GOVERNMENT UNDER LAW AND THE INDIVIDUAL

A PROSPECTUS FOR AN INQUIRY

by

Prof. Milton KATZ

Harvard University Law School

I

At the threshold, it may be useful to touch briefly upon the relevance and timeliness of the inquiry.

In the arc that stretches from Gibraltar across North Africa, the Middle East, and South Asia and up through the islands of Indonesia and Japan, societies are being reconstituted. This vast transition may perhaps be viewed as part of an even larger ferment. It has been pointed out that, of the 76 nations now members of the United Nations, all but 9 have governments which have been radically changed since 1914. In North Africa, the Middle East, and South and East Asia, the constitutions of these societies—in the literal and etymological meaning of the term—are being formed or drastically modified. This process is taking place in the wake of two shattering world wars, under the impact of accelerating technological change, and under the challenge of Communism.

There is widespread understanding of the importance of the economic development and military posture of these societies to the maintenance of peace and to the stability and vigor of the free societies of the West. There has been considerably less under-

standing of their indigenous tendencies and potentialities for constitutional development, in the comprehensive and not merely the lawyer's sense. Little attention has been given to their patterns of belief and thought and feeling and habit or to the social forms and procedures through which these have been given expressions. Yet these complex and pervasive internal elements will have no less weight than economic factors or individual leadership or chance, in determining the reaction of these societies to the impact of war and technology, the influence of the free societies, and the blandishments and threats of Communism. This reaction, and the internal elements and external factors which will principally determine its nature, will settle the form and spirit of their constitutions.

The principles and institutions comprehended within the concept of government under law are fundamental in a free society, as that term has been understood in Western Europe and America since the seventeenth century. More broadly, they are fundamental in any society which values the individual, in the sense that it attaches importance to individual personality and regards the realization by the individual of his potentialities for growth as one of the aims of society.

To men who believe in a free society, to men who value the individual, it is therefore a matter of moment whether the emerging constitutions of these societies in transition incorporate government under law or some organic equivalent. In reverse terms, the question is also of moment to men and nations who repudiate the free society and the dignity of the individual personality.

It is not only Asia and Africa that have felt the impact of two world wars, modern technology, and the threats and enticements of totalitarian doctrine. Thoughtful commentators have questioned how far we in Western society may be carrying on institutional forms and procedures through a kind of inertia but with diminishing vigor, while the beliefs and values from which these institutions drew their vitality may be suffering a gradual erosion of our allegiance. There is need to consider how far, in carrying out the daily processes of politics and administration and

law, we may be applying and gradually consuming our accumulated capital of fundamental institutions and concepts, and how this capital may be replenished. Other commentators, while zealously reaffirming their attachment to the values of freedom, suggest the obsolescence of various institutions through which these values have historically been vindicated. There is need to consider how intimately particular arrangements and forms and procedures may be connected with the essence of government under law, and how far variations in particular institutions may be consistent with the maintenance or even the strengthening of the underlying structure and beliefs.

II

Early in the second year of Adolph Hitler's dictatorship over Germany, while Hitler was still consolidating and extending his personal domination of the Reich. Ernst Roehm and several score others of Hitler's Korpsbrüder in the Storm Troops were suddenly killed by order of their Führer. On July 13, 1934, Hitler summoned the Reichstag and undertook "to explain to the people ... the events that may live in our history as a sad and a warning memory for all time.

"... Mutineers are broken, but iron laws remain eternally the same. If some one asks me why we did not invoke an ordinary court to deal with the men, I can only tell them:

"In this hour I was responsible for the fate of the German nation, thereby the supreme court of the German people during these twenty-four hours consisted of myself..."[1].

It is not merely the fact of Hitler's assertion of totalitarian power that is significant in this statement. The form also is revealing. Hitler recognized that the German people, cowed and submissive though they might be, were still permeated by a tradition of law administered through duly established and responsible agencies. By identifying himself with the Supreme Court, he

1) **New York Times**, July 14, 1934.

sought to assimilate this tradition into the apparatus of his personal rule.

The event recalls an attempt by an English king three centuries earlier to absorb judicial responsibility into personal authority, with a different outcome. A story of the incident ordinarily attributed to Sir Edward Coke is vivid and revealing. While this version seems questionable in form and detail as well as authorship, there appears to be good reason to accept its general tenor. Some such incident did take place; and the account attributed to Coke was at least symbolically true, accurately reflecting both the issues and forces of the time and the ultimate result.

"Note, upon Sunday the 10th of November ... upon complaint made to him by Bancroft, Archbishop of Canterbury, ... the King was informed that ... in any ... case in which there is not express authority in law, the King himself may decide it in his royal person; and that the Judges are but the delegates of the King, and that the King may take what causes he shall please to determine, from the determination of the Judges, and may determine them himself. And the Archbishop said, that this was clear in divinity, that such authority belongs to the King by the word of God in the Scripture. To which it was answered by me [Coke, then Chief Justice of the Court of Common Pleas], in the presence, and with the clear consent of all the judges of England, ... that the King in his own person cannot adjudge any case ... but this ought to be determined and adjudged in some court of justice, according to the law and custom of England; ... then the King said, that he thought the law was founded upon reason, and that he and others had reason, as well as the Judges: To which it was answered by me, that ... causes which concern the life, or inheritance, or goods, or fortunes of his subjects, are not be decided by natural reason but by the artificial reason and judgment of law, which law is an act which requires long study and experience ... that the law was the golden met-wand and measure to try the causes of the subjects; and which protected his Majestie in safety and peace: with which the King was greatly offended, and said, that then he should be under the law, which was treason to affirm

... to which I said, that Bracton saith, ... *'Rex non debet esse sub homine, sed sub deo et lege.'* "[2]

Another account tells us that, after this interchange, "his Majestie ... looking and speaking furiously with bended fist offering to strike him, which the Lord Coke perceiving, fell flatt on all fower; humbly beseeching his Majestie to take compassion on him and to pardon him, if he thought zeale had gone beyond his dutie and allegiance."[3] Neither the King's fury nor Coke's fright altered the course of events. When the storms of the seventeenth century had subsided, the Bill of Rights, the Act of Settlement, and the principles and institutions which they expressed and confirmed, had become organic parts of English life.

The heart of Coke's reply to James I was his invocation of Bracton's "The King must not be under man but under God and the Law." The patina of the centuries has tended to obliterate the "Rex" and has left the "non ... sub homine sed sub deo et lege" standing clear. In the popular instinct and understanding, it is the people themselves who are "not under man but under God and the Law". In the Constitution of Massachusetts, adopted in 1780, the principle is restated as a "government of laws and not of men."

The terms of Bracton's famous statement reflect their origin in medieval Christian doctrine, fed by streams reaching back to sources in Israel, Greece, and Rome.

Stoic ideas of natural law were modified into Roman terms by Cicero and other writers and thinkers of the period of the Roman Republic. To Cicero, law was "the bond of civil society"; a state was "but a partnership in law"; and law was "the bond that first bound men together in the association of a republic"[4] Law in the deepest sense was deemed by Cicero antecedent to the state, deriving from the fundamental nature of all things.

In the Roman Empire, the Stoic and Ciceronian ideas of the

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2) 12 Rep. 63 (1608).

3) Cited in Usher, R. G., **James I and Sir Edward Coke**, 18 English Historical Review 664 at 670 (1903).

4) Cicero, **De Re Publica**, I, 26, 32.

primacy of law appear to have been largely submerged and distorted along with the corruption and suppression of republican institutions. By the third century A.D., the status of the emperor as above the law—"princeps legibus solutus"—seems to have been established, and the basis laid for the maxim incorpotared some three hundred years later in the Institutes of Justinian: "What is pleasing to the prince has the force of law, since the people have conferred upon him all their authority and power".[5] Yet the Code of Justinian also incorporated and perpetuated the Edict of Theodosius and Valentinian of 429 A.D :

> "It is a statement worthy of the majesty of a reigning prince for him to profess to be subject to the law; for Our authority is dependent upon that of the law. And, indeed, it is the greatest attribute of imperial power for the sovereign to be subject to the laws and We forbid to others what We do not suffer Ourselves to do by the terms of the present Edict."[6]

It is not clear how far this represents a fundamental ambivalence in Roman legal doctrine. Perhaps it reflected the competing pulls of the imperial domination, the early republican philosophy, and the Christianization of the Empire under Constantine.

The Stoic-Roman conception of natural law was absorbed into Christian doctrine by the early Church fathers. In their writings, the law of nature became the law of God. In the early Middle Ages it was in terms of law that all social and political relations were conceived. It was rendered unto Caesar that he should rule, but Caesar must render unto God that he rules under the law, for "of law there can be no less acknowledged than that her seat is the bosom of God."[7].

In the course of the Middle Ages, the Christian concept of the limitation of temporal rule by law deriving ultimately from the

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5) "quod principi placuit, legis habet vigorem, cum ... populus ei et in eum omne suum imperium et potestatem concessit"—Institutes, Book I. Title ii, 6.

6) Code, Book I, Title xiv, 4.

7) Hooker, **Ecclesiastical Polity**, Book I xvi, 8.

will of God was reinforced through a blend of Christian doctrine and the Germanic notion of law as immemorial custom. Law in the latter sense could be found and proclaimed, but neither made nor changed. This conception of customary law, familiar enough in primitive societies, was carried through the dying Empire in the *Völkerwanderung*. The interplay of Christian doctrine and the crystallization of custom is manifest in the earliest attempt at an organized treatise upon the law of England—Glanvill, in the twelfth century. It appears more fully and significantly in Bracton, in the thirteenth century. Bracton seems to have been under the illusion that this was characteristic only of England: "... England alone uses within her boundaries unwritten right and custom. In England, indeed, right is derived from what is unwritten, which usage has approved." The same statement, however, could have been made with equal accuracy throughout the feudal world. Law in the sense of crystallized custom, was identified with the larger view of law as emanating from the divine order of the universe. Social custom and religious doctrine afforded one another mutual sanction.

It was not only in terms of belief and doctrine that Christianity affirmed the restrictions upon temporal rule. During the early centuries of persecution within the Roman Empire, the Christians had been "obliged to adopt some form of internal policy, and to appoint a sufficient number of ministers intrusted not only with the spiritual functions, but even the temporal direction, of the Christian commonwealth."[8] After the adoption of Christianity by Constantine, the organization of Christian society through authority, hierarchy, property, and discipline was extended throughout the Empire. For centuries, the competing claims to dominion by church and state constituted perhaps the outstanding issue in European political life and political thought. The historic controversies between popes and emperors had their English counterparts in contests between kings and archbishops—Henry I and Anselm, Henry II and Becket, King John and the Archbishops Hubert Walter and Stephen Langton. In the struggle between John and

8) 2 Gibbon, **Decline and Fall of the Roman Empire** (Bury's ed.), 39.

the English barons, the Great Interdict of Pope Innocent III against John contributed powerfully to the forces that compelled John's capitulation at Runnymede. The role of the Church in this struggle is evidenced by the first sentence of the first chapter of Magna Charta: "First, we have granted to God, and by this our present charter hath confirmed, for us and our heirs forever, that the Church of England shall be free, and shall have all her whole rights and liberties inviolable."

The rivalry of king and archbishop crisscrossed and interlocked with the rivalry between the king and the barons, and between the king and the cities and boroughs and towns. Magna Charta again bears testimony to the lines of battle. The rights and liberties of the lords and freemen of the realm are affirmed at numerous points in the Great Charter and, by Chapter 9, "The City of London shall have all the old liberties and customs, which it hath been used to have. Moreover we will and grant, that all other cities, boroughs, towns ... shall have all their liberties and free customs."

Events which, though lacking the traditional grandeur of Magna Charta, were nevertheless comparable in nature and force, occurred throughout medieval Europe. From the contests between emperor and pope, emperor and prince, king and bishop, king and baron, king and city, there gradually emerged a definiton of rival spheres of dominion, whether by treaty, charter, compact, custom, or mutual exhaustion and inertia. By their very nature, the definitions connoted limitations. The limitations were reciprocal. If church and baron confined the jurisdiction of the crown, the power of the crown also severely restricted the claims of church and baron.

Power was nowhere monolithic nor exclusively concentrated at a single point in society. In this pluralism of power centers, no single power existed strong enough to suppress the idea of supremacy of law. The idea was in fact strengthened by the tendency of competing claimants to appeal to the sanction of law, as the expression of religious doctrine and custom. While the contests were in process, law was invoked to support the rival claims. When the contests were over or suspended and their cessation reflected

in a definition of respective spheres, law was invoked to dignify and stabilize the settlement.

With the concept of the supremacy of law, there slowly evolved institutions through which it could be given effect. Under feudal doctrine, a royal decree which overstepped the legitimate limits of royal power could be met in the first instance by a "diffidatio", a withdrawal of allegiance. Ultimately, it could be met by rebellion or private warfare. The "diffidatio" and the armed rising were understood to be not a violent repudiation of law, but action in accordance with accepted legal norms. In France, under the *ancien régime*, a royal ordinance became binding only upon its registration by the *parlements*. The *parlements* were not legislative bodies, but institutions in the nature of courts. The king might order a recalcitrant *parlement* to register his ordinance by a *lettre de iussion*. When this failed, he could resort to the proceeding of a *lit de justice*, in which the king in person appeared within the *parlement* and by his presence superseded the judges and compelled registration. Despite these royal powers in reserve, the refusal of a *parlement* to register an ordinance of the King not infrequently had the effect of forcing a modification of its terms. In England, the courts were originally parts of the King's household or the King's council, serving as instruments to execute the King's writs. They gradually evolved into independent institutions, through a complex and subtle process of increasing specialization, the cyrstallization of legal doctrine and procedure through accumulating precedent, and the seventeenth-century struggles between Parliament and crown.

In 1610, in *Bonham's Case*,[9] Coke advanced the doctrine that "in many cases, the common law will control acts of Parliament, and sometimes adjudge them to be utterly void; for when an act of Parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will control it and adjudge such act to be void." Although the spirit of this notion was followed in a few decisions of English courts in the seventeenth century, it disappeared early from English law. In the American colonies, however, it flourished It was reinforced by

9) 8 Rep. 114 (1610).

the concepts of natural law, as restated by the rationalists of the eighteenth century. Vattel was notably influential, in his view that "... the authority of ... legislators does not go that far, and ... the fundamental laws must be sacred to them, unless they are expressly empowered by the nation to change them ... it is from the constitution that the legislators derive their power; how, then, could they change it without destroying the source of their authority?"[10] In the developing mood of rebellion in America, these ideas were congenial. They were advanced by colonial lawyers and judges to challenge the validity of decrees of royal governors and statutes adopted under their influence. It was not a long step from this point to Chief Justice Marshall's formulation of the doctrine of judicial review as the means to vindicate the supremacy of the constitution over ordinary legislative acts.

In England and France, as in the United States, the conduct of executive officers was brought under judicial review, but the scope of the constitutional power of the legislature was not. In England the doctrine of parliamentary supremacy has been associated with the absence of a formal written constitution. The French have adhered to a similar doctrine despite their adoption of formal constitutions. In the sixteenth, seventeenth and eighteenth centuries, the *parlements* of the *ancien régime* in France, through the refusal to register ordinances, had frustrated or hindered a number of attempts by the crown to institute measures of reform. The consequence, at the time of the revolution of 1789, was a popular identification of the courts with reaction and obstruction to the legitimate expression of the popular will. The concept of inalienable fundamental rights was affirmed with passion and proclaimed to the world by the revolution, but the protection against their violation was left to the people: "When the government violates the rights of the people, insurrection is for the people and for each part of it the most sacred of its rights and the most necessary of its duties."[11] An echo of the medieval rights of

10) Vattel, **The Law of Nations or The Principles of Natural Law Applied to the Conduct and to the Affairs of Nations**, Book I, Section 34.

11) Declaration of 1793, Article 35.

"diffidatio" and the feudal uprising can perhaps be heard in this famous proclamation. In the French Constitution of 1946, the problem of unconstitutionality is explicitly recognized, and a special means provided to cope with it, but the responsiblity of final arbitrament is denied to the courts.

It was in the seventeenth and eighteenth centuries, in the aftermath of the Renaissance and Reformation, that the conceptions and institutions of government under law in Western society were molded into the contours familiar today. From the idea of the sanctity of the individual human soul, there emerged the conception of the liberties of the individual and the rights of man. The medieval idea of the supremacy of law evolded into the modern principles of constitutionalism. The old pluralism of centers of power was vastly extended through the rise of parliamentary democracy, the development of Protestantism, and the expanding opportunities of the New World.

Through the ninetenth century and into the twentieth, the steady extension of suffrage, the expansion and invigoration of the middle class, the birth and growth of labor unions, and, in the United States, the widespread distribution of property ownership and widespread enjoyment of the fruits of increasing production, have represented a continuing diffusion of power in Western society. The emergence of mass production and the accelerating consequences of modern technology, the rise of the modern corporation, and the effects of patterns of organization imposed on Western society by two world wars and by intensive preparations against the danger of a new war with nuclear weapons, have represented reverse tendencies, toward the concentration of power. These developments have been attended by immense psychological processes in Western society, and a great variety of new legal and political arrangements. The implications for government under law remain to be evaluated. Perhaps they even remain to be seen. The prospect has been complicated within the past three decades by the threat of totalitarian doctrine and practice.

III

From a contemplation of the structure, processes, and animating ideas of European and American society, in the perspective

of their long history, three elements, or groups of elements, tend to emerge as the essential components of government under law. They may be described, or at least their content may be suggested, in these terms:

The principle of substantive limitations upon the scope of governmental power, in the sense of a general acceptance that the individual has certain rights which are fundamental and may not be impaired by action of the government. Familiar illustrations are liberty of religion, of throught, of speech, of assembly.

The principle of procedural limitations upon governmental power, which apply even within the limits of its substantive scope. The government may not interfere with an individual except in accordance with a general law previously enacted or recognized as established through custom; and the government may not apply sanctions against any individual even for violation of such a general law previously stated except in accordance with a just and orderly procedure. Familiar illustrations are the clause from Chapter 29 of Magna Charta, "nor will we not pass upon him nor condemn him but ... by the law of the land"; the protection against the deprivation of life, liberty, and property without due process of law; the prohibiton against *ex post facto* laws; the prohibition against searches and seizures except under warrants issued upon probable cause; the prohibition against cruel and unusual punishments.

The existence of effective institutions through which the foregoing principles may be vindicated. Familiar illustrations are an independent judiciary and judicial review of executive or legislative action.

These principles and institutions can only be understood in terms of their history and the endless variations of their actual application in practice. They merge into one another. In the United States, for example, it is only roughly true to say that the liberties of conscience and thought and speech represent substantive rights which the government may not destroy, for there is the possibility of constitutional amendment. A more accurate statement would be that the liberties of religion and

thought and speech may not be nullified by an act of government, unless supported by two-thirds of each house of Congress and a majority in each of the legislatures of three-fourths of the states. In this aspect, the substantive limitations become procedural. Americans are prone to regard judicial safeguards against unconstitutional legislation as something solid and concrete and objective, in contrast with the vaguer protections of assumed parliamentary self-restraint upon which Englishmen rely. Yet judicial review would be meaningless if judges should lose their devotion to duty or their nerve; if the executive should appoint judges who are supine or corrupt; or if a reckless legislature should deliberately and consistently withhold appropriations for the compensation of judges and the conduct of the business of the courts. The ultimate reliance, in the United States as in England, is upon the values, customs, and frame of thought of the institutions involved—the courts, the congress or parliament, the presidency or cabinet or crown—and upon the patterns of thought, customs, and values of the societies within which these institutions are organic parts. In this aspect, the institutions relied on to vindicate concepts are seen to draw their vitality from concepts. This in no sense denies the force or dependability of these institutions. It merely reminds us that they are human.

The heart of the matter lies even deeper, in the factors which made possible the emergence of the principles and institutions that constitute the essential ingredients of the rule of law. In the evolution of government under law, the factors ultimately controlling have been a concept of the dignity of the individual; a closely connected concept of the harmonious relationship of the individual to God or universal moral principle or truth or reason, depending upon whether the terms of statement have been religious or philosophical; and an adequate diffision of power. It may be anticipated that these factors will also control the future of government under law.
