

UNIVERSITY OF SYDNEY
Faculty of Law
Department of Jurisprudence and International Law
(*Institute for Advanced Studies in Jurisprudence*)

MATERIALS FOR POSTGRADUATE STUDIES, 1972

RENÉ MARCIC: SYDNEY COMMEMORATIVE SYMPOSIUM

SUMMARY

The principal paper of the Symposium (54) represents the text of a lecture which René Marcic delivered to a postgraduate jurisprudence class towards the end of his stay in Sydney. It reaffirms his dedication to the natural law cause, but presents the idea of natural law in a modern version, with some individual features of his own thought.

The main themes of his iusnaturalist thought expressed in this paper and his other writings are variously taken up by the other contributors to the Symposium. These themes include the epistemological status of natural law thought, the changing content of natural law, the problem of the right to resist, and the problem of the contemporary crisis of natural law.

In paper 54a, introducing the Symposium, Julius Stone speaks of the mutuality of the fellowship at the Sydney Jurisprudential Centre in the stay of René Marcic here during the last seven months of his life, sketching his personality and his intellectual and emotional concerns. Stone sketches the place of Marcic's open, ontological yet homocentric reinterpretation of natural law against the background of the age-old iusnaturalist-positivist conflict, indicating some features which make it particularly appealing in the Anglo-American civilisation. He draws the attention to René Marcic's willingness to think of "natural laws" as basic hypotheses of ethical Being, requiring and also admitting constant retesting and revision. In conclusion, Stone refers to forebodings of Marcic, especially towards the end of his life, relating to the effects of advancing technology on the potential role of nature, relating these forebodings to some of Stone's own earlier works, written from a less iusnaturalist standpoint.

In paper 54b, Ilmar Tammelo addresses himself to the problem of the epistemological status of natural law. He finds that natural law can be established, contrary to the belief of Marcic, also on a non-cognitivist basis. He further takes up the problem of natural law in crisis posed by Marcic and finds that natural law is to be understood as a human law, not as a law of demons into which humanity may turn through men's farreaching interference with processes of nature. A contemporary role of natural law lies in the counteracting of the development of men into demons.

In paper 54c, Joseph Shatin takes up the problem of natural law with variable content, reflected also in Marcic's thought. He elaborates this problem by recourse to the distinction of justice as an idea and as an ideal, linking this distinction with its analogues in the early 20th century German and French legal philosophy.

In paper 54d, Edgar Bodenheimer examines the conceptions of static natural law and of dynamic natural law, the latter being espoused by Alfred Verdross and by Marcic. He also considers the conception of ontonomic law, one of the characteristic features of the natural-law thought of these two writers. Bodenheimer finds the basic core of their specific ideas to be solid and sound, challengeable only in their particular elaborations.

In paper 54e, Henry Strakosch takes up Marcic's conception of peace as friendship and considers the realisation of this ideal of peace in the concrete reality of the rule of law. He surveys the evolution of the rule of law in types of political orders of the Western civilization, especially in relation to the central concept of sovereignty.

In paper 54f, Sergio Cotta examines the idea of natural law in the light of certain modern cultural trends which, in his opinion, lend it a renewed significance in our time. He comes to view natural law not as a system of norms but as a theory of law. Conceived as a theory of law, natural law offers a constructive critique of the ideology underlying legal positivism as understood by him.

In paper 54g, Robert Austin examines certain aspects of Herbert Marcuse's thought. He finds that a variety of themes and perspectives in Marcuse's works yield a iusnaturalist approach to law in contemporary Western industrial societies. Austin draws some parallels, in terms of mood and ideas, between Marcic and Marcuse.

In paper 54h, Upendra Baxi focusses on Marcic's view that the right to resist ought to be regarded as a legal right. Baxi illustrates ways in which Hohfeldian analysis of jural relations could help to clarify such iusnaturalistic premisses and arguments. He maintains that "the rule of law" notion, through which Marcic sought to establish some limits of this right, is useful only as a rhetorical device but is confused and confusing for use as an analytical tool.

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ONTOGENOMIC PROWESS AND EXISTENTIAL IMPOTENCE:
Reflexions on René Marcic's Sydney Papers

By
Upendra Baxi

*Impatience is a poor qualification for immortality.
Hot blood is of no use in dealing with eternity,
It is seldom that promises or even realisations
Can sustain a clear and a searching gaze.
But an emotion chilled is an emotion controlled;
That is the road leading to certainty,
Reasoned planning for the time when reason can no longer avail.
It is essential to know the chill of all objections
That come creeping into the mind, the battle between
 opposing ideas
Which gives the victory to the strongest and most universal
Over all others, and to wage it to the end
With increasing freedom, precision, and detachment,
A detachment that shocks our instincts and ridicules our desires.*

Hugh Macdiarmid, *On a Raised Beach*

I

Although René Marcic did not give utterance to these thoughts, he would have recognized them as his very own because he lived by them. René was always at the front in "the battle between opposing ideas", which was never to him (despite his exciting discovery of Matthew Arnold) a battle on "a darkening plain where ignorant armies clash by night".¹ René knew "the chill of all objections". Though he had the faith, the knowing, that the ideas and values he cherished will somehow win out, he too had a sense of crisis concerning these very ideas and values.² In this sense, René Marcic was among the poet William Butler Yeats' "best" men. Yeats thought

The best lack all conviction, while the worst
Are full of passionate intensity.³

Like the Vedic seers of ancient India, René Marcic prayed: "Let noble thoughts come to me from all directions." And because he was so open, so receptive he had so much to give, even in the briefest exchanges of ideas. He made alive for me the best in the iusnaturalist approaches to the problems of law and obedience. He reinforced my intolerance to insensitive denigration of these approaches. He helped me see that many aspects of contemporary sociology of law received impetus from and marched well with the iusnaturalistic concerns, whether or not these were directly acknowledged.

In his Sydney papers, René Marcic did not take the position that unjust law is not law. Rather, much like H.L.A. Hart, Marcic was concerned with the moral problems of obedience arising for a subject of the legal order once the injustice of the law was perceived.⁴ In many a way, René Marcic brought home to me the truth that good positivists need good iusnaturalists as friends, philosophers and guides and vice versa. This truth I had apprehended as an abstraction. René Marcic made it totally live for me.

In this commemorative Symposium for René Marcic and his dedicated wife Blanka, I pursue the enquiry into "the right to resist", which engaged me before René's arrival in Sydney but which has been substantially enriched by the infusion of his own distinctive philosophical concerns. I develop and present my ideas as a tribute to René Marcic: I know he would have wanted and welcomed amplification and critique of what appealed to me in what he said. As in life, so also in death, René Marcic stands as a stalwart of free, patient and responsible enquiry. His memory, no less than his presence, calls for confrontation with the hard problems which intrigued him, with a "detachment that shocks our instincts and ridicules our desires".

II

Using the term "law" in the wider sense as embracing "right-law" or law as it morally ought to be, Marcic holds that there exists not just a moral "right to resist" but a legal one and that the entire "problem of revolution and resistance is fundamentally a legal problem".⁵ The source of right-law is not "natural law" in its traditional senses but what Marcic calls the "ontonomic law". The most fundamental premiss of ontonomic law is that man ought not be ousted "from his position as a legal subject", this entailing the violation of human dignity which is "inalienable (status negatorius)".⁶

Human dignity is a prime value because of the uniqueness of man in the world. Man is the "being of the highest rank in the world of experience". He is "autotelic", rational and "adespotic". Man thus is fundamentally free in the sense that he is not "completely situation and environment-bound" but has potential for transformation and transcendence. All men are equal. All men have the same value - "the value of a single human being has the same weight as that of millions". But ontonomic law also recognizes that man "by his nature is an incomplete, insufficient, and necessitous being".⁷

The right to resist and even the duty to resist emanate from the abovementioned attributes of man and the cardinal principle of human dignity. Because man is rational, free, autotelic and adespotic, he ought rationally to appraise the positive law from the standpoint of human dignity and never in principle countenance a "mere usurpation or arrogation of power inconsistent with right-law".⁸ Because man is an end in himself, "there is a call to resist" whenever "an established legal system tries to become an end in itself and uses man as no more than a means for the achievement of political ends".⁹

But ontonomic law does not foster "philosophical" anarchism, which in some of its extreme versions extends the principle that each man is an end in himself to the conclusion that there cannot be any de jure authority.¹⁰ Ontonomic law does not gainsay the right to command and the duty to obey : it only relativizes, conditionalizes the character of the duty to obey. To be sure, man is autotelic, adespotic, free and rational. But he is also "incomplete, insufficient, and necessitous being".

When does ontonomic law sanction, indeed require, resistance? First, and this is the paradigmatic situation, when naked power reigns. Marcic observes pithily : "If the rule of naked power is espoused, there is no need to waste one 's breath on the right to resist - it is excluded from the outset".¹¹ Second, a situation of civil war or foreign aggression arises then "the right to resist and the duty to resist come into operation and the whole responsibility for relevant conduct reverts to the individual."¹² Third, the right (and perhaps the duty) to resist revives "if the rule of law breaks down or if its basic institutions fail to operate".¹³

In other words, the right (and perhaps the duty) arises only in extraordinary situations. Marcic, moreover, maintains that the ontonomic jural precepts can only orientate decision-making. The genuinely "right" decision can only be properly reached when all the features of the existential situation are fully borne in view.¹⁴

Is everyone a "bearer" of the right to resist? Marcic answers the question in the spirit of St. Thomas : in principle everyone has the obligation "to examine whether the commands ... directed to him are lawful".¹⁵ But, as "a rule of thumb ... proper competence of examination and proper competence of rejection belong to independent judges" within the legal community. The bearers of the right must avoid in its exercise "overhaste, improvidence, inadvertence".¹⁶ Social status, official rank, education, discernment, intelligence, vision, power and influence - these are the attributes to be taken into account by anyone contemplating resistance. The greater the eminence of these attributes, the greater the competence to resist.

III

It must of course remain open for other thinkers to question Marcic' above conceptions, including the very notion of ontonomic law itself. I am sure that Marcic would have welcomed criticism. I have yet to know a sterner critic of René Marcic than René Marcic himself.

Among the principal criticisms of Marcic' views, those most sympathetic to his conclusions may especially lament the fact that a thinker who starts with such a "radical" premiss (the right to resist is primarily a legal right) should end with such a "conservative" conclusion (that where the rule of law prevails this legal right remains in abeyance). But in fact Marcic' conclusion is only deceptively "conservative". On Marcic' view, there is always an active right to resist which arises when the commands of the state are manifestly in conflict with ontonomic law. So that implicitly "the rule of law" which requires abeyance of the right to resist is one which is in principle oriented to the fulfillment of ontonomic values, and which in actual operation strives to fulfill them.

When a legal system is not thus oriented, and not so striving, the rule of law does not exist. The right to resist, in such a situation is an active, not a passive, right. Furthermore, whatever one may mean by the rule of law, it breaks down when there arises "excessive or intolerable injustice" for a person, a group or a whole community. Such a breakdown renders the otherwise passive right into an "active" right to resist.

Both these conclusions are radical, considered from the viewpoint of sober legal positivism. They are conservative, in substance, if regarded from the viewpoint of conventional iusnaturalism. But Marcic is not quite a conventional iusnaturalist, even if it is only the mood of questing, rather than actual heresies, which render his positions distinctive and full of promise for fresh beginnings.

Thus, Marcic does not at all take the position summarized in the pithy assertion : "unjust law is not law". Although Marcic uses the term law as referring both to law in the sense of enacted law and law as it morally ought to be (right-law), he is well aware that the enacted law may be contrary to the standards flowing from the right-law.¹⁷ This divergence from the right-law does not result in a necessary conclusion that the enacted law is not a law at all. Rather, in Marcic' conception, it only gives rise to a need for intra-systemic negation. In other words, unjust law ought in the first place be negated (i.e. deprived of its validity and efficacy) through the routine legal processes of judicial review or judicial

interpretation. When this does not happen, and injustices cumulate or become excessive then the unjust laws are to be negated by the extraordinary but still legally circumscribed processes of disobedience and resistance.

It might still be said that Marcic offers us a very elitist model of the right to resist, strongly reminiscent of the medieval theorists of tyrannicide. The latter emphasized that tyrannicide is only justified when accomplished by the "estates". Ordinary man, confronted with tyranny, must pray for better and bear it or suffer self-exile to another realm. Thus, the author of the landmark Vindiciae Contra Tyrannos (circa 1581) observes:

But if the princes and magistrates approve the course of an outrageous and irreligious prince, or if they do not resist him, we must lend our ears to the counsel of Jesus Christ, to wit, retire ourselves into some other place.¹⁸

Marcic's dicta concerning the bearers of the right to resist sound not too distant from these sixteenth century exhortations.

But this is not so. Ontonomic law endows every human being with a right to resist. A jural order which recognizes such a right as an inherent right of its subjects cannot properly be called elitist at all. However, in the exercise of this right, it must be remembered by every bearer of it that he is acting as an agent of ontonomic law. Exercise of the right, accordingly, must be consistent with the ontonomic values. Just as surely as a ruler becomes a tyrant by the disregard of ontonomic precepts, so can the bearers of the right to resist become tyrannous by reckless exercise of this right. Tyranny, an unprincipled regime involving sacrifice of basic ontonomic values and the principle of human dignity, is no less obnoxious because it comes from those who set out to right the wrongs.

IV

The propagation of the idea that the "right to resist" ought to be regarded as a legal right is, however, inconclusive unless attended by a host of basic analytical clarifications. The nature and scope of the "right" need to be clearly specified. The range and type of analytically discrete behaviours which this "right" seeks to recognize and protect through the authority of the legal order require explication. The term "resistance" also stands preeminently in need of clarification. I believe that the need for such analytical clarifications remain even when the proposition involved only claims that there is a moral duty of resistance in certain situations, since a conscientious moral deliberation cannot proceed otherwise.

Although the luminous framework for analysis provided by Wesley Newcomb Hohfeld was oriented to the clarification of the term "right" in lawyer's operations, this framework remains relevant and fruitful for iusnaturalist and ethical enquiries as well. The questions raised in this part of the paper can of course be raised without explicit recourse to Hohfeld but to raise them within the Hohfeldian framework is, as will be seen, to lend them an analytical sharpness they may not otherwise possess.

Let us ask, first of all, what precise Hohfeldian legal relations are highlighted by Marcic' proposition that the "right to resist" remains in abeyance during the provenance of the "rule of law"? In Hohfeldian terms this proposition can only be interpreted by saying that ontonomic law recognises in its subjects a legal power of disobedience (we shall equate for the time being "resistance" with "disobedience"). Every subject of this legal order has a legal power and the sovereign (or the rulers) are consequently under a liability.

Power-liability conceptions, in the Hohfeldian schema, are concerned with change in existing relations which the wielder of the power is authorized to initiate. Hohfeld describes power in terms of such a volitional control over a fact or a group of facts as enables a person to effect a change in the existing legal relations. The correlative of power is liability by which Hohfeld means the liability (subjection or exposure) to have a duty created.¹⁹

Privileges, immunities and rights stricto sensu may coexist with power. Thus, for example, a person Y empowered to disobey "manifestly unjust laws" can transform the existing legal relationship consisting of the right (in the strict sense) of the State to command and the duty in Y to obey by exercising his power of disobedience. But Y may be as free to exercise this power as not to do so (i.e. he may have a privilege to exercise it or not). As and when Y decides to exercise his power of disobedience the state is under an obligation, a duty towards Y. This means that for one specifiable legal relation Y has converted his "power" into a "right" stricto sensu with a corresponding transformation of the state's liability (for that particular relation, again) into a duty. Similarly, a power can be accompanied by a duty not to exercise it in ordained circumstances. This is precisely what Marcic illustrates when he speaks of the right to resist being in abeyance as long as the rule of law prevails. In a legal order which in fact realized all the precepts of ontonomic law, the ruled will not be required to exercise their power; nor will the ruler be under the subjection of the ruled.

To speak of a "power" to resist is of course to suffer a loss of symbolic appeal which the expression "right to resist" commands.²⁰ And indeed it may be somewhat confusing to talk of the power to resist (if the term is not consistently used in the sense stipulated by Hohfeld) for the term "resistance" is almost always imbued with the "anti-power" ethos. The contrast between "right" on the one hand and "power" on the other may indeed be too rich and dramatic to be foregone. But the loss of symbolic appeal has to be measured against the gain in clarity. And while mere analytical clarity is not enough in itself to summon people to action, it is quite adequate (indeed indispensable) for an understanding of the dimensions and implications of social change (and potential for it) sought through the propagation of the idea of the right to resist.

This clarity emerges most strikingly when we ask where ought limits of the power (not right) to resist lie? Recall that Hohfeld regards power as consisting in relative paramountcy of volitional control over facts or group of facts. The exercise of a legal power requires an act of will. But the will of man as an agent of ontonomic legal order ought not to involve violation of the overarching principle of human dignity. Rather, the will of man must be fully orientated to the basic norms of ontonomic order. And any legal power ought to be structured so as to avoid its arbitrary exercise, for the rule of law must involve the basic notion that "a legal order faithful to itself seeks progressively to reduce the degree of arbitrariness in positive law and administration".²¹ As Marcic himself insists, the controversial chapter 13 of St. Paul's Epistle to the Romans has been crudely misinterpreted because power is construed as potentia rather than potestas, unregulated absolute power rather than regulated power.²²

The Hohfeldian mood directs us much further along the road to clarity than the above recasting of Marcic's propositions in Hohfeldian terms might suggest. It is certainly possible to argue normatively that the "right to resist" must be accepted as a right stricto sensu, the correlative of which is a legal duty, just as it is equally possible to argue within Hohfeldian nomenclature that the "right to resist" ought to be regarded as a privilege, power or immunity. The Hohfeldian scheme is only a rigorous analytical apparatus directed to attain and promote clarity and self-consistency in thinking. It is open, within these limits, to any instrumental use.

In fact, it helps us better to take as a starting point the proposition that legal systems ought to recognize a right to resist,

in the strict sense, entailing a correlative duty. Analytically such a proposition gives rise to at least two major questions. One is: What are the types of relations between persons which would be protected or punished by law's recognition of the "right to resist"? The other question relates to the "nature" of such a right. Would the right be a paucital (in personam) or a multital (in rem) right?

The first question is clearly not answered by positing that the "right" to resist be exercised in a non-violent or violent manner. This is so because the rubric "violence" covers a whole range of behaviours and consequently relations among persons.²³ The same is to be said about "resistance". On a proper Hohfeldian analysis a right is a legally enforceable claim; if X has a right then Y has a duty. Moreover, the right-duty relations must be atomized and considered one at a time; not rolled-up and spoken of compendiously. The statement that X has a right stricto sensu to resist, in order to be meaningful, must refer to a specific sort of legally permissible claim that X, a subject of legal order, can make against Y, another individual subject. The statement might furthermore indicate that the right is unique in the sense that it is restricted to one type of claim or that it is a whole set of claims to behaviour, involving related but analytically discrete sets of legal relationships.

It is thus clear that those who argue that legal orders ought to recognize a legal right to resist have the burden of specifying at least the type of relationships which ought to be recognized as legal. Such notions as "resistance", "dissent" or "disobedience" have to be broken down into a range of discrete behaviours for which the authority of the law is invoked. In a way, proponents of the right to resist need more than the vision of the enlightened legislators; they also need to perform the rather mundane tasks of a skilled and imaginative legislative draftsman.

To be sure, free expression of belief, free propagation of one's views, the manifestation of one's freely held views, through assembly, procession, marches and sit-ins in public places are all types of behaviour recognized by the law of the Constitutional democracies of the non-socialist variety. In recognition of such behaviour as permissible, these legal systems vary from direct and explicit recognition of rights stricto sensu to other types of legal relations. Those who argue for the "right to resist" in the strict sense must also be prepared to argue that each of the above types of behaviour must be a right, rather than a privilege, a power or an immunity. And they must correspondingly be prepared to conclude

that assimilation of these types of behaviour into a Hohfeldian right must in turn impose duties of protection upon state agencies including the law enforcement authorities — police and courts — in each instance not to interfere with them. It is at this level that the problem of the limit to the posited right to resist would emerge most concretely for the resistance theorist.

Such a problem would of course arise independently as well, but the importance of narrowing the right to its strict analytical sense helps give a sharper and fully existential context within which the task of delineation has to proceed. This is no doubt the task of judges under Bill of Rights type provisions; it should, however, no less be a task of a theorist of civil disobedience as well.

Specification of the criteria for limits of the right to resist is too important a task to be handled by a division of labor between those who enunciate general principles and those whose task it is to somehow implement these principles.

The second analytical as well as normative problem attending those who wish to institutionalize the right to resist in its strict sense is, we recall, whether such a right ought to be paucital or multital. Hohfeld defines a paucital right (right in personam) as being "either a unique right residing in a person (or a group of persons)" or else as being "one of a few fundamentally similar yet separate rights availing against a few definite persons".²⁴ In contrast, a multital right (a right in rem) "is always one of a large class of fundamentally similar yet separate rights residing in a single person (or a group of persons) but availing respectively against persons constituting a very large and indefinite class of people".²⁵ Standard examples of paucital rights include the right of A a lender, against B, a borrower; and of multital rights include the right of a patentee that other persons shall not manufacture patented items.

The question whether the posited legal right to "resist" is paucital or multital is not a mere academic question. If the right to "resist" is conceived of as a paucital right, then it is available against the State, conceived here as a single person or group of persons. The duty resides in that case on an ascertainable range of persons. On the other hand, if it is conceived as a multital right then it avails against society at large, "constituting a very large and indefinite class of people". If the right to "resist" is conceived as a multital right, then the duty to suffer or bear "resistance" lies on the whole Society. Even in the context of economic law, the above question remains toweringly important,

unless the assumption is necessarily true that only State (and not non-state social groups) can give rise to "excessive or intolerable" injustice, or unless it is further assumed that it is consistent with "dignity" of man for State to be so powerful and dominating a social group as to altogether and continuously eliminate such injustices.²⁶

Perhaps, when we have confronted this range of questions a further fundamental question may emerge while it is conceivable that a legal system might have self-contradictory norms (obey rule X; but do not obey it if it is unjust in your estimation). It is a moot point whether a legal system which thus decentralized authority and obedience, will long survive as a going system. It is of course conceivable, that a society could so engineer socialization processes concerning fidelity and compliance to the law as would facilitate the maintenance of viable authority structures while at the same time accommodate anti-authority behaviour sanctioned by individual sense of justice. This is conceivable; but not at all probable.

Considerations of this kind affect any argument requiring recognition of a privilege, power or immunity (rather than a right stricto sensu) to resist. Once again a lot here depends upon the sort of behaviour for which the support of the authority of the law is sought. Neither analytically nor sociologically does it help to advocate the recognition of a legal "right to resist" unless the above second-order questions have been carefully examined. There can scarcely be a more fitting memorial to René Marcic than a quest for an adequate theory of resistance which grapples with these and related hard questions.

V

René Marcic was clearly aware that positing a legal right to resist was only the first step, difficult, important and pioneering though it was. The other important step was to explicate the scope and limits of the right. Marcic was clear that the right was an extraordinary right and occasions for its exercise must equally be such. He preferred to express one limit of the right by insisting that the right become active only when there was a "breakdown" of "the rule of law".

The enunciation of the right was important to René Marcic both as a thinker and as a human being. He felt (and I had the privilege of knowing this in my conversations with him) that theories concerning the right to resist - as perhaps even those concerning the very concept of law - performed diverse roles in human history. One was of course the task of developing analysis and knowledge. But the

other, and by no means secondary, was to contribute to a climate of belief and opinion about the basic questions concerning man's relation with authority. Marcic felt that the two roles, that of a thinker and that of an ideologue, were unenviably linked in matters of this kind. There was no way to sever them; nor was blissful ignorance of the conflicting demands they made the answer.

In this mood, Marcic felt it important to assert, and attract a following to, the view that the right to resist must be conceived as a legal right. To merely postulate a potential, a passive legal right to resist is to startlingly reorientate our thinking about the entire problem. It is also, hopefully, to create a body of impressive literature which will find a degree of acceptance in the "market place of ideas", which might function to inhibit the perpetuation of injustices in society and give legitimacy to protest against them should they persist. In the same mood, Marcic felt disposed to criticize theories of law which crudely stress its coercive, as against its purposive, nature and functions.

Clearly, Marcic did not expect that the conferral of legal entitlement to resist "excessive or intolerable" injustices would result in any resistance, or any effective resistance. Equally clearly, it was not so disingenuous as to assert that any kind of iusnaturalistic evangelism had causal connection in moulding the relations between state and the citizens. What he did believe, and said often to me, was that inevitably ideas expressed in theories of law and obedience do perform (whether intended or not) ideological functions. He believed that theories are used as providing justification of the scope and intensity of political behaviour.

The belief has impressive evidence in support, though only sociological studies of social movements can finally answer questions such as the relationship of the quality and complexities of political theorizing to its consumption by needy and responsive constituents.²⁷ But I believe that regardless of such findings the task of questioning and refining the theories of resistance has to continue. And so did René Marcic.

He would, therefore, have been amongst the first to agree that the rule of law is a variable achievement. I am not so sure whether he would have further agreed with my most considered view that unless we can remember constantly that the rule of law is a variable achievement, we would be better off without the notion of "the" rule of law altogether. Let me explain.

The notion is misleading even without the amnesia concerning the variability of its achievement as it is shot through with ambiguity. Julius Stone pointed out some time ago that the "mere conformity to law in the lawyer's sense" is only one aspect, and probably not a very significant one, of the notion.²⁸ Such a rule of law can prevail at a very great cost of justice, as the Nazi version of it tragically illustrates. But in this sense, less dramatically, the rule of law may also be in conflict with what Pandit Jawaharlal Nehru evocatively identified as the "Rule of Life".²⁹

The other and more important aspect of the rule of law notion "imports both a minimal justness of the rules, and a dynamic responsiveness of substantive law to the needs of social and economic development."³⁰ This is very much the sense in which Marcic seems to be using the notion, too. In this sense, the rule of law signifies a complex of standards of justice.

Insofar as the rule of law notion continues to evoke merely the idea of conformity with the lawyer's law it is dangerous, since it tends to conceal or cushion the lawman's awareness of the total lack in some areas, and the snail's pace rapidity in others, of law's "dynamic responsiveness" to a whole host of human problems.

But difficulties attend the use of the notion in its second aspect as well. For one thing, explication of a coherent set of standards of justice entailed in anyone's notion of the rule of law is not an easy task, so long as we insist on a plurality of standards. Phillip Selznick has consistently explicated rule of law in terms merely of one standard; "progressive reduction of arbitrariness" which on analysis it turns out to be only a compendious way of stating several standards.³¹ So also the phrase "responsiveness of substantive law to the needs of social and economic development" is a shorthand way of pointing to a whole range of standards of justice. Nor is there any assurance that these standards will be in mutual harmony inter se.³² When we look upon the notion of the rule of law in this light, we are in fact questing for a theory of justice. The talk of rule of law mutes problems which a theorist of justice will have to confront frontally. And this muting constitutes one clear and present danger inherent in this very compendious notion.

But the analytical difficulties surrounding the rule of law notion do not end at the level of specification of justice - standards. Difficulties persist also in the common discourse concerning the rule of law. It is routinely asserted that the

"rule of law" exists or that it is in peril or that it is doomed or that it has broken down. Such statements are highly ambiguous. To say, for example, that the rule of law exists may mean that an ascertainable number of persons in society have accepted certain normative standards of justice as desiderata. This statement might also mean that an ascertainable number of persons in society have not just accepted these standards as desirable but actually behave in accordance with them. (Query: for both these meanings: How many persons? Which type of persons? What specific standards?) Yet another meaning of the proposition that the rule of law exists can be that a system of coercive sanctions requires compliance by subjects of the legal order with certain standards of justice in certain sorts of interactions.

Similarly, the statement that the rule of law is breaking down might have any of the three meanings above identified. The statement might mean that certain (Query who? how many?) persons do not accept (outrightly repudiate?) certain justice-norms. Or it might mean that certain persons (Query: who? how many?) do not quite follow the accepted normative standards in their behaviour. Since the question of "fit" between norm and behaviour is a question always of degree, the problem here would be to set a variance - quotient which one would regard as impermissible. Similarly, though somewhat paradoxically, to say that the rule of law is breaking down might mean that the system of coercive sanction does not any longer provide the requisite quantum of compliance with the rule of law standards.

These difficulties must now be added to Marcic' suggestion that so long as the rule of law "exists", the right to resist remains in abeyance. Let me now formulate these difficulties in more concrete terms, recalling Marcic' preference to characterize the rule of law notion through the standard of dignity.

The dimensions of poverty, racial discrimination, under-privilege in most Western affluent democratic societies demonstrates amply that the rule of law in its actual operation is indeed compatible with the denial of minimal "dignity" to a vast number of human beings. When we take count of the law's dealings or non-dealings with the poor, the black, and the underprivileged, we find that a preeminent quality of law's response to their problems has been one of benign neglect or cruel exploitation. Overcrowded prisons, slums and ghettos, inadequate welfare services, the "war" on poverty which was not even a battle, problems of bail and adequate legal representation - all constitute a challenge to any assertion concerning the "existence" of the rule of law in some modern Western democracies.

This contrast between ontonomic prowess and existential impotence is in a way embedded in Marcic's conception of human nature. For, in addition to recognizing that man is rational, free, adespotic, equal, Marcic also acknowledges that man is by his nature "an incomplete, insufficient and necessitous being". This last attribute of human nature is a potent thin end of a Hobbesian wedge. This radical dualism in the very notion of human nature preserves for us the many problems daunting the concept of nature in natural law, although Marcic states the attributes of human nature as it is rather than as it ought to be.

The contrast between the picture of society living under "a rule of law" and the substantial shortfalls in the attainment of even some of the most basic ideals underlying "the" rule of law picture should be enough to alert us about the unreality of that picture. But the ideology is absorbing and resilient enough to overcome the vigilance of even the best of us. That possibility provides the prime reason for reiterating the need for the utmost caution in handling the concept.

The fundamental question needs to be sharply posed for each society claiming to have attained "the rule of law". For whom, and to what degree, if at all, does "the rule of law" (conceived primarily as attainment of a modicum of justice through legal processes) exist? Can it be claimed with integrity that it exists for all people?

This is indeed a fundamental question for us in this last quarter of a momentous century. The answer is not to be found in decrying the rule of law ideology as a shibboleth just as it is not to be found in calling the minority of "radical" jurists emissaries of disorder or harbingers of anarchy. The question is too important for a war of pejoratives, at which anyone can easily excel.

Perhaps, it might be said that the jury's refusal to convict Angela Davis or Black Panthers (in New Haven) points at an affirmative answer, at last for the United States, because it illustrates clearly that the jury's behaviour is as rational (or irrational, if you will) for black, as well as the white, defendants. But these acquittals, I suspect, sit strangely with countless counter-instances which do not hit the headlines. The question here is a simple one, touching only one aspect of the wider question; do the Angela Davis and Black Panther acquittals represent benign aberrations of a legal system under "the rule of law" or are they systematic manifestations of such a legal system's propensity to do justice?

Even as regards this specific aspect, the question is not a manageable one. To find satisfactory answers we need discrete studies exploring the law-making, law-interpreting, law-enforcing and finally the least visible lawless dimensions of official behaviour, with a sober sensitivity to human beings as human beings rather than as mere units of statistical analysis or as fodders for computers.

The quest for a theory of resistance in the contemporary times may have recourse to the rule of law notion only as a source of faith in human abilities to aspire towards and achieve social justice through the law over time. For, however precarious our hold over what might have been achieved, the overworked notion of the rule of law represents a way of talking about those achievements. The notion has a rich symbolic appeal, essential for mobilizing people to a surge forward in social betterment, essential to summon people out of the complacency of their own insular affluence.

And the notion, however confusing, is of considerable educative value to the impatient and the ignorant. For such spirits, it might be sobering to recall that we have moved substantially further under the banner of "the rule of law" from principles such as "less-eligibility" principle in the Poor Law System or situations, promoted by liberal use of the capital punishment, of public executions which provided weekend family entertainment not too long ago. That we have moved away from the extremes of such humiliations testifies to the "enclaves of justice" slowly and painfully won over generations.³³ But subtler and more pervasive humiliations - affronts to human dignity - now confront us and need to be combatted. New "enclaves" have to be won and preserved now. Preserving what we have achieved is important; but it cannot be all to the achievement that is now necessary.

FOOTNOTES.

1. M. Arnold "Dover Beach".
2. See R. Marcic, "Natural law Called in Question", ASLP/IVR/54 (1971).
3. William Butler Yeats "The Second Coming" (1920) in Selected Poems.....of W.B. Yeats. (1962) 91 (M.L. Rosenthal ed.).
4. See H.L.A. Hart, The Concept of Law (1961) 203-7. Marcic adopts, like Hart, a "wider" meaning of the term law, as including morally iniquitous laws. Marcic does not identify "law" with what he calls "right-law". He rather employs the latter notion as a kind of yardstick to measure the justice of positive laws, not as a magic wand by which to deny the title of "law" to laws which are unjust.
5. R. Marcic, "The Persistence of Right-Law" (1971) 2 Miscellanea On Law, Justice, and Society (Sydney, mimeographed). This paper will be hereafter referred to as Marcic, Persistence.
6. Marcic, Persistence at 3.
7. Id. at 15.
8. Id. at 11.
9. Id. at 18.
10. See R.P. Wolff, In Defense of Anarchism. (1970).
11. R. Marcic, Persistence 20.
12. Id., 23.
13. Ibid.
14. R. Marcic, Persistence, 24, 28.
15. Id., 25.
16. Ibid.
17. R. Marcic, Persistence 25-6.
18. J. Brutus, Vindiciae Contra Tyrannos (English translation, 1924), 111.
19. W.N. Hohfeld, Fundamental Legal Conceptions (1919) 50-51.
20. This of course need not be so if the notion of power is equated with legitimate power (i.e. authority) as Talcott Parsons tends to do in the elaboration of his concept of power as a "generalized capacity to serve the performance of binding obligations by units in a system of collective organization when the obligations are legitimized with reference to their bearing on collective goals" See T. Parsons, "On the Concept of Political Power" (1963) 28 Il Politico 593-613 (Part I), 807-829 (Part II) at 602. For critiques see J. Stone, Social Dimensions of Law and Justice (1966) 609-16; A. Giddens, "'Power' in the Recent Writings of Talcott Parsons" (1968) 2 Sociology 257-70.

FOOTNOTES.

21. P. Selznick, Law, Society and Industrial Justice. (1969) 11-18.
22. R. Marcic, Persistence, 21-22.
23. On the ambiguity in the notion of violence, and ambivalence in our responses to it, see for example, R.P. Wolff, "Violence and the Law" in The Rule of Law (1971, R.P. Wolff ed.) 54-72. W.C. McWilliams, "On Violence and Legitimacy" (1970) 79 Yale L.J. 623; U. Baxi, "Law, Violence and Conscience" ASLP/IVR/ 52 d (1971, mimeographed).
24. W.N. Hohfeld, supra note 19, at 72.
25. Ibid.
26. The same question as to whether the posited right should avail only against the state or as against a large number of other social groups is equally sharply raised by another differential between paucital and multital rights. On Hohfeldian analysis one crucial difference between paucital and multital rights is that the former has few, if any, companions, whereas the latter has many. A paucital right is either unique or one of "a few fundamentally similar rights" whereas a multital right is "one of a large class of similar rights".
27. See, e.g., generally, the readings excerpted in Protest, Reform, and Revolt, (1970, J.R. Gusfield, ed.) 395-452.
28. J. Stone, Social Dimensions of Law & Justice, (1966) 621; Id., The Province and Function of Law, (1946) 724-26.
29. " (T)he Rule of Law, which is so important, must run closely to the Rule of Life. It cannot go off at a tangent from life's problems and be an answer to problems which existed yesterday and are not so important today. And yet law, by the very fact that it represents something basic and fundamental, has a tendency to be static. That is the difficulty. It has to maintain that basic and fundamental character but it must not be static, as nothing can be static in a changing world.
- J. Nehru, "Inaugural Address" The Rule of Law in a Free Society (A Report on the International Congress of Jurists, New Delhi, India) 41 (Marsh ed; 1969).
30. J. Stone, Social Dimensions supra note 28, at 621.
31. See supra Note 21.
32. See for example, I. Tammelo, "Is the Rule of Law Doomed?" ASLP/IVR/53a (1971: mimeographed) 4.
33. See J. Stone, Human Law and Human Justice, (1965) 348-55.