LAW AND THE COMMON GOOD

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In this piece, Ofer Raban takes issue with the claim advanced in a recent book by Brian Tamanaha that the Rule of Law requires that all our laws advance the common good (rather than the interests of any narrow faction). That claim, says Raban, is out of date with modern pluralistic sensibilities, and with our modern understanding of law and the legislative process. But the fact that the law need not always advance the interests of society as a whole, and may therefore be used as a tool for the advancement of some at the expense of others, does not mean that the law itself is not always a common good- for the Rule of Law means, first and foremost, the rule of reason and rationality; and passing our social regulations through the prism of reason and rationality is an indisputable common good.

Brian Tamahana's "Law as a Means to an End: Threat to the Rule of Law," selected last year for special honour by the Association of American Publishers, is a book about an allegedly dangerous transformation of legal consciousness – from a "non-instrumental" to an "instrumental" view of the law.[1] The non-instrumental view, says Tamanaha, regards the content of our laws as determined by factors beyond our control. This view is most evident in the theory of "natural law," which dominated the legal mind for millennia, and according to which human laws were determined by the very nature of the universe. "True law," said Cicero in the first century B.C., "is right reason in agreement with nature; it is of universal application, unchanging and everlasting... It is a sin to try to alter this law, nor is it allowable to attempt to repeal any part it, and it is impossible

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1 BRIAN TAMAHANA, LAW AS A MEANS TO AN END: THREAT TO THE RULE OF LAW (2006).

to abolish it entirely."[2] Thirteen centuries later, Thomas Aquinas echoed this view when he said, "every human law has just so much of the nature of law as is derived from the law of nature. But if in any point it deflects from the law of nature, it is no longer a law but a perversion of law."[3] A similar conception figured in the claims of 18th century judges and lawyers who resisted legislative tinkering with the English common law. The common law, declared a celebrated treatise of the time, was a collection of "rules and maxims of immutable truth and justice," a "perfection of reason" that should not be tampered with or overridden by positive legislation.[4]

By contrast, says Tamanaha, our legal world is dominated by an "instrumental" view of the law, one which sees the law as mere "means to an end... [A]n instrument of power to advance [people's] personal interests or the interests or policies of the individuals or groups they support. Today, law is widely viewed as an empty vessel to be filled as desired, and to be manipulated, invoked, and utilised in the furtherance of ends." And this new view, says Tamanaha, is dangerous to the Rule of Law.

Why is the instrumental conception dangerous? The "critical difference" between the non-instrumental idea of the law and the instrumental one revolves around "shifts in view about 'public interest'."[5] Thinkers as diverse as Plato, Thomas Aquinas, John Locke, and the American Founding Fathers all believed that any legitimate law must aim at advancing the "common good" – rather

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2 MARCUS TULLIUS CICERO, DE RE PUBLICA III.xxii.33 (Clinton Walker Keyes trans., 1928).

3 ST. THOMAS AQUINAS, SUMMA THEOLOGICA I-II, Q. 95 Art. 1, 2 (Fathers of the English Dominican Province trans., 1947).

4 JESSE ROOT, THE ORIGIN OF GOVERNMENT AND LAWS IN CONNECTICUT (1798), *reprinted in* THE LEGAL MIND IN AMERICA 38-39 (Perry Miller ed., 1962), *available at* http://www.lonang.com/exlibris/misc/1798-olc.htm

5 *Id.* at 191.

than the interests of any narrow faction.[6] But the instrumental conception of law weakens this important principle. By viewing the law as a means to an end and hence as an "empty vessel to be filled as desired," the instrumental conception turns law into an instrument of whoever happens to hold the reins of power. The result, says Tamanaha, is proliferation of legislation aimed at benefiting special interests; lawyers willing to put the interests of their clients above all else – to the point of making specious arguments or even committing fraud; and judges increasingly keen on effecting their preferred purposes and policies instead of following the law.

And yet, as Tamanaha concedes, the "non-instrumental" conceptions of law have by and large passed from the world, and are not likely to return. We have come to reject the idea that the content of the law is somehow fixed by a divine arrangement or "incontrovertible reason" announced by priests or jurists: we feel free to mold our law as we see fit, largely emancipated from the shackles of religious authority or tradition. Hence, our conception of the law is "instrumental" – we believe that the law is for us to shape in the pursuit of our chosen goals and interests. We see law "as a means to an end."

But is Tamanaha correct that our new conception poses a threat to our Rule of Law? The answer depends, at least in part, on Tamanaha's claim – in fact more an assumption than a claim, since Tamanaha never seeks to defend it – that the Rule of Law means that all laws must aim at the "common good," so that it is a violation of the Rule of Law to have laws that serve small factions rather than the common interest.

One problem with this assertion is that it sounded more reasonable in the distant and far more homogeneous societies of Plato, John Locke, or Thomas Jefferson. Moreover, as Tamanaha himself concedes, even then – perhaps

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6 *Id.* at 200.

especially then – the idea has often been misused.[7] A quick reflection on the legal status of, say, women and minorities during those periods confirms the aptness of Tamanaha's concession. That the "common good" is the only proper end of the law is a vacuous principle if those who make the law also believe, like Louis XIV, that "L'Etat – c'est moi" so that the "common good" is what's good for them. Moreover, if the only proper object of the law is the "common good" it may be particularly difficult to advance the legal interests of under-represented or heretical groups – and quite easy to trample them. It is worth remembering that the U.S. Supreme Court's decision in *Plessy v. Ferguson*,[8] which upheld the criminal conviction of a black man for occupying a "whites only" train coach, was explained on the ground that the statute was "enacted in good faith for the promotion of the public good, and not for the annoyance or oppression of a particular class."[9]

Theoretically speaking, the claim that we all share a "common good" – a Rouseauian "general will" to which we all do, or should, subscribe[10] – has come under skepticism from two related directions. First, some have turned skeptical as to whether there is in fact a single "common good" of which we can all speak, rather than many competing and potentially contradictory ones.[11] Second, even those who believe that the "common good" remains a viable concept have

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7 "Two centuries ago and before law inured to the benefit of the powerful and was often draconian and intolerant of dissent. ...[T]his was to some degree a result of enforced homogeneity in the socio-legal order which suppressed or eliminated contrary groups, granting them little or no recognition within the law." TAMANAHA, *supra* note 1, at 246. *See also id.* at 5.

8 Plessy v. Ferguson, 163 U.S. 537, 550 (1896).

9 *Id.*

10 *See* JEAN-JACQUES ROUSSEAU, THE SOCIAL CONTRACT 60 (Maurice Cranson ed., St. Martin's Press 1968) (1762).

11 Indeed some scholars see a clear tension between the political theory of liberalism, which reigns supreme in most Western democracies, and a robust idea of a "common good." *See, e.g.*, MARK V. TUSHNET, RED, WHITE, AND BLUE: A CRITICAL ANALYSIS OF CONSTITUTIONAL LAW 6 (1988); ROBERT PAUL WOLFF, THE POVERTY OF LIBERALISM 159 (1968).

become suspicious of authoritative claims as to what the "common good" entails, and have consequently come to accept the legitimacy of a wide and indeed conflicting spectrum of opinions on that matter – a spectrum we expect our laws to reflect.[12] Accordingly, we think there is nothing wrong, insofar as the Rule of Law is concerned, with legislation aimed at benefiting union workers, or corporations, or the homeless, or farmers, or stock owners – either because we believe there is nothing wrong with benefiting one group at a time, or because we think it legitimate to believe (even if we personally do not) that such measures benefit the "common good." Indeed we have developed theories of legislation – "interest group pluralism" for example, that explain and justify legislative action in a world controlled by opposing groups advancing distinct and often contradictory interests and values (that is, in a legislative environment wholly skeptical of the very notion of the "common good"). Legislation, say such theories, is the outcome of the bargains and compromises struck among those representing competing groups. Legislators who advance rural interests, or pro-union interests, or retirees' interests, bargain and compromise with fellow legislators who advance urban interests, or pro-business interests, or junior employees' interests. And these legislators do nothing wrong by seeking to advance the interests of small interest groups- in fact, this is precisely how the legislative process works in a modern pluralist society like ours. Legislation is legitimate not because it is aimed at some elusive "common good" but because it expresses the different interests and values of different constituencies.

Our modern skepticism toward the notion of the "common good," coupled with the growing legitimacy of a wide range of opinions regarding what the

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12 This changed attitude is expressed, *inter alia*, in American constitutional doctrine: while earlier courts have invalidated legislation for failing to cater to the public welfare, today's legislative determinations of the public welfare receive great judicial deference: putting aside special constitutional protections, courts examining the constitutionality of statutes merely ask that the statute bear "a reasonable relation to a legitimate state interest" – a test accommodating a large range of potentially contradictory positions on the "common good." *Compare* State v. Loomis, 115 Mo. 307, 316 (1893) *with* Washington v. Glucksberg, 521 U.S. 702, 720-22 (1997).

"common good" entails, also account for the apparent shift in lawyers' self-orientation – from the view of the lawyer as an "officer of the court" to that stressing fidelity to clients' interests. Tamanaha criticises the American Bar Association's Model Code of Professional Responsibility, which practically defines a lawyer's role in terms of fidelity to clients' interests rather than to the "public interest" (even the rule that allow a lawyer to refuse appointment by a tribunal for representation she finds "repugnant" does so only where "the client or the cause is so repugnant to the lawyer as to be *likely to impair the client-lawyer relationship or the lawyer's ability to represent the client*"[13]).

But in a pluralistic society like ours, it seems natural that lawyers ought to give priority to their clients' interests over their own conception of the common good, or their own ethical beliefs. The operating principle here is that unpopular or even ostracised views of the "public interest" have a right to be heard. A professional bar protective of the "common good" may easily shut out of the legal system a variety of voices that should receive effective representation. This is especially true where, as in the case of the legal profession, members of the professional Bar are primarily drawn from a socio-economic elite. Lawyers' fidelity to their clients' interest, rather than to their own opinions of where society's interests lie, is a result of the wish to open the legal system to a variety of interests and opinions. Sure enough, not all opinions or interests are legitimate; but which are and which aren't should be decided only *after* effective representation has been rendered – not before.

There is another problem with Tamanaha's thesis. Tamanaha is not alone in claiming that laws must aim exclusively at the "common good," and that the modern age has seen a weakening of that principle; but the claim that this had been the result of a shift from a non-instrumental to an instrumental conception of law is a novel one. In fact, however, the most natural reading of the relation between the two is the reverse – skepticism towards the "common good" ideal seemed to have led to the shift from a non-instrumental to an instrumental

[13] ABA MODEL RULES OF PROFESSIONAL CONDUCT R. 6.2 (2004) [emphasis added].

conception of law. When belief in social and moral universal truths collapsed, casting doubt on the notion of an authoritative "common good," it became impossible to hold on to the view that the law was an immutable embodiment of divine truth or justice. Natural law theory – the paradigmatic non-instrumental conception of law – began to die when belief in universal moral truths collapsed. The next obvious step was to view the law as a means to ever-changing ends. Thus, Tamanaha's alleged threat to the Rule of Law (i.e., the decline in the legal ideal of the "common good") lies deeper than, and prior to, any shift in legal consciousness – in the shift to the spirit of modernity itself.[14]

Law as a Common Good

The shift from a non-instrumental to an instrumental conception of law, says Tamanaha, and the attendant decline in the idea that all laws must serve the "common good," threatens, to turn our law into "a pure instrument of coercive power," as in those "blighted societies in which power has its way with scant restraint, and the powerless have little protection."[15] I doubt that the blighted societies to which Tamanaha alludes owe their misfortune to this or that conception of law (power usually has its way in these societies despite the law, not because of it); and I also think, as I argue above, that Tamanaha is wrong to believe that the Rule of Law means that our laws must always aim at the "common good." Still, the question remains as to whether, if such is the case, the Rule of Law *itself* is a "common good" – that is, a social institution that is a benefit to us all. After all, if law is a mere device in society's power struggles, "an empty vessel to be filled as desired" (as Tamanaha puts it), isn't it a socially neutral instrumentality rather than the unqualified good some see in

[14] Tamanaha appears to recognise that point, *see id.* at 222-223, but makes little effort to reconcile it with his thesis.

[15] TAMANAHA, *supra* note 1, at 245, 248.

it? Isn't it, as Tamanaha claims, "a pure instrument of coercive power" and therefore a potential force of social evil rather than of social good?

I think that the answer to these questions is a resounding 'no.' The Rule of Law is a highly desirable social institution that serves the interests of everybody; it *is* a "common good." The Rule of Law is a desirable social institution not because it entails that our laws exclusively serve common interests or values (it doesn't), nor simply because it is a mechanism by which the different interests and values of a society can find their practical expression. Rather, the Rule of Law is a desirable social institution because, above all else, it entails the primacy of rationality in social regulation. Modern law embraces one overarching principle – that of justifiability. Law is the medium through which we convert naked power and interest into rational rules that we then subject to the requirements of reasonableness and justifiability when applied to actual cases. Law is about argument, and debate, and justifiable decision-making; law is the forum of reason – which is why the Rule of Law means freedom from arbitrary rule.

A nice demonstration of this point begins with Ronald Dworkin's discussion of "checkerboard statutes." Dworkin, today's most important legal theorist, has famously posed the following question:

> Do the people of North Dakota disagree whether justice requires compensation for product defects that manufacturers could not reasonably have prevented? Then why should their legislature not impose this "strict" liability on manufacturers of automobiles but not on manufacturers of washing machines?... Do the British divide on the morality of abortions? Why should Parliament not make abortions criminal for pregnant women who were born in even years but not for those born in odd ones?[16]

[16] RONALD DWORKIN, LAW'S EMPIRE 178 (1986).

What is it, asked Dworkin, that makes such statutory solutions completely unacceptable to us? Why are such "checkerboard statutes" (as Dworkin calls them) not valid legislative compromises? Dwokrin's answer was that we find these laws unacceptable because they do not express one moral position: instead, they express two different and irreconcilable moral positions. On the one hand, they express the moral position that manufacturers should pay compensation even for defects they cannot reasonably prevent, or that abortions should be allowed; and, on the other, they express the moral position that manufacturers should not compensate for defects they cannot reasonably prevent, and that abortions should be forbidden. And this, said Dworkin, is a violation of a principle he calls Integrity – which requires that all our laws speak with one moral voice.

Dworkin's is an interesting suggestion, but I believe that, as an answer to his question, it is ultimately wrong.[17] But my purpose here is not to offer criticism of Dworkin but to show that the answer to Dworkin's question reveals the essence of modern law in the requirement of reason and justifiability.

The most obvious explanation as to why we reject checkerboard statutes, as Dworkin also noted, is that they violate the "equality before the law" principle; that is, the idea that the similarly situated are to be treated equally. But this answer – which is certainly true – in fact obscures the deeper significance of our rejection of checkerboard statutes. It directs us to the idea of "equality," whereas the real problem with checkerboard statutes is not that they lack equality, but that they lack rationality; they lack a justification. This is easy to see if we concentrate on only half of one of Dworkin's checkerboard statutes – "Why should Parliament not make abortions criminal for pregnant women who were born in even years?." We need not see the second half of this statute to know that the statute is unacceptable. The problem is not merely that the statute treats people unequally, but that we can think of no reason as to why it does what it does. We would feel the same if we saw a statute that forbids abortion

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17 For an extended defence of this position, *see* OFER RABAN, MODERN LEGAL THEORY AND JUDICIAL IMPARTIALITY 41, 41-62 (2003).

to woman with blue eyes. We are offended by such statutes, and find such statutes unacceptable, because we identify no justification for these statutory requirements.

What Dworkin's question demonstrates is that we expect our legal rules to be supported by publicly identifiable justifications, and herein lies the real essence of the Rule of Law and its desirability as a social institution: our rules of law are all supported by public justifications, and their applications revolve around these justifications and their reasoned implementation. Not all systems of social regulation have this requirement. The requirement of justifiability is not found, for example, in the case of religious laws: people are expected to follow religious rules whether they can identify their justification or not. Orthodox Jews and Muslims, for example, are forbidden to shave their beards, and most do not demand a justification in order to follow that rule – they just follow it because they consider it part of their religious obligations.

Modern law is different. It presents a special form of social regulation – a form that requires public justifications for all its requirements, and for the implementation of these requirements. Modern law is about freedom from arbitrariness, which not only means that legal rules need be known in advance and consistently applied, but also that they need to *make sense* – both when they are written and when they are applied. Law is certainly a "means to an end," but its *modus operandi* places rational limitations on its means and on its ends, thereby making it an indisputable "common good."