LAW AS A FUNCTION OF THE SOCIAL ORDER†

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I

Sociology of Law

The term "sociology of law" was first used by D. Anzillotti in 1892 in his text of jurisprudence La Filosofia Del Diritto E La Sociologica, dealing with what he called "sociologia juridica".[1] Sociology of law, however, is to this day not a term of precise and accepted meaning. For it is a cross of two of the broadest fields of intellectual concern — sociology and law. Sociology is the science of human behavior. As such, it covers law or the area covered by law. The sociologist is concerned with the facts of human behavior, including the fact that people have values and attitudes and the fact that they reason logically.[2] Law, in turn, is the broadest of social studies. As Ganong and Pearce said:[3]

> "Relationship between persons, and relationships between persons and things, constitute the subject matter of the law; there is no relationship of either kind that does not come within its purview. There is nothing it does not command, prohibit, or permit. In its overall aspects the law — with the possible exception of history — is the broadest of social studies, and, apart from the description of wars, history is in large part but the story of the rise and fall of legal institutions."

Roughly defined, therefore, I would say that sociology of law is the science or study of law as a function of the social order.

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1 Dror, *Prolegomenon to a Social Study of Law*, 13 J. Legal Ed. 131-156. (1960-61).

2 Sawer, Law in Society 7 (1965).

3 Ganong & Pearce, Law and Society 4-5 (1965).

I said roughly defined, because a definition is supposed to delimit the precise scope and extent of the thing defined. Neither law nor sociology, however, admits of such precision. *A fortiori,* neither does "sociology of law".

It is in this sense that Sawer tells us[4] that sociology of law is sociology including law in its scope; the study of law in its social context. This social approach to law is but one of several approaches. As Dror pointed out,[5] the special character of law opens three main avenues to approach its study. *First,* law constitutes a system of norms and can be studied as such. This is what Kelsen did, and this sort of study is called "Normative Jurisprudence", dealing with the internal consistency and structure of legal norms. *Second,* the internal relation between legal norms and other normative systems, such as ethics and religion, can be studied, and this falls under "Philosophy of Law". A *third,* approach is to look at law from the outside, with special interest in the relation between legal norms and social phenomena. This is the approach of the social study of law or "sociology of law". And hereunder, the legal norms themselves are regarded as social and cultural phenomena conditioned by society and fulfilling various functions in it.

The search for law in its social context can be seen, among others, in Savigny's "Volksgeist", in Montesquieu's "relation of things", in Maine's correlations of social and legal growth, and in Ehrlich's "living law". And it can be seen throughout Roscoe Pound's work. Pound, says Sawer, keeps coming back to the question — what is the social end, nature and scope of law?[6] It is to this recurring question that sociologists of law address themselves.

The relevance of their findings is far too dangerous to overlook. Philippine society is today confronted by the threat of rampant deviation from, and even defiance of, law. We need no Myrdal to realize that social indifference, inequality and corruption are central in the Asian crisis, including the Philippines. To tackle these problems, the relation of society and law must first be fully grasped; the functions and workings of law in society, first be understood. The disparity between law and social behavior can only be effec-

[4] SAWER, *op. cit.* at 16.
[5] *Supra,* note 1 at pp. 146-147.
[6] SAWER, *op. cit.* at p. 24.

tively dealt with in the light of a keen awareness of forces underlying their relationship. Furthermore, the Philippines faces the problems of development. As a developing country, she finds law among the available instruments of social change. To what extent and how law should be used to attain development, likewise require insight into the sociology of law.

The role of assessing law as a function of the social order falls heavily on the legal profession. Said Friendmann[7]: "The legal scholar has the complete freedom — and it is his principal opportunity — to survey and appraise the legal system, both as a whole and in its individual manifestations, as an instrument and function of social order."

The starting point of sociology of law is the proposition that law is fact. The foundations of such a theory goes back to the rise of the German historical school, represented in Savigny's jurisprudence.[8] As Hall says: "Positive law is social conduct expressing norms that imply values, deviation from which, implying a judicial process, causes harms that are and must be met by the imposition of sanctions."[9] As such, law is, in the phrase of Holmes, not a "brooding omnipotence in the sky", but a flexible instrument of social order, dependent on the values of the society it regulates.[10] Sociology of law has thus emphasized the view that law is an agency of social control and that law functions in a social context. And for this reason, Ehrlich said that the core of the development of law lies in our days, or any other time, neither in legislation, nor in theory and practice of law, nor with the judicature, but in society itself.[11]

Savigny's doctrine led to the modern correlation of law with "the trends of justice in society" or "socio-ethical conviction".[12] N. S. Timasheff, among this century's sociologists of law, held that law is the product of the psychological interaction of members of large groups on what he calls "the dual level of socio-ethical conviction

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[7] Friedmann, *The Role of Law and The Function of The Lawyer in The Developing Countries*, 17 VAND. L. REV. 181 (1963-64).

[8] HALL, LAW AND SOCIAL THEORY, 22. (1963).

[9] *Ibid.*, 78.

[10] FRIEDMANN, LAW IN A CHANGING SOCIETY viii (1959).

[11] BOASSON, SOCIOLOGICAL ASPECTS OF LAW AND INTERNATIONAL ADJUSTMENT 26 (1950).

[12] STONE, SOCIAL DIMENSIONS OF LAW AND JUSTICE 470 n. 1 (1966).

and submission to power."[13] Stated otherwise, law is the interpermeation of group conviction and power relationship. Law embodies social power, for it is imposed by a minority group on the acquiescent majority. But it is also more and less than power, for its force depends on support by the ethical convictions of the whole group, including those who wield power.[14] As Julius Stone aptly summed up the thrust of these theories, *social norms binding under institutionalized force, constitute law.*[15] Such process of institutionalization provides law its distinctiveness, as through it the prevalent social norms receive a coercive form and are raised to distinctive modality of legal bindingness.[16]

Thus, law is a specialized form of social control. It is not, however, the *only* form of social control. It is a regulating force amongst other regulating forces, in the framework of social control as a whole.[17] Law reaches indeed into nearly all social activities, but only *as a part* of such activities, so much so that some writers say it is unlikely to have as yet a "sociology of law" in the fullest sense.[18] Recognizing, however, the fact that law is not the only regulating force at work in society, the social study of law should go on, the development of sociology of law should be pursued. For law arises from the pressure of social needs[19] and we cannot rest content to simplify legal theory by differentiating law from the facts of life, by depersonalizing the legal process in terms of agencies by which it is conducted, rather than as a function of the needs of human beings whom they are supposed to serve.[20] There is, Da Cunha reminds us, the permanent need to know the "what" of what we are doing; to ask for the goals we are heading towards.[21] The study of law not as the principle in the books, but as the principle in action; not as mere positive enactments but as principles inherent in social conduct; not as mere norms in a formalistic "heaven of concepts" but as a function of the social order, this — which I call "sociology of law" — is a pressing necessity in a developing

[13] *Ibid.*, 643.
[14] *Ibid.*
[15] *Ibid.*, 470.
[16] *Ibid.*, 470.
[17] *Ibid.*, 471; BOASSON, *supra* note 11, at p. 22.
[18] SAWER, *op. cit.*, 201.
[19] GRAVESON, CONFLICT OF LAWS 7 (1960)
[20] HALL, *op. cit.*, fn. 149,
[21] Da Cunha, *Efficacy In Law And Social Change*, 37 REV. JUR. P. R. 81 (1968)

society such as ours, in fast transition, faced by the problems of social injustice and the need for social and legal reforms.

What, then, has "sociology of law" to say?

II

Social Functions of Law

A. *Social Postulates: The Requirements of Social Life*

Any study of law in its social context must have some starting points on the requirements of social life, some postulates. Roscoe Pound calls these the "jural postulates" but the more accurate term is "social postulates".[22]

The social postulate as identified by Pound, are in summary form, as follows: (1) Security of the person from intentional aggression; (2) Security of possession and property in things discovered and appropriated, created by one's own labor, or acquired under existing social and economic order; (3) Assumption of good faith in the making of representation and promises; and (4) Assumption that things inherently dangerous unless controlled will be kept under control.[23]

Pound referred to twentieth century North American society. These postulates, however, are so fundamental in any form of social living that it is safe to say that they hold true in any society whose aim is to survive rather than to perish. And these are basically the same points that Hart calls "the minimum content of natural law" referring to rules which both law and morals perforce always provide *in any society,* given that men grouping together prefer survival to extinction: There must be "some form of prohibition of the use of violence, to persons or things, and requirements of truthfulness, fair dealing and respect for promises."[24]

Referring to his own assumptions regarding law in society, Boasson said: "(a) Each group and each community of groups living a life of tolerable peace, must adjust disharmonious individual conduct to a tolerably harmonious whole. (b) Many persons, bodies and institutions are working towards establishing that harmony.

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[22] Sawer, *op. cit.* at p. 148.
[23] *Ibid.*, 147-148.
[24] Hart, Concept of Law 176, 189 (1961)

When engaged on that job they make use of means of social control. (c) It is the function (the job) of the law to deal exclusively with the prevention of disharmonies."[25]

Starting, then, with the principle that social life requires security of *persons, property* and *promises* from violation, let us now examine the tasks of law within the framework of that life.

B. *The Role of Law in Society*

Sociologists of law differ in formulating the social functions of law, ranging from Boasson who recognizes only one, to Dror, who mentions eight. Sampling through them, however, will reveal that they speak of the same things in a different way:

Roscoe Pound emphasizes the function of law to satisfy social wants.[26] Boasson says it is "adjustment for the sake of adjustment".[27] The Continental *Interessenjurisprudenz* emphasize the balancing of various social interests.[28] Social integration, says Evan, is the primary function of law; to regulate social interaction, thereby mitigating potential elements of conflict and oiling the machinery of social intercourse.[29] Paul Vinogradoff regards law as a means for redistribution of social energy.[30] And Hall says it is to achieve the actualization of the values implied in the normative structure of social action.[31]

Among those who mention several functions are:

Timasheff: To produce *peace* and *security;* to create and enforce *organization.*[32]

Llewellyn and Hoebel: To define relationships, direct the use of force, dispose of trouble cases, and maintain adaptability.[33]

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[25] SOCIOLOGICAL ASPECTS 28, note 15.

[26] Dror, *Prolegomenon* 139, note 20, citing ROSCOE POUND, AN INTRODUCTION TO THE PHILOSOPHY OF LAW 47 et seq. (1954).

[27] SOCIOLOGICAL ASPECTS, 29, n. 16.

[28] Dror, *Prolegomenon* 139, n. 20.

[29] EVAN, LAW AND SOCIOLOGY 6, 58 (1962).

[30] COMMON SENSE IN LAW; *See* Dror, *op. cit.*, 139, n. 20.

[31] HALL *op. cit.*, 110.

[32] TIMASHEFF, AN INTRODUCTION TO THE SOCIOLOGY OF LAW 334-340; (1939) *See* Dror, *op. cit.*, 139, no. 20.

[33] Llewellyn, The Normative, the Legal and The Law-Jobs: The Problem of Juristic Method, 49 YALE L.J., 1355-1400 (1940); HOEBEL, THE LAW OF PRIMITIVE MAN, Ch. 11; *See* Dror, *loc. cit.*

Hurst: The release of energy, the control of environment and the balance of power.[34]

Weber: To provide security and to enable prediction.[35]

Dror: Reinforcement of norms at potential points of stress; predetermining patterns of behavior; resolving conflicts between parties; reconciling parties and educating them; to define the basic framework of social action and legitimize the political institutions; satisfaction of expressive needs; providing continuity of the self-image of society and its value system; and serving as an instrument of organized social action.[36]

All the foregoing can be summed up, thus: The function of law is to regulate and control social interaction thereby to render the social existence *tenable* and *successful*. Thus, the social ordering by law is designed to achieve firstly, the survival and continuance of the social community and secondly, the fulfillment of its purposes and needs.

The nature of law as social fact, however, should not be forgotten. Law is a part, a function of the social order; but it is a special part with the special function of social regulation and control to the end that social life may both be possible and fruitful.

For this reason, law has to keep pace with a fast-changing society. As Jones observes:[37]

> "Society changes, typically faster than law. *Law's function is the ordering of life in the real world; its imperatives become a dead language when they are no longer relevant to contemporary needs and conditions.* Technological advances, population trends, what Professor Selznick called the waning influence of the family and other non-legal controls — these and kindred forces keep society forever on the move, and law must move with the society it serves."

All finite life is a continuing adjustment. And law, as it deals with life, performs the function of adjustment, not alone for the sake of adjustment, but in final analysis, for the realization of society's values as well. Apropos this point is Rostow's proposition that in a society that seeks to govern itself through law,

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[34] HURST, LAW AND THE CONDITIONS OF FREEDOM (1956); *See* Dror, *loc. cit.*
[35] Dror, *loc. cit.*
[36] Dror, *Prolegomenon* 139-141.
[37] Jones, *The Creative Power and Function of Law In Historical Perspective*, 17 VAND. L. REV. 135 (1963); underscoring ours.

legal institutions must perform three functions: "They must endlessly adjust the formal, stated rules of law to the pace of social and moral change. They must seek to raise the level of social behavior, and of the law in practice, up to that of the accepted standards of law. And thirdly, the law fails in its most important function unless all its agencies strive, through their own approved procedures, and according to their accepted rules, to bring the standards of the law closer to those of the ideal for law cherished by those with authority to speak for our culture in stating its law."[38]

III

SOCIAL NORMS AND SOCIAL CONTROL

A. *The Shaping of Norms: Stages of Evolution*

Socialized experience in the process of personal inter-actions is the root of legal institutions. Norms are expressed in social action — in conforming conduct, in deviant conduct, and in the social group's reaction imposing sanctions. This is the social reality of law.[39]

Sociology of law discovers that the norms of positive law can be abstracted from the social reality to form the concepts by reference to which conformity and deviation are judged.[40]

As a set of norms rooted in society and its experience, law is shaped and develops in social framework and context. Studies have thus been made of the stages of social and legal evolution. Kovalevsky mentions five stages: horde, gens, partriarchal nomadism, feudalism and democracy.[41] Pound gives five also: primitive or archaic law, strict law, equity (Natural law), the maturity of law, and the socialization of law.[42] Bucher has this: hunting and fishing, pastoral, agricultural, commercial, industrial, financial, and governmental economics.[43] Sir Henry Maine listed: themistes (customs), unwritten case law interpreted by an elite, codification, fiction, equity and legislation.[44] The famous generalization of Maine that the law

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[38] ROSTOW, THE SOVEREIGN PREROGATIVE 4 (1962).
[39] HALL, *op. cit.*, 80-81.
[40] *Ibid.*, p. 80.
[41] *Ibid.*, p. 24.
[42] *Ibid.*
[43] *Ibid.*
[44] *Ibid.*

of progressive societies has evolved from a law of status to that of contract is often challenged and was not meant by him to refer to Asian societies whose social and economic structures he found relatively stable.[45] As this stability has given way to ferment and change, however, the shift observed by Maine may become evident even in Asian legal systems.

B. *The Shaping of Norms: Folkways, Law-ways and Stateways*

The prescripts or norms that people are required to follow are of necessity shaped by the facts of social reality. Any exhortation to conform to a preconceived order must refer to one that fits with the social situation.[46] A legal norm is a legal norm when its conceptual references find in the real world the corresponding factual conduct.[47]

Savigny and Ehrlich, having this in mind, emphasized the "living law of the people" based on social behavior rather than the compulsive norm of the State. In this sense, norms observed by the people, whether in religious habits, family life or commercial relations, are law, even if they are never recognized or formulated by the norm of the State. For Ehrlich, the main sphere of the compulsive State norm is in the fields specifically connected with the purposes of the State, i.e., military organization, taxation and police administration.[48] For Ihering, also, customs are part of the living social process.[49] The prevailing customary law after all reflects, *par excellence,* the people's own choice of legal system, their daily practices, and the normative rules founded on such practice and enforced by their courts.[50]

Sumner focussed on "folkways", the modes of acting that are shared by the members of a group, produced by persons acting in the same way when faced with the same need and often by great numbers acting in concert.[51] Sumner observes that in time these

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45 *Ibid.*; SAWER, *op. cit.*, 65.
46 BOASSON, *op cit.*, 15, 18.
47 Da Cunha, *op. cit.*, 91.
48 FRIEDMANN, *op. cit.*, 4.
49 STONE, *op. cit.*, 471.
50 HALL, *op. cit.*, 146 n.
51 Ball, *A Re-Examination of William Graham Sumner on Law And Social Change,* 14 J. LEGAL ED. 301 (1961-62).

folkways, because *they exist in fact* and because *they are traditional,* become the right ways to satisfy all interests. And when these elements of truth and right are thus developed into doctrines of welfare, the folkways have become *"mores"*. Sumner defines mores as the ways of doing things which are current in a society to satisfy human needs and desires, together with the faiths, notions, codes and standards of well living which inhere in those ways.[52]

Acts of legislation, in turn, Sumner continues, come out of mores: "Legislation has to seek standing ground on the existing mores, and it soon becomes apparent that legislation, to be strong, must be consistent with the mores."[53]

Sumner distinguished between law made by judges and that made by legislatures, and suggested that the former is by its method of growth necessarily related to the mores. Thus, the "folkways" include the "law-ways", the law developed by organized legal professions in the course of advising their clients and devising transactions and forms of association to satisfy the needs of those clients, by legal commentators and teachers, and by courts in the course of deciding specific cases. Sumner sets off the "folkways" and the "law-ways" against the "stateways", conscious creation by legislatures of legal rules created as the expression of a social policy which may or may not be related to existing folkways.[54]

Sumner's thesis on law and social change is sometimes given in rather too simplified a form, thus "stateways cannot change folkways". The point he wanted to make was that persons can seldom be restrained or made to do something which they believe to be wrong, unjust or unwise *and* unnecessary or unexpedient *solely* by being told to do so by legislature.[55] Stateways *could* profoundly affect folkways and thereby change them. How? Sumner says by bringing effort to bear on the ritual, not the dogmas. "Ritual", he says is something to be done, not something to be thought or felt. A fundamental change in culturally supported patterns of conduct may to some extent be induced, but only by "slow and long-continuous effort" in which "ritual" is changed by minute variations.

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[52] *Ibid.*
[53] SAWER, *op. cit.*, 172.
[54] *Ibid.*
[55] BALL, *supra*, note 51 at 315.

To the extent that the change sought is consistent with the central elements in the culture, or based correctly on a new "group interest", to this extent will the pace of the arbitrary change be more rapid.[56] The thrust should be directed at "ritual" because ritual, which is connected with external conduct, words, symbols and signs, is the process by which mores are developed and established, so that by affecting ritual, new mores are built.[57] To summarize, the thesis of Sumner is that: Stateways can change folkways through social change by ritual alteration.

Sawer tells us that:[58]

> "It is not, then, possible to make simple statements about the relations between folkways, law-ways and state-ways. Excepting in societies effectively controlled by the terror weapons of a dictatorship or oligarchy in the grip of an ideology, it can be expected that law will be in accord with folkways in two senses; first, there will be a body of lawyers' law, probably the result of a long process of evolution, in which both the basic postulates of existence in society (such as laws restraining physical aggression) and postulates of the culture of the time (such as laws facilitating commercial dealings in liberal capitalist societies) will be strongly represented; secondly, there will be a process of legal change in which the main initiative may come directly from the folk, or a section of it, but even if the initiative comes from the lawyers or the political leaders it is unlikely that any widely held and deeply felt value of the folk will be disregarded, and likely that the change will be proposed as a means of advancing or better protecting some interest which has a good deal of popular support. But the range of possibilities which this situation leaves open is enormous."

Against the foregoing view, however, is the opposite one that courts are deficient in the shaping of norms because of their slowness of response to change and their having no adequate means for discovering social realities.[59] Furthermore, the role of law is far more creative than merely responding to social and cultural facts. It is itself a social and cultural force with a distinct positive role.

As Jones attests, quoting Young:[60]

> "The creative work of legislators, administrators, judges, and practicing lawyers is far more than a 'response' to social change.

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[56] *Ibid.*, 314.

[57] *Ibid.*

[58] SAWER, *op. cit.*, 189.

[59] Gellhorn, *The Law's Response to the Demand For Both Stability and Change: The Legislative and Administrative Response*, 17 VAND. L. Rev. 92. (1963).

[60] JONES, CREATIVE POWER OF LAW 135 (1963); Young, *The Behavioral Sciences, Stability and Change*, 17 VAND. L. REV. 57, 58-59 (1963).

> Throughout recorded history, law itself has been one of the greatest of the forces of social change. Change and stabilization are, as Donald Young has reminded us, part of the same social process and law is the heart of that process."

Not only this, but frequently the task of law goes beyond mere response to that of anticipation:

> "When issues of grave public concern are at stake, law's intervention must be forward-looking and well timed... [T]here are occasions when law cannot wait until a social institution or a societal pattern has become hardened and irreversible. Many failures of law in recent history...have been situations in which law took indecisive or temporizing action until society was committed to an unsound solution."[61]

This brings to the fore the role of administrative law, the study of which has become increasingly important. As our Philippine Supreme Court, through Chief Justice Roberto Concepcion, recently stated in *Philippine Air Lines v. Civil Aeronautics Board*:[62]

> "The . . . policy and practice underlying our Administrative Law is that Courts of justice should respect the findings of fact of . . . administrative agencies, unless there is absolutely no evidence in support thereof or such evidence is clearly, manifestly and patently insubstantial. This, in turn, is but a recognition of the necessity of permitting the executive department to adjust law enforcement to changing conditions, without being unduly hampered by the rigidity and the delays often attending ordinary court proceedings or the enactment of new or amendatory legislations."

The shaping of norms by folkways, law-ways and stateways is therefore a process of social change. To a large degree, being a social process, lawmaking is evolutionary; changes in belief bring changes in the way men live and thus make changes in the law necessary. To this extent, laws should reflect the prevailing ethics or beliefs, otherwise they become unenforceable.[63] At other times, however, there is a need for law making to anticipate the future, not merely respond to present forces; there is a need for norms of law to shape other social realities, not merely be shaped by them. To this extent, law is truly creative and, in a sense, sometimes arbitrary, but it must never disregard the central elements of the particular society's culture if it seeks to govern that society, to be a "living norm".

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61 JONES, *op. cit.*, 137.
62 G.R. No. 24219, June 13, 1968.
63 GANONG AND PEARCE, *op. cit.*, 45-46.

C. *Social Control: Recognition and Adjustment of Interests*

Rudolf von Ihering tells us that: "The process of legal evolution is not a matter of mere knowledge as in the case of truth but is the result too of a struggle of interests and the weapons by which the fight is won are not reasons and deduction but the action and force of the people's will."[64]

And indeed a foremost function of law as an instrument of social control is to classify these interests, to decide in the light of some system of values which interests should be given effect and to what extent, and if some interests conflict so that there has to be a choice among them, to make this choice.[65] In short, the task of law in this regard is *to recognize and adjust* interests.

What is an interest? Roscoe Pound conceived interests as existing independently of law and spoke of them as "pressing for recognition and security". As understood by him, then, an interest is a claim actually advanced by defined individuals or groups, and considered and dealt with by defined lawmakers and courts.[66]

An illuminating classification of interests is that of Pound. In his presentation, interests are divided into INDIVIDUAL, PUBLIC and SOCIAL.[67]

Pound further subdivided INDIVIDUAL INTERESTS, as follows: (1) interests of personality, (2) domestic (family) interests, and (3) interests of substance. In turn, *interests of personality* are subdivided into (a) the physical person, (b) freedom of the will, (c) honor and reputation, (d) privacy and (e) belief and opinion. *Domestic interests* are subdivided into those of (a) parents, (b) children, (c) husbands and (d) wives, with further subdivisions in each case and with a cross-division of claims of the members of the family against each other and against outsiders. *Interests of substance* meaning interests concerned with livelihood, are subdivided into (a) property, (b) freedom to carry on enterprises and enter into contractual relations, (c) promise-reliance, (d) protection of enterprise relations against interference, (e) freedom of association, and (f) continuity of employment.

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[64] STONE, *op. cit.*, 471.
[65] SAWER, *op. cit.*, 150.
[66] *Ibid.*
[67] For an excellent summation of Pound's treatment and classification of interests, *see* SAWER, *op. cit.*, 153.

PUBLIC INTERESTS, on the other hand, are the interests of the State or of organized government, and are subdivided into (1) *Interests* of the State *as a juristic person* and (2) *interests* of the State *as a guardian* of social interests. The *juristic person aspect* is subdivided into (a) integrity of the State "personality", (b) protection of the machinery of government and (c) State claims of substance corresponding to the first four individual claims of substance.

And, finally, SOCIAL INTERESTS, which are those of society as a whole. These are subdivided into (1) *General Security,* (2) *Protection of Social Institutions,* (3) *General Morals,* (4) *Conservation of Social Resources,* (5) *General Progress* and (6) *The Individual Life.*

Aside from Pound, we may mention other writers, such as Sumner, who stressed that the foremost right to be secured by law is equality. As an analysis of Sumner put it: 'Foremost among the rights to be secured by law [is] 'equality of opportunity', of the 'chances' of each to secure 'happiness'. Each 'social class' owed it to the other to 'increase, multiply, and extend the chances' of all, though he [Sumner] personally abhorred any attempt to 'guarantee equality' as regards results."[68]

All the foregoing can perhaps be reduced to the same rights and interests that the Romans and Greeks of old preoccupied themselves with — Justice and happiness. For *Justice,* to the Romans, is "the constant and perpetual will to give to everyone his due". And *happiness,* to the Greeks, is "the exercise of vital powers, along lines of excellence, in a life that affords them scope."[69] And all this comes to the same points that we said are the two-fold aim of law: the *survival* and *fruition* of the social polity.

As Justice Frankfurter once remarked, in law as in life, lines have to be drawn. So, also choices have to be made. The choices in law are varied, some are important, others not. In some laws the choice one way or the other is irrelevant, as long as the choice is clear, such as right-hand traffic v. left-hand traffic. Other laws, however, take sides in social issues, so the utmost importance at-

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68 Ball, Simpson and Ikeda, *A Re-examination of William Graham Sumner on Law and Social Change,* 14 J. LEGAL ED. 315 (1962).

69 *See, passim,* INSTITUTES OF JUSTINIAN, and EDITH HAMILTON, THE GREEK WAY.

taches to the choice, such as rules about marriage and divorce, prosecution and treatment of criminals, labor and trade conditions. And it is in these sensitive areas, regrettably, that the choice is often far from clear, the distinctive lines not only between habits, inchoate customs and statutes, but among different statutes themselves, are frequently blurred.[70]

No hard and fast rule, however, has been devised to render the choices of law more often clear than not. The problem is how to determine the ends to be served, in the conflict of ends that life provides. Rudolf von Ihering says that there are some guides, reasoning thus: All social action is purpose-directed; in choosing purposes, men have wide freedom of choice; four considerations guide them in this choice: The social levers of *reward* and *coercion;* the ethical levers of a feeling of *duty* and *love.*[71] In contrast, a case-to-case approach is suggested by Geny, who says that each specific problem will provide its own solution, if thoroughly and objectively examined.[72]

D. *Social Control: Rule Observance and Sanctions Against Deviations*

A rule is meaningful only where there is a choice. One or more alternatives never need much stress when there is no significant urge tending towards the antithesis of the legal rule.[73] Social regulations on human conduct, specific and general, today form in most jurisdictions of the world the bulk of law.[74] And human life being existential, presents a multitude of different choices. The rules of society serve to direct or limit the choices, by prescribing or setting a standard of conduct. Not every rule, however, is obligatory. Rules are conceived and spoken of as imposing obligation when the general demand for conformity is insistent and the social pressure brought to bear upon those who deviate or threaten to deviate is great.[75] The rules supported by this serious pressure are regarded as important because they are believed to be necessary to the maintenance of social life or some highly prized feature of it.[76]

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[70] BOASSON, *op. cit.*, 26, n. 7.
[71] SAWER, *op. cit.*, 20.
[72] *Ibid.*, 22.
[73] BOASSON, *op. cit.*, 21.
[74] Da Cunha, *Efficacy In Law And Social Change, loc. cit.*, 82.
[75] HART, *op. cit.*, 84.
[76] *Ibid.*, 85.

A society's rules of obligation are not all prescription of law. As already intimated, law is but a regulating-force amongst others. Other factors than law hold groups together. Attempts to solve social problems are tried by methods and activities that often do not even reflect prescriptions and rules of law. The range of such non-legal forces is far and wide. Says Boasson: "Such activities are embodied in the development of technics and art, in reasoned science and symbolical rites, in culture and religion: in short in the whole fabric of social enterprises and mental pursuits of which 'law' is only a fractional component."[77]

This brings us to the problem of *rule or norm conformity,* as far as sociology of law is concerned. The Scandinavian legal theory otherwise known as the Uppsala School was among the first to recognize this problem when it dealt with the concepts of social norms, social control and uniform behavior. Rules and decisions of law were thereunder regarded as instances of social norms which contribute to the creation of uniform behavior. Professor Segerstedt of the Scandinavian Uppsala school led in the scientific investigations of the impact of law on behavior and attitude.[78]

The fact that there exist other agencies of social control such as morals, religion, education, raises the possibility of conflicting norms. Rudolf von Ihering's juristic insight noted this. First, he said, various controls might be in head-on conflict, with the outcome not necessarily decided by law. As Ehrlich observed, a proposition may be a "legal norm" significant for lawyers and enforced by courts and officials but the same will not be law in the social sense until and unless "social relations" are actually being ordered thereby. The second point that Ihering's juristic insight spotlighted is that the non-legal controls are products of non-State group life, of the inner ordering of associations of many kinds.[79]

This does not mean that true law will reside only in the folkways and that the prescripts of stateways and law-ways would ever remain as paper law. For as shown earlier, the latter can be absorbed into the so-called inner ordering of associations so as to

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[77] BOASSON, *op. cit.*, 24.

[78] Eckhoff, *Sociology of Law In Scandinavia,* in 4 SCANDINAVIAN STUDIES IN LAW 34 (1960).

[79] STONE, *op. cit.*, 472.

become living law, provided it is attuned to the realities of said associations. Sawer cites an instance of such a transformation, saying that law is often first an imposed social policy — such as the Statute of Frauds in England in 1677. Later, they are identified with the social order rather than with social control.[80]

Rule observance, in short, tends to become institutionalized:

> "The regular active enforcement of the law (mainly the criminal law) by appropriate state authorities does not necessarily justify a view that the whole body of the law is constantly adopted and enforced by the governing group for the time being as a matter of conscious social policy. Once a modern society has reached a reasonable state of complexity and stability much of this sort of enforcement is institutionalized, and so far as possible separated from the questions of social administration which are the concern of daily politics and legislation."[81]

A rule of law will be generally obeyed, or the rules of a legal system will generally be observed, if that rule or that system gives effect to the primary needs of society and is consistent with its socio-ethical convictions. An alien rule or system, therefore, if incapable of being assimilated into the society's culture, will perforce be breached or simply disregarded as a dead law, unless the same is imposed by the sheerest physical power in which case there may be external observance. As Sumner, however, pointed out, the power to control ritual or external conduct can ultimately lead to the power to control belief or socio-ethical conviction.

Short of ruthless totalitarianism, the rules of a legal system have to express the most delicate adjustment of power to men's ethical convictions.[82] Rules of this sort are observed because they have what is called an *internal* aspect. The persons or groups they bind are rule-conscious; they accept said rules as intended to be observed. For the most part, therefore, they obey these rules not because sanctions are attached to them in case of disobedience, but because they are convinced that the rules are sound and good and ought to be observed. Sanctions are nonetheless attached to them because of the fact that there will always be exceptions in a group who, for lack of ability to see in rule observance their long-range self-interest, as against the tempting and immediate self-interest in its violation, will

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[80] SAWER, *op. cit.*, 136.
[81] *Ibid*, 137.
[82] STONE, *op. cit.*, 644.

be too disposed to break the rule unless such deterrence exists. As a corollary, where the rules possess no internal aspect, relying only on sanctions, their observance cannot be expected, since a general violation of the rules will render the application of the sanctions impossible. A system whose rules, or most of them, are thus being generally disobeyed is a dying one. Rule-observance, then, is a test of the "livingness" of a law or set of laws.

The power of law should not be underestimated, however. No other social institution has so profound an educational influence, for social good or for social evil.[83] And the fact of the matter is that law has not been content with a minimal role and has never been a bystander in the process of social change.[84] *Prima facie* the imperatives of law reflect ethical rightness to most members of the community. To the ordinary citizen, the law does indeed, as Blackstone put it, "command what is right and forbid what is wrong".[85] And even where the breach of relevant rules has become frequent or occurs in circumstances that threaten the existence of the social relation in question or is felt to threaten social stability generally, the society's governing associations may call upon the political institutions or the State to vindicate the law by vigorous enforcement policy, thereby renewing the relevant law, actively adopting it as current policy and in this way asserting social control.[86]

Summarizing, then:

There is a pressing need and reason to study law as a function of the social order. This approach leads to a sociology of law.

The sociology of law stresses the factual context of norms of law. As such, law is found to be not an abstract principle or command, but a norm of conduct arising out of and responsive to social facts, needs and realities. Sociologists of law even go so far as to state that the nature of law is not norms expressed in social conduct but social conduct expressing norms.

The foregoing then underscores the urgency of seeing a rule in its social setting and understanding its development in that light.

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[83] Jones, *The Creative Power and Function of Law in Historical Perspective*, 17 VAND. L. REV. 139 (1963-64).
[84] *Ibid.*, 136.
[85] *Ibid.*, 138.
[86] SAWER, *op. cit.*, 136.

Thus, we must examine the social postulates — those assumed requirements of the social life as well as the aim and purpose of our association.

In the frame of the social postulates, we assess the role of law, and we find that it has a two-fold task, namely, to assure the society's continuing *existence* and to achieve *fulfillment* of its ends.

This function the law performs as a social norm for social control. The shaping of this norm is traced to society's inner life itself, to the people's mores and folkways, to their social-ethical convictions. Further changes may be made by legislation and court rulings but all this must be consistent with the dynamism, culture and identity of the people sought to be governed.

As a special instrument for social control, law does what other social forces do, but with a difference, that it has the power to apply and use force or what we call sanctions in support of its norms. In so doing, it can and has to recognize and protect some interest as against others. This entails a system of value, a schedule of priorities, a rationale for making choices.

Several interests press for recognition, their range and diversity rendering it so difficult to fully classify them. Roscoe Pound's classification, however, is a rewarding guide in this regard.

As life goes and norms are shaped, the recognition and choice of interests have to be made, sometimes by following a general policy, often on a case-to-case approach.

All the laws form a system, consisting of all its rules. The system and the rules are obeyed if and only if they have an internal aspect, that is, they are true to their social context. If not, they will be disregarded as alien to the life it seeks to regulate, and will remain paper rules, unless enforced by sheerest physical force, which would do violence to the nature of law as rules flowing out of the needs, aspirations, beliefs and culture of the people in the social community.

As a norm for social control, the power of law is great for good or for evil. Its fidelity to the social postulates and to its twofold role of securing the *survival* and *fruition* of the social life depends on how attuned its rules and institutions are to the social facts and changes; how readily it can respond to them; and in some

cases, how able it is not only to respond but to anticipate and lead in a creative formulation of a social policy which, if attuned to the central elements of the society's beliefs and culture, will easily be assimilated in its inner life and transformed into part of its social order.

IV

SPECIAL PROBLEMS AND APPLICATION

After having dealt with the principles and tenets of sociology of law, we would naturally want to consider their practical application in the social reality around us. I propose to take up in this regard two specific areas that I feel are of sharp and vital relevance to the Philippines now. The first is the problem or task of embodying social justice in our laws. The second, which has to do with our being a developing country, is the problem of direction and assistance through law in the tasks of development and growth. The timeliness and urgency of these selected problem areas have since been recently confirmed by the nation's political departments. The President, in his State of the Nation Address, stated that the primary tasks facing us are "first to lay the groundwork for the industrialization of the economy; second, to bring about social justice." And Congress has lately announced that its Economic Planning Office is currently studying and drafting a program of legislation aimed at the twin goals of social justice and industrialization.

The so-called Asian dilemma or crisis involves many ingredients, such as social indifference, injustices, lack of social discipline, personalism and corruption, fast-rising population, inflation, poverty, need for development, etc. The developments, changes, and adjustments in the law throughout the spectra of diverse social phenomena involved in these crises are far too manifold for us to consider here. The response of the law has been far-ranging. It includes for instance the Supreme Court's increasing of the minimum amount of damages payable for the death of a person and the amount of income deemed lucrative for purposes of naturalization, both on the basis of an awareness of social and economic changes in living conditions and currency values; it can be seen in the passage by Congress of new laws to remedy the backlog in the administration of justice by the courts, such as that creating the new Criminal Circuit

Courts and those redefining the appellate jurisdictions of the Supreme Court and the Court of Appeals; it is evident in the President's search for new directions in foreign policy and national defense as well as in his forty proposals submitted to Congress in this year's State of the Nation Address. The private sectors, too, are deeply involved as instanced by student and youth activism, the recent allocation by sugar farmers of ₱30 Million as bonus to sugar farm workers, the sense of looking forward with hope to the 1971 Constitutional Convention, where even the most radical system change can be peacefully made. All these are parts of the ferment and milieu that are shaping law and are shaped by law. For our purposes, I will focus on social injustices and need for developments as encountered in the recent decades by the Philippines as a young Republic.

A. *The Problem of Social Justice*

The Philippine Constitution, adopted in 1935, declares that: "The promotion of social justice to insure the well-being and economic security of all the people should be the concern of the State."[87] Aside from this broad pronouncement, it specifies certain aspects of social justice in a further provision, thus: "The State shall afford protection to labor, especially to working women and minors, and shall regulate the relations between landowner and tenant, and between labor and capital in industry and agriculture."[88]

The recognition and adjustment of specific interests, therefore, are at the heart of the need and task to embody social justice in the laws. Speaking precisely of this crux of social justice, the Supreme Court in *Calalang v. Williams*,[89] through Mr. Justice Laurel, stated its concept, as follows:

> "Social justice is . . . the humanization of laws and the equalization of social and economic forces by the State so that justice in its rational and objectively secular conception may at least be approximated. Social justice means the promotion of the welfare of all the people, the adoption by the Government of measures, calculated to insure economic stability of all the competent elements of society, through the maintenance of a proper economic and social equilibrium in the interrelation of the members of the community, constitutionally, through the adoption of measures legally jus-

87 PHIL. CONST., art. II, sec. 5.
88 PHIL. CONST. art. XIV, sec. 6.
89 70 Phil. 726, 734-735 (1940).

> tifiable, or extra-constitutionally, through the exercise of powers underlying the existence of all governments on the time-honored principle of *salus populi est suprema lex.*"

The first aspect of social justice provided for by Philippine laws was the need for industry to compensate for death, accidents and illness arising out of employment. And thus even before the present Constitution was adopted, we already had the *Employers' Liability Act* (1908)[90] and the *Workmen's Compensation Act* (1927).[91] These pieces of social legislation formulated in response to social evils were thus bestowed a distinct recognition of legitimacy in the provisions of the Constitution.

After the Philippine Constitution took effect, the legislative body adopted more social legislation to promote the ends of social justice. To mention only some of the more prominent ones: (1) An Act creating the Court of Industrial Relations;[92] (2) the Industrial Safety Act;[93] (3) the Government Service Insurance Act;[94] (4) An Act providing for the time of payment of salaries and prohibiting certain abuses in regard to the form and manner of paying salaries and wages;[95] and (5) the Eight-Hour Labor Law.[96]

The period, however, that saw the rise of social legislation is that of the present Republic. In the last decade or two, we saw the emergence of statutes aimed at social justice, covering diverse matters. This can be attributed to several factors, such as social change and its concommitant train of friction and tension; and, it should be added, the increasing awareness and recognition of social problems. This, too, explains why the action and initiative are found primarily in the legislative body, not in the courts, because the former has the facilities and means for discovering and perceiving the prevailing and changing social realities all over the country.[97] As we have noted, law should be "prescripts moulded by the facts of social reality".[98] The position of Congress as a political department that

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[90] Act No. 1874, (1908).
[91] Act No. 3428, (1928).
[92] Com. Act No. 103, (1936).
[93] Com. Act No. 104, (1936).
[94] Com. Act No. 186, (1936).
[95] Com. Act No. 303, (1938).
[96] Com. Act No. 444, (1939).
[97] See Gellhorn, *The Law's Response to the Demand for Both Stability and Change*, 17 VAND L. REV. 92 (1963-64).
[98] BOASSON, *op cit.*, 15.

not only can feel the pulse of the nation, but can truly speak for the different elements as well as the totality of the country, should render it the most competent body to adopt such needed measures to embody social justice in our laws.

The social legislations enacted under the present Republic generally fall under the following types: (1) agricultural or land reform; (2) labor relations and (3) standards and welfare.

The first type, agricultural or land reform, includes the statute creating the Court of Agrarian Relations,[99] the Agricultural Tenancy Act,[100] and the Agricultural Land Reform Code.[101]

The second type, labor relations, are exemplified by the Civil Code, specifically its provisions on contracts involving labor,[102] the Industrial Peace Act,[103] the Anti-Scab Law[104] and the Anti-Picketing Law.[105]

The third class, standards and welfare, is the most far ranging, covering such laws as the Minimum Wage Law,[106] and the new Minimum Wage Law (₱6 a day) for Non-Agricultural Workers,[107] the Woman and Child Labor Law,[108] the Blue Sunday Law,[109] the Emergency Medical and Dental Treatment Law,[110] the Social Security Act of 1954,[111] and the law exempting retirement benefits from attachment, levy, execution and taxes.[112]

A survey of such legislations will readily show that there has been no single program of social justice legislation, deliberately planned, formulated and implemented. Rather, for the most part these are *ad hoc* statutory measures, making direct assaults on the points where maladjustment is immediately manifest, providing for *ad hoc* remedies for many particular defaults of the legal order. This is not unusual, and social legislation frequently develops this

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99 Rep. Act. No. 1267 (1955).
100 Rep. Act. No. 1199 (1954).
101 Rep. Act No. 3844 (1963).
102 Rep. Act No. 386 (1950).
103 Rep. Act No. 875 (1953).
104 Rep. Act No. 3600 (1963).
105 Rep. Act No. 1167 (1954).
106 Rep. Act No. 602 (1951).
107 Rep. Act No. 4180 (1965).
108 Rep. Act No. 679 (1952).
109 Rep. Act No. 946 (1953).
110 Rep. Act No. 1054 (1954).
111 Rep. Act No. 1161 (1954).
112 Rep. Act. No. 4917 (1967).

way.[113] The social legislators of the future, however, as Stone pointed out, have to approach the problem through a vast effort at understanding, seeking by the light of available social knowledge the key points of the systems of action from which adjustment can be effectively made.[114] This much is definite, however: That the trend is towards an increasing range of legal intervention in relations or matters affected with social interests. This is a drift away from a system of *laissez faire* or pure capitalism to one of socialization of laws. For instance, the Civil Code, has modified the traditional concept of a right by adopting the concept of abuse of right.[115] The principle of abuse of right in effect introduces the social element to the idea of a right, so that the exercise of a right is prohibited when it exceeds in a manifest way the limits prescribed by good faith, or the *bonos mores* or the social or economic aim of said right.

So, also, the freedom of the parties to stipulate on whatsoever they desire, the so-called liberty of contract, has yielded to socialization in the form of legal intervention due to the need to interfere where gross inequality of bargaining power makes the abuse of liberty likely. Instances of this are the prohibition by law of waiver of certain rights and benefits accorded to laborers or tenants, and the mandatory nature of statutory provisions on minimum wages, minimum hours of work, emergency medical and dental services, social insurance coverage, and the imposition of statutory duties in landlord-tenant and labor-management relationships. And in the case of the Agricultural Land Reform Code, it has gone so far as to prohibit the specific contract itself, sharehold tenancy. Social legislation has thus shown its power to decisively influence the patterns of relationship in work, land ownership and other rights.

A note of caution must however be added. Social reform laws are not self-executing. "Social reforms" says the Scandinavian juristic writer Tornstein Eckhoff, "are not carried out automatically by the enactment of a law in which the goals are stated."[116] The formulated social reforms must be pursued and carried out, administratively

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[113] STONE, *op. cit.*, 42.
[114] *Ibid.*
[115] Arts. 19, 20 & 21, Rep. Act 386. (1949).
[116] *Sociology of Law In Scandinavia*, in 4 SCANDINAVIAN STUDIES IN LAW 40 (1960).

and judicially. It is here that the roles of courts and the administrative or executive department come in. Courts must give life to the provisions of the law and administrative agencies must continually apply them to a vast array of changing situations. The problem of how to produce or evoke such a creative response from these coordinate branches of government is in itself a complicated matter, extending to appointments, procedure, salaries, facilities, anti-graft and continuing legal education.

The responsibility, therefore, is in the final analysis, that of the State whom people — as Friedmann observed — now invariably hold responsible for ensuring conditions of stable and full employment through public works and relief schemes, tax policies and other instruments of public policy. It is expected by the community to provide minimum standards of living, housing, labor conditions and social insurance.[117]

It would not be fair to the Philippine judiciary, especially its Supreme Court, to pass over its remarkable performance in regard to giving life to social legislation. As early as 1938, the Supreme Court, in *Cuevo v. Barredo,*[118] fulfilled its part of the task, in that case regarding the Employers' Liability Act which it sustained and applied to a worker who drowned in the process of trying to salvage his employer's log drifting in a river. The Supreme Court in *Gamboa v. Pallarca,*[119] among other cases, upheld the statutory right of a tenant under the Agricultural Tenancy Act to change his system of tenancy from sharehold to leasehold. Regarding security of employment, the same was held to extend to seasonal workers in sugar plantations, in the case of *Industrial-Commercial-Agricultural Workers Organization v. Court of Industrial Relations.*[120] Presumptions of the law in favor of the laborer, such as on the compensability of death, illness or accident, under the Workmen's Compensation Act, were given strength, force and life in *Agustin v. W.C.C.*[121] In *Maquera v. Comelec* and *Aurea v. Comelec,*[122] the Supreme Court declared unconstitutional a statute requiring candidates for public office to post a bond.[123] The Court stated, among others, the reason

117 FRIEDMANN, *op. cit.*, 5.
118 65 Phil. 290 (1938).
119 G.R. No. 20407, March 31, 1966.
120 G.R. No. 21465, March 31, 1966.
121 G.R. No. 19957, September 29, 1964.
122 G.R. Nos. 24761 & 24828, September 7, 1965.
123 Rep. Act. No. 4421 (1965).

that said law runs counter to the principle of social justice embodied in the Constitution.

The role of the administrative agencies is more extensive, including such diverse agencies as the Social Welfare Administration, recently changed into the Department of Social Administration, the Department of Labor, the Presidential Arm on Community Development, the Philippine Housing and Homesite Corporation, the Social Security Commission, the Government Service Insurance System, etc. Their performance is difficult to assess, since their best work is done in day-to-day activities that often go unnoticed and seldom make the headlines.

It cannot be seriously denied, however, that they have performed a necessary function in realizing social justice in our laws, and that our system of government is increasingly depending on them for the implementation of the social reforms that have been enacted by legislation. For it is here in this administrative level that the application of the adopted social remedies and the pursuit of the pronounced social policies in said laws, become institutionalized as they bear on real and living relationships in that delicate process of social ordering.

The problem in this regard is how to structure and streamline these agencies so as to more fully attain their objectives. A thorough and in-depth study of these bodies, with a view to adoption of needed re-structuring or changes, avoidance of overlapping functions, their placement beyond partisan politics and, in general, of rendering them truly dynamic, efficient and flexible, is highly commendable.

The need for studied reforms is indeed found in a broader scale. The Philippine Christian Social Movement, a newly-formed group or newly-launched movement that has set itself to strive for the realization of a Philippine society built on justice,[124] has advocated the use, among others, of tax legislation to effect social justice. Noting that there still abounds numerous social injustices in our midst, one of its spokesmen proposed that "we turn to government, not in the sense of management (as in nationalization), but in the sense

[124] See *A Christian Social Movement: Ideology and General Information*, 11 (1968).

of direction as in law."[125] Said this spokesman, Mr. Edgardo T. Kalaw, in his paper entitled *Christian Humanism*:

> "And the answer lies in many little things that we have to define by law, that we as a people will have to learn to rule and be ruled by.
>
> "First. There are laws that control resources that are scarce, such as foreign exchange, credit, and natural resources — and give new enterprises direction and protection, such as investment incentives and tariffs.
>
> "Second. There must be a massive emphasis on taxation, especially on values that do not originate from work, e.g.,
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> a. Inherited property;
> b. Profits arising from appreciation of land;
> c. Excess profits of public utilities;
> d. Excess profits of enterprises using natural resources — such as logging and mining;
> e. Excess profits arising from preferred markets granted as a concession to the nation, and not to a particular industry.
>
> With the exception of inherited property, these profits belong to the community.
>
> "Third. There are the many laws that deal with pure government — peace and order, public works, hospitals, schools, adult education, and social security.
>
> "Lastly. There are the laws that deal with human relations — those between employer and employees, landlord and worker, manufacturer and consumer, management and minority stockholder — realizing all the while that some of these laws, designed in developing countries, may not fit the conditions existing in our country today, and the temperament and culture of our people."[126]

Rewards of enterprise should indeed be more equitably distributed by legislation. The right to use one's labor and skill, and to be protected in the exercise of these capacities, has to a substantial extent been recognized in our laws, through minimum wage statutes, the protection of collective bargaining agreements between employers and labor organizations covering matters such as seniority rights, pension claims, grievance procedures, redress against arbitrary dismissal, etc.

Tax legislation has yet to be transformed into an instrument of social justice. Recent tax laws passed near the end of last year, however, such as Republic Acts 5447 and 5448, show a trend along this direction. Republic Act 5447 creates a Special Education Fund to be constituted from proceeds of an additional one per cent real

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[125] *Ibid.*, 25.
[126] *Ibid.*; Also in Bank of Asia Report, Supplement, July, 1968, p. 3.

property tax and a certain portion of taxes on Virginia-type cigarettes and duties on imported leaf tobacco. Republic Act 5448 imposes a tax on privately owned passenger automobiles, motorcycles and scooters, and a science stamp tax, to constitute a Special Science Fund.

There is likely to be increasing importance in the role of taxation as one of the State's policy-shaping instruments to mitigate the objectionable aspects of unrestricted private property, such as sharp and gross inequalities of wealth and the power to use property for private profit without regard to community purposes.

Not only the legislature but administrative bodies are exercising more and more important functions in the socially just redistribution of property. As Friedmann says, and the same practically holds in our system today, as witnessed by the Philippine Central Bank's regulatory circulars:

> "Public control of financial credit is another means by which the State curtails privately financed capital. Low interest rates may limit the income from private credit and other banking transactions, but by far the more important aspect of official credit restrictions is the curtailment of the power of private capital to influence the national economy, through the expansion or restriction of credit."[127]

And for this reason, he stresses the increasing importance of the role of administrative law:

> "Since most of the important planning decisions, both nationally and internationally, involve the relations between governments and private legal subjects (corporate or individuals), and since many of the major planning decisions inevitably involve some interference with property and other private interests, a study of administrative law becomes increasingly important. . . . [A]dministrative law will be the principal instrument of adjusting the interests of the public, as represented by the government, and of private citizens, as represented by contractors, foreign investors, and the like."[128]

As a whole, therefore, the Philippine legal system has at least recognized, albeit in an *ad hoc* fashion rather than in one systematic program, the need to do social justice through law. The concept of social responsibility of private ownership has been reflected in our laws, although their being carried out in the daily lives of the

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127 FRIEDMANN, *op cit.*, 86.
128 *Ibid.*, 190-191.
129 GANONG & PEARCE, *op cit.*, 95.

people is lagging behind the formulation of such laws. It will serve us well to remember what sociologists of law have stressed that "the right of private property in things in excess of individual needs is not recognized by law for the benefit of the owner only."[129] Rather, there is in such cases, a responsibility to society, to produce socially beneficial results superior to those which would be achieved under public ownership.[130]

As tenets of sociology of law attest, law regulates almost any relationship. Renner calls such a governing legal relationship a "legal institution".[131] In the Philippines the legal institutions in the field of social justice are principally landlord-worker, labor-management, master-servant relationships. To succeed in realizing social justice, such institutions must be relevant to their subjects and responsive to the needs in their areas. There is a continuing necessity to change the policy as the need arises, as social purpose requires. There is a never-ending task of balancing the different interests involved. Such laws can balance effectively only if they are socially just. As Boasson reminds us:[132]

> "The enforcement of black-out regulations, traffic-rules and those prescripts which are not kept when the consciousness of 'danger' is not uppermost in the public's mind, is usually enhanced by admonishing punishments. The enforcement of rules which on the other hand are not a matter of disciplined attention alone, but are related to economic, social and moral situations, require an all-embracing policy of enforcement, where the role of deterrent punishment is of minor importance. Black-marketing, smuggling and bribery can never be met with mere threats of punishment, if those sanctions are not coupled with fair distribution, reasonable import-tariffs and decent pay of officials. The control of gambling, alcoholism or prostitution does not depend on simple prohibitions but more on economic, social and sexual education of a persuasive character."

Social legislation's unswerving aim should therefore be to embody social justice in our laws. And the fullest meaning of justice is social order: "The observance of the actual system of rules, whether strictly legal or customary, which bind together the different members of any society into an organic whole, checking malevolent or otherwise injurious impulses, distributing the different objects

130 *Ibid.*, 95-96.
131 SAWER, *op cit.*, 165.
132 BOASSON, *op. cit.*, 17-18.

of men's clashing desires, and exacting such positive services, customary or contractual, as are commonly recognized as matters of debt."[133]

I have no hesitation in stating that this is foremost among the social postulates of Philippine society. The preamble to the Philippine Constitution, a formulation of our social postulates, speaks of "a government that shall . . . secure the general welfare . . . under a regime of justice."

B. *The Problem of Development*

1. Social Change And Law

The specific problem of development and law must be seen from the context of the larger problem of law and social change. The rules of law are framed in general terms, so as to be able to subsume social changes and flexibly apply to varying situations. "Law", as Sawer puts it, "has to be to some extent in general terms, and it must provide for equality of treatment for reasonably comparable cases over appreciable periods of time."[134]

Stability and change are therefore both needed by law. Stability of a dead text is not sufficient for law.[135] Any positive law system must therefore leave considerable room for further law-making.[136] Resistance to needed change in fact imperils stability. Says Jones:

> "Law loses its power and abdicates its ordering function when it loses touch with the dynamics of social life. In aggravated situations, as when the essential rules of a whole legal system are outmoded and the body of ordinary people denied effective opportunity to change them, uncompromising opposition to change can lead to political revolution and so to the loss of all stability in the society."[137]

Rules of law can subsume factual changes only up to a limit. As this limit is exceeded, tension develops:

> "Tensions develop because legal relation fails to correspond with social relation, even within the elastic degrees of tolerance permitted by human conduct; then adjustment of the law becomes inevitable,

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[133] Sidgwick, *The Utilitarian Theory of Justice*, in OLAFSON, JUSTICE AND SOCIAL POLICY 29 (1961).

[134] SAWER, *op cit.*, 191.

[135] See Jones, *The Creative Power and Function of Law In Historical Perspective*, 17 VAND. L. REV. 142 (1963-64).

[136] SAWER, *op. cit.*, 17-19.

[137] Jones, *op. cit.*, 140.

> in ways beyond conceptual manipulation. Even where a legal rule or concept is in terms sufficiently abstract or generalized to extend to a new development, there may be so strong an identification of the rule or concept with its original social interest or institution that the extension of the rule would be considered, at least by laymen, as a legal fiction."[138]

The foregoing is a rejection of the so-called jurisprudence of concepts or the attempt to treat the law as a closed system of definitions, rules of operation, and substantive major premises such that any specific legal problem can be solved by deductive reasoning from the propositional system so established.[139] There must always be an attitude of preparedness in the sense of readiness to lay new foundations in an orderly lawful fashion.[140] And laws must change with the beliefs and way of life of the people or of the society that they govern. The process of law-making is thus evolutionary. Said Ganong and Pearce:

> "Changes in belief bring changes in the way men live and thus make changes in the law necessary. For this reason, law making is an evolutionary process. Laws that reflect the beliefs of today, and are therefore enforceable, may well become, because of changed beliefs, unenforceable tomorrow, whereas laws that would be unenforceable today may well be enforceable tomorrow."[141]

Failure of law to keep pace with social change will damage law's integrity. The disregard of a legal norm that has become outmoded but remains unchanged tends to generate public cynicism towards all phases of the legal order. This is the consequence when practice and preachment bear little similarity. Jones says that: "In default of proper and workable law, decisions of profound importance to society and its members are inched out lawlessly."[142]

Regarding the adoption of such needed changes, sociological jurists agree that law can and should be developed by judges as well as legislatures, in order to meet changing social needs.[143] Since this change often involves shifts and adjustments in social policy, the focus has to be on the legislative body rather than on the judiciary because under the Philippine legal set-up, Congress is the policy-making body. And moreover, as stated earlier, the facilities

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138 SAWER, *op. cit.*, 169.
139 *Ibid.*, 17.
140 BOASSON, *op cit.*, 23.
141 GANONG AND PEARCE, *op cit.*, 45-46.
142 Jones, *Creative Power of Law, op. cit.*, 144.
143 SAWER, *op. cit.*, 17.

of Congress to fully inform itself of the social facts underlying any situation and its ability to tackle a problem from several angles at the same time (such as providing for both the financial and penal angles), render it the most fitted State organ to adjust the laws to social changes.

2. The Philippine Congress and Development

Some patterns may be discerned in the statutory output of the Philippine Congress in the field of national development.

Firstly, there is a pattern of promoting regional development.

As instances of this, we have the statutes creating the Mindanao Development Authority,[144] the Panay Development Authority,[145] the Mountain Province Development Authority,[146] the Northern Samar Development Authority,[147] the Laguna Lake Development Authority,[148] the Hundred Islands Development Authority,[149] the Catanduanes Development Authority,[150] and similar other measures covering other regions in the Philippines.

This type of legislation is based on the favorable nature of the chosen region, as found by factual study, to be treated as a unit in socio-economic development. And the statute creates a Development Authority charged with the primary role of assisting in carrying out said development. A typical regional statute further provides for a survey to be made of the region's social, economic and cultural conditions, physical and natural resources, industrial and agricultural potentialities. And, on this basis, it calls for the formulation of an integrated, practical, feasible, workable and detailed plan and program for development of the region concerned.

Aside from such regional attention, however, Congress has dealt with the problem of development from another angle, on the basis not of region but of industry. *Secondly,* there are the statutes designed to foster the different industries, including in this term those engaged in agriculture and natural resources, trade, commerce and manufacturing, science and technology, fishing and navigation, etc.

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144 Rep. Act No. 3034 (1961).
145 Rep. Act No. 3856 (1964).
146 Rep. Act No. 4071 (1964).
147 Rep. Act No. 4132 (1964).
148 Rep. Act No. 4850 (1966).
149 Rep. Act No. 4777 (1966).
150 Rep. Act No. 4412 (1965).

A full coverage of the laws adopted in this area is not the purpose of this present discussion. It will suffice to mention a sampling of them so as to suggest the pattern of these measures.

There is Republic Act 3127, promoting the "basic industries" by a grant of tax exemptions directed at accelerating the pace of economic and social development of the country.[151] Said law classifies 19 industries as basic, starting with basic iron, nickel, alumina and steel, basic chemicals, then ranging from deep-sea fishing to cattle industry, from cigar manufacture to refining of gold, from pulping and paper manufacturing to production of agricultural crops.

Aside from this broad grant, there are specific legislations for a particular industry only. Thus, there are the Acts promoting, assisting and/or strengthening the textile industry,[152] the Virginia tobacco industry,[153] the gold mining industry,[154] the metals industry,[155] the abaca and other fibers industry,[156] the cottage industry,[157] and the dairy industry.[158]

The development of science, through the governmental agency thereby created, the National Science Developmnt Board, was provided for in the Science Act of 1958.[159] Applied researches in the fields of rice and coconut were further specifically treated in other laws.[160] Still another law grants special privileges to inventors of new processes.[161]

The rest of legislation hereon are varied: statutes declaring specific places as tourist spots and appropriating funds for the purpose to promote and develop tourism;[162] statutes to encourage cooperative marketing;[163] statutes on sugar quota allocation;[164] the statute providing for the exploration and utilization of the Surigao

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151 Rep. Act No. 3127 (1961).
152 Rep. Act No. 4086 (1964).
153 Rep. Act No. 4155 (1964).
154 Rep. Act No. 3089 (1961).
155 Rep. Act No. 4724 (1966).
156 Rep. Act No. 4721 (1966).
157 Rep. Act No. 3470 (1962).
158 Rep. Act No. 4071 (1964).
159 Rep. Act No. 2067 (1958).
160 *See* Rep. Act No. 2707 (1960); Rep. Act No. 4059 (1964).
161 Rep. Act No. 1287 1955).
162 *See, e.g.,* Rep. Act 4884 (1967); Rep. Act No. 5066 (1967).
163 *See, e.g.,* Rep. Act No. 702 (1952).
164 *See, e.g.,* Rep. Act No. 4160 (1964).

mineral deposits;[165] the Non-Agricultural Co-operatives Act;[166] the Act to facilitate entry into the Philippines of International traders and investors of foreign nationality;[167] the Act authorizing the Philippine National Railways to operate railroads between any points in the Philippines;[168] the Cattle Dispersal Act of 1964;[169] and statutes regulating mining such as the Mining Act[170] and the Petroleum Act.[171] And there is, finally, Republic Act 5186, the Investments Incentives Act, providing for registration and priorities of investments in connection with tax-exemption and other incentives.[172]

Aside from regional development and development of industries, Congress has adopted numerous legislation having to do with the *financing* of development.

This has taken different forms: floating and sale of bonds, such as the Public Works and Economic Development bonds;[173] foreign loans, by authorizing the President to obtain the same;[174] sale of government properties;[175] taxation;[176] and the provision for special funds, like the Special Mines Fund[177] and the Special Trust Fund for Agricultural Development.[178] Foreign investments are regarded as a necessary source of financing but the same should fit with our program and interests; hence, the Investment Incentives Act favors the placements of foreign investments in pioneer and preferred areas. And recently Republic Act 5455[179] was adopted to limit foreign equity holdings in domestic enterprise to 30%, excepting such "permissible investments" as defined by the law, in the pioneer or preferred area of investments, subject to registration with and permission from the Board of Investments.

Special mention should be made of development banking, notably through the Development Bank of the Philippines which pro-

165 *See* Rep. Act No. 1828 (1957); Rep. Act No. 2077 (1958) and Rep. Act No. 4167, (1964).
166 Rep. Act No. 2023 (1952).
167 Rep. Act No. 5171 (1967).
168 Rep. Act No. 4156 (1964).
169 Rep. Act No. 4069 (1964).
170 Com. Act No. 137 (1936).
171 Rep. Act No. 387 (1949).
172 Rep. Act No. 5186 (1967).
173 Rep. Act No. 1000 (1954); Rep. Act No. 4861 (1966).
174 Rep. Act No. 4853 (1966); Rep. Act No. 4860 (1966).
175 Rep. Act No. 5169 (1967).
176 Republic Acts Nos. 5447 and 5448 *supra*, p. 9. (1968).
177 Rep. Act No. 4793 (1966).
178 Rep. Act No. 4693 (1966).
179 Rep. Act No. 5455 (1968).

vides credit facilities for development and expansion of agriculture and industry and promotes the establishment of private development banks throughout the country.[180]

The foregoing specific laws are a sampling review of the responses of the Philippine legislative body to the need to adjust law to social change. In the field of social and economic development, it appears to be more than that, for it strives to effect the social changes. Actually, it is both a response to social changes that demand further social changes which the law, together with non-legal forces, in turn bring about.

For as the Scandinavian jurists tell us, law is both a product of social forces and a factor that influences social life. In *Sociology of Law In Scandinavia,* Tornstein Eckhoff writes:

> "A Common feature of most new theories of law that have emerged in Scandinavia in this century is the strong emphasis on the relationship between law and society. It is frequently stressed that law is both a product of social forces and a factor that influences social life. This theory of the nature of law is often combined with a preference for teleological reasoning. In legal reasoning, evaluations of the supposed social consequences of the different rules or interpretations of law have largely replaced deductions from abstract principles."[181]

The task of law is thus unique, as can specially be seen in the problem of social and economic development: to build on an accepted foundation. As afore-stated, however, there should ever be the attitude of preparedness to lay on new foundations, as soon as the social changes have rendered such new grounds factually accepted or necessary and consistent with the society's culture, beliefs, way of life or its principal elements.

Still, because of this unique task of achieving stability while giving room for change, the pace and substantive reach of legal change is limited. Says Jones in this regard:

> "Pace and substantive reach of legal change have their limits. Bentham put security of expectations first in his hierarchy of legal values; Aristotle and Thomas Aquinas warn that the observance of law is achieved largely thru 'habit', and undue change in legal rules may deprive law of the precious support of moral obligation and make law enforcement a matter of pure coercion; reasonable assurance that rules will not be changed after a commitment or in-

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180 Rep. Act No. 2081 (1958).

181 *See* 4 SCANDINAVIAN STUDIES IN LAW 33 (1960).

> vestment is made is necessary in any society for men to plan their future conduct and providing such assurance has been throughout history one of the major tasks of law and lawyers. Finally, and most significant, unconsidered change in the fundamental law, as in a constitution or long-maintained organic statute, may undermine the public consensus on which an entire nations's legal order is built. Safeguards against this abound: non-retrospective operation of laws; non-impairment of contracts; reasoned judicial decisions — so that new legal departures be announced, explained and justified."[182]

The difficulty met by the writers of the Asian Conspectus of Contract is in large measure due to the problem of adaptation of an "alien" legal system that said writers encountered. Such "alien" legal systems, mostly "inherited" from the developed Western societies, are not easily adapted to meet the particular needs of Asia's now independent States and the problems of their development.[183] This is because such "alien" legal system does not suit the needs of these developing countries and their social conditions. As much as possible, therefore, Asian legislators, specifically those in the Philippines, should fashion new laws suited to the facts of our social existence.

And there is often danger when the law goes wrong. If the same, not being a living law, is totally disregarded, then the gap between practice and preachment, as stated earlier, generates public cynicism that erodes the people's faith in the law. If, on the other hand, it is followed, whether by force or by habit, then it is liable to degrade community values. Jones explains this second effect, thus:

> "Because of widespread popular identification of the legally imperative with the morally right, law, when it goes wrong, can bring about the malformation of community institutions and the degradation of community morality."[184]

A system that was designed to avoid this mistake and assure that the laws do not run counter to the underlying mores of the social group, is instanced in Section 106 of the Revised Administrative Code of Mindanao and Sulu. For certain offenses, penalties on non-Christians in Mindanao and Sulu are thereunder left to the sound discretion of the Court, but not to be higher than that fixed by law; and the Court is required to consider *inter alia,* "the degree of moral turpitude which attaches to the offense among his own

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182 *Jones, op. cit.,* 142-143.
183 *See* 1 LAWASIA 11. (1968).
184 Jones, *op. cit.,* 138.

people." Such a form of legislation distinctly recognizes the relationship of law and social values. The application of this provision, however, is itself discretionary on the Court, as the Supreme Court held recently in *Lumiguis v. People*.[185]

The area in which law specially avoids imposing a policy not accepted by the people is in what is called "lawyer's law": the basic system of criminal law, law concerning the family, property and contracts outside the sphere of social-justice interests. Legislatures are usually slow to effect fundamental changes in these areas. The Civil Code has been practically unamended since its enactment in 1949, with few exceptions, such as the portions thereof inconsistent with the relatively new Philippine Condominium Law,[186] introducing a new concept of co-ownership and adding a new kind of real right to those stated in the Civil Code. The reason for this reluctance to change "lawyer's law" is the feeling that this part of law is associated with enduring features of the social order which should not be frequently altered.[187]

This reluctance, however, does not extend to the area covered by the problems of social justice and development, the so-called "law of social administration." In this sphere, the legislative policy changes frequently with shifts in social factors. In one case, lawyer's law was invoked to apply to a situation falling under social administration. Aliens invoked Civil Code provisions on family relations to defeat immigration laws and evade deportation. The Supreme Court through Justice J. B. L. Reyes, in *Vivo v. Cloribel*[188] ruled that said Civil laws govern relations between husband and wife *inter se* or between private persons, not relations between visiting aliens and the sovereign host country.

In the realm of social change and development, then, the law cannot afford to be separated from the facts. Again, to quote Ganong and Pearce:

> "Our laws are but the reflection of our beliefs. Before a right is recognized by the law it must be established as a matter of belief. We believe the promotion of human welfare involves the recognition of individual worth and the use — as opposed to the abuse — of private property. And inasmuch as the promotion of

185 G.R. No. 20338, April 27, 1967.
186 Rep. Act No. 4726 (1966).
187 SAWER, *op. cit.*, 127-128.
188 G.R. No. 25411, October 26, 1968.

> human welfare is the criterion by which we judge morality, we, as a society, believe that voluntary intentional acts that result in injury to the person or property of another are wrong and/or immoral. This is why persons and property are given legal protection. Man-made laws are necessary only when beliefs are not strongly or widely enough held to motivate conformity with them to the degree that we, as a society, deem desirable."[189]

As society changes, so too its laws should change. Friedmann has observed that this process is true in all fields of law, even in lawyer's law. Thus, he says that *in the fields of contract*:

> "It is evident that the *Idealtyp*, the contract as an instrument of free bargaining between parties on the basis of equality, has been largely displaced by the standardised contract, the collective agreement, and the impact of the public law, either through the imposition of statutory conditions or the still-insufficiently analysed-phenomenon of the public law contract."[190]

Since the changes in society are continuing, it is necessary to fasten one's attention to new demands for further changes in the law. A method that may well be worth considering for adaptation here in this regard is that found in the New Criminal Code of Greenland. Said law provides for a continuing research on its social effects. Says Eckhoff, who credits the Danish scholar Verner Goldschmidt for his part in drafting this Code:

> "A similar model of social impact on decision-making processes is applied in the last piece of work to be mentioned here: a general study of official behaviour in the field of law, written by the Danish scholar Verner Goldschmidt. Observations made in Greenland, where Goldschmidt has been engaged in a unique chain of activities, constitute the empirical basis of his work. In 1948-49 he visited Greenland with a group of experts studying the legal customs of the indigenous population, as well as the impact of Danish legal regulations and Danish culture in general. On the basis of this research work a new criminal code for Greenland was enacted in 1954. This code is in many respects remarkable. It makes use of a flexible reaction system with a variety of different sanctions, adapted to the Greenlanders' conditions of life and their ways of thinking. From the point of view of social science it is also noteworthy that the code has a clause providing for regular research into the effects of its provisions. Goldschmidt took part in drafting the code, and he has since as a civil servant and as a judge in Greenland been engaged in its administration, as well as in the research into its effects."[191]

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189 EVAN, *op. cit.*, 36.
190 Friedmann, *Op. cit.*, xi.
191 4 SCANDINAVIAN STUDIES IN LAW 52-53 (1960).

And, finally, law in pursuing the expression of social values in its norms should do so in order, as we have said in the beginning, to render the social existence both *tenable* and *fruitful*. To achieve this, law has always to aim at normative consistency. The rules must somehow all build up to a single, relatively consistent system. Says Parsons in Evan's book:

> "Normative consistency may be assumed to be one of the most important criteria of effectiveness of a system of law. By this I mean that the rules of law formulated in the system must ideally not subject the individuals under their jurisdiction to incompatible expectations or obligations — or more realistically, not too often or too drastically."[192]

I should like to sum up the points in this discussion by referring to Justice Arthur J. Goldberg's statement a few months ago:

> "Law rests on much more than coercion. Law must have the police power, but it is by no means synonymous or coterminous with police power. It is much larger in its conception and in its reach. It builds new institutions and it produces new remedies. It tames the forces of change and keeps them peaceful. People obey the law not only out of fear of punishment but also because of what law does for them: The durability and reliability it gives to institutions; the reciprocity that comes from keeping one's word; and the expectation, grounded in experience, that the just process of law will right their wrongs and grievances. Whenever just expectations go unrealized — whenever legitimate grievances go unredressed — confidence in the law declines; people become alienated from authority and from the law; and instability and even violence become widespread. All the police power in creation could not long uphold a system that did not meet the reasonable expectations and legitimate needs of people and correct their legitimate grievances."[193]

I hope that our discussion of law as a function of the social order will stimulate us to consider afresh the relation between law and social phenomena, to embody social justice in our laws and to achieve development through the law.

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[192] EVAN, *op. cit.*, 58.

[193] *Criminal Justice in Times of Stress*, 52 JUDICATURE, 55 (1968).