ON THE CONVERGENCE OF LAWS AND NORMS

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Law cannot be effective as an instrument of change unless it is (*a*) backed by great authority or (*b*) corresponds with the widely shared sentiments of the society. In open societies, where authority is problematic and the official use of force is constrained, normative acceptance of laws is particularly important for their successful functioning. The question then arises as to whether open societies can accept and normatively approve laws that work to the advantage of previously disadvantaged groups. If that does occur, it is important to discover the conditions under which normative support for such equalizing laws is most likely to occur.[1]

Contemporary theory in law and society differs on whether law can serve as an instrument of change on behalf of the disadvantaged. Donald Black's theory[2] asserts that law inevitably works to the contrary, as a support of the most privileged segments of the society. Nonet and Selznick[3] take a contrary view. They see an evolution of law, across societies, from repressive, through autonomous, to responsive law. Unger[4] thinks that the shift from autonomous law, based on neutral principles, to a law that explicitly recognizes welfare (and corporate) needs will undermine the authority of law and thus the entire legal order.

Whether law can succeed as an instrument of equalization and redistribution is a difficult and important question. My approach to this question is to ask whether a proposed change is actually or potentially supported by the norms of the society. In open societies, however, normative consensus is extremely limited. They are characterized instead by normative variation and flux, described by Emile Durkheim as anomie or normlessness.

In such societies, law can (but does not necessarily) become the instrument of normative coalescence. We must explore the circumstances in which this occurs. It is especially important, for our purposes, to examine those cases in which laws favouring equalization and redistribution acquire widespread normative support. In general, it seems plausible that such laws are

1. Richard D. Schwartz, "Moral Order and the Sociology of Law" in *Annual Review of Sociology* 577-601 (Vol. IV, 1978).

2. Donald Black, *The Behavior of Law* (1976).

3. Phillippe Nonet, and Philip Selznick, *Law and Society in Transition : Toward Responsive Law* (1978).

4. Roberto Unger, *Law in Modern Society : Toward a Criticism of Social Theory* (1976).

likely to gain widespread acceptance to the extent that they appear to benefit all. Laws that are seen as coordinating, optimizing, or providing benefits for all stand a better chance than those that explicitly set out -- or are viewed as tending — to redistribute wealth or power or to redress prior injustice. Illustrations of these propositions can be found by comparing, for example, the widespread support of social security laws with the political difficulties faced by civil rights laws. These instances call for detailed analysis, beyond what I can provide in this context.

As a preliminary to such detailed analysis, I propose instead to discuss the conceptual background. My introductory remarks stressed the importance of congruence between norms and laws, suggesting that law may be needed to facilitate norm formation. There are various ways in which this can occur. In the remainder of my remarks, I want to identify some of them as seen in the perspective of law and society.

The basic premise of law and society, as a school of thought, is that society and law fundamentally affect each other. Law springs from the society and in turn affects it deeply. As societies become more complicated, they increasingly turn toward law to solve their problems. The capacity of law to respond successfully depends on its continuing vital connection with the society and its culture.

In studying law in western societies, scholars have become aware that law often fails to achieve its intended purposes. To analyze the reasons, it is usually necessary to study in detail a particular legal policy, to see what factors have affected its success or failure. Students of law and society have carried out many specific studies of this kind. Often, their results indicate that the effectiveness of a law is impaired because it varies too widely from the societal norm or because the law is not generally understood to be serving a shared goal.

Law can regulate behaviour most easily if it accords with strongly held norms (*i.e.*, ideas of proper behaviour) of a population. This process is well illustrated in simple societies that have a stable, widely shared, deeply believed set of norms. In that case, law becomes a device (if it is needed at all) for ensuring that everyone behaves in accordance with that standard. Legal institutions in primitive societies have been well described by the anthropologist Paul Bohannan.[5] He analyzes the legal process as one of "double institutionalization," in which the institution of law clarifies, specifies, and reinforces customs that exist in the other institutions of society.

When traditional norms do not meet the needs of society, legal functionaries are called upon to describe and enforce a new behaviour pattern. Such a law is more likely to be followed if it is understood to be serving

5. Paul J. Bohannan, "The Differing Realms of the Law" *Amer. Anth.* 67 (Dec. 1965) Pt. 2 Reprint used : Donald Black and Maureen Mileski, eds., *The Social Organization of Law* 306-17 (1973).

a common goal. If there are no legal functionaries, they may arise specially to meet the need.

A good example of legal evolution is found in a study of the Cheyenne Indians, buffalo hunters on the Great Plains of western United States. The Cheyenne used their warrior groups to keep individual hunters from starting the hunt too soon, a practice that risked driving the buffalo away before other Cheyenne could surround the herd. The warriors, originally joined to fight tribal enemies, became the policers of a vital economic activity. This example, described in an important research report[6] helped the Cheyenne to become a highly successful tribe among the Plains Indians. Effective legal regulation of the hunt played an important part in their success.

In this example, it is apparent that the regulatory activity of the warriors was carried out in a way that fitted the culture. There was widespread agreement that the buffalo hunt was vital for the economic well-being of the Cheyenne. It was easily seen and quickly understood that, unless controlled, premature hunting could frighten away the herd. The warriors were respected for their earlier achievements and trusted for their capability and dedication. In carrying out their task, the warriors punished sufficiently to reform the offenders and to deter others — but not more severely than was necessary. Had they punished too harshly, the effect might have been divisive rather than unifying.

As societies become more complex, shared norms and common purposes decline as the primary basis for law. As Emile Durkheim,[7] the great French sociologist, pointed out, societies with a complex division of labour cannot base their unity solely on similar experience and common interest. As people perform specialized functions in society, they differ from one another in what they want. In those circumstances, Durkheim says, the unity of society comes to depend on an additional principle : reciprocity. People learn that they can benefit individually from exchanges. Of course this principle is also fundamental in the simplest societies, but it may assume even greater importance as the common norms and purposes, characteristic of simple societies, decline in more complex societies.

Law can play an important part in reinforcing reciprocity. The growth of contract law in western society represented an effort, at least partially successful, to do so. Contract law sought to provide businessmen with a legal guarantee that commitments, seriously and freely undertaken in return for something valuable, would be fulfilled. It specified how agreements should be made if they were to be enforceable in court. In the event that a legally binding contract was broken, the courts undertook to compensate the victim by putting him or her in a position as satisfactory as the state of affairs likely to have occurred if the contract had been fulfilled.

6. Karl N. Llewellyn and E. Adamson Hoebel, *The Cheyenne Way* (1941).

7. Emile Durkheim, ***The Division of Labor in Society.*** (The 1902 edition has been cited because it contains an important preface).

The capacity of contract law to reinforce reciprocity is a complex matter. When parties are strangers, who do not follow the same customs, they particularly need the framework of law to reassure them that promises will be kept. From the time of the Roman Empire, the importance of this principle has been recognized in the Roman-law adage, "Pacta ..... sunt servanda " (Agreements must be kept.) Max Weber pointed out that, in the expansion of commercial activity law performed a valuable function because it gave entrepreneurs a basis for rationally calculating the outcomes of their transactions.

As economic activity expanded, however, commercial practice began to be regularized. Aided by law, especially at the outset, managers came to rely on each other to fulfill their agreements. The legal framework came increasingly to be used only in unusual circumstances —such as fraud, bankruptcy, or exceptional market fluctuation. If a businessman regularly went to court as a defendant or evan as a plaintiff, his reputation as a dependable business partner suffered.

In these circumstances, the commercial community took a critical view of law that departed widely from prevailing business understandings. Managers were threatened by a legal system that stood ready, once a commercial dispute was taken to court, to impose liability on a company whose conduct was customary, i.e., followed standard and expected practice. Such a divergence between law and custom would not reinforce reciprocity; it would interfere with it. People would be cautious about agreements for fear that litigation would be used unpredictably and unfairly against them.

This was one of the reasons why judges and lawyers most attuned to commercial relations have advocated that commercial law take into account prevailing commercial practices. In the common-law tradition of England, purposeful efforts were made as early as the 18th century to keep commercial law congruent with custom. Lord Mansfield, a famous English judge, regularly invited prominent merchants to join him in hearing commercial disputes so that they could advise him on customary practice. In the United States, Karl Llewellyn, a scholar of law and society, included in the Uniform Commercial Code (which he drafted) several mechanisms for taking custom into consideration in the adjudication of commercial disputes.[9] Although some famous scholars objected to these provisions, Llewellyn's Code has gained wide acceptance among merchants, bankers, lawyers, and legislators. The techniques he used continue to provide a model for fitting law and custom together in a manner that encourages reciprocity.

The acceptance of this model was limited, however, to commercial practice among relatively equal parties. It did not solve the problems that arose when the parties to a contract were very unequal in knowledge or bargaining power. Contracts formed under such circumstances were often

8. Max Weber, *Law in Economy and Society* (1920). Edn. used Rhenstein ed. (1954).
9. William Twining, *Karl Llewellyn and the Realist Movement* (1973).

seen as unfair, because they gave so much advantage to the wealthy and powerful. Contract law, even (or especially) if it reflected commercial custom, provided no protection for the disadvantaged. On the contrary, it offered little more comfort than the Roman-law adage, "Caveat emptor" (Let the buyer beware.)

Efforts to provide legal protection in the courts did not advance very far. Contracts could be invalidated if judged to consititute fraud or unconscionable bargains, but these doctrines, invoked in extreme cases of palpable injustice, did not satisfy the sense of fairness. The problem was that law in these instances was not seen as serving the principle of reciprocity. Instead, it was perceived as strengthening the domination of the already privileged few, an outcome condemned since the earliest days of the Republic by James Madison who warned against the "tyranny of the minority."

When the courts became heavily committed to the protection of those with wealth and privilege, the legislature has often provided an alternative method for redressing the imbalance. During the twentieth century, much social legislation has been passed that seeks to balance relations between differentially advantaged parties. Sometimes these laws try to use the power of governmental officials to prescribe and to enforce protective standards of behaviour. When the disadvantaged parties are weak, disorganized, ignorant, or alienated — direct governmental intervention may be the only recourse readily available. Recent history suggests, however, that direct governmental intervention often fails, for a variety of reasons, to attain its intended purpose. The governmental agency may be "captured" by the parties whose behaviour it seeks to regulate;[10] the agency may develop rules and procedures that antagonize affected parties and the public; the agency may offer largesse that heightens dependency or resentment, because it ignores the need for reciprocity.[11]

Many times, law can contribute best to encouraging reciprocity in another way : by aiding people to reach their own agreements and backing them up. Often this process, known as "private ordering," helps to generate norms that are satisfactory not only to the parties, but to the larger society as well. If commercial relations provided an example of private ordering in the 19th century America, labour law offers the clearest U.S. example in the 20th century. In this field, much conflict existed in the United States throughout the 19th century and into the first three decades of the twentieth century. The courts at first tried to uphold the doctrine that labour organization was a criminal conspiracy against the employer.[12] When that doctrine was sharply

10. Louis L. Jaffe, "The Illusion of the Ideal Administration", 86 *Harvard L. Rev.* 1183-99.

11. Fernando E. Agrait, "In Search of a Role for the Legal System", *Brigham Young University Law Review* 797-809 (1980).

12. *Commonwealth* v. *Pullis. (The Cordwainer's Case).* Philadelphia Mayor's Court (1806).

limited by the courts in *Commonwealth* v. *Hunt*,[13] employers turned to the injunction as a means for preventing strikes. Neither of these techniques prevented labour strife, because workers were determined to improve their wages and working conditions, whether or not the law helped them. Finally, laws were passed in the 1930s that did support labour organizations. Procedures were set up that provided for recognition of unions as the elected representatives of workers. Management was prohibited by law from engaging in "unfair labour practices," that might prevent organizing from occurring. Labour and management were required, once the union had been elected, to sit down at a negotiating table and to "bargain in good faith" about the terms and conditions of employment. The agreements thus reached were up to the parties.

This arrangement did not necessarily solve all of the problems. It did create conditions in which the concerned parties themselves had the opportunity to reach the "highest joint benefit" possible, that is, to optimize what they could both hope to get through voluntary agreement. In consequence, the collective bargaining process has led to some favourable results for improving wages and working conditions while reducing industrial strife. Scholars and policy makers are continuing to evaluate this arrangement to see whether it also will contribute to the attainment of additional goals of productivity, industrial democracy, and work satisfaction.

While private ordering seems to work well in some areas, there are other parts of law that require coordination to serve a common purpose. In criminal law, in particular, law enunciates standards for the society as a whole to protect the personal security and property of all citizens. To be effective, these laws must be understood and accepted by the society. In societies that are diverse and changing rapidly, the criminal law can suffer because people disagree on what is right.

Law in western societies seeks to maintain correspondence between criminal law and societal norms by means of the legislature. Studies of the legislative process indicate, however, that the decisions of elected assemblies are often heavily influenced by the wishes of well-roganized "special-interest" groups. When this occurs, laws may be passed that do not have the agreement of the society. An example is found in the effort to prohibit the use of alcoholic beverages in the 1920s. Studies of efforts at enforcement of prohibition laws indicate that public resistance was too strong for the forces assigned to the task. Eventually, a referendum repealed the law.[13a] Similar difficulties in enforcing unpopular laws have been reported in other countries.[14]

13. 45 Mass. 111 (4 Met. 1842).

13a. Andrew Sinclair, *Prohibition : Era of Excess* (1962).

14. Gregory J. Massell, "Law as an Instrument of Revolutionary Change in a Traditional Milieu : The Case of Soviet Central Asia", *Law and Society Review* 179-228 (Vol. II, 1968); Sally Falk Moore, "Law and Social Change : the Semi-Autonomous Social Field as an Appropriate Subject of Study", 7 *Law and Society Review* 719-46 (1973).

In Anglo-American law, the jury has been seen as an important device for preserving the correspondence between law and contemporary community standards or norms. The jury is a cross-section of the population. It has been used primarily as a "trier of fact," to determine liability. It is widely acknowledged, however, that the jury reflects the normative standards of the community. English juries in the early 19th century, for example, often found defendants not guilty of felonies that carried the death penalty—because they did not want the defendant to die.

In recent years, new legal techniques have been developed to permit the jury to reflect more fully the standards of the community, especially in capital cases. Juries are now permitted to decide if they want the death penalty, only when certain "aggravating circumstances" attend the crime. If in a given type of crime juries seldom decide to recommend execution, the courts have declared capital punishment to be impermissible for that crime. For example, the commission of a rape is no longer punishable by death in the United States, because juries rarely recommend it. Similarly an accomplice to a murder who did not share the intent to kill may not be executed. Thus, the jury has been adapted as a device, supplementing the legislature, that serves to elicit, to reflect, and perhaps to help form the norms of society.

The examples cited (commercial, labour, and criminal law) deal with instances wherein an effort is made with some success, to keep law and societal norms consistent. There are many areas in which law has difficulty maintaining congruence with society's norms. For example, laws prohibiting the sale of contraceptives were in force in some of the states as recently as 1965. By that time, people were freely selling birth control devices of all kinds. Finally, the Supreme Court decided in *Griswold* v. *Connecticut*[15] that such a law comprised an invasion of privacy, a right that it "found" in the Constitution, though it was not explicitly stated there. Later the right of privacy was invoked in *Roe* v. *Wade*[16] to invalidate state laws against abortion, an issue on which moral sentiments of the society were much divided.[17] Considerable political conflict over this issue has occurred, after the court decided the case, apparently because the decision is not widely perceived as serving a common purpose.

A crucial role in the relations between law and society is played by the legal profession, including judges and attorneys. The profession has developed a subculture of its own. Critics have charged the profession with serving its own interests and the interests of the bourgeoisie at the expense of the society.[18] Others have praised the legal system, as it has been

15. 381 US 479 (1965).

16. 410 US 113 (1973).

17. Lynn D. Wardle, "The Gap between Law and Moral Order : An Examination of the Legitimacy of the Supreme Court Abortion Decisions", *Brigham Young University Law Review* 811-35 (1980).

18. Robert Leftcourt (ed.), *Law Against the People : Essays to Demystify Law, Order, and the Courts* (1971); Jerold S. Auerbach, *Unequal Justice : Lawyers and Social Change in Modern America* (1976) : Donald Black, *The Behaviour of Law* (1976).

developed by lawyers and judges, for defending rights[19] and for developing an "inner morality" of fairness that serves the entire society.[20] Evidence can be found to support either position. The interesting question is when, how, and under what circumstances the profession and the law can serve and be seen as serving the interests of the society as a whole. This depends not only on the profession, but also on the conditions under which it operates within the society.

The legal profession can play an important part in contributing to the unity of a society. Where the society consists of widely different groups (ethnic, regional, linguistic, religious, occupational), something is needed to draw them together. In America, this diversity has been characteristic since the earliest times of overseas immigration. The United States has acquired its population by immigration from virtually every other continent. During the Revolutionary War against England, the original settlers achieved some unity. The question that faced America's leaders, the so-called Founding Fathers, was how to maintain that unity in the face of original and continuing diversity and in the absence of traditional leadership. This question was addressed by Alexis de Tocqueville,[21] a French nobleman who visited America in the early 19th century, after the French Revolution, to see whether anything relevant to France could be learned there. What he saw is described in his remarkable book, *Democracy in America*.

Tocqueville's analysis of American democracy emphasizes the integrative role of the legal profession. Lawyers, he observed, were drawn from all segments of the society and retained their connections with the groups from which they came. By virtue of their professional training, however, lawyers acquired the ability to exchange information and ideas. As a result "they naturally constitute a body; not by any previous understanding, or by an agreement which directs them to a common end; but the analogy of their studies and the uniformity of their methods connect their minds together, as a common interest might unite their endeavours."[22] This common habit of mind leads them to oppose radical change in society and to exercise a check on the excesses of democracy, while representing the interests of the common people. Lawyers, Tocqueville concludes, "belong to the people by birth and interest, and to the aristocracy by habit and taste; they may be looked upon as the connecting link of the two great classes of society."[23]

The consequences of this special position of lawyers are not uniformly favourable. On the one hand, they have been criticized as conservative; opposing change and serving the interests of the wealthy over the poor. On the other hand, they have been praised as the defenders of rights and the

19. Ronald Dworkin, *Taking Rights Seriously* (1977).
20. Lon L. Fuller, *The Morality of Law* (2nd ed., 1969).
21. Alexis De, Tocqueville, *Democracy in America* (1835; revised edn. 1899).
22. *Id.* at 124.
23. *Id.* at 125.

advocates of justice. Both potentialities doubtless exist; the dominance of one or the other probably depends on the historical development of society. We need to ask at any given time what forces are represented by law and lawyers

Law can serve a variety of purposes. It may *coordinate* activities, so that results desired by virtually everyone in the society can best be achieved. It could also serve as an instrument of *dominance*, to accomplish the purpose of a small minority such as a ruling class or a profession (*e.g.*, landlords) that seeks to protect its privileged position. It can serve as a means to *equalize* society, by formulating a set of rights to be accorded to all citizens including previously underprivileged groups. And it can *facilitate exchange* between people who can benefit from negotiating a bargain that is helpful to each.

In western societies, each of these effects occurs. Students of law and society seek to determine, through careful scholarship, which of these effects is occurring and why. Such studies involve a close analysis of legal policies, as they are carried out in a particular set of circumstances. From a range of such studies, we hope to learn more about the general factors that affect the capacity of law to support social change that benefits previously disadvantaged groups.