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LAW AS AN ENABLING DEVICE

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ABSTRACT

To many, law may be perceived as nothing more than a restrictive device. To the legal scholar, however, law may be perceived as an enabling device, even where it restricts. Nonetheless, it would not be appropriate to maintain that every restrictive norm enables. A paternalistic norm may enable; a tyrannical norm by definition restricts. This exposition advocates the position whereby law can effectively be a device of freedom. Correspondingly, there cannot be freedom without law, even though the opposite is not necessarily true. Furthermore, law, as an enabling device, points to liberal legal theory. The classical statist model of liberalism, as compared to the more communitarian model of liberalism, is promoted, even though partial inroads to communitarian liberalism are made (especially where the State is an absentee). The model promoted is also the one which comes with rights and duties: it is of relative nature and makes allowance for a hybrid state of affairs, wherein *anthropos* is the carrier of rights but also, importantly, the fulfiller of duties. Law serves man; equally, man serves the law. The paper proceeds with the elaboration, exemplification and critical analysis of the above, based on relevant literature from legal, political and economic theory. Thereafter, certain practical and theoretical connotations of the proposed analytical model are considered in detail. The analysis thus takes into account classic legal theoretical matter and tests such matter against the operation of law in the domestic and the international sphere. For instance, the analysis will revert to the theoretical differentiation between norms, laws, rules and commands by explaining how such variable legal issues can be manifested in practical matters. In this respect, the leading example of the legal harmonisation thesis will be utilised in the manifestation of certain of the points made, especially considering that such a thesis has wide-ranging implications for the domestic and the international sphere.

Key Words: law, liberalism, statist liberalism, communitarian liberalism, anthropocentricity, values, principles, norms, rules, commands, harmonisation of laws

INTRODUCTION

'The freedom of the mind is the source of all freedom' (Jenks, 1969, p. 54).

This article deals with the fact that law is an enabling force—a force of freedom for society and individual. It thus negotiates the desirability of law acting as an enabling device. It acts on the established hypothesis that a perfect life is in agreement with fair laws, while human existence succumbs to no other man but to laws and laws alone.

LAW AS AN ENABLING DEVICE

To the lay person, the law must surely be perceived as a restrictive device. 'Law restricts us.' – 'There is too much red tape.' – 'Regulation is all too abundant.' Let us take a closer look at the related questions. First of all, the lay person may certainly be excused for thinking law to be a restrictive and bureaucratic device, when law may actually not be such a device. The reason for such a misconception may be that, with the development of society and corresponding laws, law became an ever more distant reality to the lay person, a technocratic chimera. Yet such a perception neglects the very essence of law. When it comes to an initial categorisation, legal norms in any given society can take a number of forms:

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- Norms which are not paternalistic (purely enabling);[2]
- Norms which are partially paternalistic (generally enabling);
- Norms which are wholly paternalistic (enabling on the basis that, even though these deprive choice, come about by way of democratic process); and
- Norms which deprive freedom (restrictive).

FREEDOM AND LAW

Law thrives in freedom. Law liberates. When it restricts, it ought to do so in the name of the freedom of the many—the enlightened many. Law enables. It is with trust that one abides to such law cognisant of the fact that laws will not always be free from error. Laws are otherwise not walls but pathways of freedom. In the realm of law, we hold that these truths are eternal. Our laws do not, however, operate only in the interests of justice; they also seek fairness and *epieikia*. Furthermore, the call for freedom is one that expands all over the world.[3] To the author, freedom takes two forms: freedom of the mind and freedom of commercial operations. The former has to do with the primordial fundamental rights of the individual; the latter has to do with the co-extensive economic rights, which arise from civil rights and liberties in the first place.

Freedom cannot be guaranteed without law, even though the opposite is not necessarily true. Three centuries ago, Locke argued: 'Where there is not law, there is not freedom' (Locke, cited in Domingo, 2010, p. 138). Normally, for laws to enable, they should come in the form of rules (as opposed to them coming in the form of commands). The following example is illustrative of our point:

- 'Every contract or duty within [the Uniform Commercial Code] imposes an obligation of good faith in its performance and enforcement'[4] (example of a rule); and
- Any compulsory civilian/military conscription law (example of a command)

The difference between a rule and a command is that the former comes with an expectation (e.g. good faith in trade operations), while the latter comes with an obligation (e.g. civilian/military service). The former aspires to changing human behaviour; the latter imposes a predictable (Reynolds, 2005, p. 334) change in human behaviour. The former points to an 'ideal' state of affairs, while the latter imposes an 'ideal' state of affairs. The point of convergence between the two is that both rules and commands make the law, while breach of either may come with legal sanction. However, there is a clear preference for a legal framework which enables by way of rules rather than by commands. As Robin Letwin has rightly argued: '[o]ur freedom of choice depends on the extent to which we are governed by regulations that have the character of rules rather than orders' (Letwin, as cited in Reynolds, 2005, p. 334). This builds on established legal doctrine, according to which '[t]he notion of law as a command and merely a command cannot be satisfactory to anyone' (Buckland, 1945, p. 49).

The Willenstheorie may have a role to play in this respect. This theory provides that the 'the rule of law gives effect to each man's will so far as this is consistent with equal freedom of other men's will, according to a universal law of freedom' (Buckland, 1945, p. 49).[5] Freedom is, thus, one of boundaries.

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[2] This agrees with the approach expected under the calls of liberalism (political liberalism and legal liberalism being the counterparts of economic liberalism). Recent European examples of liberalisation in the sphere of legal services are Directive 98/5/EC (Establishment Directive) [1998] OJ L77/36 and Directive 2005/36/EC (Recognition of Qualifications Directive) [2005] OJ L255/22. For an illuminating discussion see R.G. Lee, 'Liberalisation of legal services in Europe: progress and prospects' (2010) 30(2) LS, pp. 186-207.

[3] In the sphere of economic laws, the obvious examples are those of the World Trade Organization, the European Union and the North American Free Trade Agreement. The idea behind these organisations is the creation and sustainability of market liberalisation. In relation to the European Union see e.g. R.G. Lee, 'Liberalisation of legal services in Europe: progress and prospects' (2010) 30(2) LS, pp. 186-207, p. 186.

[4] §1-304 (Obligation of Good Faith) of the American Uniform Commercial Code.

[5] Citing Hastie's translation of *Philosophy of Right*, p. 45.

In any case, the notion of law is multifaceted. The following diagram understands law, in its fundamental essence, as a hierarchical system of values, governing principles of law, legal norms and laws themselves. Thereafter, one could extend such a model by including rules and commands.

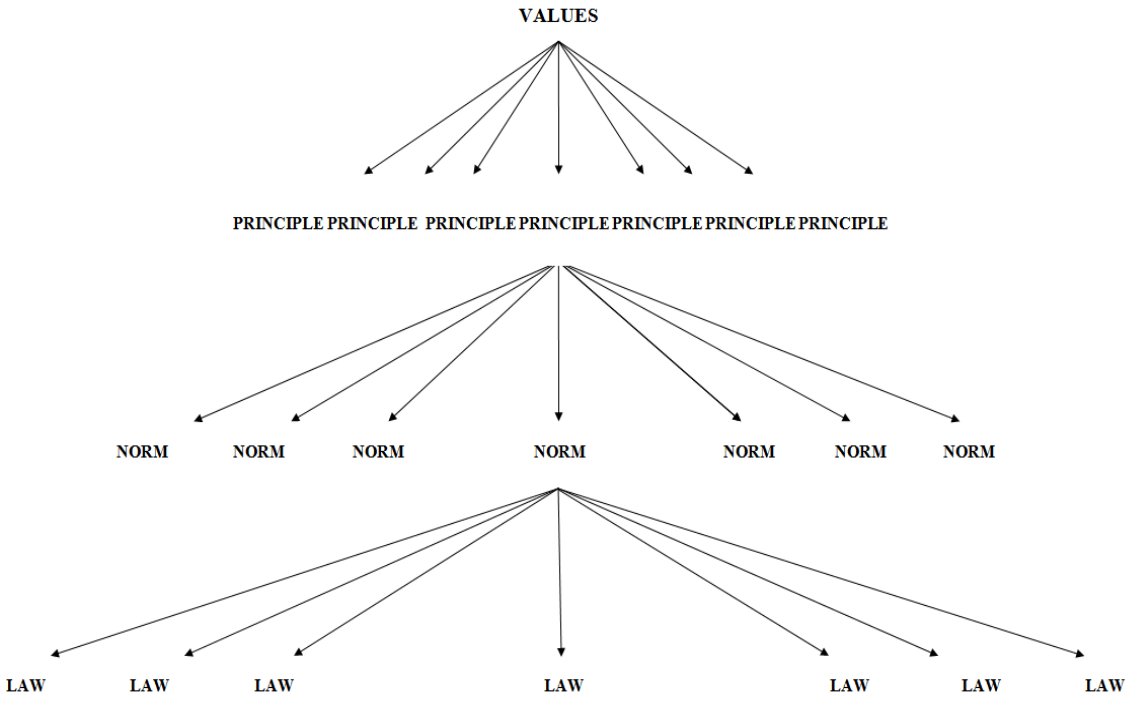

Diagram 1

Values are taken to be definitive notions of human existence; principles are constitutive of values, whereas norms (legal or social) prescribe human behaviour implicitly or explicitly, only for them to be crystallised into concrete laws. Laws, on the other hand, normally contain specific rules and, as stated, may even manifest themselves by way of commands.

The example of the harmonisation of legal systems is indicative of how economic and political values (for example) may be transformed into domestic law. Let us propose that the value of freedom of trade, the old and well-known laissez-faire doctrine, is an economic value, which defines many of the world's legal systems. The more concrete legal principle behind such an economic value is what jurists would call the principle or the idea of freedom of contract. The question would be how would such a principle could transform itself into legal norms and, subsequently, into harmonised law. The European experience on this is illustrative:

Articles 4(2)(a), 26, 27, 114 and 115 of the Treaty on the Functioning of the European Union clearly establish such an environment of free trade, in that they have created a normative supranational environment, an internal European market for free trade.

ENABLING LAW FOR AN ENABLING SOCIETY

Law in society is a central characteristic of Aristotle's man as *zōon politikon.* Beyond this, we need to ask whether our analysis should stop at the recognition that human society is made out of political beings who have laws that they should normally respect. The author wishes to depart from such a view, in the sense that the view in question restricts itself to a factuality. The proposition herein is that, while society is made out of political beings, societies are there to enable (as are the laws thereof).

The quest for freedom, happiness and perfection does not, therefore, become an individual exercise, but rather an exercise of the collective that would, in the first place, enable the individual. In such a society, full recognition is granted to 'the principle of equality of rights among citizens regardless of their social, geographical, professional, ethnic, or religious background—or their wealth' (Brousseau et al., 2012, p. 464). This approach also enables a perception of the law whereby the law operates as a uniting force of heterogeneous components in a given society (Reynolds, 2005, p. 328). So far, however, whether the ideas of capitalism or socialism are utilised in one's analysis, these ideas point to a mode of legal machinery operations, which moves either on a top-down basis (from society to individual: socialism) or on a bottom-up basis (from individual to society: capitalism). One is of the view that, while a top-down model is likely, this is to be the case only where the collectivity enables the individual (as opposed to it merely serving the individual). Close to Adam Smith's perception, our proposition suggests that there should be few or no legal frameworks; if such frameworks exist, however, then these frameworks should normally enable the individual. In short, our perception of legal frameworks is a minimal one and, where this is the case, frameworks would be enabling.

One's proposition for an enabling society, through enabling law, places the Rule of Law at the very centre of one's analysis. Accordingly, the position advocated is related to that of legal liberalism, in which case the thesis of Hutchinson and Monahan is of interest. For them, the Rule of Law stands as 'the central jewel in liberalism's crown' (Monahan and Hutchinson, cited in Cotterrell, 1996, p. 456). Rule of law is normally promoted as a form of minimum law (Cotterrell, 1996, p. 463). Legal liberalism is thus the shortest way to a society that manifests its will to promote the welfare of individuals (and by extension the welfare of society itself). To bypass the problem of 'certain individuals [being] […] morally isolated and legally unprotected; unable to and unwilling to call either on legal agencies of the state or their fellow citizens for aid' (Cotterrell, 1996, p. 463), we should put forward an analysis whereby the State (as the crystallisation of a society of the individual) acts in the same pro-active fashion as its pro-active individuals would act in their own life and towards one another. Accordingly, legal liberalism is not necessarily and wholly repugnant of a moderately pro-active State. By having such a model of a State, we escape the need for excessive regulation, which would not fit a State operating under liberal ideals. In other words, while our model of the Rule of Law is promoted as a form of minimum law, inroads to a more expansive Rule of Law are made, especially where a minimum law approach (for example, one that lacks additional legislation to the effect of our Rule of Law) would lead us to absurd or poor results. In our thesis, the Rule of Law is of minimum original specification, but of expansive subsequent operation, where this would be appropriate, only it would not be for the legislator to unilaterally expand such rule of law on a top-down basis, creating a sort of polynomous legal order; it would be for the citizen to directly alert the legislature to the effect of expanding the original core of a limited, in its conception, albeit fundamental Rule of Law model.

In our analysis, the classical statist model of liberalism (Luban, 1994, p. 32-33) as compared to the more communitarian model of liberalism (Luban, 1994, p. 33) is promoted, even though we would probably have to opine that partial inroads to communitarian liberalism could be made (especially where the State would be absent altogether). The difference between the two is found in that the former (statist liberalism) places its emphasis on rights and the rule of law, the model operating mainly in pursuit of order, while the latter (communitarian liberalism) places its emphasis on the relationships of citizens, the model operating predominantly in pursuit of justice (Luban, 1994, p. 33). Individual responsibility is the case in the former model *ab initio*, even though we know that this amounts ultimately to the responsibility of the collective; individual and collective responsibility is *ab initio* the case in the latter model (Luban, 1994, p. 33). Here is where one wishes to make a contribution: while one recognises the paramount importance of individual responsibility close to the calls of classical liberalism, one is of the opinion that collective individual responsibility should manifest itself in the relationships of individuals towards one another and in the absence of the State in enabling. That does not negate one's view in favour of the superior character of classical statist liberalism; it simply places the classical liberalism as the default rule in our analysis, while promoting communitarian liberalism as a reality that would occur in the absence of the State. Communitarian liberalism would only enable if the State of individuals would not.

One still cannot escape the reality of modern legal complexity. Our societies have become peculiar legal creatures of polynomy. Byzantine structures of complexity define the modern legal system. Complex as our societies became, so have our laws. There is inflation of regulation. Maybe then the fact that regulation is created in excess, creates a need to create further regulation. This is hardly satisfactory, and moves us away from the original position for minimum regulation in society. Regulation became the master rather than the servant. Rather than the laws serving us, we serve the laws. This cannot be a state affairs whereby law enables. How could it?

Additionally, even though it is understood that the law, as a whole, is not just a collection of rules but rather a systematic structure (Reynolds, 2005, p. 32), this is not to say that we should sacrifice the degree of freedom, which the law should inspire, at the altar of systematisation. Equally, the degree of systematisation should be one that reinforces the enabling features of the law, not one that systematises legal information by disregarding practicalities and necessities.

IDEOLOGICAL CORE OF THE LAW: *ANTHROPOS*

The individual stands in the middle of our analysis. In other words, our analysis is anthropocentric. This individual is characterised by autonomy and liberty (Ogus, 2010, p. 65). Collectivist understandings of law and *anthropos* are worthy of accommodation in our proposed thesis to the point that collectivism does not disallow even marginal understandings of individualism.

Law serves man; laws are not made for the benefit of machines and microchips. Laws are made for man. Laws are made for machines and microchips to serve man. Law is the servant of *anthropos*, not his master. Equally, implications of authority are ever-existent in the relationship between man and law, law standing above the will of the man. While these implications of authority are superimposed over the exoteric existence of man, they do not touch upon the esoteric existence of man. Thus, laws have exoteric force only on human existence. The authority of law over man is the result of the law's wellbeing. Laws derive their authority from their legitimising ethos. Thus, '[l]aw's authority might depend on how far it corresponds with, or meets, felt needs for regulation of social relations' (Cotterrell, 2002, p. 638).

PATERNALISTIC LAWS DO NOT NECESSARILY AMOUNT TO RESTRICTIVE LAWS

Another common misunderstanding is that laws that are 'paternalistic' tend to be perceived as restrictive, when, in reality, they may actually enable. As has been rightly suggested, the question here is the amount of freedom law should give (Ogus, 2010, p. 62), not whether it restricts or enables altogether. In other words, it is not a question of restrictions but rather whether or not law reduces risks (Ogus, 2010, p. 62). Laws that restrict may actually enable (Sunstein and Thaler, 2003, p. 1159-1202).

If the father of the family imposes a 'rule' on his child by clearly advising that it should avoid talking to strangers, surely that would be a paternalistic move in the form of a command. That would create a 'law' by way of command in the family environment (as opposed to creating law by way of a rule). That law would, on the face of it, restrict. *Secunda facie,* the very same command would enable. What would it enable? On the basis that the command would be carried out, it would enable the very protection of the younger member of the family. *Laws, which come in the form of commands, may be very much like those commands of the good father in a family.* They may restrict but in reality they enable.

In addition, it is understood that the value of laws arises out of the fact that laws are neutral impersonal responses to personal matters (Aristotle, cited in Reynolds, 2005, p. 23). The father's command should thus only be perceived as an impersonal response to a given person, his child (even if it would be directed to specific offspring). So too, the impersonal nature of the father's command here comes out of the fact that every reasonable father in a family would wish to protect his offspring. By extension, the paternalistic command of the father restricting his child from talking to strangers can only act as enabling law, providing for the wellbeing of his offspring, on the basis that it is not in the interest of the child to speak to strangers.

In an ideal world, laws should actually only enable. This is an idea that few would resist. Our freedom is one emanating from law, but would have to be ultimately somewhat regulated. Law is our liberator, recognising that raw freedom without limits can be tyrannical and oppressive. As Lacordaire said:

> Between the strong and the weak, between the rich and the poor, between the master and the servant, it is liberty that oppresses and the law that sets free (Lacordaire, cited in McCorquodale, 2010, p. xii).

Nonetheless, a pragmatic approach in the matter would suggest that occasionally restrictive regimes may be enabling ones. Thus, one's model is one of liberalism, which comes with rights and duties.[6] That is to say, our model is relative in nature. This is not to argue that a tyrant's legal directive on anything is an enabling law (unless, of course, that tyrant would be a liberator, which is a contradiction in terms). Law emanating from a tyrannical regime would rarely address the needs of the social. Accordingly, our preference clearly falls in an approach whereby 'normative ideas [are] embedded in social practices' (Cotterrell, 2002, p. 640). Harmony between the social and the legal should be maintained on all occasions.

Externality provides one of the bases for using the law as a restrictive device (Ogus, 2010, p 64). Essentially, we speak of a situation where the individual (in the form of a natural or legal person) turns against third parties or society (Ogus, 2010, p. 64). This state of affairs would then justify restrictions that enable, and it is one concerned with an economic analysis: is it not less costly to restrict than allow harm to materialise? (Ogus, 2010, p. 64). If it is, then

6 *Cf.* the position of neo-liberalism, which seems to place its emphasis on individual freedom and choice rather than on duties to others (Cotterrell, 2008, p. 153).

restrictions should be the case. If it is not, then the law should not interfere. Lack of adequate information is the second basis for interference that is not restrictive. The individual here cannot make an informed decision. The law then intervenes and interferes to the benefit of the individual. Again, such interference is non-restrictive. On the contrary, the individual is enabled to commit acts which he otherwise would not be able to commit (Ogus, 2010, p. 64-65).

Beyond this, paternalism in law can have two faces: a hard face (where it deprives choice) and a soft face (where it streamlines choice). A law which, on the other hand, is not paternalist is purely enabling.

It is important to note that even an otherwise paternalistic law may amount to a law which enables, on the basis that such law, *inter alia*, comes in agreement with the ethos, the ideological norms and values of the people it addresses. Thus, as Abioye has maintained in a different context, it is true that

> [f]or any law to be binding on a group of people, for it to be obeyed and respected by the people, without the threat of sanctions, it must reflect the norms and values of the people which it seeks to bind (Abioye, 2011, p. 61).

PERFECT LIFE IS A LIFE IN AGREEMENT WITH LAW

Enabling laws are the ideal. Again, even where those laws restrict, they actually enable. Beyond this, one could certainly argue that perfect life is life in agreement with those laws that actually enable. There are thus two elements of liberal essence here:

- Liberal essence, in that laws should enable; and
- Liberal essence, in that those very same laws are adhered to by way of a will that is the result of free choice.

It is not, however, for the State to prescribe a perfect life, or even a good life. In this respect, nanny States are omitted as paradigms from our analysis, in that they prescribe the life of the individual and by extension they offer him their version of perfect life. Our thesis complies, therefore, with political liberalism, which suggests that the State should be neutral in one's life (Green, 2001, p. 87). The individual prescribes his life, not the State. This individual's 'laws' are not prescriptive of his life; they enable him to lead his life together with others. It is the individual that drives society, not society that drives the individual. It is individuals that form our society, not groups of individuals with certain interests that formulate our agenda; not society in some form of abstract conception. Our thesis is, and certainly should be, about a society of individuals, not about a society made out of formless masses of human beings. Our individual is what others have called the 'citizen.' This comes in agreement with classical constitutional doctrine implying a social contract between the citizen and the State (e.g. Lomasky, 2011, p. 50). In any case, our citizen places man at the centre of his/her analysis. In this perception, liberal society is made out of citizens with anthropocentric aspirations. In this society of individuals, law as an enabling device could flourish.

There is one exception in justification of the State's intervention. While the individual recognises the value of the law and for this reason applies it, on occasion the same individual may not pay recognition to the value of law, in which case the State may have to intervene. Do individuals otherwise recognise the value of law? In the proposed thesis herein, both an individual who breaks the law and an individual who upholds the law may give recognition to the value of the law. The difference is that the individual who upholds the law does so, because he believes in the law. The individual who breaks the law may not respect the law, but that is not to say he does not recognise the intrinsic value of it. Upholding the law in every single possible occasion of one's life is one thing, and recognising the intrinsic value of the law is quite another. Besides, if a person breaks the law on one occasion, is that to say this person

does not recognise the value of the law as a whole? What if that person broke the law at an age before reaching adulthood? Are we to say that this person would not recognise the value of the law in the future? Or, on the basis that we deny this person's recognition of the intrinsic value of the law, would it not be true that our argument would then border on hypocrisy? It is clear then that incidents of breaking the law in an instance (with all the consequences that the law brings to its perpetrator) do not change the fact that our societies subscribe to our model of overall recognition to the value of law.

In our societies, the overall respect for the law is the sole unifying nexus of individuals. In other aspects of life, our individuals can be as divided as they may.[7] Law unites. The life of each and one of us divides us. Respect for the law equals to a society where each and one of us prescribes their life in their own way by respecting that which the law posits for all.

Respect for the law on the part of the individual equals goodness, indeed perfection in our thesis. We do not need to use our imagination in stating that our society of individuals is one that largely takes a uniform approach in respecting the law. In this respect, pluralism does not come into play. If it did, it would open Pandora's box for all sorts of different interpretations in what needs to be upheld and what is not worthy of being upheld. However, pluralism does come into play in the law-making processes and in the prescription of each and one's life on an individual basis. Accordingly, while pluralism is given full recognition in our thesis, the societal demands from individuals a uniform approach in respecting the law, in that laws have been generated by a majority of individuals (principle of democracy).

Finally, a general duty to obey the State and its laws defines our thesis. Socrates taught us this sometime ago. One may wish to question and disagree with the State and its organs, but one will uphold its laws and its decisions. The fact that one will uphold the law in the first instance does not equate to retreat on the part of our individual. On the contrary, even where our individual is asked to uphold the law, the individual may still judicially examine the decisions of the State. The duty to obey the law in a democratic society by far exceeds the remit of the duty to disobey the law.

CONCLUSION

Legal norms, in precise terms, can restrict but can, of course, also enable. Where it restricts, however, law may still enable. Law's magnificence is found in its positive force, a force which has been used (for the better) by democracies, and (for the worse) by tyrannies. The point remains: law enables.

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7 *Cf.* J Rawls, *Political Liberalism* (Columbia University Press, New York 1993) 303-304.

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