Juridification Without Legality

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John Gardner, *The Twilight of Legality*, 43 **Australasian J. of Legal Phil.** 1 (2019).

The death of John Gardner this summer, at age 54, is a fearful loss. This generous, multi-talented, and much-loved man was a world-renowned figure in several fields of jurisprudence, including not only the general topic of the nature of law but also in the special theories of criminal law, tort, and sexual assault. He was one of the pillars of Oxford's outstanding strength in the philosophy of law. What irony that one of the last of his writings was titled *The Twilight of Legality*.

The article itself is something of an elegy for the imminent passing away of a still familiar self-conception of the law, and of the lawyer's calling, that some will think already archaic. This is a conception of the lawyer as not merely a service-provider, but as public citizen having a special obligation to foster legality as a public good. This obligation in turn entails seeking justice according to law, and not merely justice between parties. John was conscious that his remarks might come across as cultural criticism, but he framed his subject as a philosophical puzzle: how to reconcile the trend toward ever-greater juridification of everyday life with legality, that is, with the rule of law? "Juridification" meaning: the manufacture of laws and legally enforceable non-law norms—especially contracts binding consumers to terms set in boilerplate language dictated by corporations.

At first glance no puzzle is apparent. More laws and more legally enforceable norms means more law to be ruled by, and more law to be ruled by means more rule of law, no? No. Beneath this specious surface, juridification conceals trends whose confluent effect is to erode the rule of law. One of these trends is a side effect of the capitulation of democracies to the demands of corporate power. Governments make a "pathetic display of legislative machismo," (P. 3) by reflexively criminalizing whatever arouses the moral panic of the hour (so long as, I would add, the newly-to-be-criminalized class is powerless). In evidence, John cites a recent decade in which the UK created an astonishing 3000 novel criminal offenses. This is not as draconian as we would assume, because it is buffered by a counter-trend toward selective under-enforcement. But, as John points out, the counter-trend itself is alarming, and especially so for its insidiousness.

The rule of law, for law-and-order types, demands strict obedience by the public. Where that strict obedience is not forthcoming, then for the law-and-order types among us, officials ought to use lawless means. John rightly rejects this "symmetrical" view. The rule of law makes asymmetrical demands of officials and of citizens (as Rawls, among many others, recognized). Simply put, "We ordinary folk should laugh at stupid laws; officials, poor things, have to uphold them." (P. 7.) When the law is ridiculous, or, worse, it is unknowable and unmemorable, the rule of law suffers because the law cannot guide us. It cannot rule us, only officials can. But officials, in turn, cannot rule us by law either, despite even their earnest efforts to do so, if too much is left to their discretion.

Of equal concern to John is the accelerating privatization of the domain of private law. This trend is most obvious to us when we agree to "click-through" to access on-line resources that would otherwise be closed to us. In the process of "agreeing" we waive rights too numerous and extensive even to want to know about; and the rule of law suffers, as Margaret Radin and Judith Resnik have argued. John focuses on one aspect of this: the take-it-or-leave-it consignment of consumer disputes to private arbitration.

This kind of privatization is especially insidious when, as is typical, it uncouples dispute resolution and judicial oversight. Here, the familiar Diceyan objections to *droit administratif*—as judicially unsupervised bureaucratic lawmaking—are amplified by the fact the corporations that insist upon isolating legal power from legal oversight do so solely to maximize profit. The parties may benefit from the legal enforceability of private arbitral outcomes but the public good of legality goes unprovided.[1] There is no common law, no judging with an eye to wider consequences, and no working pure of the legal doctrines that ought to guide the interpretation and application of contract terms.

John deftly debunks the libertarian notion that the law is coercive whenever it interferes with private orderings *except* when it enforces the supposed terms of private orderings; and he summarizes:

> any effect that the law gives to contractual norms should be an effect that the law, through the courts, ultimately get to determine. And that implies, I suggest, no ouster of the courts' final jurisdiction over questions of law arising under the contract, including its legal construction, which is an integral part of the determination of its legal effects. (P. 8.)

The global corporate behemoths are not (yet?) so far along on their way toward becoming outright Hobbesian Leviathans that they need not appeal to public governments to enforce their legal rights. Their ideal is "juridification without legality," which can be seen as another aspect of what Elizabeth Anderson[2] calls *private government*, and what Samuel Freeman[3] counts as *feudalism:* the appropriation, for the purpose of extending private dominion, of the normative forms of public power.

What do these trends mean for those who would become lawyers, and those who train them? The germ of the article is his Irvine Lecture, delivered in 2015 to faculty and students at Cornell Law School. John concludes with reflection upon his career as a barrister, during which interval lawyers came to be thought of as a pricey category of service-providers. To invoke the lawyer's special responsibility to assure "access to justice" is the easier part of tailoring lawyers to the service-provider template: "Much harder to integrate into the service-provider model…is our special responsibility, as lawyers, for upholding the rule of law. That is because the rule of law is for the most part a public good in which our clients may well have relatively little individual interest." (P. 16.) Winning strings of victories for underdogs is not enough:

> Today's young lawyers…have a "special responsibility for the quality of justice" going beyond any that the original drafters of the Bar Model Code of ethics could have anticipated. For they face a world more hostile to legality, and yet more wedded to juridification, than any we have seen before. *(Id.)*

Tackling the special "evil of privatization" manifest in the displacement of legality by juridification is now an indispensable task of lawyering "in the best sense"—a task left to us to pursue without John Gardner along to guide us.

1. On concierge justice between well-resourced commercial parties, *see VIP Courts*, **Private Eye** (July 2019), at P. 39.
2. Elizabeth Anderson, Private Government: How Employers Rule Our Lives (and Why We Don't Talk about **It)** (2017).
3. Samuel Freeman, **Liberalism and Distributive Justice** (2017), at 87-88.

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