GENERAL SOCIAL FUNCTIONS OF LAW AND JURISPRUDENTIAL PERSPECTIVISM (*)

A philosophy of law has to be normative. Its validity depends as much on what it prescribes as what it describes. It has to present a coherent theory of how law ought to act or function in a society. Even a legal philosophy that deliberately strives to be pure, such as that proposed by Hans Kelsen, is normative in this sense. His theory urges that law best serves society in promoting peace by refusing to take sides with competing ideologies, by remaining above politics as it were (1).

But as the sociology of knowledge shows, the normative validity of a legal philosophy is not an answer to the problem of perspectivism (2). The «Can't Helps» of a group are rooted in their experience of a way of life (3). That of the European landed gentry made natural law or historical jurisprudence normatively valid for them (4). Similarly the American frontiersman and later the businessman related to natural rights, while the New Deal reformer opted for legal realism. The English who found the Empire and Parliamentary Sovereignty essential to their way of life also breathed Austinian positivism. The Central European working class found in Marxism the normative validity of law that corresponded closest with their experience.

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(1) HANS KELSEN, *General Theory of Law and State* (tr. A. Wedberg, 1945); *What is Justice?* (1957).

(2) KARL MANNHEIM, *Ideology and Utopia* (1936); for a concise, relevant summary, see JOHN FRIEDMANN, *Retracking America: A Theory of Transactive Planning 22-48* (1973).

(3) OLIVER WENDELL HOLMES. «Ideals and Doubts», and «Natural Law», in *Collected Legal Papers,* 303, 310 (1921).

(4) The examples are taken from Friedman, *supra* note 2, regarding the European landed gentry, American businessman and Central European worker as illustrations of perspectivism. Linking them to jurisprudencial schools of thought is also chiefly for illustration of the approach to perspectivism.

An empirical analysis of law in the context of its general social functions cannot logically resolve the problem of perspectivism. But it may dispel some confusions and point the way toward something more constructive than the cynicism of unmasking ideologies (5).

The general social functions are those requisite to the survival of a social system. They are pattern-maintenance (socialization), integration (conflict management), adaptation (effective, economical action to remove obstacles), and goal-seeking (allocation of values) (6). Bredemeier identifies law as the integrative social function with an input-output relation with other systems (7). Parsons sees law «as a generalized mechanism of social control that operates diffusely in virtually all sectors of the society» (8). For comprehending the problem of perspectivism as it relates to law it may be more useful to visualize law as a specific activity in each of the general social functions.

As a specific activity, law may be identified as the collective effort to regularize individual behavior in predictable fashion by the legitimate use of the preponderance of coercive power. The key variables are «predictability» and «legitimacy». Predictability may be fostered by a systematic exposition of clearly stated rules that leave no doubt as to their meaning in comprehensively covering all possible cases. Or there may be a recognition of the unrealism of such efforts, and predictability sought instead by relying on courts to interpret and adapt ambiguous rules, or on the moral sense of society for distinguishing between right and wrong. But whichever form law takes, achieving predictability —enacted law, case law or customary law— is not immediately relevant to the problem of jurisprudential perspectivism.

It is instead the effort law makes to gain legitimacy that raises the problem. Law becomes and remains legitimate by adequately responding to the normative demands of each of the four general social functions. The way in which it responds results in more or less steady patterns. It is the empirical analysis of the Parsonian «pattern variables» that may

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(5) FRIEDMANN, *supra* note 2, argues for this more constructive approach to the problem of perspectivism in an area not altogether irrelevant to jurisprudence.

(6) TALCOTT PARSONS, *The Social System* (1951); for a concise summary, see WILLIAM C. MITCHELL, *Sociological Analysis and Politics: The Theories of Talcott Parsons* (1967).

(7) HARRY C. BREDEMEIER, «Law as an Integrative Mechanism», in William M. Evan (ed), *Law and Sociology*, 73 (1962).

(8) TALCOTT PARSONS, «The Law and Social Control», in Evan *supra* note 7 at 56.

help in comprehending the problem of jurisprudential perspectivism (9). The first step in such an analysis is a discussion of the options to which law can respond in making its specific contribution in each of the general social functions.

The pattern-maintenance function recruits new members into society by socializing them into the prevailing way of life. It sustains continuity of moral attitudes, such as a sense of justice and injustice, from one generation to the next. Law is expected to reinforce these attitudes, as it does, for example, in family law and criminal law. But its response to these normative demands depends on whether the sense of justice maintained in a society is particularistic or universal. Universal justice is furthered by due process and the equal protection of the laws. Every person, despite his race, creed or color, is equally entitled to impartial, impersonal treatment by police, judges and other officials. He is expected to stand on his own two feet, to be self reliant and not dependent on others. But as Merton has pointed out, the political machine flourished among Central European immigrants to American cities because the immigrants wanted «help» not justice (10). Jones argues that much the same is true today of French-Canadian *Quebecois* (11), and in principle would seem to apply to the «unmeltable ethnics» in America. Thus, depending on which normative demands are dominant, law orients its pursuit of justice in terms of either particularistic or universal values in making its contribution to the pattern maintenance function.

In the adaptation function, society has to have a certain level of success in overcoming environmental obstacles that may frustrate its goals of survival or affluence. A lack of rain endangering crops, for example, may induce a rain dance, irrigation or cloud seeding depending on the level of cognitive capacity and on whether the social orientation is toward expressive or instrumental values. Law thus may be ritual and ceremony for adapting collective anxieties to the unknown (noncognitive, expressive values), or rational attempts to plan ahead in anticipation of crises or problems that may arise. Such legal planning can be low level such as land use regulation in cities, or high level such as preventing inflation and unemployment (cognitive, instrumental values).

In the goal-seeking function, a society must be able to choose what needs to be done and mobilize resources effectively for doing it. The

(9) *Supra* note 6.

(10) ROBERT K. MERTON, *Social Theory and Social Structure*, 75 (1957).

(11) RICHARD JONES, *Community in Crisis*, chp. VII (1972).

clear example is when it is attacked by an outside force. A more pervasive example is its need to allocate scarce, valued resources in generally acceptable ways. Society can do this according to ascriptive standards such as birth, kinship, religion, race, seniority, etc. Or it can do so in terms of achievement standards which look to merit, effort, contribution or competitive success. The response of law is again optional. It may, for example, preserve a feudal conception of property for maintaining the allocation of values by heirarchical authority. Or it may protect private property that, while it promotes economic mobility (everyone has a chance to become a millionaire), may result in economic elitism and exploitation of the economically weak. Thus again law is structurally variable, this time depending on whether the basic values of a society are ascriptively or achievement oriented.

Two pattern variables are clasely relevant to the integration function. Affective or neutral mechanisms are available for settling conflicts within society. This is especially evident in criminal punishment. Affective orientation looks at the whole person and judges the punishment he deserves in terms of his net worth. Neutral orientation looks only at the act and prescribes the same punishment for the morally bad and good. The same variable is illustrated by conflicts within a family. They cannot be settled in the neutral way in which conflicts among businessmen can. To do so would destroy the love, affection and respect that is vital to the family relationship. Closely related also to integration and the response of law to it is the expressive-instrumental pattern variable. Settling disputes peacefully to avoid escalation to violence and other forms of social waste was handled by the early English common law by such noncognitive, expressive processes as ordeal by fire or water or combat. Now the same tradition deals with disputes in highly cognitive, instrumental fashion by technical rules of evidence, jurisdictional constraints and complicated legal doctrines.

This conceptual sketch of the variable responses of law to the normative demands of general social functions does not exhaust the possibilities. But it should suffice to indicate how the approach can help clarify the problem of jurisprudential perspectivism.

This problem is perhaps most acutely illustrated by the differences between the American and Soviet legal systems. The American legal system historically is rooted in nonfeudal, frontier experience (12). It has been the clear example of the liberal response pattern to general

(12) LOUIS HARTZ, *The Liberal Tradition in America* (1955).

social functions. It stresses universal values of due process and equal protection, achievement values in allocating who gets what and how much, instrumental values in economic regulation and scientific-technological innovation, and neutral values in applying impersonal rules in adjudicating guilt or liability.

In contrast, the popular perspectivism of the West sees the Soviet legal system as an instrument of a police state run by professional revolutionaries who are legally unrestrained in using arbitrary power for spreading communism and destroying individual liberty (13). Berman rejects this partial view as «a dangerous half-truth» (14). Recognizing the problem of perspectivism, Berman finds instead that Marxism is only one of three elements in Soviet law. It is of no more importance than the specific influences of the Russian national past. And the dominant element is the parental or paternal structure of Soviet law (15).

Because of the dominant element —and despite the effort to overcome tunnel vision— Berman concludes that the perspectivism gulf between American and Soviet legal systems is the widest possible. In this connection, he cites Llewellyn's study of the New Mexico Pueblo Indians (16). But more systematic conceptual analysis reveals this example as misleading, and thus suggests that the perspectivism gulf between the American and Soviet legal systems is not the widest possible, though it still remains a substantial one.

A tribal society like the Pueblo Indians would represent the traditional extreme from the liberal response pattern of a legal system like the American. Its law would be so unlike law in modern societies that some argue it is not law (17). This is a defensible view if law is seen as a specific technique for achieving predictability and legitimacy in the use of preponderant coercive power. But as normative responses to general social functions, customary law is as much law as case law or enacted law. In a tribal society where all law is customary, its structure is clearly paternal. Its response pattern is dominantly particularistic, ascriptive, expressive, noncognitive and affective, and that pattern directly supports the tutelage relation between the rulers and ruled. In its consequences, the tutelage relation may be benevolent or oppressive, but its structure remains despotic and traditional.

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(13) HAROLD J. BERMAN, *Justice in the U. S. S R.*, 383 (1963).
(14) *Supra*, note 13.
(15) *Supra* note 13 at 2844, 420-423.
(16) *Supra* note 13 at 282-284.
(17) E. A. HOEBEL, *The Law of Primitive Man* (1954).

Berman's analysis shows that this is only partly the case in the Soviet legal system. The difference is crucial, since Berman also concludes that American law «moves steadily in a parental direction» (18). This implies that given time the two legal systems will converge. But a more careful conceptual analysis reveals the directions of movement are at best parallel, not potentially intersecting.

The basic differences in the American and Soviet legal systems have to do with responses to the pattern-maintenance and integration functions. The American court system is adversary, while the Soviet is paternal. The American approach to education for socializing the young is liberal in the individualistic sense, even to the extreme point of constitutionally forbidding public support of the paternal influences of religious schools. In sharp contrast, Soviet law is primarily «educational» in all its integrative and pattern maintenance functions (19). Instead of the rugged individualist who is expected to take care of himself, Soviet law sees everyone as a «youth» (except those in the Party who may be viewed as analogous to the father in a family) with the mission of upbringing the people.

But in the adaptation and goal-seeking functions, Soviet law is not that different from American law. Both legal systems are structured for cognitive-instrumental responses to the environment, Indeed, Soviet law purports to go further in this direction with its stress on central planning in the economy rather than on the market system (20). Similarly in goal seeking. The Soviet legal system permits a much greater concentration of legitimate coercive power for collective action than does the American legal system (21). Moreover, the paternal direction of American law detected by Berman takes place in the adaptation and goal-seeking functions, not in the pattern-maintenance and integration functions (22). It has to do with alleviating the human misery resulting from rugged individualism by curbing its excesses and introducing welfare, not with an upbringing of the people.

The desirable solution may be, as Berman implies (23), for both legal systems to correct their distorted conception of man by learning from

(18) *Supra* note 13 at 284.

(19) *Supra* note 13 at 68, 81, 289, 383.

(20) For the thesis that central planning overloads rational mechanisms, see MICHAEL POLANYI, *The Logic of Liberty*.

(21) CARL J. FRIEDRICH and BRZEZINSKY, *Totalitarian Dictatorship and Autocracy* (1965).

(22) *Supra* note 13 *passim*.

(23) *Supra* note 13 at 384.

each other. «Man is not uniformly the dependent and growing youth of Soviet law, nor is he uniformly the reasonable man of (American) legal tradition». But whetehr heis or not would depend on a careful conceptual analysis for revealing the structural problems involved. A «conception of man» cannot be disassociated from the normative response patterns of law to the general social functions of different societies. The more knowledge we have of the complexities of these response patterns, the less likely are we to engage in wishful thinking (Utopianisms) and the more likely are we to overcome perspectivism gulfs (ideologies) (24).

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(24) The distinction between Utopianisms and ideologies is Mannheim's, *supra*