 'non-instrumental' views of law, which treated law as having inherent values or qualities related to a sense of 'common good' or an idea of society's natural or moral order. In these non-instrumental views law had 'a necessary content and integrity' as 'a pre-given order that encompassed everyone... a law for all that was the product of no-one.'¹ Tamanaha

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¹ BRIAN TAMAHANA, LAW AS A MEANS TO AN END: THREAT TO THE RULE OF LAW (2006).

argues that to see law as a mere tool, lacking any inherent worth and serving no distinctive values that are essential to it, is profoundly dangerous. The idea of law as 'a means to an end' is not in itself pernicious, he suggests, but it becomes a threat when detached from any sense of an overall public good. Then, law becomes a tool of special interests, a weapon to be seized to achieve one's purposes whatever effects this may have on others.

A threat to the rule of law comes from the breeding of cynicism about law as a system of ideas, and about the agencies that serve it. If legislatures behave in ways that suggest that the laws that they make are no more than the enacted wishes of some partisan group that dominates the nation, respect for law is undermined. So too, if lawyers act merely as 'hired guns' determinedly promoting their clients' interests without concern for wider social interests or for the integrity of the legal system. Worst of all (and Tamanaha thinks this calamity has not yet happened) is if judges no longer render decisions in an objective fashion based on law.

Tamanaha ends his book unsure as to whether there is hope for law in the United States. The evidence could be read to suggest that 'in every legal arena battles are taking place between groups seeking to seize control of and wield the law as a weapon in their struggle against other groups'; but, on the other hand, it might be that, despite everything, 'there remains a core base-line of consensus over fundamentals within US society and the legal culture.'² In the latter case, there is something to build on and what is necessary is for legislators, government officials and judges to adhere conscientiously to an idea of a common law expressing a common good. How they are to be persuaded to do so, and what that common good must be taken to be, are not made clear.

What should we make of this horror story about law, with just the faint hope of a happy ending? Tamanaha's is an American story but it has resonances in Britain and, I suspect, in any society which has a vibrant modern economy

² *Id.* at 248.

and the restlessly competing private interests that go with this. The flourishing of a dynamic civil society promotes pressures on the legal system, firstly, to recognise adequately the range of interests seeking aid and protection from law and secondly, to adapt itself (on its own juristic and institutional terms) to facilitate, as efficiently as possible, the pursuit of these interests. A third pressure may be for law simply to yield to these interests – to become an extension of them, a direct and dependent agency through which they are pursued. The legal system cannot, however, become a voice for all special interests without collapsing into incoherence.

There has to be a set of unifying criteria to govern legal regulation. This is what Tamanaha means by the 'common good or public interest'.³ But who can say without controversy what this is? The American jurist Roscoe Pound, in the first half of the twentieth century, wrestled with the problem of finding ultimate legal criteria for balancing conflicting interests in modern societies such as his own.⁴ He called them 'jural postulates' and tried to formulate them at different times throughout his long career.⁵ In earlier eras, ideas of natural law, natural rights or social contracts were invoked to suggest value systems that law must presuppose to give it the integrity and strength to regulate conflicts from a position that could be thought of as relatively independent of the clash of interests.⁶ Now, none of these ideas seem adequate. All have an antiquated ring to them. We sense that social change is too rapid – especially as regards the material aspects of life – to allow for any fixed and comprehensive value system to govern contemporary law. Law must learn from experience and change, radically and rapidly, if it is not to be left behind as irrelevant (avoided, not enforced, or rendered arbitrary and unpredictable) by technological, commercial and other developments.

³ *Id.* at 250.

⁴ ROSCOE POUND, *THE IDEAL ELEMENT IN LAW* 245-52 (reprint 2002) (1958).

⁵ *Id.*

⁶ *See, e.g.*, L. STRAUSS, *NATURAL RIGHT AND HISTORY* (1953); H.A. ROMMEN, *THE NATURAL LAW: A STUDY IN LEGAL AND SOCIAL HISTORY AND PHILOSOPHY* (T. R. Hanley trans., reprint 1998) (1947).

In any case, is it necessarily ultimate values that are needed to unify law and prevent it disintegrating into the battleground of private interests? Some writers would say that law is given its integrity and distinctiveness by tradition.⁷ Certainly, lawyers are often torn between, on the one hand, a sense of legal traditions – established ways of working with law which comparative lawyers often refer to as ‘legal style’ – and, on the other, a recognition of the importance of continual adaptability. Some jurists have also suggested that law may ultimately have a mystical foundation, based in the spirit of the culture it expresses – something experienced emotionally rather than analysed rationally. In the nineteenth century, Carl von Savigny’s famous use of the *Volksgeist* (spirit of the people) idea in trying to specify the unique identity of German law was an example of this approach.⁸

In classic socio-legal theory, three sharply contrasting but very influential approaches explain how a sense of common good can underpin law in modern conditions. One of these is that of Karl Marx. Marx claimed, as is well known, that in reality there are no common interests that law serves. Law is always an instrument of some classes used against others; any idea of common interest must be a sham. The sense of a common good may exist, but, if so, it is an ideological device to disguise the reality of class struggle.⁹ For Marxists, Tamanaha’s gloomiest prognosis (the absence of any sense of law as a common resource to counter its appropriation by sectional interests) simply recognises what law has been all along – the prize in an endless struggle between opposing forces. Old non-instrumental ideas of law would be viewed, in Marxist analysis, as a mass deception which the triumph of the idea of law as a means to an end has at last exposed.

⁷ See, e.g., H. P. GLENN, *LEGAL TRADITIONS OF THE WORLD: SUSTAINABLE DIVERSITY IN LAW* (2d ed. 2004).

⁸ F.C. VON SAVIGNY, *OF THE VOCATION OF OUR AGE FOR LEGISLATION AND JURISPRUDENCE* (A. Hayward trans., 2d ed. reprint 2002) (1831).

⁹ See, e.g., ROGER COTTERRELL, *THE POLITICS OF JURISPRUDENCE: A CRITICAL INTRODUCTION TO LEGAL PHILOSOPHY* 212-13 (2d ed. 2003).

The problem is that, whatever truth there may be in this characterisation, it does not help solve the problem that exists for those who fervently wish law to be something more than an object of struggle. Tamanaha, for example, insists that non-instrumental views of law in the past were not a sham. When adopted by judges and other legal officials, these views 'imposed their own demands. They conferred benefits upon others unintended by the elite, and regularly hamstrung those in power who wished to wield the law instrumentally for their own advantage.'¹⁰ Hence, as the Marxist E. P. Thompson declared, the rule of law – if taken seriously as a doctrine – is not a bourgeois mystification but 'an unqualified human good'¹¹ because it requires that power be channelled in predictable ways and so implies that all, to some extent, should benefit from a degree of predictability about the use of this power.

From a non-Marxist perspective, Max Weber's early twentieth century sociology of law offered a somewhat related vision – ambivalent, rather than sceptical – about the idea of a common good that the law serves. For Weber, as for Tamanaha, law is justified in instrumental terms. Weber was, no doubt, influenced by his compatriot Rudolf von Jhering, a leading German jurist of the nineteenth century, whose best-known book is titled, in English translation, *Law as a Means to an End*.¹² Weber saw modern law as having entirely lost what he called its 'metaphysical dignity' – the fundamental moral justification that had been sought in natural law ideas. It had become no more than a means of producing compromises between conflicting interests.¹³ He saw the strength of this law partly in its obvious usefulness as an instrument for this balancing of demands, but also as a means of steering society bureaucratically by means of rationally organised rules. Law serves the common good in this view by providing

¹⁰ Tamanaha, *supra* note 1, at 247.

¹¹ D.H. Cole, 'An Unqualified Human Good': E. P. Thompson and the Rule of Law, 28 J.L & Soc'y 177 (2001).

¹² R. VON JHERING, LAW AS A MEANS TO AN END (I. Husik trans., reprint 1999) (1913).

¹³ M. WEBER, ECONOMY AND SOCIETY: AN OUTLINE OF INTERPRETIVE SOCIOLOGY 874-75 (E. Fischoff et al. trans., 1978).

a vast network of rules and regulations that make it possible to organise immensely complicated modern societies. The common good is, thus, the same *usefulness* of law (for citizens, corporations, groups, or governments trying to steer society) that Tamanaha emphasises.

The downside of all this is that, portrayed in this way, life seems like a cage made up of legal rules. Is this all there is? Weber writes, his words echoing to us across the decades, that no absolute values inform law and there is no single value system that unites modern societies. Life is made up of many different value spheres, irreconcilable with each other. Hence Weber's ambivalence about the common good is that, as an ideal, it seems to be a purely materialistic good defined in terms of everyone pursuing their interests in a well-ordered nation state. Particular values and ideals may influence law in various ways at various times. But in Weber's notoriously pessimistic scenario, this will not dent or shift the edifice of modern law. In other words, while Tamanaha portrays law as weakened and threatened by legal instrumentalism, Weber presents an opposite picture of law's instrumental strength.

Weber's thinking surely still has a powerful resonance for contemporary, globalised, materialistic, and bureaucratic societies. It may reflect a European view of the state as ultimately a necessary, welcome and powerful regulator by means of law, as contrasted with an American view that sees law as rooted in community rather than state and is hence alarmed by suggestions that conflicts of private interests are undermining the sense of community. But Weber's ideas also powerfully emphasise that modern instrumental law can have an existence independent of moral values. Its usefulness is enough to justify it. It has a life of its own – as pure technical regulation. That means, we might suggest, that all aspects of it can become a matter of technical calculation. For example, the possibility of legal liability may be not a matter for shame but merely a transaction cost. And the application of rules may become a matter of trying to achieve a result that cannot be criticised for deviation from the rule's terms, rather than one that is consistent with the rule's reasonable aims. As Emile Durkheim once put it, law without a moral foundation is law that has no soul.

Durkheim is the third of the classic socio-legal theorists of law's 'common good' and the only one of them who searches for a basis of modern law in ultimate values.¹⁴ For him, law in complex modern societies needs to express principles of respect for each individual, treated as a human being entitled to dignity and autonomy as such. The sheer complexity and variety of these societies is such that only this appeal to irreducible humanity can have universal moral resonance today. This is a value system that insists on tolerance of difference between people, their lifestyles and their viewpoints, but it treats each person as equally human and equally worthy of dignity as such. What is interesting is that Durkheim sets up this humanistic individualism – today expressed most obviously in ideas of human rights – in sharp opposition to the sort of egoism that Tamanaha sees in American law. The morality of modern societies and their law has to be one that makes the rights of others at least as important as one's own. It sees the common good in, for example, concern for the loser in litigation, the convicted offender, or the person who has rights but no realistic prospect of asserting them. It necessarily seeks to limit the blind pursuit of private or sectional interests that militates against any sense of the common good. Litigation cannot be morally justified as an instrument that allows a smash and grab raid by a plaintiff on a defendant using the court as his agent; nor can legislation be morally legitimate if it promotes sectional interests with no concern for social solidarity.

Tamanaha writes about the focus of lawyers on serving private or sectional interests. However, it is important to emphasise that it is not just individuals and corporations, but also racial and cultural groups, that seek to promote their interests through litigation or legislative lobbying. Tamanaha says hardly anything about the challenges of multiculturalism for law. Yet, these are hugely important challenges in many countries now, not least India and Britain. Can there be a common good that prevails over the clash of cultural interests and sectarian claims from different parts of the nation state? Will lawyers and legal scholars who see themselves as representing the interests of particular minority groups

¹⁴ ROGER COTTERRELL, *EMILE DURKHEIM: LAW IN A MORAL DOMAIN* (1999).

still recognise an overriding obligation to a sense of common good that law must express and symbolise? Or must the matter be left to be negotiated endlessly through the piecemeal, pragmatic, temporary management of conflicts of interest in courts and legislatures? In such circumstances, law, for each self-identified ethnic, racial or religious group in a national population, may be just a means to some group purpose or an obstacle to its achievement.

How should legal analysts view the clash of claims and interests in multicultural societies? Some may consider, in Weberian manner, that the routine negotiation of interests by means of law is in itself a sufficiently useful process to preserve law's status and autonomy. Others may appeal to established legal traditions to provide a stable framework in which potentially explosive issues can be narrowed and addressed. From another point of view, the legal system may need actively to earn and retain allegiance – the sense in the population at large that it is 'our' legal system for which 'all of us' take responsibility (and not merely a resource that some can use against others). Finally, seeking Tamanaha's 'common good', we might turn to Durkheim's values of individualism and argue that these must be consistently promoted. In any case, it is important to stress that law is not *just* a means to an end. It is a means to many ends and the security of any society will depend on ensuring that the ends of law are the ones that citizens can together recognise and respect as valid.