Observations on Justices Holmes' and Cardozo's Philosophy of Law

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A philosophy of law may be defined as an integral system of legal control in terms of its final cause. It is *integral* because it is, as a matter of psychological necessity, supposed to exhibit a certain kind of internal consistency and also, as a matter of social necessity, to afford a comfortable margin of predictability. It is a *system of legal control* because it attempts to realize its mandates and objectives through socially binding measures promulgated by the legal authority. It is conceived in terms of its *final cause* because it is always taken in relation to the achievement of a predetermined end. Here is a succinct statement of the predetermined end of law which, I think, can hardly be excepted to:

> "Actions are indeed concerned with particular matters, but those particular matters are referable to the common good, not as to a common genus or species, but as to a common final cause, according as the common good is said to be the common end."

St. Thomas Aquinas, Summa Theologica, I-II, 90, 2, ad 3. Controversy, however, enters the field of legal philosophy when it comes to specifying the means and methods of legal control. While the concept of control is generically clear (nobody, for instance, would dispute the generic definition that control is active intervention), still its nature and limits in the face of varied legal situations has not been very precisely defined and has, for that reason, developed into a crucial issue in the literature of modern legal philosophy.

Philosophically, the concept of legal control may be divided into two classes: the *a priori* and the *a posteriori*. The *a priori* concept of legal control starts off from an ideal postulate, usually assumed as axiomatic, and proceeds deductively in the enunciation of particular legal canons which are held to apply to any legal complexus. It is evident that this method altogether prescinds from the empirical environment of any given legal situation. The leading *and* the inferred premises are regarded as definitive formulas of legal conduct and are for that reason independent of the vicissitudes of time and space. The outstanding example of the *a priori* concept of legal control is the metaphysical theory of law which is usually associated with Hegel. Here, the dialectical character of the Idea (i.e. total being regarded as spirit which perfects itself as a result of the synthesis of opposites), by denying the law of contradiction both as a law of thought and of reality, has led to the elimination of experience as one of the contextual factors in the law of progress.

The *a posteriori* concept of legal control, on the other hand, propounds a method and a doc-

trine which is inverse to that of the *a priori* concept. In methodology, it proposes induction, or more appropriately, experiment. In doctrine, it advocates social utilitarianism. As stated by Jeremy Bentham, social utilitarianism is the interest of the greatest number. This doctrine, while remaining essentially unchanged, has felt the powerful influences of William James and latterly of the sociological school of jurisprudence. These modifications will be treated in due course. For the present it would be convenient to recall Pound's pithy summary of sociological jurisprudence as anticipated by Mr. Justice Holmes and later developed by him in his constitutional opinions. Pound says:

> "Comparing twentieth-century science of law in America with the legal science of the last quarter of the nineteenth centry, the most significant changes are, the definite break with the historical method; the study of methods of judicial thinking and understanding of the scope and nature of legal logic; recognition of the relation between the law-finding elements in judicial decision and the policies that must govern lawmaking; conscious facing of the problem of harmonizing or compromising conflicting or overlapping interests; the pulling apart and setting off of the several conceptions involved and concealed in the protean term 'a right'; faith in the efficacy of effort to improve the law and make it more effective for its purposes; a functional point of view in contrast with the purely anatomical or morphological standpoint of the last century; giving up the idea of jurisprudence as a self-sufficient science, and unification of the methods which formerly claimed exclusive possession of the whole field. In each of these respects..... Mr. Justice Holmes anticipated the teachers and thinkers of today from twenty to thirty years." Roscoe Pound, *Judge Holmes' Contributions to the Science of Law*. 34 HLR 449.

The sociological school of jurisprudence may be traced back to the social utilitarianism of Bentham and John Stuart Mill. These thinkers, however, did not provide a clear-cut method of realizing the greatest interest of the greatest number. It remained for William James to formulate in a settled way the methodology of social utilitarianism in his theory of pragmatism. According to him, ideas and values acquire significance only in so far as they either advance or retard the attainment of any desired end. With this as criterion, he pursued his theory to its philosophical conclusion that ideas and values are true if they "work" and false if they do not. From this it is apparent that there are *no immutable* ideas and values of right and wrong. What is right now may be wrong tomorrow and, conversely, what is wrong now may be right tomorrow.

It is more than probable that Holmes took the pragmatism of James as the basis of his sociological theory (*vide* Catherine Bowen, *Yankee from Olympus*, esp. the portions dealing with the correspondence between

James and Holmes). Still it is to the great credit of Holmes that he improved upon pragmatism in its relation to the law. Pragmatism as conceived by James was primarily functional. Holmes saw further than the mere workability of ideas. He doubtless appreciated the fact that if ideas "worked" only in order to serve the interests of the greatest majority, tyranny would result to the minority. And this was precisely the grave defect of the social utilitarianism of Bentham and Mill. To remedy this, Holmes originated the theory that *legal pragmatism consists in the harmonization or balancing of conflicting interests.* Or in the words of Pound:

> "Today, in my judgment, the most important problem which confronts the jurist is the theory of interests. A legal system attains the ends of the legal order 1) by recognizing certain interests, individual, public, and social; 2) by defining the limits within which these interests shall be recognized legally and given effect through legal precepts; and 3) by endeavoring to secure the interests so recognized within the defined limits." (Roscoe Pound, "Philosophy of Law" in *Twentieth Century Philosophy* edited by *Dagobert Runes.*)

Here, then, law is made to perform the extremely delicate task of concurrently promoting majority interests and safeguarding minority rights.

Since the avowed aim of sociological jurisprudence is the harmonization of conflicting interests, it is at once plain that its conclusions are at most tentative in character. For it may happen that as group interests grow more assertive the demand for constitutional protection correspondingly grows with respect to them. As Mr. Justice Holmes says:

> "The provisions of the Constitution are not mathematical formulas having their essence in their form; they are organic living institutions transplanted from English soil. Their significance is vital not formal; it is to be gathered not simply by taking the words and a dictionary, but by considering their origin and the line of their growth." Gompers v. US 233 US 604, 610.

Hence, the Constitution is not an inflexible instrument. Since it is intended for all time or at least for a long stretch of time, its continued efficacy consists in adapting itself to the changing needs of the national life. Mr. Justice Frankfurter characterized the method of Holmes thus:

> 'Mr. Justice Holmes has recalled us to the traditions of Marshall, that it *is* a constitution we are expounding, and not a detached document inviting scholastic dialectics. To him the constitution is a means of ordering the life of a young nation having its roots in the past—"continuity with past is not a duty but a necessity"—and intended for the unknown future. Intentionally, therefore, it was bound with outlines not sharp and contemporary, but permitting of increasing definite-

less through experience." (Felix Frankfurter, *The Constitutional Opinions of Justice Holmes* 29 HLR 683.) Hence, law is more than logic. As expressed by Holmes himself, "the life of the law has not been logic but experience." Of course, it should not be supposed from this statement that Holmes altogether rejected the use of logic. Jerome Frank, in his revealing *Law and the Modern Mind*, has shown that Holmes respected the syllogism in a skeptical sort of way. Neither did Holmes rely largely upon experimental induction for the purpose of establishing his legal conclusions. If I may be permitted the archaic expression, I should say that he was a sort of an intuitive jurist who had an immediate sense of the varied legal implication of any given problem. In the leading case of Lochner v. NY (198 US 45, 76), he had occasion to confess (in an impersonal way, of course) his juristic intuition:

> "General propositions do not decide concrete cases. The decision will depend on a *judgment or intuition more subtle than any articulate major premise.*" (italics supplied.)

Holmes regarded law as fundamentally dynamic. He distrusted any system of thinking which pretended to provide final answers to the questions of life. He would subject all ideas to the "competition of the market" because he knew from his study of history that ideas which were once held to be "universally" valid dissolved before relentless scientific inquiry. Since he looked upon life as larger than logic he favored the freest latitude of thought and action to the citizen provided no clear and present danger is occasioned to the social interest. (Abrams v. US 250 U.S. 616.)

To promote the utmost judicial impartiality, he treated the constitution as above the prejudices of judges. He would not make of the constitution an instrument of any particular class.

"The Fourteenth Amendment does not enact Mr. Herbert Spencer's *Social Statics*... Some of these laws embody convictions or prejudices which judges are likely to share. Some may not. But a constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the state or of *laissez faire*. It is made for people of fundamentally differing views and the accident of our finding certain opinions natural and familiar or novel and even shocking ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution or the United States" Holmes, J. Lochner v. US 198 US 45, 75-6.

He was well aware of the fact that the law is rather a messy affair. Although he believed that law should exhibit a certain degree of certainty and predictability he was persuaded that such an ideal could only be attained by purging the law of elements that are extraneous to it. For this reason, he favored the total divorce of law and morality. Because according to him there is practically no difference between high moral motives that actuate a noble man and fear of punishment

that deters a base man from committing a crime. In legal effect both men refrain from wronging society. This idea is summarized by Holmes in the following language:

> "The prophecies of what the court will do in fact, and nothing more pretentious, are what I mean by the law." (The Path of the Law. HLR v. 10, p. 457.)

A word of criticism may be ventured with respect to this argument. If the ethical context of words be eliminated, what difference would there be between obligations contracted in good faith and those contracted in bad faith, and between torts and crimes? The idea of Holmes is valid in so far as the negative character of the human man act is concerned, but it breaks down whenever the human act assumes an affirmative character. For certainly a calculated crime is more heinous than one which results from a flare of passion.

While the universe can be reduced to fixed quantitative relations by the mathematician, still the lawyer, in spite of his pretensions to legal prognostication, cannot articulate his legal structure much after the fashion of mathematics. For the law is principally concerned with volatile elements. The quest for absolute certainty in law is denominated by Holmes as the fallacy of logical form. If then absolute certainty is hardly possible of attainment, how shall we proceed in the soution of legal problems? Here is the sociological "key" provided by Holmes:

> "The way to gain a liberal view of your subject is not to read something else, but to get to the bottom of the subject itself. The means of doing that are, in the first place, to follow the existing body of dogma into its highest generalizations by the help of jurisprudence; next, to discover so far as you can, the ends which the several rules seek to accomplish, the reasons why those ends are desired, what is given up to gain them, and whether they are worth the price." (The Path of the Law 10 HLR 457.)

But the amorphism of society, while abhorrent to the "formal" lawyer, is the inspiration of the creative jurist because it provides the occasion for *creative jurisprudence*. In the development of this idea Holmes had a very able co-adjutor in the person of Benj. Nathan Gardozo. In *The Nature of the Judicial Process* Cardozo outlined the juristic method of arriving at legal conclusions. The first method, he says, is the method of precedent. The second is the method of tradition which will be applied if there is doubt as to the proper application of a certain precedent. This method consists in an inquiry into the customs and usages relevant to the precedent. The third is the method of history. And the fourth, when all the others fail, is the method of sociology which consists " in attaching legal sanctions to emergent social pressures" (Cf. Beryl Levy, *Mr. Justice Cardozo, Philosopher of the Law;* also Benj. N. Cardozo, *The Nature of the Judicial Process*).

The notion of creative jurisprudence is not new. It was clearly anticipated by Aristotle:

> "When the law speaks universally, then, and a case arises on it which is not covered by the universal statement, then it is right, where the legislator fails us and has or has erred by over-simplicity, to correct the omission—to say what the legislator himself would have said had he been present, and would have put into his law if he had known. Hence the equitable is just, and better than one kind of justice—not better than absolute justice but better than the error that arises from the absoluteness of the statement. And this is the nature of the equitable, a correction of law where it is defective owing to its universality." (Nicomachean Ethics, V, 10, 1137b 20.)

In order to free the method of sociology from the tyranny of logical forms. Cardozo's attitude, according to Levy, "is not so much one of *deference* as of *reference*. There is not so much reasoning *from* analogy as *by* analogy." (Levy, Op. cit.)

While Cardozo believed in the *elegantia juris* he had not such a penchant for it as to overelaborate it at the expense of the layman. Distinctions and niceties are alien to the law where they do not fulfill the social function of promoting the social welfare.

There are cases where the law is confronted by a situation where solution hinges crucially upon the insight of the judge rather than upon mere subscription to stale legal formulas. In this difficulty, the judge becomes a law-maker, *albeit interstitially*. His role is to reconcile the dynamic interests of society with the static. Of course, he can choose between the two. But to preserve both in their respective spheres—that is the supreme task of law—and it is the recognition of this fact and some solid contribution to it wherein consist the enduring significance of Holmes and Cardozo in Constitutional Law.

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LIBERTY cannot be conserved by majority rule unless the majority hold sacred basic individual rights regardless of race or creed, so that, along with our differences of view, we have a deep and abiding sense of human dignity and worth.—*CHARLES EVANS HUGHES*