

# The limits of legal ideologies

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In this essay I would like to suggest answers to two questions:

1. what is the role of law in determining human progress; and
2. can any understanding of the human person, or of human nature, be derived from the study of legal arrangements and institutions?

Modern jurisprudence has largely ignored the questions of human nature and human progress in its analysis of social institutions, but the present essay will suggest that these questions are, in fact, inseparable from such analysis and thus are central to jurisprudence.

Given the scope and centrality of these questions, the present essay can hope to do little more than illuminate certain dimensions of the problem only. The particular aspect I would like to explore is given concise expression by Lon Fuller. Fuller argued that the main purpose of law is to “rescue man from the blind play of chance and to put him safely on the road to purposeful and creative activity”. In this way, law may be said to “create the conditions essential for a rational human existence”.<sup>1</sup>

Fuller’s claim implies the connection between the two questions I have raised: for in suggesting law as the pre-eminent means by which rationality is to be manifested and advanced in human affairs, Fuller of necessity presupposes certain assumptions about the nature of a “rational human existence” and the extent to which that mode of existence may be said to complete, rather than fight against, basic human impulses. Thus, the role and purpose of law are to be discovered in its rationality; and our understanding of this rationality gives substance to our beliefs concerning human life as a rational existence. My aim will be to take Fuller’s suggestion as the starting point for discussion of my initial questions, and my argument will attempt to establish that, unless it is heavily qualified, Fuller’s suggestion must be rejected.

The basis of the argument I wish to advance can be stated succinctly. It is that the notion of a rational human existence as something identifiable and intelligibly present within history is deeply problematic. This is not to deny that human action, or even human societies, may exhibit rationality; it is rather to suggest that it is impossible to derive from historical understanding anything which approximates or reduces to a definite “mode of life” that represents the necessary, unique or desired direction of human activity. Human

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1 L Fuller, *The Morality of Law* (New Haven: Yale UP 1969), p. 9.

personality implies freedom, for the ability to differentiate “persons” as separate centres of thought and activity demands not only the possibility but also the reality of independence of each centre from all others. Freedom therefore implies creativity, in that each person (in manifesting genuine independence of thought and action) must be thought capable of originating modes of purpose and activity rather than simply manipulating pre-determined possibilities for action. This freedom is present within human history just insofar as historical explanation is incapable of furnishing explanatory historical laws: were such explanations of historic actions or events available, they could also be used for future prediction.<sup>2</sup> Creativity therefore entails the rejection of determinism and thus also the possibility of artificially determining the future form or direction of social action. Law may determine behaviour (by structuring choices), but it cannot determine the general mode of existence. Thus also, whatever rationality is present in law is not of a form such as will place human society onto any particular path, rational or otherwise, and will not (unless it completely suppresses freedom and creativity) generate conditions that will allow for the identification and realisation of a rational mode of life.<sup>3</sup>

### Rationality and ideology

In the context of this essay, a “rational human existence” might mean either of two things. On the one hand, it might refer to a specifically desired form of collective social life. The quality of rationality here does not hinge upon the pursuit of reason itself, but upon the organised pursuit of some anterior goal which is itself taken to be rationally desirable (welfare, say, or peace, or the “caring” or the “just” society, perhaps even wealth). Where, as is often the case, a substantive aim is taken to be rational precisely insofar as it is not merely individually preferable, the goal around which social institutions are interpreted and organised is naturally seen as, in some sense, a collective one. Traditionally, therefore, the category of “the rational” (in this first sense) was taken to exist on a level separate from and above that of individuals; to be an object of the good life rather than a subject of personal preferences. Within the dominant patterns of Protestant political thought that have shaped the modern Western political consciousness, by contrast, this first sense of “the rational” takes shape not as some independently determined object of contemplation, but as that upon which human preferences converge: disagreements being intelligible as such only by virtue of arising within a shared framework where things have an approximately agreed sense and value. Whichever path is taken, the implication is clear that the existence of a rational form of life in this sense presupposes the presence of an impersonal aggregate, capable of identification in abstraction from the concrete human personalities which are its varied expressions. Accordingly, we may refine our understanding of the ideal form of life by clarifying our beliefs concerning the substance of this shared humanity.

The other way in which the idea of a “rational human existence” might be understood is by reference to a less substantial conception of the impersonal aggregate. This is best explained in contrast to the more full-bodied idea outlined above. Typically, the eschatological understanding of the human being implied in the suggestion of an impersonal aggregate is subsumed within the sphere of politics by way of an ideology. The uniting characteristics of “the human being”, considered apart from the particular lineaments of individual personality, can be understood to refer to those dimensions in which all human beings possess a basic equality. Since politics (at its best) concerns the

2 See L. Kolakowski, *Modernity on Endless Trial* (Chicago: University of Chicago Press 1990), ch. 22.

3 There are strong grounds for supposing that the complete suppression of freedom, even if taken as a deliberate aim of law, cannot be realised in fact: see N. E. Simmonds, “Straightforwardly false: the collapse of Kramer’s positivism” (2004) 63 *Cambridge Law Journal* 98.

advancement of the human lot through the organisation and use of power, such basic equalities are naturally suggestive of an ethic in the light of which our conception of the proper end of politics is refined, and its practical exercise guided.<sup>4</sup> Because the nature of such equalities, and hence also the content of the ethic, are capable of endless interpretation, we may reasonably refer to the variant understandings of the guiding ethic as “ideologies”. Politics then consists in the rhetorical and practical exercise of encouraging convergence upon preferred ideological principles; and in most cases it will be the law that is the primary instrument through which the dominant ideology will be advanced.

By contrast, the second, more austere understanding of rational existence takes the same impersonal substrate as demonstrating nothing more than the independence of each person (as an instance of it) as a centre of thoughts and impulses from all others. The basic equalities expressed by the substrate form the means by which each such centre is distinguished, as an *ens completum*, from the rest. This “necessary” substrate is to be contrasted with those accidental features of the concrete personality which arise adventitiously or contingently, and which give rise in turn to the pursuit, not of one common or unique set of values the attainment of which is regarded as the proper end for human beings, but rather a variety of different values and projects which may conflict with and impede one another. Thus, it is believed, no single ideology is implied in the form of the substrate, law and politics being an unfortunate if necessary body of rules and standards for the maintenance of a world in which conflicting ideologies must find some way to coexist.

Here also, nevertheless, there is an ideology at work in the transition from eschatology to politics. For, on the one hand, the features of the person that are taken to constitute the necessary substrate rather than the variable particulars of the personality are determined, at whatever level of abstraction, from a historically conditioned understanding of humans as actual social beings. On the other hand, the belief that the purpose of politics and the sphere of law lie in the protection rather than the suppression of individuality, the maintenance of many means and ends rather than the organised means to a common end, may itself display an ideological concern with the values of freedom and autonomy as central to political thought. It is important to stress here that “concern” does not necessarily connote support: the eschatological recognition of the human person as an “individual” (that is, an *ens completum*) necessitates the restructuring of political thought around ideologies specifically relating to that character, even if the resulting ideological standpoint is one that is hostile to individuality. Hobbes’s philosophy perhaps provides an example of a politics of the individual in which the need to set strict limits to the expression of individuality is keenly felt. Hobbes does not celebrate diversity but seeks to contain it: it is not individuality (still less toleration or democracy) that he strives to uphold, but rather peace and stability in a world where the unrestrained expression of individuality would lead to the war of each against all.<sup>5</sup>

This second notion of a “rational human existence” might be abridged in the following way. We may see it as the effort, not to bring about convergence upon some definable ideology, but to reduce randomness in the simultaneous pursuit by distinct individuals of their own ideologically driven projects and preferences. It is therefore concerned with the suppression or management of conditions of uncertainty in social interaction (such as the possibility of violence, or lack of coordination in expectations). The lines quoted from

4 The long history of such efforts is sufficiently well known to excuse illustrative treatment of these themes in the writings of Grotius, Pufendorf, Locke, Wolff (to name but a few). Interested readers may wish to refer to excellent discussions in J B Schneewind, *The Invention of Autonomy* (Cambridge: Cambridge UP 1997), and R Tuck, *Philosophy and Government 1572–651* (Cambridge: Cambridge UP 1993), for example.

5 See T Hobbes, *Leviathan*, R Tuck (ed.) (Cambridge: Cambridge UP 1996), ch. 15.

Fuller at the beginning of this essay are more suggestive of this second conception of rational existence than of the first outlined above; but insofar as both conceptions can be seen to animate the dominant approaches to modern politics, the remainder of this essay shall be concerned with both.<sup>6</sup>

### Ideology and history

Though not exhaustive of the ways in which a “rational existence” might be understood, the above suggestions are sufficient to show that the notion of rationality is inherently an eschatological and, therefore (when it becomes the object of political contemplation), ideological, one. We might thus refer to such conceptions as “ideologies of rationality”. Fuller’s claim, that the purpose of law is to create and secure the conditions necessary for a rational human existence, is equivalent to the proposition that the purpose of law embodies an ideology of rationality. The burden of this essay then concerns an argument to the effect that the phenomenon of law implies no such coherent ideology.

In order to understand the complex relationship between law and ideology it is necessary to begin by examining the common law’s association with what is sometimes referred to as a “historical” conception of justice. This expression can be taken to describe a form of adjudication in which remedies are determined on the basis, not of static principles of distribution or notions of fairness (for example), but of a detailed consideration of the way in which the present relationship between the litigants came about. But the common law method is historical also in a deeper sense, for the practice of determining the relevant law by reference to the interpretation of previous decisions itself embodies a distinctive historical ethos. This ethos, which predates the conscious articulation of the doctrine of *stare decisis*, is most clearly visible in the writings of Coke. It is animated by the notion that “reason” as such is too wide a basis for legal decision, as the treatment of each situation as a unique particular demanding consideration *de novo* invites the introduction of potentially endless sequences of argument and counter-argument in which there is no limit to the number of factors and perspectives which can be brought to bear. The avoidance of moral paralysis thus demands that the unique particularity of each case be recognised only within limits, by a comparison of the extent to which its various features resemble or differ from previous cases which bear some recognisable similarity to one another.

Because any two cases may be judged alike or unlike in countless different respects, such comparisons necessarily involve a determination to follow certain criteria of judgment to the exclusion of possible others. It is in this sense that jurists of Coke’s era refer to common law adjudication as “the artificial perfection of reason”: the artificiality resides in the submission of judgment to the continual reinterpretation of previous decisions as a means of channelling moral thought along a manageable number of lines. The relevant image is of a body of rules (that is, reasons for decision) being constantly refined and improved as they are reapplied in successive cases. Law in this sense represents a society’s accumulated wisdom about the way in which the perennial problems afflicting it ought to be addressed.<sup>7</sup>

6 Having dealt with these understandings of politics elsewhere, only a brief precis will be given here. For more extensive discussion, see my *From Positivism to Idealism* (Aldershot: Ashgate 2007).

7 See E Coke, *Institutes*, vol. I (1628), s. 128. Coke uses the image of a blacksmith gradually hammering a piece of metal into shape. I discuss this conception of common law reasoning in more detail in my “Two concepts of legal analysis”, in S Coyle and G Pavlakos (eds), *Jurisprudence or Legal Science?* (Oxford: Hart Publishing 2005), p. 15. For an extended discussion, see G Postema, “The roots of our conception of precedent” in L Goldstein (ed.), *Precedent in Law* (Oxford: Clarendon Press 1987), p. 9.

This historical conception of justice is itself expressive of an ideology of rationality. For it embodies a commitment to the image of reason as the product of reflective immersion within a body of experience, rather than (say) the deduction of a system of general principles of morality which derive their validity in abstraction from that experience. The ideological dimension to this distinction is clearly articulated in the first chapter of Blackstone's *Commentaries*, where he contrasts the shallow and regrettable attempts of the younger generation of MPs to legislate general solutions to social problems, with the deep, patient moral sensitivity exhibited by those who have devoted themselves to long study of common law precedents.<sup>8</sup> This ideological elevation of the common law, though never embraced unequivocally, was nevertheless visible in the writings of prominent jurists throughout the 17th and 18th centuries as a means of indicating certain limitations to the powers of Parliament and the monarchy. The fact that such a view of the common law's authority was but one argumentative standpoint in the search for a constitutional settlement underlines the ideological character of the variant understandings of moral rationality.

The ideology of rationality which lies at the heart of common law adjudication is not easily accommodated within the currents of modern philosophical thought, for which the idea of immanence is deeply problematic. Informed by a changed understanding of the nature of philosophical analysis, modern philosophy is animated by the belief that the possibility of moral judgment depends upon the independence of moral "validity" from the practices to which the relevant norms stand in a critical relationship. An obvious source of this conception lies in the need to preserve the necessity of the critical standards vis-a-vis the variable contingencies to which they apply: the critical function of morality being lost precisely where the standards of judgment are as contingent as the "facts" being judged. But the inherent oddness of this conception is never far from the surface: it can be seen, for example, in the sceptic's question of how the truth of standards which are *independent* of human practices can be demonstrated to apply to those practices?

The distinction between the two ideologies is captured quite clearly in the reflection that moral judgment depends upon an appreciation, not simply of facts, but of the *meaning* of the facts. Modern philosophy has by-and-large assumed that if history has any meaning, it must be in virtue of human interpretation. Spurred on by rapid developments in logic and the philosophy of language at the beginning of the 20th century, it was thought that meaning is not simply present within the facts, awaiting discovery; rather, meaning or significance are imputed to the facts on the basis of values that derive from elsewhere. Two distinctive lines of philosophical thinking served to reinforce this tendency. First, the search for a new and logically satisfactory theory of the *a priori* and the apparent success of philosophical semantics in explaining certain problems of mathematics led to a general belief in the dispensability of metaphysical concepts and a strong focus upon the conventional nature of language.<sup>9</sup> The second was an increasing tendency towards moral voluntarism, in which "values" were regarded as emanating from a source in human will and reason, rather than entering the consciousness via the intellect. Though he was not the originator of either of these developments, both received important (and in some ways definitive) expression in the writings of Kant.<sup>10</sup>

The form and substance of common law judgment stand in opposition to these developments and in this we find, within the historical conception of justice, an echo of an

8 W Blackstone, *Commentaries of the Laws on England*, vol. I (1769), "Introduction: The study of laws".

9 For an informative discussion, see J A Coffa, *The Semantic Tradition from Kant to Carnap: To the Vienna Station* (Cambridge: Cambridge UP 1991).

10 On Kant's involvement with the second of these intellectual developments, see e.g. Schneewind, *Invention*, n. 4 above.

earlier tradition of thought about morality and reason. Here, the aim of law lies not in the production of a set of ideal arrangements, nor the elucidation of a quintessential body of rules to secure their attainment, but rather in the creation of a means of fair and openly intelligible judgment in relation to occasions of social conflict. Law in this sense does not directly embody an ideology of the human good (that is, of reason-in-the-world), but instead seeks to give precise expression to aspects of the background of shared understandings upon which social interaction of all kinds is based. Thus, law, more perhaps than any other social institution, articulates the meaning of historic forms of human association; and in so doing it both reflects and refines those understandings which underpin social existence.<sup>11</sup>

It is not difficult to see how this understanding of common law judgment can blossom into an ideology of rationality in either of the two senses outlined above. For, in giving expression to the conditions of mutuality which constitute a civilised existence, we also clarify (as it would seem) a body of ideal arrangements in which the high watermark of that form of life can be identified. Thus, the progressive refinement of present rules of social engagement naturally appears as a journey from the imperfect society of the here-and-now towards the future Utopia. There is no doubt that a significant body of political and juristic writings, both of the early modern period and of the present day, reinforce this congratulatory myth; but the *artificiality* of the idea of reason to which the older jurists were (on the whole) much more sensitive ought to highlight the limitations of this view. This might be explained as follows.

In embodying a historical conception of justice, the juristic method of the common law displays an awareness far greater than that of the majority of ethical theories of the present day of the fact that a moral consciousness is, in the end, a form of historical consciousness. Amongst modern philosophers it is perhaps Gadamer who gives clearest expression to this idea: "Within the concrete conditions of his own historical existence – not from some position suspended above things," he writes, "[the historian] sets himself the task of being fair."<sup>12</sup> What is true of the historian here is also true of the philosopher and, more particularly, the jurist: for it is within the historic forms of language, culture and engagement that both the reality and the knowledge of our essential similarity and involvement in conditions of mutuality are manifested. Thus,

[j]ust as understanding connects the individual ego with the moral commonalities to which it belongs, so also these moral commonalities themselves – family, people, state, and religion – can be understood as expressions.<sup>13</sup>

Law, more than any other aspect of the institutional fabric of society, gives direct expression to the meaning of these moral commonalities. But what does it mean to express such meanings, which are inevitably historical meanings? The human consciousness is essentially a finite source of understanding, and it embodies an intellect which is itself limited in terms of its powers of arrangement and perception: it is not something before which everything enjoys a simultaneous and equal presence. The arguments of the early natural lawyers, including Grotius, Locke and others, articulated this limitation as an inescapable frailty or imperfection of human reason, cause and consequence of the turbulent conditions of Fallen man. Yet it is these same limitations which make intelligence possible: memory, perception and the submersion of the individual power of judgment

11 I do not intend to provide extensive argument for that proposition here, as it seems to me fairly self-evident. However, a deeper argument for it can be found in my "Positivism, idealism and the rule of law" (2006) 26 *Oxford Journal of Legal Studies* 257.

12 H-G Gadamer, *Truth and Method* (London: Continuum Books 1975), p. 211.

13 *Ibid.*, at p. 213.

within the context of historical effect are precisely functions of understanding, for they form the basis of priority and distinction. And it is the power of distinction which allows an escape from an existence of mental paralysis in which everything is equally present and co-significant. The historic consciousness, therefore, is inevitably a partial one, for it can perceive meaning only in the part and not the whole of history; and it is this partiality that constitutes the power of judgment. It is in this sense that (I believe) the artificiality of common law reason must be understood.

That being so, the narrow limits within which the law can be said to pursue the goal of a "rational existence" begin to take shape. The notion of a rational existence in the first of the senses explored above (as a specifically desired form of social life) depends upon the idea that history may be read in such a way as to reveal a general arc or trajectory belonging to human existence, terminating in some ultimate condition or state of perfection. Historical progress is thus viewed as a step-by-step transition from a primitive condition of existence to one of enlightened civility. The emergence of concepts or political phenomena, such as rights, can then be conceived as identifying the attainment of stages of enlightenment in which some previously hidden potentiality is actualised. (Grotius's elucidation of the *sumum*, for example, may in this sense be thought to give expression to a necessary dimension of human personality hitherto undisclosed. If we believe this, then we believe such intellectual discoveries to involve the recognition of historical inevitabilities.)

The general suppression of metaphysical perspectives in modern philosophy is ironic in this regard, for the idea of human history as a journey from a more primitive condition towards a standpoint of enlightenment is one for which historic inevitability is substitutable for teleology. This teleological dimension to political philosophy is disguised only because, by an intellectual sleight of hand, the notion of a prized final state becomes detached from its historical context and becomes an abstract model of "the good society", history itself being appropriately reduced to a mere arena of application for moral insights derived from elsewhere. Thus, "historical necessity" becomes "logical necessity" or "moral necessity", comfortably shorn of metaphysical associations.

In the following section of this essay I shall attempt to reveal the shortcomings of this notion of a rational existence. It will then become clear that the second understanding of "rational existence" follows directly on from the failure of the first. The subsequent discussion will then focus upon the difficulties with this second concept of the rational life, and its applicability to notions of legal order only in a reduced and heavily attenuated sense.

### Law and the pursuit of a rational existence (1)

It is important to be clear from the outset on the proposition that is to undergo criticism. The proposition is that the purpose of law is to create the conditions essential to a rational human existence, in the sense of a specific set of desired arrangements that are either absent or (more likely) only partially and imperfectly embodied in the society of the present. Law, in this sense, might be said to embody an ideology of rationality in that it is believed to give shape to a particular vision of what a "rational" existence is.

As we have already seen, the ideal of a rational existence is an eschatological one insofar as it implies a direction to human life, terminating in some finally desirable condition of being. In less evasive language (that is, the language of the layman rather than the philosopher), such an end-point might be termed "the meaning of life"; and to express the proposition in these terms is to claim that law exists to bring about the institution of an ideal set of arrangements which give clear and direct expression to this meaning. Expressed in these terms, the central problem becomes immediately clear: for an agreed understanding of the meaning of life is precisely the happy condition which is absent from human

existence. Politics, then, cannot concern in any straightforward way an advance toward the realisation of that meaning through law; rather, the question of the meaning of human existence is just that which defies agreement in all facets of human social engagement.

It is not, however, this fact which is most damaging in political thought (though the creation of blinkered and evangelical ideologies has certainly played a significant part in determining modern political realities). For the error of political and jurisprudential ideologies lies not in mistaking specific dimensions of a contested truth for the agreed core; rather it concerns the very pursuit of a rational existence, in those terms, at all. Upon reflection, it becomes apparent that the attempt to institute an enhanced mode of existence carries the suggestion that the full or true meaning of life is something postponed to a future time, and hence that such meaning cannot completely emerge in the conditions of the present. This is, of course, a direct if implicit reduction of the meaning associated with the life of the here-and-now. Such a reduction betrays a basic misunderstanding of human existence: for to view present arrangements as unsatisfactory is one thing; but to view them as a mere stage of development on the road to an imagined higher state is to contrast the actual imperfection of man with a vision of human perfectability which is alien to its essential nature.

It is possible to challenge this vision of perfectability in a number of ways, but one such explanation is as follows. Historians have frequently pointed out the tendency, in some degree inevitable, of understanding historical events in the light of present knowledge. This is not true simply of history but of all fields of human enquiry: despite stubbornly embedded philosophical intuitions to the contrary, there are not “facts” and “interpretations” of the facts, of which only the latter are knowable. Rather, the “facts” are always different ways of looking at the facts. (This is inevitable in any context involving discussion of facts: the notion of some objective bedrock lying behind our characterisations is something which must itself lie beyond characterisation, and is hence useless and irrelevant to human thought.) If this is true of our relationship to present events, then the status of our understandings of historical events as interpretations does not affect their validity, simply because they differ in numerous respects from those of contemporaries. The very possibility of history as a subject depends on this. But there is an important difference between the proposition that the past is always understood as a projection of the present, and the proposition that the significance of the present and future are determined on the basis of the meaning attributed to this constructed past. The latter, but not the former, implies the existence of a reliable method of historical explanation.

As Kolakowski amusingly recounts, there is a simple way of demonstrating the absence of any such method, which is at the same time a demonstration that the status of all explanations depends upon a decision to treat them as explanations:

My late friend Lucien Goldmann displayed admirable ingenuity in linking up the smallest details of Pascal's *Pensées* with the plight of the French *noblesse de robe* after the Fronde. One would think that he could really write the *Pensées* without reading them, solely on the basis of the historical evidence concerning the class conflicts of the time. And it is here that the crucial point lies. For if there were a reliable method for a historical explanation of culture, we would also be able to use it as a tool for prediction. To be able to explain what has happened is also to be able to predict what has not yet happened, otherwise the word *explain* would not have the meaning normally attributed to it.<sup>14</sup>

<sup>14</sup> Kolakowski, *Modernity*, n. 2 above, at p. 244.



Thus, he concludes,

Whoever claims to be able to explain particular phenomena in the history of music, or of the novel, can prove this claim only by writing a novel or a piece of music which does not yet exist but which will be created tomorrow by someone else.<sup>15</sup>

Similar thoughts hold true of the attempt to characterise an imagined state of human perfection. To claim to have discovered a general trajectory in human existence, from an initial state of barbarism to one of urban civility, and to project that into the future as a vision of the ideal society (or, at least, the ideal set of principles for running such a society), is to express belief in a form of historical explanation that does not exist. It is here that the historical conception of justice implicit in the common law differs from an ideology of rationality of this kind. For the body of rules and ideas inherited from the past are not taken as together revealing “the meaning of life”; they are simply a convenient set of mundane arrangements which have been tried and tested in a vast array of previous contexts, and which thus form a useful point of departure for the judgment of new contexts which we decide to treat as relevantly similar to those that have gone before. The appropriate image is of a set of standards for managing the tensions endemic to a social existence, rather than a body of principles which aim, through their own gradual self-transformation, to resolve all tensions and bring about a heaven-on-earth.

The goal of a historical conception of justice is not the production of a general understanding of how things ought to be done, or of how things must be refined further and further to some ideal point; it is instead a form of self-knowledge, that is, a society’s attempt to give concrete expression to its own form of life. The ability to furnish self-knowledge is limited in just the same way as human understanding lacks a general method of historical explanation. For history is not simply a collection of causal processes and outward appearances, but a living tradition “riddled with countless breaking-off points, and each creative act, each creative individual, is such a point”.<sup>16</sup> That being so, there is no single direction in which human existence moves, nor a collective destiny by which human existence is shaped: “historical reality is not merely a heavy, opaque medium, mindless matter, rigid necessity against which the spirit beats in vain and in whose bonds it suffocates”.<sup>17</sup> The view that legal order gives expression to a form of life by *determining* that form of life (that is, by uncovering its eschatological meaning) is thus a false picture.

The idea of a “form of life” is roughly that of the various relationships which connect the individual person to the moral commonalities to which it belongs. As previously noted, the meaning of these commonalities are inevitably historical meanings. Truly to understand such meanings we must relinquish the false view of historical progression. History (as well as law) is shaped by human choices; but these choices are not made by reference to abstract understandings of historical time or direction, nor of their significance for the era in which they come about.<sup>18</sup> Rather they emerge as direct responses to current events. In the same way, the judgment of single instances, which forms the main business of the common law, is not exhausted by the explanation of such instances as particular examples of a general rule or concept, for each case is identified precisely by reference to that which makes it unique.

15 Kolakowski, *Modernity*, n. 2 above, p. 245.

16 Ibid., p. 246.

17 Gadamer, *Truth*, n. 12 above, p. 199.

18 This comes across most strongly in the context of those actions performed with a conscious regard for posterity: for the meaning of the actions of the French Revolutionaries (for example) are finally explicable only as responses to particular events which provoked them. Robespierre is as much an unrepeatable product of his time as any other historical figure. The uniqueness of the individual demands recognition of this point.

Legal judgment, too, is therefore inherently particular: just as there are no “facts” but only different ways of looking at the facts, there are no “values” which structure judgment in the manner of abstract rules of morality that exist independent of the world; there are only judgments about the nature of particular “facts”. A morality, as Oakeshott remarked, “cannot exist in a book or a vague ideal or anywhere except in an active sensibility”.<sup>19</sup>

It follows from this that the attempt to give expression to a form of life must necessarily remain incomplete. For the significance of each judgment is completed neither by its contemplation of the uniqueness of the situation in reference to which it exists, nor in the relation of the particular case to the general concepts or understandings in relation to which it is identified. In direct consequence, no given set of principles or ideals which might be abstracted from practice as those which guide legal decision can ever amount to a coherent and complete statement of a “form of life”, nor to an unambiguous governing ethic capable of producing a higher state of social existence or a rational mode of life. Lacking full comprehension of the meaning of the present, we also lack any reliable means of predicting the future significance of human choices.

### Law and the pursuit of a rational existence (2)

The failure of the ideology of rationality lately described gives rise to idealism of a different kind. This can be explained as follows, but it is worth mentioning that the failure of the first ideology does not imply its irrelevance to modern society, for it is still experienced as a significant pull in legal and political thought. Indeed, the relationship between the two ideologies (the first in which a common end is the object of organised pursuit, the second seeking to maintain a balance between various competing means and ends) is much closer than might be supposed, as the argument below serves to demonstrate.

At some level, law and government consist in the production of an average condition of being. The pursuit of a particular mode of rational existence, as a single end in social life, serves to place that average condition at the heart of political and legal aspirations. As noted above, such an average condition of being is but an incomplete understanding of the complex relationships that exist between the individual and the common moral structures which that persona inhabits. This is, indeed, the reason why legal rules are capable of endless refinement and adaptation. An ideology of rationality in the second sense mooted above perceives perhaps more clearly than the first the truth that wherever organised government exists, people are governed as abstractions. This immediately discloses an inherent tension in political and legal order: for the duties, rights and privileges that constitute the person under law will never fully or completely correspond to the actual range of interests, desires, beliefs and dispositions which belong to the concrete person. No matter how sophisticated it may be, a mere concept inevitably implies a *contrast* with real life, not its description. (It is, as Gadamer points out, essential to an experience that it cannot be exhausted by what can be said about it or grasped as its meaning.)<sup>20</sup>

This tension is proper to law, for it is in effect part of the function of law to suppress human creativity. At first distasteful, the truth of this proposition becomes clear when we reflect on the fact that unrestrained human creativity embodies anarchy (precisely the lack of regulatory boundaries to human endeavour). Thus, a society, in the proper sense of the term, demands the presence of an organised bureaucracy and the rule of law in order to contain just those forces of human creativity which mark the breaking-off points that

19 M Oakeshott, *Religion, Politics and the Moral Life* (New Haven: Yale UP 1993), p. 45.

20 Gadamer, *Truth*, n. 12 above, p. 58.

preclude the emergence of historical explanation.<sup>21</sup> It might then be supposed that central to the notion of a “rational” existence is the need to preserve large and concurrent areas of freedom in which to explore the self in all its particularity. Indeed, it may be thought that a rational existence involves a search for the minimal bureaucratic and legal arrangements needed to secure this personal freedom from the will of others.

Such a vision of a rational existence is just as chimerical as that which seeks the implementation of a higher state of social being based on a view of human perfection. One could mention, of course, that the possibility of agreement upon such a set of minimal arrangements is on a par with that of a general consensus on the meaning of life; or that a view of human perfection is every bit as present in this vision as in the first (for how else are we to determine which forms of behaviour it is necessary to suppress within these minimal arrangements?). But I wish here to explore a different aspect of the problem. For what is common to both visions of “rational human existence” is the assumption that the conditions required to bring that state of perfection about are external rather than internal to the self.

The elevation of social philosophies and theories of justice to the status of secular religions is to be despised precisely insofar as they present the meaning of life as a set of external conditions as opposed to an inner state of reflective awareness. It has been the hallmark of modern political thought to seek for an optimal pattern of distribution of rights and liberties by reference to which all persons are treated as equals. This has led to a damaging tendency for present arrangements to harden into ideologies. But the aspect of this transformation that is most damaging is not the ongoing series of military attempts to liberate “backward” or “unenlightened” regimes for which such ideological developments are otherwise unattainable; it is rather the spiritual impoverishment that results from a view that a form of life is to be comprehended in terms of its outward arrangements. To have discovered the meaning of life or sociality in a particular set of arrangements or mode of governance is to assume that life has less significance, or less value, where such external features are absent. But this is manifestly absurd: both the inner life of the spirit and the outer life of action and performance remain undiminished even in contexts wherein fundamental rights, say, do not exist or are unimaginable, or where magic has replaced ordinary causality. Passing familiarity with Tennyson’s poem “The Lady of Shalott” or with Siegfried’s life as presented in the *Nibelungenlied* are enough to confirm this.

If, instead, that which gives meaning to life is not to be found in the external conditions within which the individual moves, but rather in a person’s inner spiritual life, it becomes apparent that that meaning is articulated in the endlessly variable ways in which the individual is able reflectively to transcend the present state of affairs and approach the eternal. Here, society is not irrelevant to the spiritual quality of life, but it is not the goal. It rather forms an essential context in which spiritual reflection is able to take place. This becomes clearer when we reflect upon the fact that the “individual” self only has meaning *within* society, as part of the whole world of ideas in which it is understood and given meaning. The nature of humanity as it is made transparent to us is derived from this body of ideas, and thus the ability to reflect upon the human situation is itself determined by involvement in the shared world of ideas. As Michael Oakeshott observed, a society is not finally understood as a collection of bodies in proximity, but of minds in relation.<sup>22</sup>

21 I use the word “creativity” here to refer equally to the production of evil or destructive forces as to those of “progress” or the good.

22 Oakeshott, *Religion*, n. 19 above, p. 50.

It follows from this that, if the production of an average condition of being falls far short of a genuine understanding of whole and part within the social world, then so too does the attempt to give maximal expression to "the individual". For an individual's "experience" of life, which is given meaning through concepts and language (phenomena that are essentially public rather than private), forms the basis for deliberation, understanding and decision. Given that our very understanding of an individual (whether as an "agent", or locus of choice, or passive victim of circumstance) is conceptual, the meanings of individuality and of individual experience remain fused with the totality of social life in which they move, and thus the meaning of an individual's creative expressions, thoughts, desires and actions are constantly accompanied by the meaning of that social whole. Here, therefore, it is necessary to think of the part *neither* as determined by the whole in which it operates, *nor* as independent of it (even relative to certain aspects or dimensions only), but rather of whole and part as organically connected at every point.

So long as juridical and political understandings focus upon the differentiation between individuals and the external conditions which affect them as forming the basis for discussion and analysis, such a notion of organic connection will remain elusive. For it will continue to seem that the philosophical meanings that are sought in jurisprudence and politics lie neither in present institutions and arrangements nor in the social commitments and personal freedoms they generate, but instead in some abstract world of concepts beyond them, and in the light of which the present social forms are imperfect realisations of a governing ideal. Life (specifically the prized life of liberal society under the rule of law) is misrepresented as a journey towards this ideal, or towards a fuller expression of the free self, rather than as a process of understanding in which the goal is to "know thyself" (in the words of the Delphic injunction). The precise distinction between the person, as an individual, and the broader social whole is irrelevant to this enterprise except insofar as it forms a context in which reflection on that question takes place. Self-understanding is finally inseparable from the conceptual nexus supplied by language and culture, for it is these dimensions of life which shape the identity of all individuals subject to them. It is because such social forms and arrangements are themselves historically undeterminable and evolving outcomes of human creativity that the shaping effect of these forces is not to be *contrasted* with the existence of personal freedom, however much they may limit immediate possibilities. One recognises oneself not in contradistinction to these forces, but rather through them:

In language, customs, and legal forms the individual has always already risen above his particularity. The great shared moral world in which he lives represents a fixed point through which he can understand himself in the face of the fluid contingency of his subjective emotions.<sup>23</sup>

It is this organic connectedness which undermines the two alternative ideologies of rationality explored above. For within the creative world underpinned by common structures, there is no common object of pursuit or independence of individual direction in which to anchor the notion of a "rational existence". Kolakowski points to the

simple fact that all of us, both in politics and in private life, pursue various independent objectives, irreducible to each other, inexpressible in homogeneous units, and unattainable jointly; the means we employ to achieve one objective usually limit, sometimes even destroy, the hopes of achieving another. Since we may not evaluate the objectives on a hierarchy of preferences in terms of

23 Gadamer, *Truth*, n. 12 above, p. 229. Gadamer is here commenting upon Dilthey.

rationality, we are often helpless in assessing the rationality of actions if they imply a choice between incompatible or mutually limiting aims.<sup>24</sup>

This is especially true when seeking to assess the rationality or otherwise of a society's life, or that of a single individual, over time. For even supposing a hierarchy amongst available choices and values were possible (something that is itself difficult to ground in "rationality"), the defence or criticism of particular choices or historical trends in hindsight would require the ability to construct accurate counterfactual chains of causality in which an optimal solution is reached. Again, for this we would require a truly scientific method of historical explanation and prediction concerning the overall effects of particular decisions, which the very presence of creativity denies.

More than this, the options around which individual and collective choices and desires are structured do not come readily demarcated into discrete units; nor are such options generally functionally independent of one another. This is most clear at the political level, where party politics ensure that all but the most committed ideologues must settle for indicating support for a range of policies and objectives of which only a percentage are actually desired. Here, the mechanics of constantly shifting majorities belie the attempt to analyse political progression in terms of the rational pursuit of consciously desired aims. But this is also true at the level of individual choice and desire, for each exercise of an option serves to eliminate or restrict others, or to invite unavoidable and unwanted consequences of its own. In the light of this, "rationality" for the individual is probably limited to the deliberate avoidance, where possible, of foreseeably counterproductive actions. The complexity of all mechanisms of social choice, and the randomising effect of interaction between millions of everyday individual decisions, means that even this restriction is insufficient for capturing a workable notion of rationality at the social level. Thus, in neither sense can the purpose of law be said to consist in the pursuit of a rational human existence.

### An alternative suggestion

The structure of a human society of any size or complexity is such that the connection between visible means and clearly defined ends lies beyond the scope of criteria of "rationality" or "irrationality". It is perhaps a necessary feature of such societies that they seek the joint realisation of objectives that are known to be mutually limiting or in conflict. Thus, the desire for minimum standards of food safety is apt to undermine the desire for low prices; the welfare state comes at the price of unwieldy bureaucracy, duplication and waste; popular elections bring about the coarsening and dilution of political debate; and all measures aimed at security (of property, of the person, of the market etc.) are bought at the expense of freedom. That these familiar facts have not dimmed the attempt to characterise legal and political arrangements as elements in the creation of a "rational" society is due to the fashionable philosophical belief that the goal of juridical and political theory concerns the achievement of a satisfactory or correct balance between the competing aims. But the notion of "balance" between goals which pull in mutually exclusive directions is entirely spurious: the tensions that exist between the various goals are not binary or opposite, but complex. No direct comparison of such tensions with physical forces in the context of which "balance" has an established meaning is available; hence the key ingredient of a successful analogue, that the meaning of the conceptual transition is direct and clear, is missing.

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24 Kolakowski, *Modernity*, n. 2 above, p. 193.

It would have been possible, if overly dismissive, to object to Fuller's statement about the purpose of law at the beginning of this essay, by recalling the simple fact that only persons, and not systems, have purposes. Systems may be created or adapted for a purpose, but they do not mechanically give expression to that purpose in their operation. In order to understand the significance of law, therefore, it is necessary to begin with an idea of the person.

We might begin with the observation that the person has being within a social world to some extent composed of competing causes and random effects. Being random, such forces will only ever be imperfectly and incompletely understood. Moreover, the external forces (fashions, manners, prices, availability, political majorities etc.) affecting the person are not fixed or static but constantly changing and in motion. Given that such forces are a permanent fact of social existence, Fuller's statement that law exists to "rescue man from the blind play of chance and to put him safely on the road to purposeful and creative activity" must be read with care. An uncareful reading of this statement might suggest that law exists as a means of organising the activities of persons so that they serve to converge upon specifically agreed goals; or that law operates to create domains of equal freedom from the will of others in which each person can coherently pursue medium to long term projects of their own. Both suggestions are indeed useful as convenient shorthands; but if taken for deep truths about the nature of law they are apt to mislead. For when are important social goals (those significant enough to become the focus for collective pursuit) ever agreed upon, rather than converged on more-or-less obliquely, and with greater or lesser passion or interest, often incidentally on the road to other goals? And when can the person be said to be free of the will of others, when we operate in a world of interpersonal cause and effect, of market interaction and multilayered influence: in short, a world of shared ideas?<sup>25</sup>

Law does not exist to *rescue* humankind from the blind play of chance, but rather (in forming a body of rules and decisions) to offer greater stability to expectations, that is, to make the decisions of others more predictable, in a world where chance cannot be eliminated. Thus, the decisions of others (deliberate or otherwise), including those of judges, may be made more transparent and predictable without ever becoming fully predictable or clear as to their total effect. We know this; but the ideologies of rationality that lie at the heart of modern jurisprudential and political thought operate as if phenomena such as "freedom" can be given clear boundaries within which they possess an absolute, or at least rigid, existence. This is no more than the observation that concepts are always but incomplete descriptions of realities which constantly outrun them. But, moving within a world of ideas, we have lost touch with the feeling that society is not simply a collection of externally fixed rules and boundaries and interstices of freedom in which to pursue subjective desires. It is, rather, a malleable and constantly shifting product of those same ideas; and our understanding of it is shaped by exactly the same linguistic and conceptual forms that give expression to our desires.

Such an existence might well seem to deserve description as "rational"; yet if it is thus described, this really is to say no more than that we enjoy a "human existence" or a "social existence". The adjective "rational" is in that case redundant. But the implicit connection of

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25 This is sadly true even of philosophy, where a market in ideas certainly exists and operates to define the orthodoxy and the accepted centre ground. For example, the starting points of this essay are determined by what is acceptable and readily recognisable to others. It is still more true of political argument: perhaps the thought that the perceived value of ideas depends insidiously upon their popularity might do something to dent the belief that academic commentary, in virtue of being more refined, is somehow more "rational" than lay opinion?

that term with measurements of the quality or validity of arguments and chains of reasoning has the damaging effect of suggesting that the nature of human society is other than it actually is: it suggests, falsely, that human societies can be and are directed and underpinned by coherent ideologies that are capable of abstract expression and “rational” analysis.

I do not intend to offer any general conclusions regarding the ramifications of accepting this thesis. Rather, I shall briefly consider one issue that I believe to be central to jurisprudential and political thought: that is the altered conception of the individual’s existence in a modern society.

By and large, the political and jurisprudential philosophy of the modern day has concerned the relationship between the individual and the state, and the nature of the relationship between citizens within a state. The approach I intend to suggest is different in that it focuses upon the nature of the individual person’s own existence within a society composed of ideas (or, in Oakeshott’s words, of minds in relation). In seeing society as something *external* to the individual, something to which the individual is *related*, philosophers and social theorists have committed a fundamental error. For what is the character of such a society? Scholarly and popular opinion often refer to the concept of the “secular state”, for example. But what does this mean except to reflect a substantial body of opinion that religious belief, and perhaps religiously inspired morality, are matters for private decision rather than public goods? Given the manifest failure of efforts to remove altogether religious discussion from public debates of all kinds, we must understand “the secular state” as an abstraction, as part of a world of ideas which is both broader and deeper and which constitutes human society.

Labels such as these are undeniably useful in describing vast currents of experience, but become limiting towards philosophical thought when mistaken for the whole. Once it is understood that human society is in fact a constantly shifting mixture of ideas (in which large and noticeable shifts occur but slowly), we can appreciate the error involved in analyses of the relationship between the individual and society. For although we may artificially isolate dimensions of this supposed relationship, there is in fact no settled object which is in the relevant sense “externally” related. Consequently, the goal of philosophical reflection might be said to be the partially autobiographical one of understanding the way in which an individual exists and develops within a world of ideas of which they are themselves an element. And this is simply to know thyself, to understand the meaning of one’s life as it takes place within the possibilities that are open to it.

If there is an overall moral to be drawn from this, it might be expressed along the following lines. Philosophies of politics and of law should not concern the reduction or elimination of tensions and conflicts within society according to some overarching political ideology or theory of justice. Tensions are endemic to human society, and in that respect their particular form and substance at a given point in history is peripheral to analysis of the kind I am suggesting. But if tensions and conflicts are endemic and permanent features of the human condition, our responses to them are not. The meaning of “free will” is disclosed in the fact that our reaction to adversity of all kinds is open and unpredictable, which is to say that each thought and decision is a breaking-off point or creative act, not something fixed by the mechanical operation of grace or its opposite. Thus, the goal of self-understanding, of the good or virtuous life, is just the recognition and banishment of hatred and its replacement with the institution of the Christian ethic of neighbourly love: the avoidance of depersonalising forces and alienating tendencies in human thought and action in favour of a compassionate understanding and fellow-sympathy. In knowing oneself, therefore, one comes to understand others. The difficulty then lies, not in understanding what the good life consists in, but in actually living that life.

This is an approach to the understanding of human societies with which modern philosophical approaches are fundamentally out of sympathy. For they seek a mode of analysis which aims to emulate in key respects the scientific method of clarifying general laws. As G K Chesterton's Father Brown observed:

Science is a grand thing when you can get it; in its real sense one of the grandest words in the world. But what do these men mean, nine times out of ten, when they use it nowadays? . . . They mean getting *outside* a man and studying him as if he were a gigantic insect: in what they would call a dry impartial light, in what I should call a dead and dehumanised light. They mean getting a long way off from him, as if he were a prehistoric monster . . . When the scientist talks about a type, he never means himself, but always his neighbour; probably his poorer neighbour. I don't deny that the dry light may sometimes do good; though in one sense it's the very reverse of science. So far from being knowledge, it's actually the suppression of what we know. It's treating a friend as a stranger, and pretending that something familiar is really remote and mysterious.<sup>26</sup>

To return to my initial question, law does not "create" the conditions for a rational human existence if this is intended to refer to deliberately constructed conditions which emerge at some posterior time. Rather, law forms an essential and organic part of a civilised human existence, and cannot be analysed in separation from it. In what sense, then, can law be said to play a role in determining human progress? I would like to close this essay with the following brief observations. First, the notion of "human progress", much like that of "rational human existence" is essentially an ideological abstraction which finds no foothold in history. For how is such progress to be measured? Is it a matter simply of greater average standards of living? This suggestion is problematic in that greater material wealth and comfort might be said to lead to decadence, complacency, waste and spiritual impoverishment. Nor can progress be measured simply by technological advancement, for every such advance can be used to increase evil in the world as well as good. At every point, therefore, the general notion of "human progress" demands the arrangement of values that are irreducible to one other into a hierarchy: values which, being mutually independent sources of good (or evil), do not admit of hierarchical arrangement on the basis of rationality.

Rather than relating law to an ideology (of progress, of rationality), I suggest that law must be seen as an integral part of the fabric of social existence. It does not play any part in creating or sustaining something which is abstract and historically impossible, but is rather an element of something concrete and familiar but historically indescribable. Thus, finally, understanding of the role of law in human existence is inseparable from an understanding of the human person or of human nature in general.<sup>27</sup>

26 G K Chesterton, "The secret of Father Brown", in *The Complete Father Brown* (Harmondsworth: Penguin 1981), p. 465.

27 A previous version of this essay was presented as a public lecture at the LSE. I am most grateful for the helpful comments I received on that occasion, and to my colleague Fiona Smith for her insights and suggestions.