

LAW AND DEVELOPMENT: TOWARD A GENERAL THEORY OF LAW*

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I. ADEQUACY OF LEGAL THEORY

A theory of law as phenomenon posits a description, *first*, of a legal order in abstract terms or in the form of a construct, including a sufficient and precise criterion for identification of concrete legal orders; and *second*, of the methods for the enactment of the different forms of law, as prescribed in said legal order.

The two descriptions will provide the criteria for the identification of any given norm, as a "law" or as not a "law", *first*, by determining whether or not the normative order from which the given norm arises is, indeed, a legal order; and *second*, there being a legal order, whether or not there was a valid enactment of said norm according to such legal order. If such enactment is valid, the given norm is a "law" in such legal order; if not valid, the given norm is not a "law" in such legal order, although conceivably, it could be a "law" in some other legal order.

Such a general theory should enable an investigator to identify any concrete legal order in human experience, past or present, and also, to make and state a description of the different processes for the enactment of different forms of law authorized in such concrete legal order, and even to identify the different laws validly enacted pursuant to such prescribed processes. Such general theory would permit identification and inventory of the different concrete orders of primitive law, of ancient law, of feudal law, of modern law, of capitalist law, and of socialist law.

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If such general theory of law is indeed adequate, it should permit, after due investigation, and granting sufficient data, a complete description of the legal orders of which we have historical or present knowledge, plus a description of all the processes of enactment authorized in each concrete legal orders. The outcome would be massive inventories, not only of legal orders, but also of the processes of enactment and the laws enacted for each legal order. On the basis of such inventories, would be possible to have an encyclopedic description of all the concrete legal orders of which we have knowledge and information.

On the other hand, if a general theory of law is not adequate in terms of the identifying descriptive criteria, the consequences of its application will be as follows:

- (a) There will be legal orders concretely experienced, that such theory will not be able to identify as legal orders.
- (b) There will be processes of enactment within a duly identified concrete legal order, which will not be identified and described.
- (c) There will be particular laws validly enacted within duly identified concrete legal orders, that will not be identified for inclusion in an appropriate inventory.

The inadequacy of such a general theory of law might even be worse, where upon application, normative systems not properly includible are identified as validly enacted laws, or laws validly enacted are identified as invalidly enacted. Such gross inadequacies would commend discarding of such general theory.

II. THE GENERAL THEORY ADVANCED IN THIS WORK

We now turn to the general theory of law advanced in this work. The theory aims at generality and comprehensiveness, adequacy as well as accuracy. It is designed and formulated, so as to accomplish the three main tasks of general jurisprudence:

1. The identification of concrete legal orders, and in the process, to permit distinction of normative orders, which are legal orders, from normative orders which are not legal orders. Granting sufficient data,

such technique would permit a listing of all concrete legal orders, past and present. The province of Jurisprudence would thus be determined.

2. Identification of the fundamental forms of law, and of the processes of enactment for each of these fundamental forms of law. Such technique will permit categorization of concrete legal orders, in terms of processes authorized for each fundamental form of law, and in the differences in the stages or requirements for each process. Focus can thus be given to the over-all rationality of each of such processes of enactment. Standards of rationality can thus be formulated, for assessment of processes in concrete legal orders.

3. Identification of the laws enacted pursuant to the processes authorized or prescribed in each concrete legal order and in the process, to make a determination which enactments are valid and therefore have resulted in the creation of laws, and enactments which are not valid, hence, unproductive of any law. Such technique would permit, given sufficient data, a listing of all the laws enacted pursuant to a concrete legal order.

All such lists, inventories and descriptions made possible by application such general theory of law, when massed together in one site, would in theory permit the gathering together of all the laws extant in the world. Such mass of legal materials would provide an empirical basis for critique of the general theory of law, and for conceptual adjustments, additions, elaborations in the continuing task of further developing and refining the general theory of law towards higher levels of comprehensiveness, adequacy and accuracy, and thereby serve as jurisprudential tool of analysis, criticism and prediction.

The key idea asserted in the theory is that law is phenomenon. Indeed, it is a phenomenon of profound complexity. It is a culture object in the domain of purposive human behavior. Not only is it the creation of purposive human behavior. Not only is it the creation of purposive behavior through enactment, but also its content (meaning) is behavior that ought to be, and its intended impact is behavior modification (conformity) in the social field. It is therefore an aggregate of different kinds of phenomena, with discrete elements of language (medium of enactment), culture form (norm conveyed), social desire (object to be attained), social will (asserted in enactment), official behavior (process of enactment), and prescribed behavior (content of the norm). There is a commingling or mixture of natural phenomena (enacting behavior), cultural phenomena (language of enactment), social phenomena (official behavior and relations in enactment

process), mental phenomena (desired object of prescribed action), and psychological phenomena (social will underlying enactment). To the extent that law is implicated in all such phenomena, it is a social fact accessible to perception, identification, investigation, and scientific description like other phenomena, law can be the object of a general theory.

The generality of the theory being propounded lies in the comprehensiveness of its scope and coverage. It will operate as a framework of criteria for identification of every kind of concrete legal order in human experience, and thereby permit a segregation and aggregation of the entire universe of legal orders, and their classification according to distinguishing features and characteristics. We shall thus be enabled to isolate and separate the domain of law, from the other kinds of normative phenomena in human experience, such as Dogma of religion, or the Mores of social life. The province of Jurisprudence can thus be defined and demarcated, with reference to the field of its subject matter.

More importantly, we shall also be enabled to build and develop a Science of Law, in terms of a systematic and uniform description of the entire field of Law. The theory will operate as a framework for analysis of concrete legal orders, so as to lay bare for identification and description, the discrete parts or components thereof, the distinguishing features of each type of legal order, the different modes of enactment authorized therein, the features of rationality reflected in the prescribed stages and conditions, and the output or mass of norms produced by each mode of enactment. In short, the theory will function as a common grammar towards a re-statement of the legal experience of mankind, in terms of concepts, principles, and fundamental doctrines and tenets. The outcome could be a new *Jus Gentium* stated in encyclopedic form.

III. ELEMENTS OF THE GENERAL THEORY

We now proceed to a brief discussion of the concepts, in terms of which the general theory will be stated. The two key concepts are: (a) social order, and (b) sovereign order in society.

In connection with social order, the following concepts will be discussed: (a) normative culture, (b) offices, (c) authority, (d) government, and (e) norms and normative systems. In connection with sovereign order in society, the following concepts will be discussed: (a) society, (b) ruling class, (c) social contract, (d) constitution, (e) government, (f) military organization, (g) sovereignty, (h) political culture, (i) law, and (j) legal order.

A. Social Order

Law is the strongest of the cultural webs binding together an aggregate of social orders into a society under a sovereign order. In the theory of law we are elucidating, the social orders play a crucial role. It is the social orders which are the basic units of society, and it is their interrelationships which are the primary determinants of political culture, hence, key influences in shaping quality and strength of law in society. This will be discussed more fully in a later chapter. It is enough at this point to note that the binding together of a large population into one society is not achieved solely by social power; there is also the cementing and amalgamating forces of intertwined interests, common values, common culture, ties of blood and kinship, and sheer inertia of neighborhood, or prolonged living together within the same area of territory.

A social order has three components: (1) a community with shared interests, values and purposes, or an association of like communities, (2) a government consisting of office-holders exercising authority in behalf of the community or association, and (3) a normative culture on which the authority of office-holders and the government are founded and sustained.

There is a community, where shared interests, values and purposes are substantial and enduring. There are three types of bonds arising from shared interests, values and purposes. One is the bond of kinship, based on ties of blood, actual or fictive, or some equivalent. A second bond arises from common livelihood, occupation, economic activity or economic interest. A third bond arises from sharing deeply held beliefs and ideas. Examples of the communities based on kinship are well known, and include families, extended families, clans and tribes. Examples of communities based on economic bonds are guilds, plantations, finance houses, factory enterprises, professional partnerships, etc. Examples of communities based on cultural

bonds involving sharing of deeply held beliefs are the different churches or religious sects, religious orders, colleges and universities and the like.

Associations are often formed by communities with similar interests. Tribes may band together under a pact, especially in the face of a common threat or danger. Similar businesses may form chambers of commerce, or chambers of industries, or chambers of financial houses, *etc.* Also fairly common are associations of religious orders professing the same faith, or of colleges or universities within a certain area, or with certain specialties. Where communities over a fairly extensive area of territory have developed strong associational ties, and their associations embrace sizeable populations and control substantial resources, the stage would be set for alliances, syndicates, or confederations, from which a higher and more inclusive social organization could evolve.

A government is the organization of each social order, with the power to act in the common interest and to meet common needs. It might be set up on a specific date or within a specific period, or simply evolved over time. Necessarily, if the common interests, values and purposes are to be protected, nurtured and advanced, there must be one of some entrusted with responsibility for the common good and welfare. An office is simply a defined or discrete sphere of social responsibility. It may be established formally, as by grant or conferment, or by tradition evolved over time. Or it may be established informally, by tacit arrangement or simply from the necessity of having someone to act. However established, every office carries with it functions and duties for the adequate discharge of the social responsibility entrusted to such office. Inevitably also, every office carries with it powers adequate for the proper discharge of its functions and duties. The totality of functions, duties and powers pertaining to an office is Authority of such office. The totality of the offices is the Government.

Government is founded on a fundamental institution, which is the heart of every social order. This is the institution of authorized representation. By this institution, acts of persons holding offices are deemed acts of the entire collectivity. The acts of its officials are acts of the social order. The institution of representation is the creation of the normative culture of each social order. Such institution is recognized whenever the normative culture permits or recognizes the taking of action by office-holders for and in behalf of the social order.

Authorized representation is provided for in normative culture either through (1) Quasi-norms or (2) expressly enacted Norms. Quasi-

norms are not enacted by any authority, but are creations of anonymous forces over a substantial period of time. Such Quasi-norms are known as Tradition, authorizing governance through the exercise of social power. Tradition prevails in the different forms of kin-groups, such as clans and tribes. Tradition may also prevail in the governance of old-time churches, religious orders, and even in colleges and universities over a hundred years old.

Authorized representation through expressly enacted Norms is a general practice in modern times. Such norms are found in documents of governance, such as charters, articles of incorporation, articles of partnership, enabling ordinances, *etc.* These are actually forms of a Constitution, by which government of a social order is instituted, its organs and offices defined, modes of filling them prescribed, duties and powers of each office or organ specified, and the different conditions of governance stated. Different forms of such Constitutional prevail in the governance of modern universities and colleges, new churches, in the different types of corporate enterprise, trade unions, professional societies or partnership and the like.

Governance is the elaboration of measures for the protection and advancement of common interests, the safeguarding and promotion of the common values, and the attainment and effectuation of common purposes. All such measures have a common denominator: the control and modification of behavior, individual as well as collective. Such control and modification of behavior is sought to be achieved through a system of sanctions and rewards, conditioned on violation or compliance with behavior that *ought to be*. Such behavior is prescribed by a Norm, which occurs in three modes: commands, or what ought to be done; prohibitions, or what ought not to be done; and permissions, or what may be done.

For any such Norm to come into existence, and be binding on the population of the social order, there must be an enactment. This is an affirmative act of will of a person or persons in authority, to bring into existence *specific behavior that ought to be*, hence, binding or obligatory on all within the social order. For such act of will to be socially manifest, it is essential that an appropriate communication in the form of language be made, to give existence to the Norm, and make it known to all who are to obey. In small communities sharing life on a face-to-face basis, enactments may take the form of direct orders issued face-to-face. In large communities and associations, the enactment may be formal process, with the rules set down in written form, and carrying prescribed means of authentication, such

as signature of the official issuing the rules, or even the seal of his office. Once the government of a social order is in place, enactment of rules becomes regular, and the mass of norms governing the social order increases rapidly. The totality of such norms constitutes the Normative System of the social order.

B. Sovereign Order in Society

Two complex components are conjoined; namely, society *and* a sovereign order. We shall proceed to discuss each separately, in terms of their elements. In connection with society, we shall discuss the following: (1) society, (2) political culture, (3) the ruling class, (4) social contract, (5) constitution, and (6) government. In connection with sovereign order, we shall discuss (1) military organization, (2) sovereignty, (3) law, and (4) legal order.

A society differs from a social order in two important respects. While a social order consists of individuals basically, a society consists of social orders. As earlier stated, a society is an aggregate of social orders. The other difference is that for a society to exist, its population must be in permanent occupation of territory. On the other hand, a social order may or may not occupy territory; such requirement is not essential to the concept.

Associations resemble societies in one respect. Each association is a grouping of communities. However, in the case of an association, the communities comprising it share a particular affinity, such as kinship, or economic interest, or cultural orientation. Associations then exhibit homogeneity; in that the communities comprising the membership are particular kind. On the other hand, societies are characterized by a diversity of social orders within each society. Social orders exhibiting different affinities, or cementing bonds, are found in each society.

Social orders, then, whether communities or associations of like communities, are held together by affinities of great and enduring power. The cementing bonds of kinship, economic interest, and shared culture have sustained social orders in modern times, as during primitive days. But what holds society together? This question is fundamental, especially because of the diversity of the social orders that are aggregated in one collectivity. The answer to this question is that every society is held together, despite the centrifugal forces latent in diversity, by the political bond.

By political bond is meant the aggregating and cementing force of domination through social power. In this respect, the aggregate of the dominating communities, including their associations, and the aggregate of dominated communities, also including their associations, and the aggregate of dominated communities, also including their associations. In every case, the social power must be sufficient to establish and maintain the domination, otherwise, the society falls apart. Such social power is founded upon one or more kinds of resource. A common resource is physical prowess, either through sheer numbers, proven skills in the martial arts, or superiority in weapons. A illustration is provided in the domination by the Egyptians of the Hebrews before the Exodus, as the latter were comparatively few. Skills in the martial arts is illustrated by domination of the helots by the Spartans or the Athenians. Superiority in weapons is illustrated by the domination of the American Indians, and by the easy conquest and domination of native peoples by European colonizers.

Another common resource for achieving and maintaining social power of dominant communities is wealth, or economic power. In ancient societies, this is well illustrated in the early Roman Republic. The communities of patricians were smaller in numbers than the plebian communities, but were dominant partly because of their control of the bulk of the wealth in the society. In medieval societies, the dominant communities were aristocracies, who held not only status of privilege but the bulk of the wealth through the manorial system. This is made out clearly in the work of Max Weber on *General Economic History*. In modern societies, the triumph of capitalism has made capitalists, industrialists, and managers of industry, the dominant class, to which the proletariat and adjunct groups are subordinate. This is the substance of the Marxist analysis.

A third common resource for achieving and maintaining social power are deeply held beliefs, myths and ideas the administration of which are in the custody of special communities in society. These are cultural resources, which permit the control of large numbers of the population of a society through their minds. Such resources have taken three chief forms: religion, ideology, and knowledge. In societies enjoying relative isolation, monastic communities have enjoyed dominance, or at least great influence, over public affairs. For a long time, Tibet had been a theocracy. Until recent times, in Japan, the cult of the emperor and the communities associated with it had dominated public life. In many parts of Europe in the early modern era, Protestant communities exercised secular power. In most parts of medieval

Europe, the princes and officials of the Roman Catholic Church shared state power with Kings and monarches.

In recent times, systems of political ideas projecting social vision and destiny had attracted large followings in some countries of Europe, and had helped catapult political parties sponsoring them, to state power. In Italy, it was the Fascist ideology that enabled Mussolini's party to gain control of the government. In Germany, it was the Nazi ideology which had helped propel Hitler's political party to a majority that entitled him to the chancellorship, and thus paved the way for a Nazi take-over of the government. In many parts of the world, communist parties had attracted widespread public support with their socialist programs, and there is no denying the force in ideology in propelling communist parties to total power through successful revolutions. We might mention here the cases of the Soviet Union, the People's Republic of China, Cuba, Vietnam, Nicaragua, *etc.*

Knowledge as a basis for ruling society holds attraction for many and is indeed, the underlying idea of technocracy. However, as yet, there is no definite record of any concrete society ruled by a community of philosophers. There is, of course, Plato's *Republic*, which reputedly took inspiration from the city-state of Sparta. It is not clear, however, whether Plato was concerned with a concrete society, or with the projection of an utopia. In the societies of the further, there is every reason to hope that Plato's model will be actualized.

In concrete societies, of course, the 3 forms of political resources, on which domination is founded, do not occur singly, or in isolation. In the general case, domination is anchored on the use of all three resources, or at least a combination of two. The exceptions are societies dominated through military conquest by a foreign invader. In the interim stage of pacification and consolidation following conquest, the dominating community, which is that of the foreign conqueror or colonizer, will remain isolated from the previously dominant communities of the conquered society. But this will not be for long. Great interests cannot long survive without protection. Hence, the communities representing the vested interests of wealth and established religions will seek to come to terms with the successful invader and colonizer. Once the terms are acceptable such communities will either ally, alliance, collaboration, support and cooperation. Before long, they would be adjuncts of the foreign conqueror or colonizer.

As will be discussed in a later lecture, every society builds and develops a system of normative culture of its own, distinct and separate from the normative cultures of its component social orders. Part of such system is political culture, consisting of a system of beliefs and attitudes and ideas for acceptance of domination. The main thrusts are legitimacy of political rule and government, and the justness of the laws and the administration of social power. Basic to political culture are doctrines and theories that justify governance of society in a particular way, such as divine right of kings, or social contract, or mandate of Heaven.

In every society, there is a ruling class. This consists of the leadership echelons of the dominant communities and adjunct groups in the society. Embraced in such leadership echelons are office holders within each community or group of the first, second or even third ranks. Key positions of government for the society are filled from the ranks of the ruling class, or are held by others with its consent. The members of the class are bound together in an alliance or pact of the dominant communities. The terms and conditions of such alliance or pact constitutes the social contract for the governance of the society. Such social contract is not an agreement among individuals, but an agreement among the dominating and dominant communities in the society. It is the foundation of social power, and sets basic conditions for its exercise.

Social power is allocated in terms of subjects or areas for the governance of society. The social power allocated for each subject or area of governance embraces functions, duties and powers. Specific allocations each constitute a public office. The functions, duties and powers pertaining to each public office constitutes the authority of each public office. This is technically referred to as jurisdiction.

The system of power distribution or allocation in a particular society is its constitution. Where such system is evolved, the constitution is known as Tradition. Where the system is established by formal enactment of a written document, this is known as a Constitution. In Great Britain, there are two distinct parts of its constitution. The unwritten portion is tradition, while the written portion consisting of fundamental documents is the British Constitution. From this viewpoint, every society has a constitution. The government of a society is the totality of public offices specifically provided for in the constitution, together with the offices created and established pursuant to the authority of the constitution. Where a society has a Constitution (written form), the offices provided for therein are known as

constitutional offices, in contrast to ordinary offices, which are merely created or established pursuant to the authority of its provisions.

We now come to the concept of sovereign order in society. A sovereign order exists in a particular society, where the government of such society exercises supreme power throughout the territory of such society and such supreme power is maintained by armed forces under the exclusive control of such government. Where the government of a society does not exercise supreme power because its acts are subject to the control of another government, the sovereign order may exist in the society of the controlling government. Or where the government of a society does not exercise exclusive control over its armed forces, which are subject to the orders of another government, the sovereign order may also exist in the society of the other government. In such situations, a sovereign order does not exist in the society, and such society is a dependent society. Its status is that of a mere component in a larger society where a sovereign order obtains. This is the case in state in a federal union, or in colonies vis-a-vis parent societies, or in self-governing territories of a state, or autonomous units of an independent government.

The line between sovereign societies, and societies not sovereign or dependent societies, is clear in most or nearly all concrete instances. There are, however, societies which do not maintain armed forces in the accepted sense, such as states whose neutrality is guaranteed by a multilateral treaty among powerful neighbor states. Then, there are societies which do not maintain such armed forces yet enjoy supreme power within the territory, first, by reason of their hold on the population through cultural bonds or kinship bonds and second, the reason of their isolation from the rest of the world. Such border-line situations will receive fuller treatment in a subsequent lecture.

Summing up, law is posited as phenomenon which is identifiable in terms of conjoined text and context. The text consists of rules concerning human behavior stated in a Culture Medium of language. The context consists of two parts:

- (1) the enactment of said rules as an act of will of officials duly authorized to act in behalf of a society, and
- (2) under governance of a sovereign order.

The mass of rules thus identified may be segregated into three distinct and discrete forms of law:

(a) Law as a Legal Order consists of the totality of the rules enacted by officials of a government of a society under a sovereign order. Each such society has its own discrete legal order.

(b) Law as any particular Rule or a set of related Rules, refers to rules belonging to any Legal Order.

(c) Law as a universe of rules refers to the totality of rules in all legal orders, distinct and separate from the rules of Dogma, Morals, Custom, *etc.*

IV. UTILITY OF THE GENERAL THEORY

The utility of the general theory herein posited may be stated as follows:

First, the theory permits the identification of law and segregates it from related phenomena, such as Dogma and Morals, and therefore establishes clearly the province of Jurisprudence as a science.

Second, the theory permits the identification of Legal Orders, as distinct and separate from one another, and also permits identification of particular rules as Law belonging to specific Legal Orders. This contributes to clarity. As will be noticed in the discussion on legal theories below, there are theories which do not posit any criterion for the identification of a Legal Order as distinct from rules of law, with resultant inadequacy in description.

Third, the theory makes clear the dynamics of social and legal change, resulting from changes in the component communities comprising the society, changes in their relationship, and in the composition of the ruling class. Thus the processes of social evolution as well as revolution and their impact on the law of the society concerned are accommodated and made understandable.

Fourth, the theory accounts for the impregnation of the law of a particular society with its values, mores and customs, through the value-bearing and value-laden participation of different communities through

their leaders in public office, in the different processes of law-creation, such as legislation, administration and adjudication.

Fifth, the theory clearly shows law to be a Culture System which as Legal Order of a particular society is peculiarly a growth and precipitate of its collective processes, hence, understandable only in terms of the total culture of such society. This underscores the importance of educating thoroughly officials in all facets of culture in their society.

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