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Reprint of

**Österreichische Zeitschrift für öffentliches Recht**

Band XVIII, Heft 1

(1968)

Springer-Verlag / Wien · New York

Österreichische Zeitschrift für öffentliches Recht *18*, 36–62 (1968)



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(Received October 13, 1966)

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## I. Legal Sociology and Legal Change**

I should like very much to make the interrelationship between legal sociology and legal change very clear right at the beginning. Therefore let us begin with a quotation from an American College textbook on *Social Disorganization* by Mabel A. Elliott and Francis E. Merill:

"Every marriage ceremony in the United States is a reaffirmation of the conception of the monogamous family. Every criminal apprehended and sent to prison is a redefinition of social values with regard to crime. Every department store purchase is an unconscious assent to the social norms related to private property."[1]

This formulation happily emphasizes that the elements *ceaselessly vary* even though society and law *remain unchanged.* In other words, law — even unchanging law — is but a balance of ever-varying individual facts and rules.

The step from the *unchanging* balance of its elements to *legal change* proper is characterized, of course, by a *new balance* between rule and fact elements, occasioned by the origin of new law, by legal development, or by the decline of legal institutions.

Though the authors conclude that social reorganization, introducing a new consensus into society, becomes correspondingly harder to bring about, since we may expect cumulative increase in social disorganization in the future, others have felt that *elimination* of law was one of the prerequisites of perfect society, of any *Golden Age,* past or future.

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** Lecture delivered in the Law School of the University of Copenhagen on October 6, 1966.

[1] Mabel A. Elliott and Francis E. Merrill, Social Disorganization. Third edition. Harper & Brothers (1934). 1950. Pp. XIV + 748, p. 18.

In the last decade, several outstanding investigations were published about future law: whether it is bound forever to be what it always has been, so that Golden Ages will be, if at all, few in the course of the *Next Million Years,* as seen by Sir Charles Galton Darwin[2]. Or whether, on the other hand, *Inventing the Future* might become possible in a way that assures the Paradise of the Common Man, as seen by Professor Dennis Gabor[3]. Maybe the *Social Order Tomorrow* will mean leisure and welfare for the Common Man, while Judicial Power will suffice to protect him against menacing neo-feudalism, as seen by Otto von Habsburg[4]. Or will the blueprint of Communist Society materialize as elaborated in the *Third Party Program* in Moscow[5]?

That something new is stirring in the folds of Society is most obvious from the changes that Economy, War, Power, Science and Procedure — the most important social bases of the law — undergo. Scarcity is more and more yielding to plenty — or at least to affluence. War is yielding to peace — or at least to the "balance of terror". Power is increasingly turned into freedom, assistance, or into resistance to power, civil disobedience. Prejudice and error yield to science — or at least to know-how. Procedures are getting more and more spontaneous or voluntary.

From the perspective of these developments it is easily seen that legal sociology is interested in them as problems of the theory of legal history. Legal sociology is insofar involved as these developments, so far, did not yet reach their final results.

Well observed facts are often more illustrative of legal sociological truths than fat volumes about theory. For instance what Mabel Elliott, the noted criminologist wrote about food and sanitation in county jails, or of the women's prison in Maria Nostra in Hungary which "combines order, cheerfulness, and a belief in the redeemability of the offender with rural life", at once reveals the indefatigable thorough sociologist with an eye for what is important from the sociological point of view. What has been mentioned here is set out in more detail in her *Crime in Modern Society*[6].

Legal-sociological detail *for its own sake* is abundantly found in the daily job, tradition and craftsmanship of judges, lawyers, clerks: in the atmosphere of law practice. This *folklore* of law is, of course, popular in America where one of the most outstanding lawyers, Thurman Arnold, in his autobiography[7] told of the time when he started to practice law

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[2] Sir Charles Galton Darwin, The Next Million Years. A Dolphin Book. Doubleday. Garden City. New York. Pp. 154. 1952.

[3] Dennis Gabor, Inventing the Future. London. Secker & Warburg. Pp. 231. 1963.

[4] Otto von Habsburg, Soziale Ordnung von Morgen. Verlag Herold. München. Zweite Auflage (1957). Pp. 172. 1958.

[5] Text of the Draft Program as translated by Tass, the Official Soviet Press Agency. The New York Times. August 1, 1961, p. 13–20.

[6] Mabel Elliott, Crime in Modern Society. Harper, p. 502–503, 724. 1952.

[7] Thurman Arnold, Fair Fights and Foul. A Dissenting Lawyer's Life. Harcourt, Brace & World, Inc., New York 1965. Pp. XI + 292.

in Wyoming in the early 1920's. A large part of his practice was collecting small accounts from merchants on requests sent to him because of his membership in various lists of collection attorneys. He got fifteen per cent if the bill was collected without suit, and twenty-five per cent if suit was required. Most of those items involved from ten to fifty dollars. But one morning he received in the mail directions to start suit against a large corporation: the amount involved was thirty thousand dollars.

Here was a piece of business that might give him eight or nine thousand dollars, which meant the difference between affluence and poverty. The only trouble was that the corporation was not "doing business" in Wyoming. The Wyoming courts had no jurisdiction over it. The claim had apparently been sent to Mr. Arnold in error. Nevertheless, he decided to take a chance. He sued the corporation in Wyoming and served it by publishing a notice in the newspapers, which was sent to the defendant in Salt Lake City by registered mail. This was called "service by publication".

The corporation immediately filed a notion to quash service of summons on the grounds that they were not doing business in Wyoming and had no property there. Then came the procedural mistake Mr. Arnold had been hoping for. In addition to asking the court to quash the service of summons, counsel for the corporation added the words "and to dismiss the suit". By putting these words in, the defendant had appealed to the general jurisdiction of the Court. It was no longer a special appearance; it was a general appearance ("thank God" thought Mr. Arnold). The corporation had "voluntarily" submitted itself to the jurisdiction of the Wyoming court, and there was no way to pry itself loose. The moving finger had writ, and having writ moved on, showering on Mr. Arnold the largest fee he received that year (p. 65—66).

Behind this satirical and self-ironical side of Thurman Arnold's thinking, or rather in close relation with it, is a serious economical and ideological side as well. The latest version of it may be summed up from the last chapter of his auto-biography: "The Education of the Educated Voter". His starting point is that "prior to the First World War, if a young man on a modest salary had gone to his banker and asked for an unlimited letter of credit to finance a trip to Europe, he would have risked being sent to some institution for the treatment of the insane. Today for a small sum he may obtain an unlimited letter of credit for travel . . ." (p. 273).

Lastly, Arnold sums up his overall philosophy: "The human brain is like a computing machine. When new ideas or new data are fed into it, it flashes electrical impulses into a compartment ordinarily called 'memory'. When the new data hit the memory of either the machine or the mind, the results come forth instantaneously. But what those results are depends upon what has been previously stored in the memory of the machine. The advantage of the computer is that by merely mechanical processes the memory of the machine can be changed to fit realities.

To remove the rag bag of phobias, prejudices, principles, and ideas that condition the reactions of the human computer to new data is a long and painful process. It involves fighting revolutionary wars and endless suffering and slaughter. But gradually the change comes about, principally through the substitution of new words, words that have a different emotional content from those previously used." (p. 285)

The degree of sophistication in these words is hardly surpassed in legal thought. It will be fitting to intercalate two specimens of the highly developed technique of characterizing and appraising the recent work of the Supreme Court done recently by two Yale professors. Fred Rodell interviewed Cief Justice Warren and writes in a rather understanding vein: "As his Court, term by term, extends the protection of the Fourth, Fifth, Sixth and Eighth Amendments to the Constitution — as the guarantee against unreasonable searches and seizures, the privileges against self-incrimination, the right to counsel and other measures of fairness are given even wider scope — Warren beams with a special pleasure and pride."[8]

Professor Rodell goes on: " ... his favorite decision during his tenure as Chief is none of the libertarian 'criminal-coddling' extensions of the Bill of Rights, nor any of the equally libertarian First Amendment rulings on free speach, free press, or free assembly that led to charges that the Court is coddling Communists. It is not even, as most people would probably assume, the first big desegregation case, Brown, in which Warren, less than a year on the Court, performed the near-miracle of achieving not only a unanimous vote but an unanimus opinion ... No, the Chief Justice did not hesitate a split second when I asked him to name his most important opinion. 'Reynolds v. Sims, of course', he said. Reynolds v. Sims was the Court's second major voting-reapportionment ruling, built on Baker v. Carr, two years before. Reynolds v. Sims was technically not one case but six, all decided together, all applying the new constitutional cliché: 'one man, one vote'." (p. 94)

Alexander M. Bickel, Professor of Law in Yale University, on the other hand, in his article[9] points out that in the United States "the constantly recurring institutional problems are the division of powers between the Federal Government and the state, and the division" — perhaps it would be more correct to say in this case: *separation* — "of powers between the Supreme Court and anybody else." He thinks the Warren Court has paid less attention to these problems than it should. The American system confides to the Supreme Court greater power than that of any other judicial body in the world. "It is the power to

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[8] Fred Rodell, The Earl Warren Court. The New York Times Magazine. March 13, 1966, p. 30, 93–100, p. 93.

[9] Alexander M. Bickel, Is the Warren Court too "Political"? The New York Times Magazine. September 25, 1966, p. 30–31, 130–132. See also: U. S. Circuit Judge Irving R. Kaufmann, Miranda and the Police, The Confession Debate Continues. The New York Times Magazine. October 2, 1966, p. 37, 47, 50, 52, 54, 57, 60, 62–64.

render reasoned, principled decisions. There — in the process by which these decisions are reached, not in the results, however good, humane or politic — is the justification of a power that needs justification in a democratic society, and there also is its limit. And the limit is transgressed — again, regardless of the results — and has on occasion been transgressed by the Warren Court, when a decision is rendered that amounts, after all, to nothing but an arbitrary choice." (p. 132) Nor has the Court any *mandate* such as obtained at each election by the Legislative and the Executive Power.

Professor Bickel enumerates five cases decided by the Warren Court to support his thesis. Thus "the striking thing about the Court's handling of the problem in the Miranda situation was its decision not to apply the new rules even in cases quite like the Miranda case itself — and there were a few dozen of these pending — in which defendants whose procedural rights were violated, having been interrogated by police without opportunity given to secure the aid of counsel, were appealing convictions that had not yet become final". Moreover, in the famous reapportionment cases of 1964, "the Court shied away from the full adherence to the principle to which its reasoning led — whether that reasoning be thought right or wrong — namely, one man, one vote. The Court has allowed variations from the principle by this or that percentage point. The labeling of one variation as constitutional and of another as not is a purely arbitrary exercise, as is the allowance of variations at all." Similarly, if in the Ginzburg obscenity case "the Court could find no self-consistent standard", "none that it could explain or even seriously promise to apply to other cases in the future, then why should we accept its decision, whatever it may mean"?

## In the Storm's Eye

It has been an outstanding member of the Supreme Court of the United States (Holmes) who thought they lived there quietly, but it was the calm in the eye of a storm. The story of the establishment and performance of the *Administrative Office of the United States Courts*, as told in a remarkable monograph by its first director[10], escorting the reader right into the storm's eye, is a fascinating spectacle of that storm, seen as it were from within.

The reader is at once aware of the storm when Chief Justice Taft, back in 1921, argues for establishing the Judicial Conference of the United States in hearings before the Senate Committee on the Judiciary: "as there is nobody to supervise" a district judge "it is a wise thing to have his business and what he is doing under mild annual observation".

In the debate, Senator John K. Shields of Tennessee denounced the intervention of the Chief Justice: "It was a matter in which under the Constitution he was not allowed to interfere. It was beyond the functions

[10] Henry P. Chandler, Some Major Advances in the Federal Judicial System 1922–1947. Reprinted from 31 Federal Rules Decisions. Copyright 1963 by West Publishing Co., p. 307–517.

of the judiciary, and solely and purely within the function of the legislative department of the Government. The impropriety of the action of the Chief Justice is obvious and indefensible." (p. 324)

To understand the fury of this particular storm, it may be recalled that Taft was the only President of the United States (1909—1913), who subsequently (1921—1930) was Cief Justice as well. During his term as President Taft, although a Republican, had appointed Democrats to Federal judgeships in a number of instances, believing that they were the best quilified persons available. This irked the powerful Speaker of the House of Representatives, Joseph G. Cannon, a stalwart Republican and led him to remark: "The trouble with Taft is that if he were Pope he would be in favor of appointing a few Protestant cardinals." Later, when he was Chief Justice, Taft told this anectode, adding "it makes no difference what the politics of a Judge may be — but that is not the general opinion" (p. 341).

We get another impression of the storm when the *Federal Rules of Civil Procedure,* characterized as perhaps "the greatest single element of progress in the conduct of the federal trial courts in this century" (p. 515), is adopted by the Supreme Court's order of December 20, 1937, which, however, concluded: "Mr. Justice Brandeis states that he does not approve the adoption of the rules." (p. 503)

There is only a letter, addressed to his brother, which explains why the same Brandeis, who back in 1913 as a practicing lawyer tried to secure legislation authorizing the Supreme Court to regulate by rule the procedure in the federal district courts, was unable, by 1937, to adopt the improvement of federal procedure. "History teaches, I believe", he wrote in that letter, "that the present tendency toward centralization must be arrested, if we are to attain the American ideals, and that for it must be substituted intense development of life through activities in the several states and localities." (p. 504)[11]

Again we sense even from within the storm's eye the ravaging hurricane, Brandeis' resistance being as *epochal,* perhaps even prophetic, as the new code of procedure proved to be both epochal and universally beneficial.

The *Administrative Office* handles the business of the Federal Courts, but *not* that of the Supreme Court of the United States. This was so arranged at the suggestion of Chief Justice Hughes. Basically, the Office prepares their budget and their statistics, serving also as Secretariat for the Judicial Conference.

The questions raised by this reorganization concern both the financial and the statistical (research) aspects of Court administration. Mr.

[11] "His concern lest states be emptied of power without necessity explains in part his dissent from the promulgation of the Federal Rules of Civil Procedure. Although hailed as a notable advance in simplifying and rationalizing the procedural steps in a law suit, the rules seemed to him needlessly to supplant local rules for the governance of trials in the federal district courts." Prof. Paul A. Freund, of Harvard, in: Alison Dunham and Philip B. Kurland, Mr. Justice (The University of Chicago Press, 1956), p. 111.

Chandler does not share the opinion that the Attorney General, because of his political status, could be more effective with the Congress in procuring appropriations than representatives of the courts who lack his political prestige. This opinion nevertheless had some weight. Even Chief Justice Hughes was of the opinion that "as a practical matter he did not know that any great harm had resulted" from the previous handling of the administrative matters of the courts by the Attorney General (p. 399). Such frank admissions are the reward for patient legal-sociological research, especially against sonorous arguments which adumbrated the whole debate. It was said, for instance, that the Courts should not depend, financially and administratively, on the chief litigant before them. Something could also be said for the Court statistics being made, or at least controlled, by experts *independent* of, and uninfluenced by, the Government altogether.

The various points of view find admirable expression in succeeding versions of the Bill and the enacted Law. The Director was to be appointed by the Chief Justice according to the First and Second Version of the Bill (1936, 1939), but by the Supreme Court according to the Law (1939).

The Director would act under the supervision of the Chief Justice and a Committee appointed by him, according to the First Version of the Bill, but under the supervision of the Judicial Conference, according to the Second Version of the Bill and the enacted Law.

The Budget for the Courts is being prepared by the Director, transmitted by the Bureau of the Budget, without revision or power of recommendation, according to the First Version of the Bill. According to the Second Version, estimates for appropriations are prepared by the Director under the supervision of the Judicial Conference, rather than of the Chief Justice as in the First Version of the Bill. Yet the enacted Law follows the First Version of the Bill in requiring the Bureau of the Budget to transmit the estimates "without revision" but adds the words, "subject to the recommendations of the Bureau of the Budget". The grant of this power of recommendation, not granted in the First Version, gives to the Bureau as a practical matter some influence over the shaping of the estimates.

Perhaps this whole development in the Federal Judicial System is best seen in the parenthesis of the two shock waves which hit the American public: the breakdown of the Prohibiton Amendment[12], and President Roosevelt's "court-packing" attempt (1937). In the story just told of the reorganization of the Federal Court System and of its administration, there is involved the sociology of *public opinion,* which suffered the two shock waves, never before experienced. The sociology of the *judicial mind* is involved as well, insofar as it often reacts ambi-

[12] As to the Wickersham Report — "Findings and Recommendations of the National Committee on Prohibition Laws of the United States submitted to President Hoover" (1931) — an analysis by this author may be found in 4 Archiv für Angewandte Soziologie (1932), p. 166—176.

valently, namely both eagerly and reluctantly, whenever their own cherished independence is concerned. Involved is also the sociology of *separation of power,* reminding one of the proverb: *incidit in Scyllam qui vult evitare Charybdim.*

The thorough, immensely illustrative and conscientious monograph of Henry Chandler serves, indeed, as the *retina* of the storm's eye which mirrors the several hits of the giant arms of the great hurricane of our age. These were the aftermath of the First World War issuing in the Russian Revolution, on the one hand, and in the American Prohibition Amendment and its repeal, the havoc wrought being so dramatically displayed by The Wickersham Report on Law Observation and, somewhat later, in the great Depression, on the other hand.

The corresponding advances in the Federal Judicial System were accompanied by patriotic anguish as shown in the case of Brandeis, and some senators: the dilemma being the priority of unity or diversity in the system of Federal Union. The honesty of the work done is warranted by the clear appearance, as it were on the retina of the hurricane's eye, of precisely this clash of opinions.

## Stone on Meta-Sociology of International Law

The most comprehensive, most informative, and at the same time most scholarly treatment of legal sociology is found today in Julius Stone's *Social Dimensions of Law and Justice.* It follows after an interval of ten years his pioneering study of what he had called a "meta-sociology of international law[13].

To begin with the earlier publication, three considerations seem to be in the foreground of the author's attention and concern: (1) that the *actio finium regundorum* between "sociology of law" and "sociological jurisprudence" or „legal sociology" has remained inconclusive (p. 5); (2) that the insulating activities of the State entity threaten to destroy the channels of human communication without which no real international community, with its attendant legal order, can come into being or securely exist (p. 113), and (3) that the principle of effectiveness, because of the specific nature of the international legal order, as one which lacks effective coercive procedure of its own, might even permit without any technical breach of legality, the abolition of the existing international legal order; the system of independent States being eventually converted by world conquest or by treaties which the defeated States are compelled to accept, into the legal order of a *civitas maxima* (p. 135). The author speaks of rules like those of "effectiveness", title by conquest, and the validity of imposed treaties, as a "fascinating meeting point of law and

[13] Julius Stone, Social Dimensions of Law and Justice. Stanford, California, Stanford University Press. 1966. Pp. XXXI + 933; Problems Confronting Sociological Enquiries Concerning International Law. 87 Hague Recueil des Cours (1956), pp. 63–180. Printed for Private Publication only. A. W. Sitjhoff, Leyden, p. 120.

the negation of law, preserving the international legal order even into the moment of its destruction" (p. 134).

He herewith places the problem of legal change, at a point where radical change seems to blur the difference between a perfect state of law and a state of perfect lawlessness, into the most glaring light imaginable.

As regards the *first* point, the terminology used is indeed of slight importance, provided the user remembers that, law itself being a social phenomenon, it does not matter too much whether one emphasizes or not, on each occasion, that jurisprudence of course has a sociological aspect as well and, especially, that legal change is a variety of social change.

Even so it is not superfluous to emphasize that we do *not* mean to imply more than this by the use of the term "sociology". For the use of this loaded term may involve us in some embarrassing implications if applied in the sense and specific acceptation attributed to it by its name-giver Auguste Comte. Even Marxism protests against being stamped as "sociology" and tries to extricate itself from the Comtean overtones of the term such as a religious cult of positivism. Even today, when social sciences such as economics, anthropology, military science, information and public opinion research have made considerable headway, the residual progress of sociological theory is hardly impressive, so that the adjective "sociological" detracts from, rather than adds to, the scientific rank of jurisprudence, while the substantive "legal sociology" or „sociology of law" itself more or less amounts to tautology. This is due, above all, to the self-explanatory circumstance that, even though it may be doubted whether *ubi societas ibi ius,* no such doubt arises as regards the opposite: *ubi ius ibi societas.*

As regards the *second* point, the concern with the breakdown of human communications interestingly underlines the aspect of the sociology of learning and exchange of ideas — Wissenssoziologie — within legal sociology. When the author's courses were held at The Hague Academy, coincidentally with the Hungarian freedom uprising, there was indeed a blank, perhaps the low tide of communication since the end of World War II. Today, when polycentrism replaces the monolith we see better that even prolonged silence, the breakdown of dialogue, nay even the interruption of monologues, is unbearable. People simply do not care incessantly about the impending thermonuclear disaster, simply forget it from time to time, rather than live constantly in the absurd deadly anguish in which such highly sophisticated and authentic studies were written, published and read, as for instance a book with such nerve-racking chapters in it as *The Oceanic System: The Invulnerable Force; The War of the Laboratories,* or: *Negotiations and Diplomacy in Nuclear Parity*[14]. And, indeed, one way of getting rid of insolvable problems, such as among others our legal problems are, is to stop thinking about them.

[14] Oskar Morgenstern, The Question of National Defense. Random House. New York. Pp. XII + 306. 1959.

Perhaps this is the point to intercalate the remark that Stone has served as Lieutenant-Colonel, temporary on special duties (staff of Commander-in-Chief, Australian Military Forces) and Deputy Chairman, Prime Minister's Committee on National Morale, during the Second World War. He devoted searching study especially to *Economic Warfare,* with particular *Discourses* on such questions as "The Long Distance Blockade" as a Response to Technological, Logistical and Economic Change" (p. 503), as well as to the *Law of Naval Warfare,* with particular *Discourses* on Economic Warfare and Naval War-Law and Air and Submarine Warfare and the Rules as to Destruction of Merchant Vessels (p. 571–607), all within his outstanding monograph on *Legal Controls of International Conflict*[15].

In his Hague Lectures, he mentions, among *Intensive Studies of State Official Behavoir in Segments of Rules Affected by Impending or Actual Change or Breakdown,* precisely the problem of "lawful limits of hostile naval operations against ships, both neutral and enemy" as such "which would bring to bear upon the question of the present standing and future prospects of the rules concerned the divers relevant *expertises,* legal, administrative, naval and economic ... Applying these resources to all levels ... it can be hoped that a picture of the standards of economic compulsion, as well as the norms of actual behavior might emerge. And the results may provide some escape from the interminable flood of charge and countercharge which has hitherto overlaid both the law and politics involved." (p. 147)

This is how a man writes who knows the perplexing problems at hand, not from theory only, but from practice as well. Finally, as regards the *third* point, namely the „fascinating meeting point of law and the negation of law", the principle of effectiveness, "preserving the international legal order even into the moment of its destruction", it has its counterpart in municipal legal order as well, being but a special case of what Adolf Merkl has called "Fehlerklausel" — an overall implied clause revalidating and reconfirming *(ratihabitio)* defective acts — which, even in case of a mere *prevalence* of cases of derogation over the pre-established rules, threatens to destroy law in its sociological function[16].

Although the overall implications of the fact that law provides not only for its change, but even for its own disappearance as well, cannot be pursued here, it is highly significant and indeed welcome that Stone independently came to the same conclusion. It must have been more difficult for him to conclude thus, than for those who, within a single lifetime, repeatedly saw the fall and rise of empires, the establishment of law, visiting, taking leave of, single provinces, entire countries and finally, a considerable part of a continent, which soon was also visibly and tangibly set apart from the rest, where law is still respected, by mine fields, barbed wire and other monstrosities, such as the Berlin Wall.

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[15] Julius Stone, Legal Controls of International Conflict. A Treatise on the Dynamics of Disputes- and War-Law. Rinehart & Co., New York. Pp. LV + 851. 1954.

[16] Cf. my Rechtssoziologie, 1934, p. 289–292.

## Sociology of Law or Sociological Jurisprudence?

Back in 1939 Timasheff, a well-known outstanding thinker and former student of Petrazhitsky, conceived of "sociology of law" — seeking natural laws of a scientific nature concerning society in its relation to law — as distinct from „sociological jurisprudence", which he took for a branch of a "science" of jurisprudence. The distinction seems to proceed on the test whether it is some set of universal "laws" of interaction of law and other social phenomena ("sociology of law"), or merely their interaction in a particular time an place (sociological jurisprudence"), which is being examined.

Julius Stone rejects the underlying idea that, while both disciplines cover the same field, the former covers it „idiographically" (being concerned with actual, "concrete" normative systems), the latter covers it nomographically. Botany and zoology can coexist with biology, according to Stone, because their subject-matter is more limited than that of biology. Yet the subject-matter of sociological jurisprudence is identical with that of sociology of law[17].

It is believed that, in this case, differences in the traditional uses of the term *jurisprudence* occasion misunderstanding. In the German acceptation of the term, such as for instance *Begriffsjurisprudenz,* it means specifically *dogmatic* jurisprudence or, to use Wedberg's terminology, the *internal* sentences of law. The difference is reduced hereby to that between "snowstorms are frequent in winter" — which is of course not true everywhere — and "snowstorms are frequent in the Arctic" — which is more nearly true. The typical German *dogmatic jurisprudence* — which Timasheff probably had in mind — differs thus considerably in its meaning from the English term introduced especially by Austin who was interested in *analytical* jurisprudence and *pervading* legal notions.

It must be admitted that the disregard of this distinction by Anglo-American jurists is sometimes painful in the eyes of European ones. Especially Stone's remarkable achievements suffer from disregard of the difference between what concerns *generally* lawyers everywhere and what concerns English, American or Australian lawyers *exclusively.*

Yet this distinction of socio*graphical* and socio*logical* treatment of law should not be exaggerated either, mainly because the historically *unique* often turns out to be the truly *universal.* Accordingly, though *legal sociology* seems to be the more correct characterization, *sociological jurisprudence* ought to be tolerated and even *legal sociography* encouraged. The important thing is that both author and reader *know* what they want.

More serious is Cairns' objection that existing jurisprudence is not „science" but mere "technology" of the law. He proposes a "pure science" to support this technology: "social science jurisprudence". Stone rejects

[17] Julius Stone: Social Dimensions of Law and Justice. Stanford University Press. Pp. XXXV + 933, p. 32.

the proposal, mainly because the law cuts across the whole social process and, consequently, "it must be all the sciences dealing with the social process which are the foundation of the 'technology' of Law"[18].

In sum, Stone believes that progress does not depend on the illusory search for the methodological basis of an autonomous social science or sociology of law but, rather, on what is offered by the existing social sciences, and their underlying philosophical ideas[19].

Similarly resigned — some would say complacent — is Stone's final appraisal of the American realist movement. He thinks "the concerns common to the realists and the more orthodox sociological jurists are far more important than the ephemeral if bitter conflicts which at first flared up between them. In the continuing iconoclastic review of traditional legal concepts of the last thirty or forty years, no clear line divides the work of 'realists' from that of others."[20]

Perhaps it might be interesting to sum up the characterization of the American legal realist movement. Giovanni Tarello[21], as quoted by Stone, points out three main areas of realist service. One was the re-questioning of the general concepts of "law", "legal system", "constitution". Another was a general anti-conceptualist raking over of many specific branches of the law, and the attempt to redesign concepts bearing a closer relation to the facts of social life and the objectives of legal action. A third was a critical overhaul of the generally assumed bases of legal argument and persuasion, centering on setting proper limits to the role of syllogistic argument, on the rejection or radical restatement of the notion of *ratio decidendi,* and (with the late Jerome Frank) the exposure of "fact-uncertainty" alongside "rule-uncertainty" as part of the environment of adjudication.

In his own final summation, Llewellyn repeated his denial that realism was ever "a philosophy attempting a rounded view". Its essence ("astonishingly simple" he thought) lay in "method": "See it fresh. See it as it works."

Stone thinks, accordingly, that no clear line but perhaps only a matter of mood and patience finally separated the concern of American "realism" from the general concerns of sociological jurisprudence. He adds the estimates of Thurman Arnold (1958) to the effect that realistic jurisprudence was a good medium for a sick and troubled society (as in his opinion America was in the early 1930's), and that the main stream of the movement becomes a trickle after the middle thirties. He adds also W. Friedmann's comment to the effect that this is because the "essential postulates" of realism have in the United States become "part and parcel of common practice and writing"[22].

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[18] *Op. cit.*, p. 32.
[19] *Op. cit.*, p. 43.
[20] *Op. cit.*, p. 68.
[21] Il Realismo Giuridico Americano, 1962.
[22] Stone, *op. cit.*, p. 70.

## Legal Realism and Utopias Realized

The reaction to legal realism, as well as to legal utopias more or less realized, was by no means balanced. Even Stone, of whom Pound foretold that he will be "one of the masters", feels obliged to gloss over the vehemence with which his master was attacked and with which he has reacted. In some respects Stone is indeed walking in Pound's footsteps: in the "botanical" care in classification, in volubility, in seeking a, not always pioneering, balance amidst the welter of conflicting theories and their verbal formulations.

American legal realism was certainly an explosion and, no less certainly, it indulged in iconoclasm. Legal thought, especially pioneering legal thought, cannot rest on the laurels of classificatory natural history. One is reminded of this by Professor Stone's otherwise so able criticism of recent Soviet legal thought. Of course, their "State of the Whole People" "imports the claim that the classless society has already been achieved"[23]. He objects, especially, that the welcome degree of liberalization does "not necessarily presage the attainment of a *law-free* communist society". Yet he expects that it will be reiterated, as against his doubts, that "Statal functions ... are already disappearing and being replaced by societal self-administration". He concludes that, if taken seriously, "the assertion returns us to the euphorial level of prophecy of the death of state and law"[24].

But why grudge even some euphoria if needed hard enough by hard-working people like the Russians? Why bother whether their Communist Party will be able to achieve their Third Program? Why grudge Khrushchev's political testament and farewell message to his fatherland? After all, he was truly popular and caught the imagination throughout the world, whether he pounded the table with his shoe in the United Nations or complained because he was not admitted to Disneyland. The *Third Party Program* has its well-deserved place in the series of documents such as *The Next Million Years* by Sir Charles Galton Darwin, *Soziale Ordnung von Morgen* by Otto von Habsburg, *Inventing the Future* by Professor Dennis Gabor and *Natural Law and Technology* by Scott Buchanan. It presents the shining prospects as well as the grave obstacles fairly and impressively enough. Though not as disillusioning as the prophecy of Sir Charles, neither is it more optimistic than the other three forecasts.

No matter how incredulous one is, he need not try to save the Russians, a typically *ajuridical* people[25], from nefarious consequences of their blueprint based on automation and leisure plus the emergence of the New Man. Whoever is afraid they could perform what the blueprint sketches should try to out-perform them. Whether he listens to the voice of courtesy, sympathy or, on the contrary, to the promptings of egoism

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[23] *Op. cit.*, p. 514.

[24] *Op. cit.*, p. 515.

[25] George S. Guins, Russia's Place in World History. 22 Russian Review 355–368 (1963), p. 359–360.

and fear, an outsider has neither reason nor any chance to disprove the blueprint, provided he neither had nailed down himself previously to any narrow — or perhaps on the contrary too elastic — conception of law, nor can he be sure how far and how long society will be unable to dispense with law, except in the sense of social regularity.

The narrow interpretation of the independence of law, or the dependence of society on law, on the one hand, and the restrictive interpretation of American legal realism, on the other hand, testify to the limits of scientific interest on the part of sociological jurisprudence.

## Interdependence and Objectivations

The criticism applied to Stone as regards the significance of legal realism, on the one hand, and the fading role of law as forseen in the Third Program of the Soviet Communist Party, on the other hand, should by no means lessen admiration for the wealth of information and incisive, enlightening and encyclopaedic treatment in his *Social Dimensions of Law and Justice.*

It will perhaps clarify our respective views if I try to point out the precise difference between our approach to the dependence, independence, or interdependence of law and society.

Looking back at my own formulations of the interrelationship, I find that perhaps the most popular interpretation will turn out as the most obvious as well. Society presents different aspects. Depending on the point from where it is looked at, it has many faces. It is *economy* if we are interested primarily in statisfying want from scarce supply.

But to anyone who is interested, rather, in mutual annihilation of human behavior, society presents another face, for he looks at it from the angle of *warfare.* Under the aspect of conditioning rather than conditioned behavior, society presents its face of *power.*

It is seen as *culture* if we look at it from the point of view of *truth or error* (beauty or ugliness, virtue or vice). It is seen as *law* from the point of view of the most elaborate procedure (less elaborate ones being habit, custom, varieties of social control). *Procedure* is any conduct (behavior) observing some pre-established pattern.

Any social event is considered under *double* origination, like any performance in the theater. Hamlet kills Laertes because this follows from his character as seen by Shakespeare. But the *actor* who plays Hamlet performs the movements, suggesting the duel, because he wants to follow the received instructions and his own interpretation. This allows for two or more ways of "causation" including "determinism" and "indeterminism" and, therefore, both behavior and conduct. Any social performance is seen, in this sense, as a *theater performance.* This should explain both the "symbols of government" and the rather important phenomenon that a modicum of *mental irritation* — from annoyance, to ignorant or learned error, mass illusions and madness — is seldom completely absent from society.

In this simplified, popular version, the different objectivations, which at the same time are considered as bases of the law as well, are not

thought of as establishing any hierarchical order. In other words, it is by no means believed, or tacitly presupposed, that economy is more independent than law, or culture more dependent than warfare or power. What *is* presupposed, however, is that more basic needs, such as hunger and peace, are more urgent while they act from a greater distance from law, whereas culture and procedure, even though less urgent, act on law more immediately.

The problem of independence which seems to bother Professor Stone does not pose any difficulty in a view which admits of social objectivations. Law does not threaten to be dissolved into economy, warfare, power, culture or procedure. The objectivations, though distinct enough to be treated separately, in their present unprecedented progress rather threaten to lose their own distinctive features, all of them.

Economy, in an affluent society, not to speak of the hoped-for welfare world, threatens to lose the distinctive mark of *scarcity* (in favor of plenty). Warfare is becoming more and more inconclusive, though omnipresent, and peaceful arrangement of conflicts more and more the only way out. Power is increasingly diffused, while freedom gains by plenty, leisure, culture and science. Science alone opens prospects, from health to automation to space travel, which herald the fullest freedom man ever could hope for. Procedures, too, will certainly soften and coalesce (not to speak of their automation), people witnessing less occasion for legal conflict than the wealthy American today who travels abroad in friendly countries. In this sense Utopia is already real for quite a number of people and some believe and wish it were real for all. The still remaining social procedures might well be *called* law for any time desired: they are not law even now *only* because so called. And if the Russians want to call them even now "rules of self-government" — a Western Lawyer surely cannot forbid them to do so, nor has he any reason to do so.

On the other hand, anybody in his senses has reason at least to suspect that the people living in leisure and plenty, war being practically eliminated, a kind of world welfare organized, in full enjoyment of all the blessings of science — the social rules observed will also be so different that to call them law will sound a bit queer to anyone conversant with the present usage of the term.

## East-West Exchanges and Sociological Jurisprudence

There is by now a considerable amount of serious literature about the chance of mutual agreement, or at least comprehension, between Eastern and Western authorities on matters of law[26]. Whether one looks

[26] Foremost one should place the basic study made by Ilmar Tammelo, Coexistence and Communication: Theory and Reality in Soviet Approaches to International Law. Sydney Law Review (1964), 29—58. The rest includes Pound, Soviet Civil Law: A Review, 50 Michigan Law Review (1951), 95—112; Bodenheimer, The Impasse of Soviet Legal Philosophy, 38 Cornell Law Quarterly (1952), 51—72; Timasheff, Das Wesen des Sowietrechts, Separatabdruck aus der Schweizerischen Juristen-Zeitung, Heft 12 (1956), 1—8; Robert

at the chance with optimism, pessimism, or detached interest, the phenomenon of stubborn, intentional, premeditated misunderstanding is of prime sociological interest.

It should be noted, first of all, that attempts to restore mutual understanding, at the very least about the matters in dispute, originated so far mostly from the West. This points to the greater interest of the East in fanning the flames of discord. The Western critic, on the other hand, was usually more interested in restoring some consensus at least among lawyers, sometimes even at the price of questionable concessions.

There are some, however, who see the trap and prudently avoid it. Dr. Lievens belongs to this class of perspicacious critics. He points out, for instance, Academician Szabó's view that bourgeois jurisprudence "always considered as just the point of view which, scientific truth notwithstanding, was more convenient to the ruling class at a given stage of evolution". The reviewer adds: "Rien de tel dans la société socialiste" and continues with quoting the dubious explanation that only in the latter kind of society are given all the objective conditions for a really scientific interpretation. Here, at least, it is obvious that criticism is not debased to flattery. On the contrary, it is merely sugarcoated by way of irony that cannot be misunderstood.

If both sides tried to make each other ridiculous, instead of contemptible, this would probably render their dispute more conducive both to mutual understanding and human progress. Needless to say that Dr. Lievens sums up the shortcomings of Marxist jurisprudence more explicitly as well. But the vitriol of ridicule renders his otherwise exceedingly polite review rather invulnerable.

Tammelo's learned paper is the most thorough search for eliminating the stumbling blocks in the way of coexistence and communication. One of his best arguments is that the "withering away" of State and Law doctrine is not the absurdity most Western Lawyers understand by it, who think it stems from Soviet utopianism. This view is illfounded, in the opinion of Tammelo, "if one bears in mind that neither the word 'State' nor the word 'Law' mean, in Soviet doctrine, the same thing we are accustomed to understand by these terms. What remains after the definitive advent of communism, when the process of 'whithering away' of these entities (as conceived of by the Soviet thinkers) has taken its course, is still something that Western political and legal thinkers would call 'State' and 'Law'." (p. 34)

One must not necessarily agree with this conclusion in order to share the almost explosive idea that legal concepts of indeterminate reference may play a considerable role in shaping legal change. This idea is forcefully brought out by the Moscow Professor Grigory I. Tunkin, whom Tammelo quotes: "for thousands of years jurists have not been

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Lievens, L'interprétation en droit socialiste, Revue de droit international et de droit comparé, Extrait du fascicule Nos. 3, 4 (1961), 172–183; Stephen L. Sass, K. Kulcsár, A jogszociológia problemái (Problems of the sociology of law), Budapest, 1960. Pp. 269, Book review in 11 The American Journal of Comparative Law (1962), 473–478.

able to agree on what is law. And still throughout all this time law existed. So States may profoundly disagree as to the nature of norms of international law, but this disagreement does not create an insurmountable obstacle to reaching an agreement relating to accepting specific rules as norms of international law."[27]

At the end of his admirable paper, Tammelo expresses strong doubts "about the fitness of man as he actually is to live in any community of a considerable size governed by the principle of brotherly love". Moreover, he thinks it is but commonplace when he says that "we also cannot believe that material goods can ever become so abundent that everyone's experienced needs can be satisfied . . ." (p. 56). He goes even so far as nailing down as common belief: "We do not know whether it agrees with human nature to be delivered from want altogether . . . we have fears that the "administration of things", instead of "administration of man", . . . can be realized only when men, too, are treated as things. And we are afraid that when jails are closed in the process of the "withering away of the State", a corresponding number of asylums must be opened" (p. 57).

These may be interesting examples of a state of "communication breakdown", though it may be doubted whether these specific worries of an otherwise so enlightened and progressive author are widespread or general. Is this not the characteristic ambivalence of wavering attitude with an outstanding scholar, who at the same time goes as far as recognizing that "Communism is the most resolute attempt of all human history to improve the human lot"? This is followed, of course, immediately by the *countervailing* argument, castigating those "incredulous or oblivious of the perversions which have manifested themselves in the course of the striving to convert . . . ideals into reality" (p. 58). At last, a final formulation is found: "we may wish that what lies beyond these horizons, the future state of human affairs unknown to us all, may be such that their way and our way or ways may ultimately converge" (p. 58).

The secret of East-West exchanges in the legal field seems to be locating prejudice and obsolete stumbling blocks in the way of realistic understanding. The Tunkin-Tammelo exchange is so far unsurpassed and it obviously cleared the atmosphere. The rest is no business for mere jurists but for statesmen, who are able to overcome their inclination to listen to siren songs.

## II. Legal Change, Past and Future*

### Comparative Legal History

A comparison of the methods by means of which legal historians have contributed, by mid-twentieth century, to the advance of legal

[27] G. I. Tunkin, "Co-existence and International Law". 95 Recueil des Cours (1958), 5—78, p. 59.

* Lecture delivered in the Law School of the University of Copenhagen on October 7, and in the Law School of the University of Gand (Belgium) on October 10, 1966.

science may cast some light on the conditions of the advance in other fields as well. The complaint that legal history was not legal enough, or not historical enough, has lost much of its force.

The advance is conspicuous in the combination of dynamic and static description. This is achieved mainly by dividing the course of events into periods, and also separating the lines of social and legal development. The result is a body of law characterizing that period. In some of the works of Holdsworth, Olivier-Martin, Planitz and Fehr, for instance, foundations (social and political conditions), constitution, the body of law, and its sources, are so sharply separated, in each period, that legal history assumes the character of a *legal science of the past.* It tends to turn into *cinematographic* legal *sociology* of the past.

This important methodological device, calculated to bring law and history into closer contact and focus, is fully operative also with James Willard Hurst. It is eminently applicable to American Law. For, whereas Europeans generally abandon their legal histories somewhere in the XIX. Century, and treat with greatest success the medieval period, American legal history is essentially XVIII—XX. Century history. Hurst divides it into two main periods and calls the 1870's the "watershed decade", contrasting the permanence of institutions with change in substantive law[28].

Hungarian legal history is divided by Eckhart[29] into three main periods, marked by outstanding historical events, such as the foundation of the Christian Kingdom in 1000, the battle of Mohács in 1526, and the war of independence in 1848. Although the whole background of the law changed around the above mentioned turning points, the change in the law was institutional rather than substantive, owing to the emergence of a famous book just before the turn of the second and third period. This, Werböczy's *Tripartitum,* conserved the law's substantive unity even in the changed institutional framework of Habsburg monarchy, Transylvanian principality, and Turkish occupation.

Let us consult the two last-named authors, perhaps less well-known than the others, from the point of view of scientific advance.

Hurst examines lawmaking by five agencies — legislature, courts, constitution-makers, bar, executive — in comparison, profiting by the opportunity the United States offers for such study by reason of the *division* of power between States and Nation, and by *separation* of power under the Constitutions (between legislative, judicial and executive powers within the individual states and the Federal Government as well).

His basic division of the two *main* periods is, of course, qualified by a number of sub-periods. We may mention differences in the respective role of lawmaking agencies. Other sub-periods appear in the development of the court system.

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[28] James Willard Hurst, The Growth of American Law. The Law Makers. 1950. Pp. XIII + 502.

[29] Ferenc Eckhart, Magyar Alkotmány- és Jogtörténet (Hungarian Constitutional and Legal History). Budapest. 1946. Pp. 468.

Hurst speaks of the 1870's as a "watershed decade that divided periods distinguished by great acceleration in the range, depth, and speed of social change" (p. 336). Contrasting the growth of substantive law with the toughness of institutions, he concludes that "from the pre-Civil War years we inherit a set of legal agencies and procedures ... But if we ask what jobs these agencies are doing, we find that their important work has to do with issues that scarcely existed before 1870." (p. 4)

From 1750 until about the 1820's the legislature led in the growth of law. Then the courts began two generations of leadership. Again, the judicial veto was exerted, against State legislatures, at its fullest between 1875 and 1905, but by 1910 the courts were on the defensive. Coinciding with this latter date, the full-scale development of the administrative process, after 1910, stimulated, for the first time after the Revolution, first-rate institutional invention by lawyers in the field of *public affairs* (p. 337). The three years period of 1934—1937 is, of course, in the federal field, "our most significant testimony of the relative weight of judicial and legislative policy making in the face of crisis" (p. 29). However, in the field of *private relations,* the defeat of the codification movement in New York State was the decisive period, around the middle of the nineteenth century, in determining the relative weight of statutory and judge-made elements in the law. The nation-wide copying of Field's Code of Civil Procedure, at that time, was the most sweeping legislative contribution. But the general Field Code was copied only in a handful of states. Even in civil procedure, opinion soon turned to a new approach, after the English judicial reform in 1873, and full rule-making powers were granted to the courts, beginning with 1912, and extending to some 19 states by 1940. The nationwide adoption of Uniform State Laws, characteristically in fields where law was well settled (negotiable instruments, warehouse receipts, sales), marked the period of two decades around the turn of the century (1896—1906).

The Federal Constitution was in sharp contrast to State constitutions which hampered judicial reform by imposing limits on local legislation. After 1900, Pound and others called for reform and unification of state courts. States merged in one trial court jurisdiction in law, equity, and in major criminal cases. Judicial councils and conferences were created. The marked independence of auxiliary agencies (clerk, trial jury), which resulted in the very limited role of the trial judge, and management of the case by attorneys, was cured by indirect change, less frequent use of the jury, for example.

Appellate jurisdiction, a tangled part of United States legal history, much influenced by the lawmaking done by the judges between 1810 and 1880, and hampered by its own unwieldy model, the *writ of error,* has been improved by eliminating duplication, giving the Supreme Court discretionary power *(writ of certiorari)* to order up cases for review and by a more practical attitude in using procedure as a means rather than a source of substantive rights (p. 104).

In the long-range trends in *federal* jurisdiction, *expansion* was marked chiefly by the 1875 Act which gave federal courts the full range of constitutional jurisdiction, and the Circuit Court of Appeals Act of 1891, which established powerful intermediate appellate courts. Thus the review as of right in the Supreme Court could be *restricted.* The new principle, however, that the Court was to decide the most important issues only, concerning the federal balance and fundamental rights, was finally settled only by the Act of 1925 which made all cases disposed of in the circuit courts of appeals reviewable in the Supreme Court only on grant of *Certiorari* (p. 121).

But overriding all the change of main periods and sub-periods, there was also *permanence* in American legal history as a whole, characterized mostly by the toughness of legal *institutions.* Thus legislature changed little in structure from 1787 to 1950, keeping the full measure of its inherited powers, although it lost something of its representative character and public standing. The structure and powers of *state courts* were about the same in 1950 as they were one hundred years before. The history of the *federal courts* was marked by more change. In the *constitution-making* process the factors of permanence and change were closely interrelated. By its independence from everyday institutions of government, it not only facilitated certain changes, but also insured that, once made, they would stay. Since constitution-making, on the whole, enhanced the power of the courts, permanence proved to be the stronger factor in the end result. Permanent was also the strong *executive* power of the President, although there was considerable change in the executive branch, and the Governor emerged as a policy leader only after the turn of the century. Permanent were also the *key-characteristics* of the growth of American law: its speed, anonymity, diversity sprinkled with uniformity, and a highly instrumental attitude toward law.

Thus the advance in more scientific description of both the law and its development, by means of combining static with dynamic description, is explained by the use of the device of breaking up the flow of events into periods, *provided* that these periods serve as yardsticks to measure both permanence and change, simultaneously. For these are intertwined in varying measures in all periods; the skilful division of the latter *describes* the measure of their admixture.

Eckhart, dealing with older, broader historical periods, and with more enigmatic elements of permanence and change, applies the same methodical device with success. What is remarkable is the dramatic clash of the old and new ways of life, and institutions, at the turning point of each main period. Thus they are sharply separated but, at the same time, the memories of old institutions live long to influence the new ones, even after the violent suppression of the former. This was true of the pagan tribal organization; its traces may be found in the principles of inheritance, for example. At long last, the tribal authority of the Árpád dynasty blends into the Christian *charisma* of Saint Kings of the same dynasty, to produce that peculiar form of loyalty, grafted on a stubborn sense of independence, which is symbolized in the Hungarian Holy Crown.

The same is true of the survival of a strong feeling for independence which characterizes constitutional struggles with the Habsburgs, even though their power was the only hope for liberation from Turkish occupation. This trend runs like a red thread through the history of the principality of Transylvania, where Protestantism took firm root, whence national uprisings started, in alliance with Western powers, under Bocskay, Bethlen, Thököly and Rákóczi. This dualism of loyalty and independence is the central theme of Hungarian constitutional history.

Clear demonstration of interwoven elements of permanence and change seems to be the noteworthy scientific achievement. For instance, during the medieval period, the development of the Estates of the Realm is going on. By the key-word "Kings's servant" — *serviens regis* — Eckhart is able to locate the phenomenon. This term, stemming from the times *before* these 'servants' came to be called also 'noblemen', was preserved in the Hungarian name of a county office. The Latin equivalent — *iudex servientium* — of the Hungarian term — *szolgabiró* — explains why it came to be alternatively used, *after* nobility arose, with the Latin term *iudex nobilium* which means, of course, "judge of noblemen" for which again, the somewhat derisory Hungarian equivalent was the abbreviation *"judlium"*.

The "service" of these "servants" was, of course, military service, the considerable expense of which was paid by the "servant" himself from the revenue of land possessed by him. Whoever could do so, was raised socially; all others sank. This social ascent and descent, based on military valor notable enough to be rewarded by donation of land, resulted eventually in the immunity of such land from exaction of (other) services for the king, and in corresponding transfer to the landlord of *jurisdiction* over those living on the land. Thus developed *villeinage* as the counterpart of nobility.

But the key-word "servant" explains even more. Nobility organized in the XIII. Century, its privileges being granted by the Golden Bull — *Bulla Aurea* — of 1222, its counties exercising jurisdiction from 1232 onward. Their assembly was called before the end of the century *parlamentum publicum*. Eckhart believes that the assembly of 1267 may be regarded as the first one worthy of that name (p. 109).

Moreover, in his opinion, the grand inquest — *requisitio* — held in judicial assembly — *proclamata congregatio* — in the counties by the Palatine, bears comparison with the Anglo-Norman jury (p. 399).

The development of the court system — *iudices ordinarii regni* — is significant from the point of view of scientific verification. It presents an identical process, thrice repeated within the XII.—XIII. Centuries, of high judicial office branching off from the royal household. The deciphering, as it were from mirror writing, of early statutes, casting light on social conditions, is another major scientific achievement.

Between 1526 and 1848, the overall picture of a well-defined main period is also qualified by an impressive variety of sub-periods, slowly accumulating changes in the social structure, sudden uprisings which blocked Habsburg absolutism even at the zenith of its power, and the

vicious circle between national independence and social progress, enlightened absolutism and reactionary gentry, the function of the latter becoming more and more hollow, meaningless.

The basic fact was, however, Turkish occupation and Habsburg government from abroad, by aliens, which entirely changed the mental climate. A clear picture of the social position of the villeins — *iobbagiones* — is presented. Their lot became especially heavy after the peasant revolt led by Dózsa in 1514. On the other hand, worsening of the peasant's condition was pretty general in that age. The condition of Polish, Rumanian and Russian peasants was even worse. There was difference and movement within the peasant class itself. There was migration, flight, exemption, rise into nobility. In territories liberated from the Turk, there were *contracts* which fixed the obligations of the whole village in a yearly lump sum, luring masses of German immigrants into the country by offering the peasant favorable conditions. The *Urbarium* of 1767, a conservative reform decree of Maria Theresa, offers an admirable picture of the precise legal situation of peasants. One possessing an entire lot — *sessio* — is comparable to a small landholder, but by no means to a proletarian farm hand. The majority did not posses an entire lot but, in principle at least, even a 1/8 lot should be enough to maintain the villein and his family, after all his obligations had been performed (p. 216).

Thus the most impressive result of Eckhart's historiography is the discovery of hidden channels of change, of socio-legal ascent and descent, even within the seemingly stable periods. But he succeeds also in exhibiting the thread of permanent elements even within the texture of turbulent change.

## Changing Ideas about Legal Change

In our time ideas are changing about the very concept of law: contradictory definitions of law such as the traditional and the revolutionary (Marxian) one imply that, however sincerely a reconciliation is striven at, in sober logic it is impossible. Everybody knows that who ever read the official version of a publicized show-trial, whether that of Cardinal Mindszenty, for example, or that of László Rajk.

This uneasiness about the very definition of law is mirrored in the literature dealing, directly or indirectly, with the *crisis* of law and civilization. Buchanan's diagnosis of natural law and teleology, for example, is significant because he focusses attention on the great historical crises of law, characterized by the confusion between ends and means, as well as by the arts and sciences getting out of hand. The following passage focusses attention upon his idea of crisis:

"The Greek historians Thucydides and Herodotus saw events this way, law as the human reason of the community, full of *hubris* and leading inevitably to *nemesis,* and visited finally by divinity ... If this is at all valid as a historic vision, Christianity is the climactic theophany for a series of tragic episodes in Hellenic civilization." (Buchanan,

Scott, Natural Law and Teleology, in: Natural Law and Modern Society. 1963, p. 106.)

The corrected formula of Kant's categorical imperative — that every part of nature, not just mankind, is to be treated as end as well as means — is calculated by Buchanan to cure the "technological phenomenon" and thereby to restore the harmony of sciences lost with the Renaissance.

Buchanan would enthrone *ecology* which ought to transform the world into a kind of Tennessee Valley Authority. Yet it is at least doubtful whether the "celestial clock", if run down, could be wound up again this way. Some may doubt also whether the sciences can be turned back into their Aristotelian version.

The reformulation of the categorical imperative may be, perhaps, understood as qualifying such use of nature as the atomic bomb — or exhausting the oil and coal deposits, or depriving future generations of natural resources unnecessarily wasted, or preparing for them the almost inevitable general conflagration — crimes so heinous as may be aptly characterized also as religious *sacrilege.* They amount to *something unheard-of* in the normal course of past history.

It would be hard, indeed, to state when this kind of "sacrilege" originated. Dit it begin with the Industrial Revolution, or with the First World War, or during its aftermath with the various dictatorships and totalitarianisms which, during the Second World War, almost logically led to Hiroshima, Nagasaki, and the Cold War? Were those early "dictators" the stormy petrels to announce the inevitable cataclysm?

Others have tried to scan the horizon in order to see what is in store for mankind in the future. Sir Charles Galton Darwin specializes in *The Next Million Years,* a time long enough to produce a new species. Otto von Habsburg focusses his attention rather on the immediate effects of nuclear fission and automation. Professor Dennis Gabor discovered the fruitful idea of *Inventing the Future,* based not only on his superior knowledge of technology but also on a thorough acquaintance with classical utopian literature. In the future thus invented, the nuclear danger is bridled and automation renders a full life possible for all. Finally, the *Third Program of the Soviet Communist Party* heralds a communist society within the lifetime of the present generation and offers a rather detailed, although still sketchy account, of the transformation of law into social and moral rules of behavior.

## Individualism and Collectivism

Just as the Moscow Program makes concessions to individualism, even though grudgingly and at the lowest bargain price, thus keeping intact the *primacy* of collectivism, Otto von Habsburg applies the principle of *subsidiarity* in order to reconcile individual freedom, natural law and state intervention. Nor could Otto von Habsburg, who rejects Renaissance, Humanism, Revolution, Capitalism and Liberalism, be classified simply as individualist in the sense in wich John Stuart Mill was one.

Nevertheless, when it comes to the decisive alternative, he formulates it in terms of freedom or tyranny: "We have to decide whether we want a free society of independent individuals or a new form of feudalism." There can be little doubt about his preference when he advocates *planning for freedom:* "Our planning should ensure that a great majority of free, independent existences emerge in the future state, who share the possession of the means of production and steer their own lives, within the framework of the general interest, according to their own judgment." (p. 86)

## Effortless Rule of Law

With Otto von Habsburg, the *primacy of the judiciary* is perhaps the outstanding feature, advocated chiefly because their *independence* renders the judges the suitable safeguard of individual freedom, and thus of the rule of law. The function of the judiciary is characterized as drawing the limit, and applying the principles of the constitution which mirrors natural law and consists of a few basic principles only. Not only legislative and executive power are pushed into the background. The state itself, and with it government as well, are considered as merely *subsidiary* as compared with natural law. Yet the primacy of politics is advocated as compared with economics.

While there may be some doubt about the role of law in a society in which leisure and free movement are assured and all live in luxury, the primacy of free individual initiative, the shares of public enterprises freely acquired and, especially, the constant vigilance against neo-feudalism, leave little doubt about the preference by Otto von Habsburg for a future society of free individuals who, nevertheless, and always within limits, would not shrink from collectivistic measures if such were confirmed, subsidiarily, by natural law or, simply, by reasonable common individual interests.

In comparison, Buchanan may be mentioned who endows all nature, that is, all the citizens of the Empire of Nature, with autonomy. Sir Charles Galton Darwin, on the other hand, lets merciless blind natural selection, determinism prevail. Finally, with Professor Dennis Gabor, science and invention will compensate for the lost aggressive appetite, for gambling risk and satisfaction, as well as for the lost interest in a future which hardly holds surprises any more. The Moscow Program hardly considers the chance that full-fledged communism may prove deadly boring.

Only the Moscow Program expressly mentions the withering away of the state. Otto von Habsburg characterizes the future state as under the rule of law, if not precisely a government of laws. With Sir Charles Galton Darwin, the laws are but devices of survival in the struggle for life, the inevitable products of an inevitable cause. Accordingly, the imperative theory of law is expected to be everlasting. Should the cause cease to operate, however, as in the still possible golden ages, however fleeting and partial only, the effect could still possibly happen due to other causes. For people could, of course, observe the same rules for

different reasons which they had observed so far only in order to survive. This, in a capsule, is the whole trick in "withering away" as well.

With Professor Gabor, lawyers will be the useful adjuncts of the scientists inventing the future. Law will be probably more sophisticated. Otherwise, Professor Gabor like Otto von Habsburg, would use law to copy the spontaneous stirrings of human nature and, even if this necessitated some deception, law would be observed voluntarily like the promptings of human nature.

Whatever the interpretation, law in its perfection is imagined as the rules of behavior which the clerk, the craftsman, the professional soldier, musician or actor, physician, teacher, horseman, pilot, engineer, and soon the spaceman, observe as their *second nature*.

## Theophany and Natural Law

According to Sir Charles Galton Darwin, the law of the variation of species guarantees the survival of law for the next million years. Science's law serves as warrant for both Malthus and Austin, both for the theory of population and for the imperative theory of law. This is one of the symptoms of the intimate tie between natural law and science discovered by Scott Buchanan. Of course, the suspicion may always arise whether wishful thinking did not play a part in shaping the scientific law so handy for the purposes of Malthus and Austin.

Buchanan, anyway, goes on to demonstrate that the dialectics of Plato discovered between opposites a logical infinitude, reminiscent of the infinitude discovered by mathematics between any two members of a series of numbers: their fractions. Gabor's idea that the new physics will include an element of finality, or purposefulness, which had been banned from science since the time of Aristotle, is also reminiscent of Scott Buchanan who wants to restore Aristotelian science. One may well ask: Will this wind up the celestial clock and render theophany visible again?

There is virtual unanimity among these authors as to the extraordinary, giant breakthrough of science. One gets the impression of natural law riding the new science breaking through the sound and heat barriers. The Moscow Party proclaims that it knows the laws of social development. Sir Charles knows of irreversible changes in the course of history always repeating herself. Still there is room for golden ages in it — during which one would suspect that the celestial clock might be wound up, if the "theory of creeds" holds true, so reminiscent of the myths of Sorel. For this would at least keep civilization within the same races which thus would dominate the world! Only Otto von Habsburg, to whom theophany is an article of faith, sticks to the cyclical view of history based on free will, a history of perpetual beginning. Accordingly, it depends on man alone whether he follows natural law and uses the bounty of the scientific breakthrough for freedom or abject tyranny.

Yet the detailed proposals are rather divergent. Take population. While Professor Gabor would limit the number of children to two per

family, Otto von Habsburg would pay bonuses to the parents of numerous children, honoring them — as once Francis Bacon did — as the "creditors of the prince". Sir Charles Galton Darwin expects *homo paediphilus* to ensure the survival of permanently civilized races — possibly resulting in an irreversible golden age. Moscow is silent on the problem. The family was never popular either with communists or with fascists. It served always as a bulwark for tempered individualism.

The basic common core of these various new versions of natural law and theophany is, perhaps, that the knowledge and mastery of the laws of the science of nature render easier the discovery and observance of natural law as well. Theophany is perhaps the revelation of this interdependence on a grand scale, which stirs in man the characteristic awe for the divine.

If Otto von Habsburg emphasizes the primacy of the judiciary, it is because the independent discovery and application of those principles which the creator himself prescribed to man is more important than either legislation or executive power. Natural law being reduced to the few principles just mentioned, the constitution also being reduced to their enactment, and the need of the near future being just distribution rather than increase in the production of goods, the legislative and executive powers seem to wither away as compared with the judicial.

To sum up: eternal law is seen today through new spectacles. Those of Otto von Habsburg show a classless society if the plans of neofeudalism are thwarted, which wants to expropriate the state. Leisure, free movement and, above all, breaking through the sound and heat barriers, both in the literal and the figurative sense, herald the advent of a world which includes all the former breakthroughs in a new oecumenical sense.

In the Moscow Program, the Party's knowledge of the scientific laws of society should replace the Divine providence. The theoretical atheism of the movement automatically seems to deify the Party, either as a collective or in the form of the "cult of the individual". With its monolithic structure breaking down, the world movement presents the spectacle of several warring creeds, all of them infallible. The scientific laws of society, known to the Party alone, is the precise form of communist natural law, now itself presenting a variety of versions.

With Sir Charles Galton Darwin, theophany is hidden in his interesting theory of creeds. With Professor Dennis Gabor, we find inventing, circumventing obstacles, and drafting of primary importance. With the Moscow Program, the doctrine is hammered out at each turn by the Party and, as a result, the latest Plan is paramount, thus stressing the primacy of the legislative collective will. With Buchanan, the "celestial clock" seems to be ultimately decisive which may mean religion, supernatural sanction, or merely the mythological awe at the sight of overwhelming, disarming proportions. The modern cult of the "myth" is to be understood in a sense analogous to that attributed by Sir Charles to "creeds" in general.

All these trends seem to converge on a common sense interpretation of the reciprocal interdependence of science, natural law and theophany. At present, mankind is overawed by the giant steps made by science and technology and by the corresponding dangers of imminent world catastrophe. The dimensions of this gigantic progress simultaneously rouse the wildest expectations and the deepest anxiety. When these will be reconciled in the way the previous clashes between former civilizations have eventually been reconciled, theophany will be experienced in the sense of all-encompassing order. At present, this is not yet visible, mainly because of the ever-present danger of atomic war, the rift between science and humanities, and the failure of translating the technological revolution into economic plenty everywhere in the world. All this is much aggravated by the ideological division of mankind as well as by the obvious impossibility to establish at once the same prosperity everywhere.

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