LEGAL ORDERS AND SOCIAL CHANGE

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This paper sets forth a contextual approach in support of legal orders that contribute to enlightened social change as an ongoing public interest.[1]

Enlightened social change contributes to the public good which includes the enhancing of those features of legal orders that through the crucible of experience have shown themselves worthy of continuing guidance of changes within social structures. Specifically, this discussion will focus on social change and the justification of legal orders, the institutions of law and motivating factor sin social change, and the role of law as an instrument of social change.

1. *Social Change and Justification of Legal Orders*

Justifications of the role of legal systems in social change related to the public good rest upon notions about the foundations of law. Seeking to justify the foundation of legal orders lies outside the purpose of this paper. However, an evaluation of views on this issue together with their orientation toward social change can be of assistance in understanding the position set forth in this discussion. In a presentation of this brevity oversimplification appears to be unavoidable.

There is a reasonable expectation that legal orders will achieve certain basic objectives. These include the realization of justice which requires that laws be applied equally to those subject to its force and that in its application decisions will be grounded in the merits of the case and determined under adequate procedures of due process. Based upon properly formed legal precedents, justice also requires the protection of individuals against the capricious, arbitrary, mali-

[1] I wish to thank several acquaintances who, after reading an earlier draft of this paper, made helpful suggestions for its improvement.

cious or invidious administration of laws as their application affects the actions and opportunities of persons and groups.

A second reasonable expectation of law is fairness in which judicial discretion can be made in cases where the letter of the law is excessively harsh or lacking in degree to distinguish exceptional cases or mild from outrageous deviations from the law's rules. There also are legal rules such as those based on statutory or case law that have some degree of imprecision. Adjusting to the rule may leave some latitude in the interpretation of its requirements. Yet fairness is essential in its administration. Fairness emphasizes the need for justice to be tempered with equity.[2]

Both justice and fairness require laws to be subject to formulation in open forums and subject to reevaluation and reformulation based on judicial experience and rational criticism. There is need for some fundamental charter such as a constitution that sets the limits in which laws are operative and that recognizes basic rights and freedoms of individuals *vis-à-vis* the authority and power of government.

There also is a reasonable expectation that law will serve to support and enhance enlightened public interests which include public peace, personal security, orderly and progressive change, resolution of conflicts, and encouragement of the production of adequate goods and services together with some way of providing for their equitable distribution.

Two forms of justification of legal systems appear to have serious defects. One of these views holds to absolutism and the other to complete relativism.[3] Absolutism has various forms. One is theological and another is formalistic. Theological absolutism presupposes some kind of divinely-given legal system which is known and applied through a special awareness of divine notions about the content legal orders should have and the way they should function. Such an approach encounters difficulties in diverging or conflicting theologies which do not agree on the provisions of law which are alleged to have divine approval. Frequantly, theological interpretations of legal systems attempt to crystalize the customs and legal procedures of a particular group in a limited historical setting. They propose to make these historically conditioned features binding in all other cultural contexts. Theological approaches to legal systems can be inflexible

2 For a brief discussion of the notion of equity as fairness, see: Jerome Frank, *Law and the Modern Mind* (New York: Brentano's, Inc., 1930), p. 139.

3 There is a brief discussion of one notion of divine law in John Austin, *Lectures on Jurisprudence or the Philosophy of Positive Law*, Vol. I, edited by Robert Campbell (New York: James Cockcroft & Co., 1875), pp. 25-29.

with regard to needs for enlightened social change. They also can resist the procedures needed for critical review and examination of proposed laws.

Some absolutists' views presuppose some kind of pattern or structure inherent in some rational order of the universe. By intuition or raciocination about these patterns the mind can know what these legal patterns are and then formulate them into legal codes. This kind of absolutism has some basis in Platonism and in totalitarian legal systems. It suffers from the defects of theological absolutism and, like the latter, can be subject to arbitrary and even capricious interpretations.[4]

Relativism in legal philosophy would hold that legal systems derive their justification only from social conventions. Legal system based on relativism can be flexible and even can encourage volatile or revolutionary procedures in support of social changes. Although there is a significant element in existing legal codes that appear to be derived from such a source, the view fails to take into sufficient account the need for evaluating these conventions by objective criteria that are found in such notions as justice, fairness, individual liberty, and enlightened public interest. These criticisms do not hold that all persons holding to a merely relativistic position always ignore these considerations. Obviously such views may be included in a set of conventions. Yet the critical issue is that their inclusion in such cases is not essential to the notion of legal codes but rather it is circumstantial. Ignoring minority or even majority rights, as well as granting arbitrary privileges to special groups, can become an integral part of legal codes in judicial systems based on mere convention.[5]

The position for justification of legal systems supported in this discussion is contextual. It recognizes that legal codes are relational and have both objective and conventional aspects. Unlike the absolutists' view, it is flexible with regard to social change, but it likely would seek greater continuity with precedents and provide stronger restraints to volatile social change than merely relativistic views. It draws heavily from traditional views based upon natural law theories

[4] Some, but certainly not all, views holding that law is the sovereign's command also are expressions of legal theories of absolutism.

[5] Examples of relativism applicable to the philosophy of law include some of the views of the Sophist and Skeptics in ancient Greece. Relativism also is implicit in some forms of sociological jurisprudence. See: Eugene Ehrlich, *Fundamental Principles of the Sociology of Law* (Cambridge, MA: Harvard University Press, 1936). Constitutions also serve as restraints on merely relatavistic interpretations of legal orders.

and upon pragmatism.[6] It recognizes with natural law theories the need for some objective grounding for legal systems. This position can be appraised by objective standards similar to those set forth at the beginning of this paper. Yet these standards and their interpretations are subject to refinement and maturation. Likewise, legal codes are concerned with the future public interests and, in part, with what the courts will do in a given circumstance. Yet the courts can err and justice can miscarry through judicial processes.

Justice is not identical with what the courts decide. Legal decisions and legal systems can be subject to critical evaluation on grounds of fairness, comprehensiveness, adequacy, applicability, and consistency. Cultural heritages and anticipated consequences do make a difference in the use of the above criteria in evaluating legal systems. But in discussing future consequences priority should be given to the effect of the kinds of rules that are formulated in legal systems rather than simply to some kind of estimate of likely consequences in any given case. Legal systems as well as the rules developed within them are subject to critical evaluations not only by informed, sensitive, and discerning individuals and groups but also by anyone affected by their administration.

2. *The Institutions of Law and Motivating Factors in Social Change*

A primary issue in any society is the direction taken by social change. A concern of this essay is the role taken by the "path of the law" in such change. In considering this issue there is need to take into account the conditioning factors in social change and the function of law both with regard to what it can achieve and what it cannot achieve in influencing social change. There also is concern to determine the ways in which the law both can be consistent with its basic functions and can be a factor in helping to channel social change in directions that are socially commendable.

Social change can be multidirectional. In some cases it can be for the better and in others for the worse. At the risk of appearing rhe-

[6] For an effort to restate the views supporting natural law as a foundation for legal systems, see: A. P. d'Entreves, *Natural Law,* 2nd ed. (London: Hutchinson, 1970), pp. 119-172. There is also an evaluation of traditional law theories in H. L. A. Hart, *The Concept of Law* (Oxford: Clarendon Press, 1961), pp. 181-195.

For a discussion of the influence of Pragmatism as a philosophy on the development of legal decisions in this country see: Benjamin N. Cardozo, *The Growth of the Law* (New Haven: Yale University Press, 1924), p. 127.

torical or pedantic this paper holds that social change for the better includes the broader participation in those aspects of culture that are distinctively human and creative such as artistic, literary, scientific, and scholarly achievements. It is supportive of rational discernment, friendship, and individual and group freedoms. It embraces the economic order in its concern for the use of knoeledge and skills in the production and broad distribution of goods and services, in supporting individual initiative and risk, and in developing natural resources, industry, and trade. It includes opportunities for physical security, for adequate food and housing, for education, and for adequate medical care. It also provides for fair legal systems and political orders which support the public good.

Social changes that do not contribute to the public good include those that increase human misery and suffering, or that block or restrain the growth of intelligence or of democratic institutions. Such undesirable changes also are those that support ill will among humankind or disrespect for human life or dignity, or exacerbate predatory tendencies.

The kind of social change which hopefully legal orders will enhance and which are advocated in this paper are whose that are supportive of maximizing conditions that provide greater expression to human dignity and well being.

In a formal sense the institution of law is neutral with respect to what is socially commendable or reprehensible. Persons and social institutions both interact with legal institutions in bringing to bear interests and concerns relative to the manner in which the law supports social change in one direction, is indifferent to it in some cases and restrains or obstructs its development in others. The role of law in social change is not merely a response to referenda regarding public interest. Legal systems themselves act as restraints both on the means that are chosen and on the goals that may be selected in directing social change.

Legal institutions are only one factor involved in social change. Production and distribution of goods and services, changing group attitudes, customs and preferences, demographic shifts, control of property and credit, fiscal and monetary policies of government, international political and economic developments, military concerns, as well as other considerations, all can have a bearing on social change. Legal systems can accelerate or restrain some social changes, but their power remains limited. They are only one of the many interacting forces active in social change. Their administration can lead to greater realization of social interest. Or their administrative abuse

can be destructive of social interests or even the system of which they are a part.

Organized group activities can have a definitive bearing on social changes influenced by the law. These actions include the actions of persons and groups interested in a wider participation in sharing goods and services which they hold to be supportive of social well-being and individual happiness. They encompass the maneuvering of interest groups who seek to assure that their concerns will play a more dominant role in determining the allocation of opportunities and privileges in the developing social order. They involve individuals and groups who may have as a primary concern the gaining of power or of prestige through controlling or dominating the actions and activities of other persons or institutions. They take in the actions of persons who may have a genuine concern to find ways to increase the degree and range of participation of underrepresented groups in the available goods and services. They also may include actions of groups who recognize a need to correct inequities resulting from existing legal norms or a need to extend legal provisions to prevent excesses permitted under existing legal practices.

3. *The Institution of Law as an Instrument of Social Change*

The institutions of law can support practices that suppress, restrain, support, or embolden tendencies to social change. They can exercise any one of these tendencies in given cases in an enlightened or a repressive manner.[7]

The primary means used to bring about social change through institutions of law include constitutional provisions, recognized codes or common law, legislative enactments, judicial decisions or precedents, and administrative procedures. Secondary means in such changes include bureaucratic practices and ways of enforcing the law.

When legal norms serve primarily to preserve the life style and privileges of the past, they become repressive and are supportive primarily of the *status quo*. If such norms become directed primarily toward effecting changes sought by limited interest groups, they can serve as a means of promoting both social confusion and a breakdown of well-founded practices. Law appears to serve public interests

7 See: Roscoe Pound, "Law in Books and Law in Action. Historical Causes of Divergance Between the Nominal and Actual Law", *American Law Review*, 44 (1910), pp. 12-34.

best when it provides continuity with the practices proven to be in the public good together with a means of supporting existing and emerging public interests.

Laws set forth prescribed or proscribed claims on individual or group actions. But in many circumstances a basic concern within the legal order is determining the precedent having priority in the adjudication of a given dispute.[8] Teleological prescriptions such as maximizing the social good or happiness may not solve priorities. The future remains contingent and the results anticipated from one kind of ruling may be limited or flawed. The immediate consequences of a ruling have to be weighed against the effects of a rule applied in comparable context to other cases as well as to constitutional and legislative matters.[9]

Teleological considerations also need to be weighed against deontological considerations or fundamental rules. Many deontological concerns find expression in constitutions such as the *Bill of Rights* in the *Constitution* of the United States. But even these considerations cannot always be determined mechanistically, like programming a computer and having the computer provide a printout with a writen judicial decision. There are human and social factors that are both unique and changing to consider. Views on how to determine priorities themselves are subject to change.

Judicial interpretation of laws appears to operate in a quasi-dialectical manner.[10] There have been courts in the United States whose decisions appear to have been weighted toward social concerns. And these courts have been preceded or succeeded by others that have had stronger orientation toward traditional or stricter constitutional concerns. One court may seek to accelerate and another may seek to restrain social change.[11] One court may act as a corrective force on its predecessor. But through this process there results an accrual

8 In some cases conflicts arise in choosing between distribution goods and efficiency. Laws that are designed to support only one of these aspects of social change can come into conflicts with other interests. See: Burton A. Weisbrod, "Conclusions", in *Public Interest Law,* by Burton A. Weisbrod, Joel F. Handler, and Neil K. Komesar (Berkeley: University of California Press, 1978), p. 555.

9 For a view which emphasizes that short range consequences of judicial decision may undermine basic judicial principles, see: Ronald Dworkin, *Taking Rights Seriously* (Cambridge: Harvard University Press, 1978), pp. 5-7.

10 For a limited discussion of the role courts played in the development of new law, see: Richard Arens and Harold D. Lasswell, *In Defense of Public Order* (New York: Columbia University Press, 1961), pp. 61-69. See also: Benjamin N. Cardozo, *The Nature of the Judicial Process* (New Haven: Yale University Press, 1921), pp. 98-141.

11 For a discussion of the way legal precedents can change over a period of time, see: Benjamin N. Cardozo, *The Nature of the Judicial Process,* p. 150.

of precedents that over a period manifest a definite development and change in the manner in which legal processes affect social change.[12]

Are laws relative to social change basically a response to public sentiment supportive of such changes? Or are they a consequence of legislative or executive decisions that determine either in an enlightened or arbitrary fashion the social change that is to be supported? Or are they some accommodation worked out between these courses of action? There is no simple answer to these questions. In actual practices there are instances of the use of each of these procedures within a specific legal structure.

Laws that are made without the support of popular sentiment in many cases are difficult to enforce. Some of them come to be ignored by both the public and law enforcing agencies.[13] On the other hand, judicial interpretation related to constitutional provisions, such as rights of minorities, are enforceable to a degree although there can be popular opposition to them in pockets or even large geographic areas of a country. In some cases laws are passed that have only the support of minority interests such as labor unions or business. These laws may remain in effect since there is insufficient organized political opposition to them to result in their repeal.

Some laws that fail to gain public support and that become unenforceable tend to weaken respect for laws. Such disrespect also can occur when laws are passed primarily to support limited interest groups in opposition to what appears to be the larger and stronger public interest. But constitutional provisions, although subject to interpretation in the courts, are not subject to general referenda except in cases of amendments to the constitution itself.

There is a body of quasi-law interpreters whose decisions have a kind of secondary legal status until they are subject to rulings by the courts. These groups are government agencies often responsible to the executive branch of the government. They make policies which have as their purpose the carrying out either of laws passed by the

[12] For further discussion of the ongoing interplay between different courts in their modifying decisions of previous courts and in making new case law, see the following: John Dewey, "Logical Method and Law", *Cornell Law Quarterly*, vol. 10, no. 1 (December 1924), pp. 17-47; Oliver Wendell Holmes, "The Path of the Law", *Harvard Law Review*, vol. 10, no. 8 (March 25, 1897), pp. 457-478.

[13] An example of laws without the support of popular sentiment would be the reduced speed limits brought about by the need to reduce the importation of oil. On some super highways in the United States drivers have tended to disregard these laws which frequently are not enforced by the law enforcing agencies. If they were relieved of the pressure of federal regulatory agencies, many states would repeal such laws.

legislative branch of government or of directives handed down through the executive branch. Although some of these policies and regulations may be in accord with the explicit provisions of laws or of a constitution, others can be based upon interpretations of law made by these agencies. Until such a time as these regulations are challenged, they can have the force of law binding on individual and group actions.

To seek relief from what can appear to be arbitrary, capricious or extreme administration of laws by such agencies, groups or individuals have the right to appeal to the courts by claiming that such agencies have exceeded their authority. Such appeal processes can be both costly and excessively time consuming.

The regulations of these agencies can constitute a form of interim legal requirement which forges social change in the direction sought by these agencies. Such regulations can be subject to implementation by the passing of new laws more specifically supportive of the existing bureaucratic interpretations or they can provide grounds in judicial decisions for restraints in the policies or directives favored by such agencies.

The degree of discretion permitted to governmental agencies is made evident by the differences in the manner in which policies formulated and interpreted under different political administrations are administered under the same statutes.

Policy making groups within these agencies can have their own special concerns and interests which have a definite bearing on the way in which such groups formulate, interpret, and enforce policies. To the degree that these agencies themselves succeed in having their positions followed they become a powerful force in influencing social change in specific directions.

To adapt an analogy from Henri Bergson, a legal system is comparable to a living organism. To examine its state of being at any one stage provides only a static view of a dissection of a living process that can be understood only through its interaction with other social forces and its responses to them.

By way of summary, I have attempted to show in this discussion that some legal orders are more supportive of enlightened social change than others. Legal orders can be appraised, in part, on objective grounds related to such notions as justice, fairness, reasonableness, adequacy, and applicability. These legal orders are a significant factor in channeling social change and also serve to provide some consistency and continuity in these changes. There is need for internal corrective processes in legal institutions in order that they can

be instrumental in bringing about social changes that are in the public interests. Legal institutions are only one among many social forces operative in social change that relate to the public good. The administering of the law is crucial both in preserving those factors that can contribute to the public interest and in supporting social changes that lead to enlarging opportunities and enhancing the quality of life consistent with public interests.