

The Concepts of Law and Foundations of a Legal System

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As Minister of Justice¹, I will adopt the recommendation given by the second deputy because he claims that under the Purple Shirts regime no law could exist. The second deputy asserts that what the “grudge informers” did was neither lawful nor contrary to law, for they lived, not under a regime of law, but under one of anarchy and terror.” (Fuller 1964, p. 161) Accordingly, he declares that we should let “bygones be bygones” (Fuller 1964, p. 161) for you cannot punish those who were neither lawful nor unlawful. The second deputy’s recommendation can be supported by several philosophers of law such as Aquinas, Hart, and Fuller and will serve as evidence for its superior clarity. Clearly, the second deputy’s recommendation surpasses the other four deputies recommendations in that it avoids apparent flaws and defects that the others fail to do address.

The second deputy’s recommendation had several strong arguments. First, he concludes that the Purple Shirt regime was not a lawful government and therefore no legal system of any kind could exist. He claims that instead of a government “we had a war of all against all” (Fuller 1964, p. 161) He adds that “the acts of these so-called grudge informers were just one phase of that war.” (Fuller 1964, p. 161) The deputy demonstrates that government was impossible to maintain in a state of such chaos; war and the struggle for survival are not forms of law. The deputy supports his claims, “for us to condemn these acts as criminal would involve as much incongruity as if we were to attempt to apply juristic conceptions to the struggle for

¹ In this selection and the one that follows, students were asked to consider the problem of “grudge informers” – those who informed on their neighbors out of malice rather than faithful testimony – under a violent regime with contempt for the rule of law – the Purple Shirts. The scenario is outlined in Fuller (1964). – *Eds.*

existence that goes on in the jungle or beneath the surface of the sea.”(Fuller 1964, p. 161) His use of metaphors to compare the Purple Shirt’s regime to the brutal forces of nature provides us with his clear idea that law could not exist in such a state of terror and imbalance.

The second deputy can be understood better through the analysis of Aquinas and his view of the law. The second deputy states, “A legal system presupposes laws that are known, or can be known, by those subject to them. It presupposes some uniformity of action and that like cases will be given like treatment.” Aquinas agrees with these very same basic principles. Aquinas states, “law is nothing else than an ordinance of reason for the common good, promulgated by him who has the care of the community.” (Aquinas, p. 14) This point proves what the second deputy is attempting to explain. The Purple Shirts did not create law for the common good and their illicit law was never promulgated to the people so that they may abide by these so-called laws. The Purple Shirt’s also failed to care for the community in which they chose to rule, they used the law for their own benefit and tainted the administration of justice in the legal system. According to Aquinas not everyone can make laws for the community, only those who have care for the people within the community. Therefore, the Purple Shirt’s regime was not a true legal system because they did not care for those in which they ruled, instead they terrorized and hurt the people of the community. Aquinas believes that in natural law good is to be done and promoted, and that one should avoid evil. The second deputy’s suggestion proposes this belief, let bygones be bygones, to restore the peace and replace terror with just law.

Hart (1961) also strengthens the second deputy’s argument with the idea of obligation and recognition. According to Hart, there is a primary rule of obligation which is the restriction of the free use of violence, theft, and deception. In the Purple Shirts regime, violence was prominent and theft and deception were the norm. In the case of the “grudge informers” there was no obligation to restrain from violent and deceptive acts because the Purple Shirts were unsuccessful in providing promulgated law. The Purple Shirts attempt at a legal system suffered from the

defects outlined by Hart, and were not corrected properly. The first defect, that of uncertainty, is the inability to understand what the primary rules are. In the Purple Shirts regime, no laws were clearly known by the people, and at times the Purple Shirts created their own secret laws and statutes that only they knew and could enforce unethically. The Purple Shirts also suffered another flaw, the flaw of inefficiency. Inefficiency in their laws makes it impossible to know who broke the rules and how to organize such rules, judgments were made on an individual basis, and not all cases were treated the same. According to Hart these inefficiencies could have been remedied, but as we can see the Purple Shirts failed to uphold the rule of recognition defined by Hart. Hart defines the rule of recognition as the acknowledgment of the practice of referring to the written document as the authoritative source for identifying the rules in a system. The Purple Shirts had no standard written law in which people could refer too, proving their error in acquiring a just legal system. Hart also adds that to obtain "legal validity" in a system a law must be recognized as passing all the tests provided by the rule of recognition. Thus, the Purple Shirts regime did not have any rules that were legally valid because all of them failed the tests required by the rule of recognition. The second deputy undoubtedly points out that the Purple Shirts legal system was non-existent. Hart and Aquinas both do not recognize the Purple Shirts power as true law and therefore the second deputy's recommendation indisputably prevails as the most suitable solution.

The second deputy's recommendation can also be defended by Lon L. Fuller's, "Eight Ways to Fail to Make Law" (1964). Fuller states that the first and most prominent "is the failure to achieve rules at all, so that every issue must be decided on an ad hoc basis"(Fuller 1964, p. 22). The second deputy is correct in this way of thinking, Fuller states that a law fails to be a law when a government, of any form, cannot achieve any set rules and as a result improvises and decides cases on an unprepared whim. Another key aspect of the failure to create law is the "failure of congruence between the rules as announced and their actual administration" (Fuller 1964, p. 22). This makes obvious the apparent failure to make law by the Purple Shirts for they

clearly did not make rules announced congruent with their actual administration. The Purple Shirts formed capricious laws and did not administer them as initially created, which under Fuller's argument fails to be law. The second deputy's claim that the Purple Shirts law was never law at all holds true when referring to the analysis of Aquinas, Hart and Fuller.

The remaining four deputies have fine recommendations, but lack or fail to completely suffice as logically sound solutions. The first deputy suggests that we can do nothing at all to solve this problem because the acts were in fact unlawful according to the rules of government in power. The law of land stands according to this deputy and you cannot punish those who broke no apparent law under the regime in which they were ruled. But the first deputy fails to see that the Purple Shirts law and reign over the people is inadequate as a legal system and cannot be considered one. The first deputy ignores Aquinas's idea that an unjust law is no law at all. He ignores the fact that the Purple Shirts did not properly promulgate and make known their law, in fact they make secret unethical laws that no citizen knew or could possibly abide by. This deputy does not meet the rule of obligation outlined by Hart. The Purple Shirts did not restrict the free use of violence, theft, and deception, but employed these in their attempt to make law. The rule of recognition was also ignored as no rules were documented anywhere to make available for the citizens to refer to and read as law. The Purple Shirts regime cannot embrace a true legal system when their adopted laws were evident crimes to their people. It follows logically that the first deputy's recommendation would be thwarted by Fuller's discussion concerning the failure to make law. It is impossible to consider the Purple Shirts regime as law because they failed to make rules and as a result all decisions are made on an ad hoc basis. Clearly, you cannot perceive a law to be valid that is unclear, unofficial, and by which rulings are made with total disregard of congruency of administration.

The third deputy claims that we need to discriminate and that we must not disregard the clear cases but take care of those in which we can. The third deputy does not meet moral requirements. Discrimination, in itself, is unjust and according to Aquinas cannot be law. We cannot merely look

at the cases that are clear and understood and completely discount those in which prove to be complicated matters. Also, to discriminate in this situation would only put you back down to the Purple Shirts level of activity. Therefore, your regime would have no legal system at all, for an unjust system of discrimination cannot be considered law. The deputy's idea on how to resolve the matter without a doubt conflicts with the philosophy offered by Aquinas concerning a just legal system. Aquinas states, "in order that a law obtain the binding force which is proper to law, it must needs be applied to the men who have to be ruled by it" (Aquinas, p. 14). This statement conveys that not only is a law to be applied and promulgated to the people, but all people under its rule are bound by its force. The key word is "all" for a government cannot discriminate against certain cases because under a true lawful regime "all" the people must be ruled by the same law.

The fourth deputy does not create a completely lawful recommendation supposing that they enact a special statute directed toward the problem of the "grudge informers." The first and most apparent problem to this recommendation is the direct conflict with *ex post facto*. One cannot be punished for a crime that was not considered by law a crime at the time the act occurred. This deputy deviates from Hart's rule of recognition. If they were to create this statute now, after the actual so-called crimes were committed, the people whom this statute ruled over would not be known to the people. We could not acknowledge the practice of referring to the written document as the authoritative source for identifying rules in the system if they were not written down to observe at the time of the grudge informers' crimes. Fuller also has a similar explanation and he opines that "a failure to publicize, or at least to make available to the affected party, the rules he is expected to observe" cannot be considered law. With the creation of a new statute after the actions have been done would fail this rule pointed out by Fuller, as the people would have no written law to observe.

The fifth deputy completely disappoints as he offers an illegitimate recommendation for the correction of the "grudge informers." The deputy suggest that "the people are quietly handling this thing in their own way and if we leave them alone, and instruct our public prosecutors to do the

same, there will soon be no problem left for us to solve" (Fuller 1964, p. 163). This ignores moral and just law, and allows the people to become disorderly and violent. This deputy also pays no attention to Aquinas's natural law precept that good is to be done and promoted and evil is to be avoided. The deputy's idea suggest full out retribution and brutality and cannot be considered good in anyway. His suggestion promotes evil and overlooks the effect such an idea would have on the peace between citizens. The deputy disposes of the rule of obligation which is the restriction of the free use of violence, theft, and deception. Those who do not follow these rules must be a minority, Hart asserts, or there will be no social pressure to prevent them from acting wrongly (Hart 1961). The deputy is applying no rules of obligation, making it free to use violence, theft, and deception. His plan also would create a majority of people who do not follow rules and would inspire the people to always act wrong as a result of the lack of social pressure and punishment for such acts.

The second deputy's recommendation clearly provides us with a sufficient and legally valid idea. Though he suggests we let "bygones be bygones" he does not suggest that we completely stop employing the laws that we already have. We cannot punish the "grudge informers" because they were neither lawful nor contrary to law when the Purple Shirts regime failed to design a legally valid, just and recognizable law. We can however control what the people are doing now, and should not just simply let the people sort it out on their own, for this would only encourage violence and end in chaos. We must also avoid the problem of *ex post facto*, for it is unethical to impose laws that are unknown to the "grudge informers" at the time of the act. Therefore, we shall adopt the second deputy's recommendation and continue our pursuit to obtain a just legal system.

REFERENCES

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