A Comment on the Limits of the Metaphor/Une observation sur les limites de la metaphore (for RIEJ 49)

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This note considers the thesis of Ost and Kerchove in relation to the laws prevailing among the populations of the so-called common law world, that is, the countries in which the state law includes a large measure of common law. That law was first developed in England and then, in the process of British colonisation from the late sixteenth century, was extended to many territories throughout the world. Although the common law is not radically different from other laws, it is possible that its history and nature may provide especial illumination of some questions about aspects of the argument of Ost and Kerchove.

Metaphors have persuasive power. The argument of Ost and Kerchove that there is currently a paradigmatic change in the dominant metaphor used to depict the form of our laws, is important. But the persuasiveness of a metaphor does not depend entirely on reason. We need to examine critically the extent to which any metaphor accurately represents (in its analogical way) reality.

Ost and Kerchove refer to the work of Thomas Hobbes, who wrote famously of the sovereign authority in a state as Leviathan. The important feature of Leviathan – a mythical and highly unattractive creature – is its (or his) great and irresistible power.[1] For Hobbes, Leviathan was "a mortal god".[2] This Sovereign is the source of all law. Although Hobbes does not speak of law as a pyramid, the law in Leviathan's realm has a form which may be illuminatingly depicted as a pyramid. The metaphor emphasises the significance of power in the political and legal structure of a state. Law is made by the most powerful person or group in a state; or, as Hobbes put it elsewhere, "It is not Wisdom, but Authority that makes a law".[3]

A metaphor such as that of the pyramid may be propounded for either of at least two purposes. It may be a means of describing some aspect of reality as it is perceived by the author. In this case it aims to help the understanding by suggesting that something unknown or not well understood has characteristics in common with something which is familiar. A skilful exposition of a well-chosen metaphor may persuade the sceptical reader that the vision of reality propounded is correct. In another instance of this case the metaphor may be offered in the course of the description of an ideal-type, which is not claimed to exist in a pure form, but which is claimed to exist as a significant aspect of a more complex reality. Alternatively to all those cases of

[1] Hobbes derived the figure of Leviathan from *The Book of Job*, Chap. 41.

[2] Th. HOBBES, *Leviathan, or the Matter, Forme and Power of a Commonwealth Ecclesiasticall and Civil*, Londres, 1651, ch. XVII.

[3] Th. HOBBES, *A Dialogue Between a Philosopher and a Student of the Common Laws of England*, University of Chicago Press (1971), p. 55.

descriptive analysis, a metaphor may be a means of advocating an objective, or an aspiration. In this case the metaphor is used not to show that the object of description has an empirically verifiable existence, but to persuade the reader of the value of the goal and to inspire him or her to strive to attain it. These two purposes of the metaphor are not always kept separate.

The difference between the two is important for a discussion of a paradigmatic change in the metaphor used for a subject such as law. If the old and new metaphors have a descriptive purpose, and if the users of the metaphors have been correct in their perceptions, the change reflects a paradigmatic change in the form of laws and is thus a reflection on historical fact. If on the other hand the metaphor is used to set goals for political or legal activity, the paradigmatic change is likely to be primarily a change in the dominant political and legal theory. Such a change is not necessarily accompanied by any change in social practice. No doubt there is much of interest to be studied in the relationship between the acceptance of particular political or legal theories and political or legal practice. But they are not the same.

There appears to be a distinct thread of thought in the legal philosophy of the common law world, extending over centuries, which approves, either expressly or impliedly, the notion of a law in a pyramidal form. Some of the theorists of this view have used the metaphor descriptively, claiming that this is necessarily the form of all law, including the laws of common law countries. Many other theorists have advanced prescriptive claims, advocating this form as a goal to be pursued.

Hobbes' expression is equivocal in this respect. His account of the institution of a commonwealth through a covenant made by a multitude of men living in the state of nature[4] reads as a claim about the course which political and legal history have in fact taken. The covenant is said to have created a sovereign who, in the field of law, is the unqualified, illimitable, sole source of law for the population.[5] Hence the legal system of the state has a pyramidal structure. But always underlying this account, even when it is stated as historical description, is a marked element of political advocacy. Perhaps, then, Hobbes' object was prescriptive, not descriptive. Further, if the context in which he wrote is taken into account, it seems clear that he cannot have believed that the effective government of England conformed to the notion of the Leviathan at that time. His book was published in 1651. This was two years after the execution of King Charles I on the decision of a rump of a parliament led by Oliver Cromwell. This emphatic repudiation of all notion of an absolute ruler had followed two close-fought civil wars over a period of several years, which had divided the country. In 1651 there was no very clear political controlling force in the country. There can be little doubt that this was in Hobbes' mind when he acknowledged that it might be objected to his argument that there was a danger that the Leviathan-sovereign could abuse its power, and replied that this objection failed to consider "that the state of man can never be without some incommodity or other; and that the

[4] Th. HOBBES, *op. cit.* n. 2, Ch. XVIII et seq.

[5] *Op. cit.,* Ch. XXVI.

greatest… is scarce sensible in respect of the miseries, and horrible calamities, that accompany a civil war…"[6]

Even if the events of the mid-seventeenth century are disregarded, it may be argued that it would have been at least highly controversial to depict the common law of England with a pyramidal structure. In medieval times it had been commonplace to state that the king ought to observe "the laws and customs" of the realm. The extent of the law-making authority of the crown, both in and without parliament, was doubtful. It was thus presupposed that there was a body of established law which did not emanate from a specific institutional source which had the power to change or repeal it. The legal profession engaged in the exegisis of this fundamental law and its establishment as the common law of England.[7] The status of common law established in judicial precedent was by 1610 such that Chief Justice Coke could in *Dr Bonham's Case* claim:

> And it appears in our books, that in many cases, the common law will controul Acts of Parliament, and sometimes adjudge them to be utterly void: for when an Act of Parliament is against common right and reason, or repugnant, or impossible to be performed, the Common Law will controul it and adjudge such Act to be void….[8]

It is thus unlikely that Hobbes considered that the legal system of England conformed to his account, but intended to argue rather that it ought to be brought into conformity with it.

There is much evidence for the claim that English law and all other common law systems have continued since Hobbes' time to have structures which cannot correctly be depicted as pyramidal. Nevertheless it must be recognised that some leading British legal philosophers have claimed the contrary, and these must be noted.

Jeremy Bentham defined law as "the will or command of a legislator".[9] However, he devoted his work to law reform, and this "definition" may be regarded as a statement of an ideal. He recognised that judge-made law, which he wished to see swept away, formed a major part of the common law of his time. His disciple John Austin, however, aimed explicitly at a general, descriptive Jurisprudence. He defined the positive law of a state, or "law strictly so called" as the general commands issued by

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[6] *Op. cit.,* Ch. XVIII.

[7] See C.K. ALLEN, *Law in the Making* (6th ed.), Oxford, Clarendon Press, 1957, pp 68-74, on "the Common Law as custom".

[8] *Dr Bonham's* Case (1610), *English Reports*, vol. 77, p. 646 at p. 652. As Allen shows, *op. cit.*, Coke at other times spoke differently, and the authorities he cited for the claim quoted here were of doubtful weight. But that he could seriously make the claim suggests that there was not a universal acceptance of the notion of an unlimited legislative sovereign.

[9] J. BENTHAM, *The Theory of Legislation* (ed. C.K. Ogden), London, Kegan Paul, Trench, Trubner & Co. Ltd. (1931), p. 82. See also the more elaborate definition in J. BENTHAM, *Of Laws in General* (ed. H.L.A. Hart), The Athlone Press, University of London (1970), p. 1.

the sovereign in that state to its subjects.[10] He strove mightily to show that the law of the United Kingdom conformed to this notion.

Austin was confronted with two major difficulties, which are highly instructive in considering the correctness of his analysis: that of identifying the British sovereign; and that of including within his analysis laws established by judicial precedent. First, the sovereign was defined as the determinate person or body of persons to whom the generality of a society was in the habit of obedience, and who was not habitually obedient to a determinate person or body.[11] In the United Kingdom the sovereign body consisted of the electorate of the House of Commons, the membership of the House of Lords, and the monarch.[12] Thus Austin's pyramid had an exceedingly wide, flat top. According this view, one is led to the conclusion that, after the expansion of the parliamentary suffrage in the following century, the pyramid must have become well-nigh cylindrical. Second, rules of precedent were according to Austin circuitous, tacit commands of the sovereign, who, by refraining from repealing them or ordering the judges to desist from making them, impliedly issued them as its own commands.[13] This again is an interpretation of facts which seems to be quite remote from reality. Thus in all Austin's account, while clearly intended to provide a descriptive theory, was not highly plausible.

H.L.A. Hart, the leading British legal theorist of the twentieth century, in *The Concept of Law* starts with a fundamental critique of Austin. He presents a powerful argument against Austin's view that the entirety of a legal system emanates from a sovereign in the form of a determinate person or body of persons.[14] Those who doubt the accuracy of the metaphor of the pyramid as descriptive of the law of a state may be well pleased with Hart's arguments that a human sovereign can supply neither the continuity which law exhibits through generations of replacement of the persons who constitute the sovereign, nor the persistence of laws after the sovereign who made them has turned its attention to other matters, nor incorporate satisfactorily the legal restrictions in many constitutions on the legislative powers of the sovereign. At this point in the discussion we may see the transition from Austin to Hart as a move away from the earlier pyramidal notion of law.

However, after this preliminary destruction Hart constructs an account of law which has been described by his most prominent critic, Ronald Dworkin, as having in general a "neat pyramidal architecture".[15] According to Hart, the entirety of the rules of a legal system are identifiable by their conformity to a master Rule of Recognition. Rules of recognition are those rules in a legal system which 'specify some feature or

[10] J. AUSTIN, *The Province of Jurisprudence Determined*, London, Weidenfeld and Nicolson (1954) (first published 1832), Lectures I, VI.

[11] *Op. cit.,* pp. 193-95.

[12] *Op. cit.*, pp. 228, 230-31.

[13] *Op. cit.*, Lectures I, V, VI.

[14] H.L.A. HART, *The Concept of Law*, Oxford, Clarendon Press, 1961, Ch. IV

[15] R. DWORKIN, *Taking Rights Seriously*, Cambridge Massachusetts, Harvard UP, 1977, p. 43.

features possession of which by [another] suggested rule is taken as a conclusive affirmative indication that it is a rule of the group...'[16]). In a developed, modern legal system one of these is an ultimate rule which gives recognition directly or indirectly to every norm of the system, and thus unifies the system. This analysis does not merely change the apex of the pyramid from a human sovereign to a rule. Hart denies that the Rule of Recognition itself gives legal validity to the rules of the system. It merely provides the means of identifying norms which belong to the system. It need not refer to only one source of law. It may be a complex rule specifying a number of alternative identifying features of valid legal norms, such as enactment by a legislative assembly, declaration as a precedent by the courts, and social observance by a population. But in any such case of multiple sources it usually specifies a hierarchical ordering among rules which qualify through derivation from different sources. So, in the English legal system,

> custom and precedent are subordinate to legislation since customary and common law rules may be deprived of their status as law by statute. Yet they owe their status of law, precarious as this may be, not to a 'tacit' exercise of legislative power but to the acceptance of a rule of recognition which accords them this independent though subordinate place.[17]

The metaphor here begins to be surrealistically transformed. At the apex there is now a funnel which accepts elements from everywhere, and directs them through the narrow opening of the Rule of Recognition before distributing them to their various levels in the pyramidal space below. This produces a vision more like that of a machine functioning in a modern industrial process than the massive, solid edifices of the Pharaohs. But perhaps that is appropriate in our technical culture.

Hart described his work as both "an essay in analytical jurisprudence", not concerned "with the criticism of law or legal policy", and "an essay in descriptive sociology".[18] Thus he was, like Austin, seeking to give an account of observed reality. But there is no suggestion that he thought he was describing a newly emerged reality. He asserts that a society is "pre-legal" until a Rule of Recognition emerges.[19] Thus for him all law at all times, as soon as it has emerged as law, has had this form.

If Austin propounded an extreme and misleading pyramidal notion of law, did Hart rectify the errors and provide a justification a more moderate use of the metaphor? Ronald Dworkin has presented in his *Taking Rights Seriously* an effective critique of Hart on the basis of an analysis of the judicial process.[20] He argues that the rules of a legal system cannot possibly provide legal answers to all the issues which can arise.

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[16] HART *op. cit.*, p. 92.

[17] HART *op. cit.*, p. 98.

[18] HART *op. cit.*, p. vii.

[19] HART *op. cit.*, pp.89-92, 97

[20] R. DWORKIN, *op. cit.*, n. 11.

But, he argues, when the "hard cases" in which the rules "run out" may be, and are to be correctly decided by the application of "principles", or standards which must be taken into account in deciding the legal outcome although they do not necessarily determine the cases to which they apply. Legal principles, and the weight to be accorded to each in the circumstances of each case, have their origin "not in a particular decision of some legislature or court, but in a sense of appropriateness developed in the profession and the public over time".[21] This argument is used by Dworkin to attack Hart's claim that all the elements of a body of law have a "common pedigree" (as Dworkin puts it) in the Rule of Recognition of that body. It is not each to distinguish in Dworkin's writing the descriptive from the prescriptive. He sets out, in an extended account of the application of principles, the judicial process which would be followed by Mr Justice Hercules, the ideal, super-human judge.[22] But although this appears to set a goal to be aspired to, the account is firmly based on the analysis of past cases. Dworkin seems to be extracting from the records of common law decisions the elements of the ideal method which common law judges in practice aim to follow, while admittedly not always succeeding in applying it perfrectly. In describing the process followed by Hercules J, Dworkin is describing the common law method as he sees it, shorn of the adulterating elements which invariably intrude in practice.[23] If Dworkin's account is at least partially correct, it reveals fatal flaws even in Hart's modified pyramidal description of a legal system.

To summarise the argument thus far, it appears that the metaphor of the pyramid has been used not only to promote an aspiration, but often for descriptive analytical purposes. Yet it has never reflected the reality of common law systems in the past and does not do so today. It may be readily conceded that there is less support today among legal theorists in the common law world for a pyramidal theory. But this, it may be suggested, is not a result of a change in the realities of law in society, rendering a formerly accurate metaphor erroneous, but of a decline in the visible power of the nation-state which has long been the centre of attention for lawyers. It may also be related to a weakening of the relationship between legal and political theorists and the powerful groups in the state. It is to be expected that the metaphor of the pyramid used for descriptive purposes (as well as when used for a prescriptive purpose) will generally be propagated by those who wield power, and their agents and allies. Such an account of a legal system tends to depict the concentration of all legislative power in a small group as the normal, necessary arrangement, and exceptions to this as pathological. The powerful group is likely to view a general acceptance of this picture with favour unless they find their position threatened and

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[21] *Op. cit.*, p. 40.

[22] *Op. cit.*, chap. 4.

[23] In subsequent work culminating in *Law's Empire*, Cambridge Massachusetts, Harvard University Press (1986), and then in his current work DWORKIN has been greatly concerned to examine the ways in which ideally judges ought to exercise their functions. This does not detract from the value of *Taking Rights Seriously* as an account of the way in which common law judges in practice aspire to decide cases.

perceive the most effective defence to be concealment of the essentials of the distribution of power.

The alternative metaphor of law discussed by Ost and Kerchove, that of the network, does not as yet have behind it the support of recognised common law theorists of the past such as those who propounded the metaphor of the pyramid. The major question which may be put here, and almost the sole helpful question, is whether the metaphor presents an accurate account of the common law in society.

Many of the arguments which challenge the metaphor of the pyramid may be called in aid to support that of the network. In the metaphor of the network the knots in the net represent individual subjects of the law, and the cords the legal relations between them. This metaphor thus looks not to a single or several clearly identifiable sources of the creation of law, but rather to the legal relations observable when law has come into existence. It meets the demand of those who doubt whether it is possible to identify a sovereign person or group with the sole power to make law. It can thus recognise that there is not a determinate sovereign legislature, that judicial practice may succeed in making laws without the pretence that the true maker is the legislature, and that some laws may emanate from widespread customary social practices and beliefs in the manner of Dworkin's principles. This in turn invites us to sever the concept of law from that of the state, and opens the possibility of recognising that there exist many varieties of non-state law.

That is the position of legal pluralism, strongly supported, it is suggested, by the arguments of Dworkin and other critics of the pyramidal accounts of law. According to one important definition of legal pluralism, it is "la situation, pour un individu, dans laquelle des mécanismes juridiques relevant d'ordonnancements différents sont susceptibles de s'appliquer à cette situation".[24] Thus the individual may be linked to a large number of other individuals not by a master rule which governs them all, but by a variety of sets of rules of behaviour which create a variety of obligations between that individual and others. Every one of those other individuals may be similarly represented by points which are linked, that is, have legal relationships of obligation, to a great number of others. Provided that we recognise that the network can be immensely complicated, it may seem to suffice.

And yet… Three aspects of the view of the legal world which emerges are open to question, and suggest that much is lost by taking a metaphor which may be is as narrow and contraining as that of the pyramid, albeit at another extreme of the range of legal-political perceptions. First, the network does not easily allow for sub-groups. Some theories of legal pluralism may have obscured social reality by depicting the world as consisting of fixed communities, in which an individual either belonged to a particular community and remained within it for many or all legal relations, or was totally outside it. But we do not gain much insight if that view is replaced with a view which does not

[24] J. VANDERLINDEN, "Vers une nouvelle conception du pluralism juridique", *Revue de la recherche juridique - droit prospectif* XVIII, 573 (1993), p. 583.

allow for communities of the form of semi-autonomous social fields which "can generate rules and customs and symbols internally but [are] also vulnerable to rules and decisions and other forces emanating from the larger world by which [they are] surrounded" [25]

Second, and related to the first observation, is that it is a weakness of the network metaphor that, as already observed, it does not include a notion of power in its scheme. Although we may reject the crude view that each state is a legal pyramid, it may still be helpful to recognise that within the complex legal interrelations which govern the world's population, there are many instances of the concentration of power over particular populations. There may be structures analogous to pyramids in many places which are the means of bringing a certain, limited but firm order into the world of legal relations, and form an alternative to the diffuse creation of law by customary practice. The legal professions of common law countries do, it is clear, exercise power disproportionate to their numbers in the creation of new legal rules. It is to be expected that they create rules which are favourable to themselves and their clients. These are issues which may not be examined if the metaphor of the network prevails.

Third, although a network is not rigid, allowing for some folding over or pulling of the ensemble into different shapes, it is in another respect inflexible. The metaphor hardly invites us to consider changes over time, in which for an individual the mandatory force of one type of rule may decline, to be overtaken at some indeterminate point in time by the more compelling force of a different type of rule, or in which a rules may arise or disappear as a result of social practice. It does not provide for the situation in which rules of different provenance impose different and conflicting obligations between subjects.

It is of interest if many theorists, having rejected the metaphor of the pyramid, turn to that of the network. But this does not of itself show that the latter produces an accurate understanding. Yet one feels dissatisfaction at being unable to suggest a more tenable metaphor than that which one attacks. But it may perhaps be justified to warn generally against reliance on these attractive but too persuasive devices to enhance our understanding of the world.

[25] S.F. MOORE, "Law and social change: the semi-autonomous social field as an appropriate subject of study", *Law & Society Review* 7 719-746 (1973) p. 720; reprinted in S.F. Moore, *Law as Process: An Anthropological Approach*, London: Routledge & Kegan Paul (1978), Chapter 2, p. 55.