LAW AS A BRIDGE BETWEEN THE IS AND THE OUGHT

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The German poet Johann Wolfgang von Goethe once made the remark, in the course of a philosophical discussion with his friend Friedrich von Schiller, that organic nature was dominated by two fundamental phenomena: the polarity of all things and the principle of enhancement.[1] The thought he meant to convey by this statement was that the play of contrasts and antagonistic forces forms a conspicuous and ubiquitous aspect of reality, including particularly the reality of human life; and that this dynamic process does not operate as an essentially senseless and indecisive encounter of contradictory tendencies but performs the function of engendering growth, improvement, and some degree of perfection in the various forms of life.

Goethe's utterance represents a combination of the Hegelian theory of dialectical movement through the struggle of opposites with the Aristotelian concept of "entelechy", according to which living things tend to rise from incomplete to fully-developed modes of existence. This symbiosis of two ideas which are not directly related to each other becomes meaningful and defensible only on the assumption that in the contest of antagonistic forces those which are constructive and life-affirming preponderate over those which have a destructive and life-negating character. If the positive and negative constituents facing each other in the battle would remain in a state of eternal stalemate, any vision of "enhancement" would be nothing but a figment of the imagination. It should also be stressed that the entire thought holds true only for the period of time during which growth, improvement, and amelioration actually occur. Goethe would hardly have denied that we are also confronted with the phenomena of decay, dissolution, and death of the various forms of life.

The notion of perfection through struggle has meaning for the life of individuals as well as that of societies. It also offers a fruitful perspective in the endeavor to understand the institution of law. The law, in its theoretical conception and practical operation, represents a fusion of disparate and antagonistic elements. At the same time, it serves the function of improving the quality of a society.

The dialectical element in law manifests itself in the attempt to reconcile

[1] R. Friedenthal, *Goethe: Sein Leben und Seine Zeit* (1968), vol. II, p. 528.

stability with evolutionary growth, to harmonize freedom and authority, to synthetize equality and differentiation. No legal system can persist for any length of time unless it offers to the people a certain degree of continuity and security in the possession and enjoyment of rights. Such stabilization of the conditions and arrangements of life is necessitated by certain characteristics of human nature which militate against the prevalence of constant, indiscriminate, and chaotic change. On the other hand, a considerable amount of properly-dosed and rationally-planned change is needed even in normal times, and obviously more so in periods of emergency and crisis. All legal systems worthy of their salt have therefore heeded Roscoe Pound's observation that "law must be stable, and yet it cannot stand still." [2]

It is also a characteristic of developed legal systems that an effort is made to reconcile the conflicting ideas of freedom and authority. [3] A social system whose members would be deprived of any semblance of freedom and individual rights would be an order based on arbitrary power rather than law. On the other hand, there has never been a society which did not limit the freedom of individuals for the purpose of protecting the liberty and security of other individuals, and in order to safeguard certain basic interests of the community. [4]

A further crucial problem faced by every legal system is the need —produced by certain well-nigh universal postulates of the sense of justice— for according equal treatment to equal situations and yet at the same time make room for a differentiated allocation of rights, duties, and decision-making powers. Some degree of equality is guaranteed by every legal system by the mere existence of rules which are applicable to all persons or groups which come within their scope of operation. Many contemporary legal systems, however, go much further in the implementation of the equality concept by granting certain fundamental rights to *all* members of the community and by prohibiting discriminations based on race, sex, or religion. [5] No society, on the other hand, has been able to dispense with the necessity of creating or permitting some amount of inequality, especially in the realm of decision-making. Thus, legislative assemblies are vested with power to lay down rules binding on other members of the community, and executive and administrative top officials in private and governmental organizations are authorized to make functionaries of the organization.

The manner in which a legal system deals with the problems of stability and change, freedom and regulation, equality and differentiation may be considered part of the ontological "is" of a social structure. It reflects the

[2] R. Pound, *Interpretations of Legal History* (1923), p. 1.

[3] See in this connection C. J. Friedrich, "The Dialectic of Political Order and Freedom", in *The Concept of Order*, ed. P. G. Kuntz (1968), pp. 350-351.

[4] See E. Bodenheimer, *Jurisprudence: The Philosophy and Method of the Law*, rev. ed. (1974), pp. 222-229.

[5] *Id.*, pp. 229-236.

actual distribution of rights, duties, powers, and competences in a particular society. But there are many different ways in which the reconciliation and synthesis of potentially conflicting social values can be accomplished. One society may strive for the maximization of liberty in its various manifestations. Another society may propagate the realization of political, economic, or social equality as its highest ideal. A third social order may give priority to the achievement of the utmost security for its citizens and their possessions.

The preferential treatment of certain goal values by the normative structure of a legal system may be said to form part of the axiological "ought" of the social order in question. This characterization presupposes, of course, that the value patterns embodied in the legal norms are in fact not fully realized in the actual operation of this social system. If the ideals proclaimed by a society have become invariable guides for the conduct of its members, a fusion of ideality and actuality has occurred. It is hardly to be expected, however, that a society will ever attain this utopian state of affairs. The existence of substantial gaps between ethical demands and concrete behavior has been a persistent feature of social reality through the centuries. The constitution of a country may endorse a far-reaching freedom of speech and assembly as its normative goal, but frequent interferences with liberty of expression by dissident groups may mar the fulfillment of this promise. A society may hold out the fullest equality of the races and sexes, but prejudice and ingrained habit may result in the retention of substantial enclaves of male supremacy or racist hegemony. A social system may have rigid rules designed to protect the security of persons and property, but a high incidence of criminality may seriously hamper the materialization of this objetive.

The general conclusion may be derived from these observations that both the principle of polarity and the thrust towards enhancement, which in their combination have a bearing upon the evolution of organic processes, exert some impact upon the man-made institution of law. While the actual arrangements of the law disclose an endeavor to accommodate disparate ideas and values which tend to pull community life into opposite directions, there is also operative in the life of the law a tendency to raise the conditions of life to a higher level by erecting dams against the free flow of forces which threaten to disturb or disrupt the harmonious working of the social system. This attempt to enhance the quality of social life will not always be successful. There will be periods in the history of societies and nations in which disintegrative trends will gain the upper hand, so as to impede the realization of the Aristotelian "entelechy" aimed at social amelioration.

It can be safely assumed that some empirical links exist between the existential foundations and ideal ends of society-building. In a primitive state of the economy the safeguarding of survival rather than the achievement of affluence will have to constitute the supreme axiological goal for the group, and this may entail a measure of communal integration of the individual

which is incompatible with the maximization of freedom. In a highly developed society, on the other hand, which has in the past enjoyed some of the blessings of freedom, equality, and social mobility, a decision by the ruling authorities to restore conditions of feudal hierarchy and social stratification would be unlikely to meet with the degree of popular approval necessary to institute political and economic change successfully. Thus, what is within the range of social achievement with the help of the law depends to a large extent upon the actual state of technological development and cultural advancement.

It stands to reason that the preceding comments are not in accord with the views of those authors who have sought to place the institution of law entirely in the sphere of the ontological "is" or exclusively in the domain of the axiological "ought". Two influential attempts to assign the law in fairly dogmatic terms to one or the other of these two realms may be recalled in this connection. They are commonly designated as American legal realism and Kelsenian normativism.

In 1930, Karl Llewellyn proposed that the key endeavor of legal science be shifted from a study of the normative structure of the law to the observance of the real behavior of law officials, especially the judges. "What these officials do about disputes is, to my mind, the law itself." [6] He withdrew this statement twenty years later, on the ground that this characterization of the law was "plainly at best a very partial statement of the whole truth." [7] But his earlier identification of the legal process with human behavior was taken up by the behaviorist social scientists, particularly Glendon Schubert. In Schubert's view, legal inquiry should set its focus on "what human beings, cast in socially defined roles in certain characteristic types of decision-making sequences which traditional have been identified as 'legal', do in their interactions and transactions with each other." [8]

The following are samples of questions which have aroused the interest of the behavioral scientists in the legal field: What are the psychological, sociological, and cultural influences which condition the adjudicatory processes? What kind of values are preferred by certain types of judges? How do the decisions of these judges affect the behavior of other people, especially laymen? [9] It is obvious that this approach to jurisprudence is purely factual and wholly devoid of normative reflections about the functions of the law and the goals of the judicial process. Even though it may be argued that these scholars are talking about legal research rather than about the law itself, it seems clear that the excision of normative inquiry from

[6] K. Llewellyn, *The Bramble Bush* (1930), p. 3.
[7] *The Bramble Bush*, rev. ed. (1951), p. 9.
[8] G. A. Schubert, "Behavioral Jurisprudence", 2 *Law and Society Review* 407, 409 (1968).
[9] *Id.*, p. 410.

legal science mirrors a purely empirical conception of the institution of law as such.

It should be pointed out that the assignment of the law to the sphere of social reality has not remained the monopoly of the behavioral scientists. John Chipman Gray, for example, who defined law as a body of judge-made rules, expressed the following view. [10]

> The great gain in its fundamental conceptions which Jurisprudence made during the last century was the recognition of the truth that the law of a State or other organized body is not an ideal, but something which actually exists. It is not that which is in accordance with religion, or nature, or morality; it is not that which ought to be, but that which is.

Starting out form an entirely different philosophical vantage point, Hans Kelsen took the position that the law was not a part of empirical reality but an aggregate of "oughts". [11]

> The legal order ... is a normative order of human behavior — a system of norms regulating human behavior. By "norm" we mean that something *ought* to be or *ought* to happen, especially that a human being ought to behave in a specific way.

Kelsen reasoned that the legal order cannot be allocated to the sphere of the "is" because a legal command or prohibition may be violated by actual human conduct. A penal provision proscribing theft, for example, is not a statement to the effect that human beings do not steal. It signifies, instead, the formulation of a postulate that a person should not appropriate another person's property. The postulate may be obeyed or disobeyed by the addressees of the legal order. [12]

It would appear that both the factual and normative conceptions of the law exhibit distinctive weaknesses. The factual view pays insufficient attention to the truth that the actual behavior of law-related officials, particularly the judges, tells us nothing about whether this behavior conforms to, or deviates from, the directives imposed by the legal system. This system provides standards and guidelines for official conduct, and the actions taken by the officers of the law must be measured against the norms they are supposed to enforce. This process often involves the making of evaluative judgments which cannot be classified as facts of empirical reality.

The purely normative interpretation of the law, on the other hand, tends to neglect the fact that a substantial amount of compliance is essential to the existence of a meaningful legal system. Unless such a system succeeds in shaping the actual conduct of a majority of its addressees, its significance

[10] J. C. Gray, *The Nature and Sources of the Law*, 2d ed. (1921), p. 94.
[11] Kelsen, *The Pure Theory of Law*, 2d ed. (1967), p. 4.
[12] *Id.*, p. 7.

is to a large extent a theoretical one. If more members of the community break the law than observe it, the chief purpose of legal arrangements is frustrated. The law remains a book law, it is inefficacious in its practical operation.

It is instructive, in this respect, to note the shift in Kelsen's attitude towards law which was articulated in his late writings. In the first edition of his *Pure Theory of Law* he took the position, consistently with his radically normative legal philosophy, that the validity of a legal norm was not conditioned by its factual effectiveness, as long as the legal system *as a whole* was for the most part observed.[13] In the second edition of this work, published twenty-six years later, Kelsen assumed a closer relationship between validity and effectiveness by declaring that "a norm that is not obeyed by anybody anywhere, in other words, a norm that is not effective at least to some degree, is not regarded as a valid norm".[14] We thus find that, just as Llewellyn came to realize the one-sidedness of a purely behavioristic interpretation of legal processes, Kelsen finally discerned the weaknesses of an attempt to separate the validity of legal norms sharply from the efficacy of such norms, and thus to underrate the empirical component of the law.

An integrative jurisprudence will view the institution of law as an endeavor to transform ethical canons of desirable social conduct into actual ways of community living. A legal order seeks to accomplish this objective by securing widespread acceptance of its normative postulates among the addressees of the law and to impose sanctions for noncompliance upon non-cooperative members of the legal community. To the extent that the prescriptions of the law remain unobserved by lawbreakers, the law dwells in the sphere of ideality. To the extent that the commands and prohibitions of the law have filtered down into the consciousness of the population and have become transmuted into empirical modes of behavior, the law resides in the realm of the actual; it has become a *realized* ideal. Thus, the "ought" and the "is" aspects of normative regulation do not stand towards each other in a posture of separateness and isolation; they display a rather close mutual interaction in the enterprise of subjecting human conduct to the governance of norms.[15]

The life work of Luis Recaséns Siches has given recognition to this situs of the law in the twilight zone between the realm of human ideals and the scene of human action.[16] "Man", he has said, "is a citizen of

[13] Kelsen, *Reine Rechtslehre* (1934), pp. 69-73.

[14] Kelsen, *Reine Rechtslehre*, 2d ed. (1960), p. 10; *Pure Theory of Law* (Knight transl., 1967), p. 11.

[15] See in this connection J. Hall, *Foundations of Jurisprudence* (1973), pp. 153-168.

[16] L. Recaséns Siches, *Panorama del pensamiento jurídico en el siglo XX* (1963), vol. I, pp. 488-495; L. Recaséns Siches, "Human Life, Society and Law", in *Latin American Legal Philosophy* (1946), pp. 26-28.

two worlds, so to speak, of the world of nature and of the world of values and ends; and he stretches a bridge between the two".[17] It has always been clear to him that the law, as a device for mediating between the existential facts and the axiological goals of human social life, has furnished the chief supporting structure for this bridge.

[17] "Human Life, Society and Law", *supra* n. 16, p. 39.