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THE SUPREME COURT OF CANADA AS "ARCHITECT OF THE COMMON LAW"

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One of the major themes of Paul Weiler's book, *In the Last Resort,* is that the members of the Supreme Court of Canada require a general theory of inference (and decision) sufficient to the functions which it is necessary for them to perform. Practice must be informed by theory.

In chapter three, "The Architect of the Common Law", Weiler develops his general theory of legal inference as it applies to disputes in the area of private law. He concentrates on tort law as it is the area which he is the most familiar and as tort cases more sharply raise the issues with which he wishes to deal.

In conjunction with his general theory of legal inference Weiler sees present another set of factors operating on our legal institutions which he thinks determine the nature of our legal inferences. These other factors are political and social and they will differntly shape the scope of the highest Courts of Appeal of any country, as they themselves differ. They may do so, it is worth commenting, but they will only change the shape of the legal inferences themselves: they will only change the amount of the inference for which different sub-parts of the institution will be responsible.

In any event this part of the argument is not our concern here. In chapter three we are given Weiler's views on what an important part of the legal inferential process must be and that will be our focus.

Weiler sees a weakness in the positivist stance on the inferential process of the Law, which as he describes it, would attempt to do the Law's work with only the "bare rules"[1] at its hand. He sees that the valuable and daily business of the law cannot be carried on without the addition to these "bare rules" of what he calls "legal principles",[2] a concept which he thinks is non-rule-like and (therefore?) anti-positivist in its character.[3] He is clear that among the premises which a jurist must use in order to reach conclusions which are his incumbency, are included both "rules" or "statutes" and "a very different kind of legal doctrine [or premise]", a legal principle. In such important cases as *Barbara Jarvis* v. *A.M.S.*,[4] it is clear, according to Weiler's useful analysis that unless a decision can be taken on the statutory scope of the concept of a "person" and its distinction, if any, from the concept of an

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[1] P. C. Weiler, *In the Last Resort: A Critical Study of the Supreme Court of Canada.*

[2] *Id.* at 49.

[3] *Id.*

[4] [1964] S.C.R. 497, 44 D.L.R. (2d) 407.

"employee" as they occur in the relevant sections of *The Labour Relations Act* of Ontario, the *Barbara Jarvis* case would be undecidable. It is then clear, as Weiler brings out, that . . . "there is more to a legal rule than its linguistic expression. Every legal rule has a hidden dimension, an underlying structure. The rule prescribes a standard of conduct in order to achieve some social objective within an over-all statutory scheme. . . . As the passage of time throws up . . . cases . . . a faithful interpretation of the rule requires that judges discern this hidden reality of legal policy and draw out the implications for the case at hand".[5] The legal principle is an "indispensable weapon in the judicial armoury" and it allows the judge to "appraise the fitness of the [bare] rules[6] [presumably positivist] that are available and anticipates the policy results of the one that is selected".[7] This implies that legal principles for Weiler, are perhaps among other things, the statement of legal policies.

It seems difficult to deny this fact of policy. Moreover, legal philosophy seems to have partly accepted the presence of policy within the Law as embodiel in so-called "principles". Both Hughes' and Dworkin's[8] earlier papers are versions of that stance. Put in a less tendentious way, however, the fact that is difficult to deny is only that an additional premise is required than what the "bare positivist" might have thought. It has not yet been shown that such an additional premise is of a sort that the positivist could not encompass. Arguments presented to show that principles are not rules have been singularly unsuccessful. There seems to be an obvious reason why *any* proposition, even one with policy or social objectives as content, cannot occur in the form of a rule even as a positivist might define it.

It is probably, then, worth suggesting to Weiler that that part of his view which adducts legal principle as a contra-distinct element from rules as part of the judge's drawer of allowable premises is not where he may want or need to go. If legal principles are not in some sense rule-like then there is a real danger that they are at the mercy of the judge's discretion and not as Weiler really wants it, as much a part of the Law as the "bare rules", unless one subverts the notion of Law. This becomes an even more worthwhile suggestion when one attends to another part of Weiler's view which is original and interesting but at odds with his view that principles are not rules. This other part is Weiler's insistence upon the systematic nature of the law, including its social objectives which must be set in "an over-all statutory scheme".[9] Furthermore, there is his use of such terms at "theory" and "order" as well as "scheme" and "system", used to characterize the context and therefore the restraints upon the use of legal principles. Indeed, for Weiler it

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[5] *Supra,* note 1 at 35.

[6] It is indeed a question whether the positivist's conception is that "bare". There is a good deal of evidence that it is not. But the normal positivist additions such as judicial discretion and "communal consensus" (of judges) force the positivist away from his position of giving legal credence only to those elements in the Law which have accorded with, to use Hart's phrase, strict rules of recognition.

[7] *Supra,* note 1 at 35.

[8] R. M. Dworkin, *The Model of Rules* (1967), 35 Univ. of Chi. L. Rev. at 14.

[9] *Supra,* note 7 at 35.

could not be otherwise. Unless he is to see some systematic relationship between principles and statutes (as well as among principles themselves) he could not achieve the results he wants. Unless principles and the "bare rules" are strongly related then all we will have is the same bifurcation between policy and "bare law" which the positivist offered us, the mediation of judicial discretion notwithstanding. Weiler's instincts tell him this and earlier he says of that relation that "the aims of the legislature have an equal claim on the title 'law' as do the words chosen to express this aim."[10]

> The judge will not find the solution in the bare words of the statute book no matter how long he stares at the page or how many dictionaries he may consult; the answer is not there. This does not mean that a court is lost in a sea of legal uncertainty. . . . Every legal rule has a hidden dimension an underlying structure.[11]

Unfortunately we are not told more of this hidden dimension, this underlying structure. We can assume, though, that it must be a clear, public and datable fact that a particular social objective or aim of the legislature is identifiable as being that particular aim which the words chosen to express this aim speak of. Otherwise we would be back in a sea of legal uncertainty: which aim associates with which set of words in the hard cases? In order for aims to deserve an equal claim to the title of "law" they would have to enter the judge's drawer with as much rule ceremony as have the words of the laws he studies. Aims, Weiler has seen, have to be as rule-governed, at least in their giveness for the judge, as do statutes, and for all the same reasons. There can no more be "bare aims" than there can be "bare rules".

If this is true, then Weiler has to reject, without any real cost, the earlier part of his view that there are legal rules and also legal principles which are not rules in the Law. With this rejected, we can concentrate on that very promising aspect of his view which suggests that aims and rules are related in a rule-like fashion themselves, together comprising a fuller, more accurate notion of what a rule actually is: strictly and accurately speaking there may be no such things as "bare rules". There may be that part of a rule which "prescribes" a standard of conduct ("bare rule") and that part of a rule which states the aim of the prescription. What exactly the relations must be between these two parts of a rule would be interesting to see, especially since these relations must preserve a rule-like link between the two. If this were possible then the positivist would have his legal certainty and the anti-positivist his rectitude. Hard cases would not make bad law and bad law would not have to come out of hard cases. The form of the law would be what it ought to be: by rule.

There is another very attractive part of Weiler's view. This is the suggestion that the aims or principles themselves will be systematically related or as he says will form "a statutory scheme".

This relationship is further developed in Chapter Four and presents an exciting prospect. It would imply that there already exists in the Law put there by two hundred generations of improvement and wisdom, and

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[10] *Id.*

[11] *Id.* at 35.

waiting for analysis to bring it out, the following sorts of material. Most of the aims persons will be concerned with and which are subject to law will already be present there. Moreover, these aims will already have been subject to a finer-grained and better-tested ordering than we are likely to find elsewhere or to think of on an afternoon. The introduction, perhaps by the legislature, of aims to be newly subject to law will be interposable somewhere definite in the existing scheme and immediately be subject to the implication of that as well as other aspects of the total system. There will also exist in the law general rules which will allow the continuous adaptation of the relative order of our aims in particular cases as the changing facts may warrant. These principles of change will be of a very high status and themselves without content as to our aims or their order.

Any ordering of aims which exists will always be subject to the general *Caveat,* among others, that when any aim, say aim 13, would, if *pursued under certain conditions,* displace some aim 1-12 which is above it, then under those conditions its ordinal position is suspended. It must be remembered, aims, goals, values, principles etc. are themselves merely states of affairs dispositional and actual which we find desirable. Such states of affairs will inevitably be casually and effectually linked to all sorts of other states of affairs which may or may not be aims. Such links to and from other states of affairs are complex and dense and we cannot fully anticipate them. *Hence the above caveat on any ordering is* always open. What keeps it open we must understand is not our uncertainty or vacillation with regard to our aims. What keeps it open is that we discover new factual implications for the ordering of our aims from old facts or new implications from new facts. The complex and dense matrix which exists and houses both our aims, their trade-offs and their relevant facts is the system which the law has painstakingly produced and continues to produce. Individual laws describe individual paths in that matrix and are only a small part of it, subject themselves, as always, to the above general *caveat.*

What follows from this is that the work of courts, judges and legislatures will by now be mainly composed not of adding to or subtracting from the aims of the matrix but of making clearer and consistent the relations and factual conditions which inhere among them. Most of this work will *begin with empirical or factual matters and their effect on the relations already in existence.* It is a serious question if our legal institutions are fit for this. Who really does the factual work? Can the judiciary say that it is exempted? — for that is what it must say if it is to apply the "bare law" alone. Can the legislature say they are the sole and rightful arena for this major part of the Law's work? Should this be so? Are they really equipped to do this for all areas under the law? *How many of the most legally seminal factual questions* are left to officials' guesswork.[12]

At any rate, as stated earlier, our aims and their order, subject to the general *caveat,* must be given in the system. There is no problem concerning

[12] How widely is it recognized (let alone practiced) that many of the major legal questions are in their resolution primarily questions of fact?

the non-ordinal aspect of this given undergoing much change at all since it will have achieved enormous validation over its generations of function. No doubt there may be some errors in its ordering by the Law and certainly that order will be subject to the unnoticed effects of new states of affairs, but in what the aims themselves are to be or in what values as a sheer unordered set are to be promoted and/or discouraged there will be agreement.

There will in the system also have been developed various propositions and generalizations which express large and important facts about the relative orderings of our aims, their exceptions and other saliencies which have emerged from and been verified by the operations of the Law over its life. Weiler's notion of a legal principle is probably from the first-mentioned of these.

To clarify why we must have both law and system and what the system would look like would be to clarify the above issues. Weiler has turned us in that direction with his focus upon the notion of legal principle. The rest of the system he suggests is there and it is to be hoped that he will be engaged in its further uncovering as well as development.

It will be useful in conclusion to look at one of the tort cases Weiler analyzes in order to emphasize the types of judicial practice he describes and to illuminate the land he endorses. The handling of the doctrine of cattle trespass has been a simple and instructive model. Weiler shows that the courts have been aware that two main considerations are at work in such matters. The first is the presence of the common law ruling that "absolved a farmer of any duty to prevent his cattle from straying on the highway and endangering its users".[13] There is also present "a general principle of law firmly established in this area. A person is required to take reasonable care in his behaviour when it creates the risk of physical injury to another".[14] If he does not take care he is correspondingly liable.

Weiler sees a need for what he, perhaps mistakenly, calls "judicial rennovation". First, as to the need. The reasons are the standard ones. A judge in dealing with cattle trespass as in *Fleming* v. *Atkinson*,[15] might take refuge in the common law precedents which absolved the farmer of responsibility for his errant cattle: "the courts cannot change the law; the legislature can".[16] The Ontario judges who took such refuge as late as 1959 saw as well as anyone the need for a "a change". They also saw what was at stake if they moved out to effect the change. Judges would become arbiters of both what the Law actually was and what it ought to be. Could the authority, stability and respect which the Law requires survive the joinder of the functions in the hands of mere judges? Weiler offers a palliative to such fears. That palliative is that when a law has, because of changed circumstances, fallen out of the line of purpose which a legal principle in the area defines,

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[13] *Supra*, note 1 at 58.

[14] *Id.* at 61.

[15] [1959] S.C.R. 513, 18 D.L.R. (2d) 81; Weiler, *supra*, note 1 at 58.

[16] Weiler, *id.* at 58.

then that law ought to be changed in such a way as to be brought back into line. In accident torts, Weiler argues, there exists the legal principle which asserts that a person must take reasonable care in his actions or their foreseeable results when they produce risks of physical injury for others. Armed with this principle a judge could amend the precedent set forth in the common law on cattle trespass and have no fear that he was changing the law in a way which undermined its authority and stability, which undermined it as law; or that he, a mere judge, was taking moral or value decisions for the entire community. The legal principle, Weiler says, is after all as much a part of the Law as is the precedent. What the judge does is remove the anomally between the two which changed circumstances has produced.

This sounds persuasive and a little reminiscent of Dworkin's position in his paper, *The Model of Rules,*[17] which Weiler refers to in his own paper, *Two Models of Judicial Decision-Making,*[18] but not in the text of this book. In any event, critics of this position have seen for some time that the problem judges face in the trade-off between defence and the law as law and the correction of anomalies is not solved by the recognition of the presence of legal principles. It is not solved until one ascertains the origin of these principles and, just as important, the *inferential* relationship between Weiler's "bare rule" and/or common law precedent and legal principle. Suppose on the one hand, that the judge may or may not amend the precedent. Then the fears of these judges on the Ontario Supreme Court were justified because now too much is in the hands of the judge to justify the authority, respect and stability which the Law must retain. This is so, at least in part, since those considerations which move the judge one way or the other will be extra-legal and justifiably so. Thus the identical problem persists even with the introduction of a legal principle.

Suppose, on the other hand, not that the judge may or may not apply the legal principle, but that it is as incumbent upon him to do so as it is to apply the "bare law" or recognize a clear precedent. This would mean that the inferential relationship between a legal principle and the "bare law" or precedent would be of the following form. If the application of the "bare law" or precedent produces decisions which have consequences, as in the cattle trespass case, which are incompatible with the sorts of consequences a legal principle in the area implies than the application is not to be made in those cases. Those cases will exist as exceptions to the law in question. This is, to go a step further, to say that *the satisfaction of the legal principle is a necessary condition* for the correct application of the law. It could be written in elementary logical notation as: (the statute or precedent is applicable), (the legal principle is satisfied). This tells us that the "bare law" and the legal principle are related in a fully rule-like fashion. The law, conceived fully enough, cannot be the "bare law" or the simple precedent. We saw earlier that Weiler has strong instincts in this direction.[19]

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[17] (1967), 35 Univ. of Chi. L. Rev. 14.

[18] (1968), 46 Can. B. Rev. at 406.

[19] *Supra,* note 1 at 35.

If this characterization of the relationship between the "bare law" and its legal principle(s) is correct, then the question of the origin of the legal principle still remains. The question or origin is important since it affects the authority of the Law. The "bare law" clearly derives its authority from the legislature, in our system at least; precedent its authority from the common law. A legal principle derives its authority from the set of laws in a given area. If that set contains a common purpose or purposes, then the legal principle will state that common purpose. It will function as a controlling generalization. This will ensure consistency and awareness of effects or purpose within and among those areas of the law where this is possible. This is the first and elementary step towards system in the law, according to Professor Weiler. In order for the Law to be more systematic than the presence and application of legal principles require, would be to see it as we have suggested several pages back. That is the direction in which Weiler is very probably leading us and it is clearly a good one.