LAW AS THE STABILIZING PRINCIPLE OF ECONOMICS, POLITICS AND CULTURE

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Law's function of stabilizing economic, political and social activities by reconciling conflicting interests is dependent upon the credibility of law's claim to objectivity. The general belief in human sovereignty, in the modern era, destroyed the theoretical objectivity of law, which rested upon the ancient belief in a metahuman origin of prescriptive order or upon the medieval belief in a divine sovereign. One of the major theoretical responses to suspicion that human constitution makers and law givers are guided by their own interests and not solely by impartial pursuit of the prescriptive implications of truth about the universe and human nature denies the possibility of law's objectivity and gives interest primacy over law. Juriscultural study of the English experience in making social and legal changes in response to the opportunities of industrialization suggest that it is sometimes possible to achieve an experiential objectivity which gives law sufficient credibility to stabilize economic, political, and social activities by reconciling conflicting interests even during periods of substancial social and legal change.

In Western civilization law has served to stabilize economic, political and social activities by reconciling conflicting interests. Law's justification for serving as the standard for limiting and denying, or permitting and approving, proposed actions in pursuit of interests rests on its claimed objectivity. The credibility of this claim of objectivity was high in the Ancient World because it was generally believed that law was the prescriptive part of the rational order of the universe which was metahuman in origin, unchanging and everlasting.[1] The credibility of law's claim of objectivity was also high in the Middle Ages, when it was generally believed that law was the divinely prescribed order of a universal community of mankind founded and governed by God himself.[2] In the modern era the secularization of natural law philosophy resulted in the belief that full governing authority lies within the human commonwealth and that human create law, rather than discovering it by reason or receiving it through divine grace. General

1 Cicero, p. 211.
2 Gierke, p. 10.

acceptance of this belief brought law's objectivity under serious suspicion. Laws that harmed the interests of those to whom they applied may always have evoked resentment, but rejection is so much more plausible if laws are believed to be created by the reason and will of other human beings instead of being a part of the eternal order of the universe or a divine emanation.

Theoretical responses to this challenge to the credibility of law's objectivity, predictably, fall into three categories —natural law, positivism, and Marxism. The dominant response of natural law is that whether a law created by human legislators is just or unjust depends upon whether it can be deduced from the metaphysical assumptions of Western civilization, namely, a rational universe, human reason and free will. Positivism, when it goes beyond formal indicia of promulgation, tends towards the position that conflicting interests are to be reconciled by reference to the common good. In fact, positivism finds the common good in principles that the natural law philosopher could deduce from the metaphysical assumptions of Western civilization. An example is the principle of contract law that the expectations created by the manifestations of the parties in a bargaining situation should be protected. This principle makes sense because of a shared belief that the causes and effects of a rationally ordered world are knowable by all mature persons who, therefore, can foresee the consequences of their promises. Positivism rides on the shoulders of natural law but, by definition, can not lock down.

Marx could not accept the common good as the standard for limiting and reconciling conflicting interests because the common good embodied the implications of that abstract, conceptualized human reason that Marx had rejected as the premise of his science of historical development. Marx premised his science on what he called real, material producing individuals and "*their*" consciousness.[3] Accordingly, interest is primary, law is secondary. Consciousness serves interest; there can not be consciousness of a common good that would limit and reconcile conflicting interests. There can be a common good for all members of a society only if all have a common interest. By common interest Marx meant that every member of the society was free to choose the task each would perform in the society's production efforts. Such a society is what Marx meant by a communist society.[4] When less than all members of a society share an interest with respect to production relations those persons constitute a class, and the interest

[3] Marx, p. 25.
[4] Marx, pp. 35-36.

they share is a class interest. Because the common interest of every member of a society is complete freedom of choice with respect to participation in production, any class interest, by definition, is an interest with respect to restriction of that freedom of choice. Therefore, there are two and only two classes. One is composed of those persons who seek to compel others to perform tasks they have not freely chosen and the other is composed of those who are so compelled. In Marxist theory, all semblance of objectivity gone, and with no potentiality for stabilizing economic, political, and social activities, law becomes an instrument of class warfare.

So much for theoretical responses to the challenge of human sovereignty to law's function as the stabilizing principle of economic, political, and social activities. This is the stuff of juris*prudence*. At the IXth World Congress of IVR in Basel, I introduced juris*culture*.[5] At that time I emphasized jurisculture's pluralism, which makes it suitable as a world perspective of legal and social philosophy. Another characteristic of jurisculture is that it does not limit itself to *knowlege about* justice and law, but studies the process of organizing and reorganizing societies and legal systems in response to newly perceived life opportunities. The changes involved in shifting work from muscles to machines, that is, the general movement called industrialization, is the outstanding instance of reorganization of societies and legal systems in Western civilization since human sovereignty became a general belief, arrousing fears that constitution makers and law givers would serve their own interests instead of impartially seeking the prescriptive implications of universal truth. As an example of juriscultural study of processes of social and legal change, I propose to set out briefly some of the experience of England in responding to the opportunities and problems of industrialization.

By the third decade of the 19th century England was experiencing great pressure for social and legal changes. The privileges of the landed aristocracy were increasingly perceived as unjust in light of the new wealth and the consequent economic power of a rising middle class. Then, in a period of about forty years, beginning with the Reform Act of 1832, political power was transferred to the middle class, and laws were enacted which made humanitarian reforms (e.g., abolition of the pillory and public executions, prison reform, reduction of the number of capital offenses), extended individual liberty (e.g., emancipation of slaves, habeas corpus act, religious tolerations, freedom in

5 Dorsey, "Toward World Perspectives of Philosophy of Law and Social Philosophy", pp. 2-3.

dealing with property), reformed legal procedure and created additional courts so that the rights of the rights of all would be protected.[6] The repeal of old laws and the new laws passed by Parliament in the middle third of the 19th century gave social status and legal protection to the interests of the middle class merchants and tradesmen, and limited but by no means destroyed the social privileges and legal rights of the landed aristocracy.

What were the roles of reason and of interest in these changes? Bentham, the influential English legal and social philosopher, well understood the significance of human sovereignty. It was precisely the passage in the *Commentaries*[7] in which Blackstone sought to limit human sovereignty to the promulgation of laws created by a divine sovereign that Bentham made the focus of his attack upon the law of nature.[8] Blackstone's law of nature was not the objective expression of a divine will, Bentham said, but an expression of the will of the royal and aristocratic few which served their own interests. Bentham said that he adopted the principle of utility because it served the interests of all the people.[9] Further, Bentham defined law as a part of the logic of the will, which, he said, had been neglected because logicians since the time of Aristotle had concerned themselves exclusively with the logic of the understanding.[10]

But, as John Stuart Mill said in 1838, "the changes which have been made, and the greater changes which will be made, in our [England's] institutions, are not the work of philosophers, but of the interests and instincts of large portions of society recently grown into strength."[11] What Mill meant by that statement, as Dicey makes clear in his *Law and Public Opinion in England,* is that the struggle between the landed aristocracy and the new middle class was damped by the resort of both groups to the ideas of Bentham in the attempt to prove the justice of their claims and demands. These arguments were admittedly self-serving. Each group bent Benthamism to their own interests, in the process creating what Mill called "common sense Benthamism". Benthamism as philosophy was badly distorted; but when the aristocracy and the middle class accepted a new balance in their power relationships, reconciling the demands of newly powerful interests and

6 Dicey, p. 184. For further exposition of the theme discussed here see: Dorsey, "Jurisprudence and Law Reform".
7 Blackstone, 41.
8 Bentham, *Works*, pp. 269, 272-273.
9 Bentham, *Works*, p. 272.
10 Bentham, *The Principles of Morals and Legislation*, p. XXXI.
11 Mill, p. 79.

previously established interests, there emerged also a new standard of right and wrong which was objective, in the limited sense of being generally accepted. New principles of ditributive justice in England were thus created. These principles did not have the general validity of metahuman or divine emanations. But they were valid so long as the balance between competing interests groups held. The same process occurred again in the last third of the 19th century when some Tories, acting as protagonists for workers, struggled with manufacturers and merchants, sought justification in the Coleridgean idea that property ownership carries a fiduciary obligation, and produced a series of statutes establishing household sufferage and protecting the interests of workers.[12]

Juriscultural study of some of the English experience of making social and legal changes incident to industrialization, all too briefly summarized above, and of the experience of other countries, which time does not permit me even to summarize here, leads to the conclusion that the meaning of distributive justice must be reconsidered. Traditionally, that distribution of rights and duties, benefits and burdens is said to be just which is in accordance with the prescriptive implications of truth about the universe and human nature. This traditional view contains two elements —authenticity and objectivity. With the modern loss of confidence in any impartial, disinterested derivation of prescriptions from truth, every version of social and legal order derived from the same philosophical ideas by groups with conflicting interests is equally authentic; but none is objective.

One response to the loss of the universal, eternal objectivity that inheres in law created by a metahuman or divine sovereign is to declare that law is not capable of stabilizing economic, political, and social activities by reconciling conflicting interests, that social change is possible only through revolutionary struggle in which one interest group emerges as the total victor and establishes a social and legal order that serves its interests. This was Marx's theoretical response to the skepticism aroused by human sovereignty. But one historical instance is sufficient to disprove theoretical impossibility.

Theoretical objectivity is universal and eternal. The English experience in making social and legal changes in response to the opportunities of industrialization suggests that it is sometimes possible to achieve an experiential objectivity. Experiential objectivity consists of general acceptance of distributive principles resulting from a struggle for political power which includes interested appeals of groups to

[12] Coleridge, p. 50; Cobban, pp. 202-203; Dicey, pp. 259-310.

shared ideas to justify their competing claims and demands. These appeals bend the ideas to suit the interest, seeking to weaken the conviction of opponents, strengthen the resolve of supporters, and sway those whose interests are not at risk. It is of no particular significance that in England the ideas of Bentham or Coleridge were appealed to, or that the power struggle was conducted through parliamentary institutions. The crucial thing is that instead of trying to force individuals to pursue ideologically defined interests, individuals be permitted to pursue what they see as their real interests and that the struggle for political power between the resulting interest groups bend ideology to the service of interests in the attempt to justify and win support for their claims and demands. Conflicting interests can be composed more easily than conflicting ideologies. Dicey said of the English experience, "Extreme and logically coherent theories have, during the nineteenth century, exerted no material effect on the law of England".[13]

[13] Dicey, p. 18.

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