THE SHAKING OF FOUNDATIONS: SOME THOUGHTS ON JEROME HALL'S
FOUNDATIONS OF JURISPRUDENCE*

Those of us who studied jurisprudence as students, before the mid-sixties when the so-called ‘modernization’ of legal education began, would still recall with admiration Jerome Hall’s *Readings in Jurisprudence*, which used to be a prescribed reading for postgraduate legal studies in all leading Indian universities. Some of the Indian jurisprudents may have, since then, lost contact with many of the invigorating subsequent writings of Professor Hall. For them, as for others, it is essential to return to his recent work, which represents a quintessence of a whole lifetime’s dedication to jurisprudence.

Jerome Hall invites us to a common search for an “adequate” and an “integrative” jurisprudence. A legal philosophy is “adequate” if it meets at least four criteria: it should be “relevant” to “current socio-legal problems and intellectual interests”; it should clarify legal concepts; it should be “internally self consistent” and, finally, it should “comprehend” the variety of [legal] experience within the limits of one scheme of ideas. Jurisprudence can be “integrative” only when the “basic importance” of the structure, fact and value of law is fully and sensitively grasped and assembled under a general perspective of law.

Legal positivism offers one building block for an “adequate” and “integrative” jurisprudence; but the trouble arises when we

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1. I derive this title from Paul Tillich’s deeply stirring book published in 1949. In many ways, Hall writes with the same fervor which characterizes Tillich.

regard the building block as a whole edifice. Positivism, particularly as in hands of Bentham, Austin and Kelsen, has developed a “logic of the law” and made important contributions to the structural analysis of legal concepts. But, Hall cautions us, one should resist the dominant tendency which would appropriate either analytical method or the “logic of the law” wholly to legal positivism as this raises a “serious barrier to the progress of jurisprudence”. Hall reminds us that natural lawyers have also made equally important contributions to a structural understanding of the law. He sharpens this point by adding: “Indeed, what we now think of as an analytical jurisprudence was the product of Roman law interpreted by glossators and post-glossators of the seventeenth and eighteenth century”.

This is by now trite learning; it is generally conceded that analytical method neither arose with, nor is a monopoly of, legal positivism, which is a much more recent development in the history of human thought than the idea of law and legal systems.

What is distinctive in Hall’s analysis is his further claim that, not unlike natural law theories, legal positivism is also based on subjective valuations. Positivism has its own “metaphysical” and “moral” tenets and the “neutrality” claimed by, or on behalf of, Bentham, Austin and Kelsen is a misleading myth. Just as there is no value-free sociology there is no value-free jurisprudence. This point is certainly not novel in social sciences or philosophy; it may however, be new for jurisprudents. It is worthwhile to follow Jerome Hall in some detail on this aspect.

It is true, generally speaking, to say that in legal positivism it is plain that what is involved is not simply logical analysis viewed only as a method; the claim is not merely that the method is neutral but, also, that the product of that method, the significance of the results, is neutral...

In what precise respects is legal positivism non-neutral or to what values is it necessarily committed? First, Hall doubts whether positivist conceptions of the law are at all free of ethical or value commitments. Hall flatly states: “There is no such thing as a neutral definition of law”. Definitions of law (like Austin’s), in “purely factual (i.e. power) terms” can never be neutral. Even Kelsen’s professedly pure descriptive theory of law is not free of commitment to legal justice. Hall quotes Kelsen: “justice” means “the maintenance of a positive order by a conscientious application of it”. This is clearly an admission of “minimum ethical standard” in the very notion of law. And Hart’s admission of minimal natural law as an “essential constituent of positive law” is to Hall “tantamount to a surrender” since it implies that “an ‘essential’ element of positive law is an ethically normative one.”

In addition, analysis of legal concepts itself presupposes a “legal theory”. Hall contends that analytical jurisprudence is itself subservient to a “positivist” legal theory; it includes “substantive statements whose meanings reflect a positivist theory of law”. Second, the very conception of neutrality in conception of laws itself imports certain value-preferences. “In pure theory, a negative valuation of all valuations”, avers Hall, is the “dominant ideology”. Kelsen’s ethical non-cognitivism is itself an ethical attitude. Valuation is thus ineluctable; even negation of values is a value. Hall describes Kelsenian positivism as “subjectivist legal positivism”.

Third, Hall asks: “is subjectivist legal positivism neutral when it dismisses neutral law theories as ‘myths’ or ‘ideologies’”? Hall stresses that Bentham and Austin “made little effort to restrict their writing (jurisprudence)” to neutral ‘analysis’. The same observation applies to Kelsen and realists (whether or not the latter can be lumped together with ‘positivists’). Hall is clearly using ‘neutrality’ here to mean that the “analyst must not prefer any normative ethics or express any value judgements”.

Jerome Hall thus joins the ranks of very few jurisprudential thinkers who have endeavoured to expose positivist pretensions of

3. Id., 51.
4. Ibid., 38.
5. Ibid.
6. Id., 64-65.
neutrality. If he had just stopped with this critique, he would have only demonstrated the backwardness of the state of art in jurisprudence. Such pretensions were unmasked in the thirties and forties in relation to social theory, history, economics, epistemology, pure natural sciences and even theology. Belated exposures of purported value-free jurisprudence in Anglo-American legal thought can only be relegated to an exercise in overcoming a “cultural lag”.

Fortunately, the unmasking of value-free legal positivism is not an end in itself for Hall’s analysis, though some rather surprisingly careless statements suggest precisely that. In substance and spirit, Hall’s analysis is a powerful rebuke to the deadening dichotomies between “positivism” and “natural law” theories. A move towards a more “adequate” jurisprudence which takes account of the structure of the law, social facts and values is certainly facilitated by candid recognition of the fact that valuation is “expressed in all the theories and analyses” of law, whether “deliberately in some, incoherently in others”. The difference between natural law theories and legal positivism is a difference not thus of kind but merely of degree.

Another major component in Hall’s critique of positivism is that it is almost exclusively concerned with the structural understanding and analysis of law. Structural analysis of law is undoubtedly important but preoccupation with it may obscure the socio ethical content and nature of law. Positivists’ insistence that law may have any content and that the law is a “formal vehicle”, is, for Hall, contrary to the plain fact. That plain fact is that “there is not and never has been a positive law that is or was only a formal vehicle: every positive law has content, much more content than legal positivists deal with”. Hall reiterates throughout the book: “one may say that positive laws are vehicles or hypothetical judgments or commands; but saying that does not alter the actual character of these laws”.

Hall stresses that mere structural analysis of law does little to clarify our understanding of law as human social process. For example, the problem of validity of law in legal positivism is merely one of identifying whether a norm conforms to a higher norm or a problem merely of identification of a norm as part of a legal system. The criteria of validity for a legal positivist are purely logical or formal (exercise of legal power following prescribed procedure is law).

But discussion on the validity of norms presupposes the idea of a legal system. The grundnorm makes sense only when it is presupposed that it is “by and large efficacious”. Austian sovereign similarity must (in order to be such) receive habitual obedience by the bulk and generality of people. Acceptance of certain rules of recognition by “people” is essential to Hart’s conception of law as a union of primary and secondary rules. A legal norm may be valid, in the sense that it satisfies criteria of validity as a matter of logical operation, irrespective of its efficacy. But the legal order—as an order of norms—and its criteria of validity do contain ineluctable reference to the social facts of efficacy. Hall is right thus when he observes that subjectivist legal positivists “discuss the efficacy of a legal system as a condition of its being law” but they do not “scrutinize the conditions of that efficacy”. Hall urges that validity of law cannot simply be reduced to a problem of “factual attitudes”; social “reality” is also “partly normative”.

Hall concludes: “if the treatment of the validity of law is taken as an important test of the adequacy of a philosophy of law, legal positivism is not a likely candidate.”

Jerome Hall further exposes the core of limitations of the positivist analyses in a remarkably insightful chapter on “sanctions and concepts of law”. Positivists, confronted with the need to distinguish positive law from other laws ‘improperly so-called’ or from other normative orders rely on coercive sanctions as a distinctive feature of positive law. Austin incorporates sanction as an essential property of positive law; so does Kelsen. Both Kelsen and Austin (the latter more specifically) do not include positive sanctions (e.g., rewards, incentives) in their notion of sanctions of law. This leaves them only with negative sanctions, that is the notion of “coercion” or “physical force”.

16. In regard to positivists’ work, Hall says that his criticism of law is not new: “that analytical jurists were not or are not neutral—or that such neutrality is impossible.” Jurisprudence, 67. This statement does not: find any elaboration.
17. Jurisprudence, 70.
18. Id., 51.
19. Ibid.
Hall has no difficulty in demonstrating that "not all legal sanctions are measures of force" and that the positivistic notion of legal sanction is inadequate. What is more interesting is his conclusion that sanctions, as defined by Austin and Kelsen, cannot really help us in distinguishing normative legal order from other normative orders. He points out, following Ehrlich, that every group or association has its own normative orders; and these orders, like the law, are backed by both positive and negative sanctions. The internal "law" of the various organised groups in society includes sanctions which are measures of force, and these bear a striking affinity with the state law. All that could be said is that: "some legal sanctions are measures of physical force, others are not and both statements are true of the sanctions of the norms of various sub-groups".

How then can we distinguish legal norms from other social norms? Frederick Harrison, whom H.L.A. Hart very substantially follows, observed in his critique of Austin that it is necessary to define law in a way that would "combine the two aspects of command and rule... without losing sight of the obligation and sanction...". Hart endeavoured to offer precisely this combination in his Concept of Law by elucidating the notion of law as a combination of primary rules of obligation and secondary rules of recognition, change and adjudication. Hall, on a closer analysis of Hart's notion of obligation, maintains that it is really difficult to extricate it from "moral obligation".

Hall proceeds to demonstrate the implausibility of any clear distinction between rules of obligation and other rules by maintaining that each of the three principal features of the rules of obligation can

24. _Id._, 109. For some examples of this inside-out sanctions such as 'discharge', 'dismissal', adverse 'publicity', suspension from benefits of membership of associations etc. clearly do not involve sanction conceptualized as a "measure of physical force".


26. _Jurisprudence_, 111.


28. _Id._, 133.

without inconsistency, be extended to other rules. Whatever be the merits of Hall's criticism of Hart, the real question he raises merits closest attention: can we construct a wholly positivistic theory of 'obligation'? Or must any theory of 'obligation' entail some specific features of morality?

This critique of positivism bears out, in large part, Hall's indictment that positivistic jurisprudence, with all its many worthwhile contributions to thinking about law, is both particularistic and inadequate. An 'adequate' jurisprudence, according to Hall, must grasp and explain law not just as normative structure, but also comprehend law's relation to social facts and moral values. It must be stressed here that Hall himself does not, in saying all this, espouse any extreme natural law position; he is equally conscious of the major limitations of _inunaturalists_ thinking, an aspect which we are not taking here into full account.

Hall thus arrives at the notion of "integrative" jurisprudence which focuses not so much on the key conception of 'norm', 'rules' or 'sanction' but rather on action. The central idea in 'integrative jurisprudence' is "law-as-action", which includes "decision-making... viewed as rational and free to a significant degree". "Action", as described by Hall, includes the 'ideational', factual and valutational aspects'; indeed, "action" is a 'vital unity' of all the three aspects. Law as action, of course, recognizes the importance of law viewed as rules. But legal rules and practices are "ancillary" to law-as-action which is "paramount". Law-as-action includes actions of "legislators, judges, enforcement officers", who being authorities of the state orientate their action to legal rules. But legal rules are important in Hall's analysis only in so far as they relate to legal action.

29. _Id._, 133.

30. _Id._, 132. A recent analysis by J. Raz also sidesteps this question of "how to present a unified account of both moral and non-moral obligations" by saying that this raises a "general question of the nature of morality". J. Raz, "Promises and Obligations" in P.M.S. Hacker and J. Raz (eds), _Law, Morality and Society: Essays in Honour of H.L.A. Hart_, 210, 225 (1977).

31. See, for Hall's critique of _inunaturalists_ thought, _Jurisprudence_ 21-53, and of Fuller's notion that the "law is the enterprise of subjecting human conduct to the governance of rules" at pp. 116-118.

32. _Jurisprudence_, 158.

33. _Ibid._

34. _Jurisprudence_, 157.

35. _Id._, 159.
Hall would also include in the notion of law as action the "interpersonalistic conceptions of law always recognised, with varying degrees of obedience", conformity, experience of sanction, or "effectiveness”). But there are important sociological reasons for including lay action into the notion of "law-as-action".

One such reason is provided simply by the fact that action "by a very large numbers of lay persons has considerable effect on legal right organized evasion of the law, conformity, obedience, or compliance..."

The law at bottom can only be what the mass of people actually does and tends to some extent to make other people do by means of governmental agencies...

Karl Lewellyn, similarly, looked upon rules of law as being important "in so far as they give us a guide to what the officials will do or how person’s behaviour as a part of law", as falling within the "field of law-as-action is the fact that lay action can generate ‘potential’ law through custom.

A third reason for concentrating on law as "action" rather than merely as "rules" is that it enables one to better perceive the dynamism of law as a social process. "Subjectivist" legal positivism "bars the construction of a dynamic theory" since its model is "first rules, then conduct". Hall dismisses Kelsen's attempt at formulating a dynamic theory of law as a purely formal attempt, of no fundamental relevance, since it bases the "dynamism" of law "only on the consistency of legal rules with higher norms". However, dynamism of law as social action "involves duration, sequence, causation and change as basic categories". In the model of law-as-action, the traditional model gets reversed: What comes first is "action", then the "rule". This clearly applies to "custom", judicial process and, to some extent legislation.

Hall has made a bold and important beginning in his insistence that "action" rather than "rule" be explored as a unifying conceptual focus for new jurisprudence. His call for inclusion of lay action in the very notion of law-as-action is sociologically sound as well as jurisprudentially legitimate. He certainly adds to our understanding of legal positivism by emphasizing that it included lay action as a specific definitional component of law.

Since the notion of law-as-action is so important it needs close examination both at analytical and ideological levels. Analytically, even when we accept the stipulative definition of action as "purposive", "useful and inherently valuable", "goal-directed", "environment-bound"), we may ask whether the notion of law-as-action is clear and self-consistent. Hall would include action of law persons as well as lay persons in his conception of "law-as-action". Is all lay behaviour comprehended by that action? Hall feels that if that were the case this conception would be "too vague for fruitful use". Accordingly, he proposed a "guiding line" for inclusion of lay conduct which is "the relevance of law". "Conformity" and "violation" are two types of lay conduct which have relevance to law; therefore, these types of lay action would fall within the notion of law-as-action. Hall distinguishes between "merely fortuitous conformity" from "conformity that results from the effect of internalized norms that are moral as well as legal"; violations of law may be similarly distinguished as "inadvertent" and "conscious".

36. Ibid. (emphasis in original). Hall has some difficulties in classifying the actions of lawyers. He says "the work of lawyers does not comprise an essential component of law-as-action", it is "obviously necessary" for "correction or better conduct" of lay persons and officials. Jurisprudence, 161. The inability, or disinclination, to conceptualize lawyers, action as an ingredient of "law-as-action" is, in the present opinion, a serious limitation in Hall's analysis.

37. Jurisprudence, 159.

38. F. Beney, The Process of Government; 277 (1903); Jurisprudence, 144.

39. K. Lewellyn, The Bramble Bash (1930); Jurisprudence, 147.

40. Ibid.

41. Jurisprudence, 160. Hall classifies lay action as the act which "conforms or obeys or complies with the law".

42. Jurisprudence, 162.

43. Id. 164.

44. Id., 165.

45. Id., 167-68.

46. Id., 160.

47. In this discussion, Hall overlooks lay action as constitutive of custom or "potential law" see supra note 41.

48. Jurisprudence, 159 (emphasis added). Hall operationalizes the relevant notions thus: "This is conformity where there is no awareness of relevant rules of conduct; ‘obedience’ where there is awareness; and ‘compliance’ where there is not only such awareness but also approval of the rules".
All this does not really contribute to any clear understanding of the scope of inclusion of lay action in the notion of “law-as-action”. Is “fortuitous conformity” (which Hall defines as conformity without any awareness of the relevant rules of law) to be entirely excluded from the idea of “law-as-action”? If we exclude it (even John Austin so clearly relied on “habitual obedience” as a basic aspect of the definition of the “sovereign”), would it then be at all possible for us to provide an “adequate” social account of law? How do we distinguish “genuine” conformity from merely fortuitous one? This question becomes still more acute in view of Hall’s insistence that the former is not merely a function of “internalized” legal rules but also of “internalized” moral rules. Is a person conforming to what he considers to be totally unjust law on the ethical ground that the law ought to be obeyed genuinely conforming to the law? The point is that it is simply not open to the jurisprudent—especially of the “integrative” kind—to simultaneously seek to include lay action in terms of “conformity” and “violation” into the very notion of law and to seek to take only selective aspects of the lay action. If inclusion of all lay action (of these two types) makes the concept of “law-as-action” “too vague for fruitful use” then we need to look for other unifying concepts which would be more adequate for the purpose.49

The real difficulty here is that once we go beyond state law (official, positive, national, formal law) and proceed to include ‘lay’ action, it is not possible to adhere to any idea of a ‘monistic’ legal system. Indeed, one has then to reckon with the pervasive reality of the plurality and multiplicity of legal systems in each society. All societies are multi-legal. The state is only one of the many social groupings, however imperious and dominating it may be. If the state needs for its operations, social control and institutionalization of conflict—namely, the law—so do other non-state groups. To refuse to conceptualize their regulatory systems as law (in any significant usage of the term) is to do inadequate and particularistic jurisprudence—jurisprudence of state law. Jerome Hall, and those who believe in fundamental reorientation of jurisprudential thought (regardless of the label “integrative”) need to move beyond state law as determinative of inclusion of lay action into the notion of “law-as-action”. Lay action not merely “conforms” or “violates” state law. It also creates and sustains autonomous legal systems which may complement or conflict with the positive law of the state.50

How does the law-as-action notion help us solve some analytical puzzles which positivist jurisprudence, according to Hall, can do only inadequately? Let us take Hall’s analysis of the problem of validity as one example. If “rules are viewed as proposed solutions of practical problems”, Hall argues, it would simply not be possible to confine the idea of validity of a law simply to a mere logical derivation from, or conformity to, a higher norm.51 When rules are viewed thus, we move from the mere question of their validity to the questions of “usefulness” or “fitness” of the actions based upon these rules. A “correct, right or useful solution expresses sound values and contributes to the solution of a practical problem”; it “also establishes and maintains decent relations”.52 Hall further maintains:53

The correctness or utility of certain actions is closely and rationally connected with their effectiveness. That certain actions are “right” or useful is necessary but not sufficient to make them part of law-as-action; they must also be done with “sufficient” frequency and be supported by a sufficiently large number of persons, lay and official, to distinguish them from the actions of a martyr or a saint. Instead of separating pure rules from paralleling behaviour, and the consequently necessary treatment of efficacy as a “condition” of law, we deal with equally important characteristics of law-as-action its correctness or utility and its effectiveness.

How is this formulation to be understood? Are the positivist criteria of validity of law to be altogether abandoned and replaced wholly by the ones proposed? If this is so, then even if legal action is itself infirm (being void ab initio, or ultra vires, or unconstitutional) it will still be valid if it is “right” or “useful” and followed by “sufficiently larger number of persons lay and official”.54 A legally invalid action may thus form an aspect of “law-as-action” if the above stated criteria are fulfilled.

This last formulation makes perfect sociological sense because it concedes that the norm regarded as invalid (and the action regarded as

49. Indeed, a more adequate conception than “law-as-action” is necessary if we are to be able to take better account of custom and lawyers’ practices. See supra nn. 36, 41, 47.
50. See U. Baxi, op. cit, supra n. 25.
52. Id., 174.
53. Ibid.
54. Ibid.
illegal) by the criteria of state law may still well be valid and legal by the criteria of validity of a non-state legal system, (e.g., untouchability, dowry, prohibition). But, of course, this is not Jerome Hall’s viewpoint, since he accepts the state legal system as the exclusive concern of “integrative” jurisprudence. 55

Hall’s difficulties, therefore, are numerous, and even formidable. How can an action that is illegal and a norm which is invalid be ever subsumed under the category “law-as-action”? Or does Hall mean that such action and norm can, by definition, neither be “correct” nor “right” nor still “useful”? There is a related question: if a rule is correct, right and useful and yet “sufficiently large number” of lay persons do not follow it, would it be “law-as-action”? What would be the situation if there is divergence between “sufficiently large number” of lay and official persons as regards the “validity” of a norm and action based upon it? It may be considered as a part of “law-as-action” but would it be “valid” for that reason? Or is it simply to be assumed that whatever is correct or right or useful will necessarily be followed by a large number of people? Or that it would necessarily establish and maintain “decent” relations?

All this raises questions concerning the ethical components or ideology of integrative jurisprudence. One wishes Jerome Hall had as frankly addressed himself to this question as he has in his critique of “subjective” legal positivism. It is clear that “integrative” jurisprudence, like most Anglo-American jurisprudence, celebrates the ideology of liberal legalism, the main tenets of which are open to serious sociological and philosophical questionings. 56 Hall’s “integrative” jurisprudence thus turns out to be both “particularistic” and “inadequate” in its present stage of formulation.

55. Hall has an insipid awareness of the notion of plurality and multiplicity of law (as his analyses of sanctions and effectiveness of law demonstrate). It is puzzling that, despite this, he adopts the hegemonic state law model in the construction of an “integrative” and “adequate” jurisprudence. The “law-as-action” should thus mean many more types of interaction than Hall’s analysis accommodates. Some of these are: (i) interaction between state law persons and laypersons; (ii) interactions between state law persons and non-state lawpersons; (iii) interaction between non-state lawpersons and laypeople; (iv) interaction between and among laypersons in relation to both state and non-state law.


Indeed, one may sharpen the point by asking: how can a book called Foundations of Jurisprudence, providing a vision of “integrative” jurisprudence, altogether ignore the competing paradigm of law provided by Marxist thinkers? Can integrative jurisprudence be truly integrative if it does not take account of power, conflict, and radical change? One may also ask, in the same mood, whether jurisprudence can be “adequate”, let alone “integrative”, if it overlooks the complexities of interaction between state and non-state legal systems, present everywhere but pointedly illustrated by the Afro-Asian legal and social experience?

These, and related questions, indicate salient items on the agenda of “integrative” jurisprudence. Jerome Hall has pioneered a new path and helped remove the cumulated jurisprudential debris. The laying of foundations still awaits the patient, and near-Herculean, labours of gifted and dedicated jurisprudents like Jerome Hall.

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