

THE INDIVIDUAL'S PERSPECTIVE OF LAW

SCOPE

This paper is in response to the overall theme of the Congress and to a particular sub-theme: Analysis of the functions of law as related to individual view of law. Brevity of allotted space allows no more than a contributing statement, at best a preliminary exhortation in support of the importance of the sub-theme. It seems likely that closer consideration of individual perceptions of law will be helpful to analyses from other perspectives. However, some adjustment in traditional theories may be necessary. Present theories sometimes underplay the significance of the individual hardly ever taking account of individual perceptions *qua* law as possibly part of «law itself».

ANALYSIS AND PRESCRIPTION

Any response to a call for functional analysis requires special heed to the difficulty of keeping straight the kinds of evaluations available for the task. First off is the distinction between descriptive or empirically involved statements on the one hand and on the other the prescriptive or normative. The distinction or failure to make it has been continually important not only to Western legal theory but philosophy generally for centuries. In the United States, the so-called functional approach which came out of sociological jurisprudence and the related «legal realism» was touted to be more empirically oriented than other approaches. Yet functionalism is not necessarily empirical. One may be purely speculative or idealistic in the name of «function».

Functional analysis is happily applied to the causes of comparison of is and ought. In a society in which laws were only sporadically enforced, for instance, one could say «the laws are not serving their function»; i.e., compared with the way we think the laws ought to function, per-

haps to induce conformity in behavior throughout society. An anthropologist might see the function of some of these laws to produce conformity in only a particular segment or class. Maybe their actual operating function is to vest discretion in the police or prosecutors.

Perhaps no functional analysis can be purely descriptive. Indeed it may be that there is no way to be purely empirical or to make purely descriptive statements. To describe the articles in a room —say a chair, table, hammer, glass, etc.—, is to engage, mayhap unconsciously, in a prescriptive functional analysis. A chair is to be sat in, a table is to be used for different purpose, and so on. Yet if one is taking an inventory, then the laisting is descriptive within *that* enterprise. In short, whether one is being descriptive or prescriptive depends upon the project at hand. Description at one level is prescription at another.

It may be that any analysis in legal theory, whether called functional or not, is at least subtly prescriptive. No doubt that is true of a general theory of law, for it is unavoidably a view among possible views. To pick a view of law, a perspective, a slant, and to say this is the way law *is*, or this is the way law functions, or even, these are the functions of law, is to prescribe a way of thinking, ultimately of acting, in light of that prescribed view.

At the risk of belaboring the obvious, permit an illustration involving some subtlety, concerning the inquiry as to the kind or kinds of principles or norms which are legal as opposed to being purely moral or social or whatever. To initiate the question is to prescribe a way of inquiring. We can with England's John Austin say that laws are commands or with his succesor H. L. A. Hart that law is made up of rules. These *views* excite differing attitudes toward a proffered system or even piece of law, potentially affects, then, their functioning. The Austinian or Hartian analyses are not merely differences in description. They have rhetorical significance. On that level, consider that to move from either one of these views to Kelsen's pure theory of law (as constituted by norms) involves risk. The risk surely is that the regulatory potential of laws on the book are lessened if not destroyed. How so?

Put it simply. A police officer is not going to say, for instance, «The norm is not to speed». He will say something like. «You're breaking the law». A judge is much less likely to speak of norms than of laws, rules, statutes, regulations, constitutions, and such. «Norm» does not have the requisite impact for *most* rhetorical endeavors.

Of course Kelsen was presumably not trying to influence the ordinary citizen's law-perceptions toward constituted law-authority. He was

prescribing a science of law and attempting therewith an ideologically neutral model. For that purpose, «norm» seems somehow neutral. Yet it is not when viewed functionally against other terms that might be used such as «command» «rule», and so on, at least no not against the question whether a statement so labelled must be obeyed. The Kelsenian move to «norms» can be liberating or otherwise beneficial. Even so, there is prescription involved, either in saying that law is not made up merely of commands or rules, or even most broadly that one has his choice in determining what kind or kinds of norms law does contain. Then one is free to look at «a law» as a command or a rule or what have you, depending upon *his* preference. While this perspective offers considerable creative mobility, it is also potentially, promotive of anarchy if placed in the wrong heads.

The implication is not that some ways of prescribing appropriate views of law or functions of law are not better than others, but it does depend what one is trying to do. Law as a subject of discourse, inquiry, or theory may not be peculiar in this regard, but it is unusually complex. It is not some sort of merely observable phenomena, although we may take some observable phenomena and call them law or say that law is within the phenomena or vice-versa; e.g., law is what judges do (legal realism in United States). Even if law were universally regarded as observable in some such way, different views of it would be possible as we know from everyday experience with simple observables such as chairs and mountains. Yet even more so than purely material observables, the stuff of law, the reality of law, the functions of law are very much dependent upon varying *views* of law which do exist. It is very possible that a true science of law would be heavily dependent upon that sort of assumption, requiring then a collection and organization of varying «views of law», rather than some disciplined way of persuading people how they *should* see law.

THE MOVE TO PERSPECTIVES

Generally speaking, legal theory and for that matter behavioral analysis of «law-related» actions have been remiss in dealing with law-attitudes and law-perspectives. The reasons are many, complex, and subtle, but chief among them is the understandable tendency of a given theorist to view «law» from a certain position without being aware of, or at least without being willing to examine or admit, the other possible positions. Thus one *may* view law from the position of a legislator, but such single

perspective is hardly sufficient or appropriate to aid appreciation of the actual or appropriate viewpoints of say a policeman. Probably the most underplayed perspective on law is that of ordinary citizens, conceivably a demonstration that most theorists identify with other perspectives.

Not that theory has totally ignored the significance of individuals, although the tendency has been to speak of laws as it affects or should affect individuals, or to see individuals as calling upon legal institutions and rules of law, as litigation, or having rights and duties under the law, or within it. Closer in to the individual, the significance of his attitudes or views of law tend to get boiled, simmered, and distilled into higher level generalities and statistics about public opinion. It seems that theorists and social scientists alike have difficulty in understanding what relevance *individual* views have to the nature and functions of law, and even more in perceiving individual views. Of course one may not climb onto another's head. Yet there is a method, and that is to listen to what a person says, or better to observe what a person says *together* with what he does.

That kind of inquiry has precedents, beginning in the United States with legal realism. In that view, judges were somehow part of the process of law, inextricably so. They are law appliers, extenders, makers, interpreters, and so on. Under that view, it is not enough to see what rules of law are taken from the corpus of law and announced or offered. It is necessary to see what judges do with what they announce. In this complex is law. Civil lawyers have trouble with that view, despite its relevance to them.

It is harder to see that ordinary citizens are involved in a related process in ways which are important to the functioning of the legal process. Perhaps a bridge to what otherwise may seem a merely radical view is possible. Consider how a lawyer may operate: not the litigational lawyer, but the advising or counseling lawyer, as he relates to clients. drawing up contracts, advising this or that alternative course of action «under the law». He would not want to say that he makes the law in any legislative, quasi-legislative, or judicial-legislative fashion. Certainly his decisions are not official or governmentally enforced. Yet he is an interpreter, of «laws on the books». He is authoritative and influential of behavior, that of both private citizens and officials whether through private channels or official.

Such an expert on the ins and outs of law-in-action at this level cannot actually afford the luxury of a single viewpoint on law; not in his role or several roles, although in his private life as citizen he may be more legal positivist or even legalistic in his attitudes toward law. It does

not follow that he has articulated or could articulate just what his views-in practice may be. Given the requisite models for inquiry, however, an observer of his approaches to problems could likely plot the lawyer's views, sketch a profile.

A related approach can be taken to various kinds of individuals who have no official position in the legal process nor the authoritative sort of role enjoyed by lawyers, for instance, to the school teacher, the artist, student, homekeeper, and so on, to the man on the street or the woman in the Clapham omnibus. What legal theory can do is to offer some preliminary theories on the spectrum of views that seem likely to be abroad in this or that community or culture and to contemplate what impact varying views can have on the way law actually functions.

The object is not to say that law *is* whatever one thinks it is, nor that law is just what people in society do; neither relativism nor pure behaviorism. It is only if law is dogmatized as purely normative that law-involved behavior or views of law become aspects of some other study or theory than that of law. It is only if it is believed that *everyone* ought somehow to have the same lawview or law-gestalt that existing variations in perspectives are ignored or discouraged as always deviant. Very possibly a plurality of law-views is indispensable to a modern society. In any event, whether good or bad, such variations ought to be acknowledged and their impact and significance considered. The reasons are in turn many and varied.

Consider a possible if unlikely perspective on law. If some individuals believed that law is constituted of rules that are discoverable through pure reason, that certain officials are repositories of that reason, that they must conform to the rules announced by those officials, then their behavior *qua* such law pronouncements becomes highly predictable. Mechanisms of control would be expedited were a sufficiently large enough number of individuals somehow or other to be ingrained or programmed with such a view. It is worth wondering what alternative perspectives may be widely shared without detracting from the general effectiveness of a legal system, or at least its regulatory part, perhaps more importantly its criminal laws.

Of course there are individuals who regard criminal laws as mere rationalizations for the exercise of power by officials and the police as influenced by preferred members of society. Behavior modifiers may have more drastic solutions; but alternative methods of adjustment, insofar as such individual views might be fallacious lie in the direction of education or even therapy. On the other hand, and probably equally im-

portant, it would be interesting to discover how prevalent the legalistic attitude may be, the attitude that amounts to rule-compulsion, not inherent, but of high risk in legal positivistic directions.

This sort of search for individual attitudes and views of law should not stop with consideration of «ordinary» citizens. For instance, legalistic dispositions may be most socially significant when found in officials, such as judges and administrative officials and agencies as well as the police. Ultimately, appreciation of individual perceptions of law would extend to all persons in all their roles.

It would be a mistake to view this as just another call for empirical data. Space does not admit elaboration, but this particular suggestion calls for closer attention to communication variables. It calls for a particular kind of words consciousness which is not yet common among legal theorists. One who would be empirical about law in this way will look at law-involved behavior law and legal process but in a way which allows him to become aware of the views and attitudes of the person (s) observed. Observers of this stripe are in need of supporting or guiding theory, of theorists who will abjure putting forth definitions and functional analyses which are their own preferred prescriptions of the way to view law (*).

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(*) Elaboration of the point of view supporting this short essay will be found in Probert. *Law: Language and Communication* (Thomas & Co., 1972).