THE FUNCTIONS OF LAW IN INTERNATIONAL SOCIETY

The life of the law, Mr. Justice Holmes observed, at the beginning of the twentieth century, has not been logic, but experience (1). Although the statement has been quoted many times, it still seems to come as something of a surprise even to well-informed people. Perhaps he might have presented an equally arresting challenge if he had also pointed out something similar about analogies. Although the search for similar cases has constituted the unique method for the advancement of the common law since Bracton's time —«let them be decided like a similar case», was the latter's recomendation for securing justice in the court (2) —the socalled rule of thumb, which became pervasive as the established principle of *stare decisis,* tended to dominate the system on the local level with foreclosing rigidity. If a precedent could not be found, the conclusion of «no remedy» quickly followed, no matter how justifiable a complaint appeared to be.

Today, much of the time spent on «research» in the practice of law has been used up in trying to locate a case «on all fours» with the set of facts currently in issue, Happiness comes to the plaintiff who is successful in his search. Frustration is the lot of a defendent who is unable to find even an infinitesimal difference in the fact situation upon which to distinguish the cases. The accepted adversary procedure yields decisions based upon verbal battles over interpreting previous judicial opinions and their application to similar sets of facts. The vast area of human activities which cannot be squeezed to fit within this ancient edifice are carried on quite outside the law. To the extent that day by day experience has been overlooked and logic has prevailed instead within the legal order, the steady erosion of life from law has continued until the crisis stage has about been reached.

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(1) HOLMES, OLIVER WENDELL, Jr.: *The common law,* 1881, pp. 1-2.

(2) BRACTON, HENRY DE: *De legibus at consuetudinibus anglie,* Thorne trans London (Selden Society pubs.), Cambridge, Harvard Univ. Press, 1968, f. 1b.

The separation of law from life has become perhaps even more obvious on the international level than in local affairs. This may be inferred from the appearance of the first serious study of Analogies in the Law (3) by Hersh Lauterpacht, afterwards British Judge on the World Court, which was centered in the international law field. In this connection it is worthy of note that Justice Lauterpacht's second book was entitled *The Function of Law in the International Community* (4). It may not be entirely without significance that C. K. Ogden's translation of Vaihinger's *Philosophy of 'As If,'* (5) was published at about the same time as Lauterpacht's innovative work. Before then, apprentice training for the practice of law had adapted the prevailing pedagogical system involving the transmission of concepts, or, rather , of principles in the law, often it is feared in a rather mechanical manner.

The break away from assumptions, presumptions, concepts, and analogical thinking, which had constituted learning in the law during earlier centuries, began to take shape at the beginning of the twentieth century, when a call for more realism in the law began to be heard. Not only Mr. Justice Holmes, but also Mr. Justice Brandeis, both subsequently partners in drafting dissenting opinions of the United States Supreme Court Bench, insisted repeatedly on the need for facts and ever more facts. With his early experience as professor of the law of evidence to build on, Louis Brandeis was in a position to take a strong stand for first-hand testimony and against hearsay, or the reporting of events through the eyes and interpretive mind of third persons. The way was opened again for parallel advance of law with science and technology.

On the European continent a comparable turning away from artful constructs and unexamined assumptions was being recorded in the publications of the pioneer group of jurists and law professors in France who have come to be known as *The French Institutionalists,* principally Maurice Hauriou, Georges Renard, and Joseph Delos (6). In between, not professedly as advocate for the Institutionalist theory, but stimulated by

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(3) LAUTERPACHT, HERSH: *Private law sources and analogies of international law (With special reference to international arbitration),* London, 1927, 326 p.

(4) LAUTERPACHT, HERSH: *The function of law in the international community,* London, 1933.

(5) VAIHINGER, H.: *The philosophy of 'as if',* trans. by C. K. Ogden. London, 1925.

(6) *The french institutionalists:* MAURICE HAURIOU, GEORGES RENARD, JOSEPH T. DELOS. Edited by Albert Broderick. Translated by Mary Welling. Introduction by Miriam Theresa Rooney. Cambridge, Harvard University Press, 1970 (Twentieth Century Legal Philosophy Series, VIII), pp. XXV, 370.

the tendency to shift closer toward the actualities observable in life than had lately been customary in the legal system, François Geny's pioneering work found an appreciative response with Mr. Justice Benjamin Cardozo, also to be appointed later to the United States Supreme Court, who presented aspects of the new perspective to sympathetic colleagues (7).

The road ahead did not permit a steady advance, however, but instead, was marked out in a rather zig-zagged pattern, particularly checkered in domestic circles. Two World Wars appear to have done more to turn human artifices into shambles with impending speed than even far-seeing seekers of light might have thought possible. The latter half of the twentieth century found the intellectual struggles of the law thereafter transported to the world stage.

Although there seems to have been little direct interchange of borrowing between law and philosophy in modern times, both appear to have followed parallel courses into the snares of abstraction, only now turning attention towards the roots in the hope of finding the causes of the unhealthy plants grown up in the absence of skillled cultivation. It might be inferred from the great number of comments published, many of them critical, involving the names of men like Descartes, Hobbes, Kant and Hegel, Bentham and Austin, that their dominant influence has started to decline. Is there anything left to say about theire speculations which can amount to a real contribution toward the solving of contemporary problems? Quite the contrary, it would seem in substance that they have led those that followed them on wide detours from life as it is lived.

The fallacies perpetrated in the name of logic, and of analogic, would seem to demand profound reexamination and correction. By way of suggesting alternatives, there have been offered in succession insights denominated Mechanicism, Behaviorism, Biologism, Existentialism, Phenomenology, and Structuralism, as well as the age-old pacifiers that can still be drawn, in neo— forms, out of Materialism, Positivism, Idealism, Conceptualism, and Realism. A book should perhaps be written clarifying the influences, often mixed or otherwise confused, which can be discer-

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(7 a) GENY, FRANÇOIS: *Méthode d'interpretation et sources en Droit privé positif,* Paris, 1899; 2.ª ed. 1910, 1932 rev. ed.

English translation by the Louisiana State Law Institute (Jaro Mayda, translator), St. Paul, West Pub. Co., 1963, 624 p.

(7 b) GENY, FRANÇOIS: *Science et technique en Droit Privé positif,* Paris, 1914-1930, 4 vols.

(7 c) Cited in CARDOZO, BENJAMIN NATHAN: *The nature of the judicial process,* New Haven, Yale University Press, 1921.

ned in various juridical trends. For this paper it is preferable to avoid if possible becoming bogged down in such a dark thicket.

While acknowledging that a considerable degree of selectivity is inevitable, which may not win universal support from people with different experiences to draw upon, the premises adopted here are admittedly allied with realism, especially that based upon firsthand observation, which has been associated traditionally with Albert the Great, Thomas Aquinas, and Francisco de Vitoria, but not necessarily with their professed advocates or commentators. Actualities, especially in the International Law field, seem to require reexamination in considerable detail. Perceptivity is recognized as tre first avenue of light. Not abstractions but concrete facts; not hearsay but direct reporting of events or patterns that may be seen, heard, tasted, or felt; not concepts but percepts, constitute the data, or 'givens' of experience, with which the law of the future is called upon to deal. Of course it is not possible, nor desirable, to deny that abstractions necessarily continue to exist. The image of a table that takes shape on the retina of the eye is already an abstraction, since the table itself cannot physically be admitted to that limited space. The purpose here is not to reject every vestige of wisdom accumulated during the entire history of the human race, but rather to become more keenly aware of the subtle fallacies that have multiplied undetected in the form taken by the legal order, and to reexamine the functioning with an eye for both gaps and worn-out parts in order to get the model back on the road humming smoothly on route to its acknowledged goals. Were the philosophy more adequate, doubtless the law would be more satisfactory; perhaps the opposite is no less true.

On the international level it is no longer necessary to advance timidly step by step. Ever since Sputnik showed the way in 1957, there has been no further need for relying on unproved assumptions in the international relations field. The astronauts have given first-hand testimony that the world is a unity in form —if not yet in agreement on the goals for its juridical order. There are, however, tremendous changes going on at the top, and the rate of change no longer lags but runs. There is an eager sense of creativity being manifest, with proposals as likely to come from the ministates as from those with established reputations as responsible powers of long experience. It is not necessary to generalize. Specific examples are already numerous. Perhaps the most significant is the way the law is now functioning at the United Nations itself.

History has been telling us that a new legal order can be dated from the 4th of july 1776, when the Declaration of Independence was proclai-

med in what had hitherto been colonial territory. Although the force of arms did appear in consequence, it was not so much the military engagements as the juridical appeal to persuasion on the part of the Signers which above all distinguishes the Declaration as momentous in the progress of the law. Here was the art of advocacy presented in its most effective style. Following shortly after, theory took shape in the form of a written constitutional document, with checks and balances artfully inventted to account for the three functions of government, legislative, executive, and judicial which were then thought to be all embracing, in a workable plan for cooperation between independent states. Soon the Declaration form was copied and adapted elsewhere, to explain desired goals for a different, non-colonial Revolution, addressed more specifically to ensure governmental guarantees, protecting the Rights of man, and of citizens.From that time on, at more or less irregular intervals, the Declaration form has been put to use whenever a direct appeal to reason has been felt essential on governmental heights. Written constitutions have also multiplied, even more frequently. The functions differ, but the models that have taken shape either as Declarations or as Constitutions, have suffered no diminution of respect as legal documents through the years, regardless of the exclusivenes of the authority claimed for judge-made law in the common law system.

The significance of these eighteenth century innovations in the governance of new nation-states becomes clearer in the twentieth, with the planning of the framework for a United Nations entity. Although the Declaration of Independence has not yet been acknowledged as a preamble, *de facto* or *de jure*, for the United States Constitution, the two documents are usually published together, suggesting to interpreters that the meaning of one may be made clearer if read in context with the other. It was the model provided by the Constitution which was close at hand when the time came for drafting the United Nations Charter, the League's basic document having been abandoned as inadequate to provide the broader base desired to sustain a less fragile structure. The surprising thing is not that the Constitution was looked to as a model, but that the framework ultimately adopted was as different in details. The theory basic in the United States Constitution has no counterpart in the United Nations Charter. The General Assembly is not at all a legislature for the world. Instead, it provides for Independence as well as Interdependence. The Secretariat is not a check upon the General Assembly, but its servant and helper. What check there is in the Security Council is limited in jurisdiction and in size. The complexities of procedure, and the recog-

nition of the right of equal opportunity for the expression of views and experiences, has permitted a degree of progress in juridical ideas which leaves the checks and balances theory quite a distance behind —in the eighteenth century in fact. The comparison between the documents is most striking with respect to the judicial arm. The Court has certain functions with reference to the Charter and its interpretation, but it is not at all the Court of last and definitive resort that the United States Supreme Court has become. In other words, power is acknowledged quite consciously in the Charter, but it is divided up in functional rather than in theoretical ways, sometimes to such an extent that little actual power is left, and at other times rather formidable concentrations of power seem to dissolve without fearsome effect. Exactly how the Charter of the United Nations functions in regulating states rationally is surely deserving of skilled theoretical analysis, but it must not be undertaken on the basis of preconceptions. It is its perceptive integrity, like that with which Outer Space has been viewed, from Copernicus to Galileo to Einstein, that holds much promise, if the legal order may properly be compared with a compass, as well as a balance or scale.

Fresh observation of recent developments on the international level suggest that it is the Declaration form rather than the more rigid Constutional structure which is taking on greater importance. What is at stake here is freedom in expression and in the clarification of meaning. Just trying to state one's position succinctly, the legal draftsman's job —for the record, helps. From the standpoint of advocacy, the Declaration is much more persuasive, especially when supported by multilateral adoption, than an *ex parte* argument presented before the World Court could possibly be. Furthermore, the lack of forcible implementation that ordinarily accompanies a Declaration, which is usually held to be a sign of weakness, compared to the obligatory nature of a treaty, which is clothed with the so-called force of law in the event of its breach, is in fact the key to the widespread appeal which Declarations attract. Persuasuion, not force, seems at last coming to be recognized as the preferable implementation for the legal order directed by, to, and for, human beings.

There is another feature of Declarations which suggests much wider appeal than that accorded judicial decisions as evidence of the law. The Declaration functions above all in an interpretive capacity; whether it be the Universal Declaration of Human Rights, or the Declaration of Philadephia of the ILO, or the more recent Declaration of Friendly Relations Between States, which may be selected as an example, a Declaration which is adopted unanimously, without dissenting vote by any Delegate

authorized to participate, necessarily claims wider adherence from the great numbers of people whom the Delegates were empowered to represent. Not only greater weight accompanies a Declaration but also it carries more human appeal than any court decision does, since the latter is primarily a ruling in a single case, which has force and effect limited to parties officially involved in adversary proceedings. It is only by analogy that a decision rendered in one case is permitted to function as a general rule, applicable to all similar fact situations. The question is being asked now with increasing frequency whether the United States Supreme Court has in fact jurisdiction under the Constitution to establish a rule for persons who were not adversary parties of record, who were not heard on evidence of the facts at issue, or on the legal issue, or on the applicable law, and who indeed had no right to intervene in the formulation of the decision under the rules which the Court has established. There was a time when taxation without representation in the legislative organ that enacted the tax was a grave issue. This was precisely the situation 1776 which gave rise to the Declaration of Independence. Today a parallel, if not an analogous situation seems to exist when a Supreme Court rule in a single case is extended by analogy into a universal law, without legislative intervention of any kind. Even treaties recognized as the supreme law of the land under the Constitution when ratified by the Senate have not been considered self-executing, but require implementing legislation by the Congress, bearing also the signature of the Executive. With respect to the functioning of Supreme Court decisions, however, the theoretical device of checks and balances does not seem to be functioning any more according to plan. Not only has the analogy of stating the law as applied in a similar case led so far astray as to amount to a denial of justice in situations that have arisen among different parties, but the effect on administration has been an increasingly burdensome appellate calendar, made up of cases which often vary very little on the facts or issues from cases previously decided which are said to establisch the applicable rule. Perhaps if Mr. Justice Holmes were to rephrase his observation to fit today's situation, he might say, the life of the law does not owe anything to analogy; it depends instead on interpretation. Its power derives from its persuasive appeal, that is, upon intellect and judgment, and not on force and will, as Kant would have us believe.

The Declaration form would appear to function even more satisfactorily as an instrument of interpretation on the international level than on the national. Unlike the United States Supreme Court, the International Court of Justice is not accustomed to rely on analogy to extend its

interpretation of the Charter, although trying to remain consistent. Furthermore, its rules are designed to provide that all parties in interest can be heard in argument before a decision is reached. In view of these specific limitations of the applicability of its decisions, the interpretive functions of the World Court are nowhere nearly as far reaching in impact as action by the General Assembly can be. In order to obtain authoritative interpretation of the meaning of the Charter that is of universally persuasive quality, not Court procedures but General Assembly procedures would appear to be much more rewarding. Since thought is prior to action, persuasion in law is more effective than compulsion. The growing importance being given to Declarations adopted by the General Assembly as interpretive of the Charter indicates a shift in the functioning of law in international relations. It is not the only change that might be used as an example of the rejection of conceptual jurisprudence, and its substitution by percepts of the actual way the law functions in its task of reaching the professed goal of effectuating justice in the lives of human beings everywhere in the world. If the new structures and institutions that are currently in demand are ever to be built, sound foundations are indispensable. For these, philosophy no less than the legal order must be resurveyed and approached with new devices and inventions, more suitable for sustaining improved ways of living. Outdated and unexamined assumptions, presumptions, concepts, and theories must be replaced by more acceptable affirmations of the actualities of life.

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The call for realism in the law, which is restated here in somewhat different form, has been presented in previous articles by the same author, in part, as follows:

(1) *Lawlessness, law and sanction,* Washington, The Catholic University of America Press, 1937 (Philosophical Studies).

(2) «The Movement for a Neo-Scholastic Philosophy of Law in America, 1932-1942», *Proceedings,* American Catholic Philosophical Association, XVIII, 183-203 (1942); also sent by Department of State, Division of International Conferences, to Santiago, for inclusion in *Proceedings,* 10th Chileen Scientific Congress, 1944. Excerpts in the *Natural law reader,* ed. by Brebdan F. Brown, Dobbs Ferry, N. Y., Oceana Publications, 1960, pp. 25-30.

(3) «Supplementary Checklist of Publications of Interest in Neo-Scholastic jurisprudence», *Proceedings,* American Catholic Philosophical Association, XIX, 150-178 (1943).

(4) «Law and the notion of Confrontment», *Seton Review,* I, n.º 3, 7-14 (1952); reprinted in Wu, John C. H., *Cases and materials on jurisprudence,* St. Paul, West Pub. Co., 1958, pp. 675-680.

(5) «Concepts or Actualities?», *The Catholic Lawyer,* Brooklyn, N. Y., St. John's Univ. Law School, XII, 141-145 (Sept. 1966).

(6) *The New Catholic Encyclopedia,* N. Y., McGraw Hill Book Co., 1967; articles on *Jurisprudence,* VIII, 63-66; and *Law, Philosophy of,* VIII, 556-560.

(7 a) Introduction to *The French Institutionalists,* Cambridge, Harvard Univ. Press, 1970, pp. 1-14.

(7 b) Also Review of this volume, in *American Journal of Jurisprudence,* Notre Dame, Indiana, Notre Dame Law School, vol. for 1973, pp. 166-171.

(8) Review of Llewellyn, Karl N., *Jurisprudence: Realism in theory and practice,* Chicago, in *Arizona Law Review,* Tucson, Univ. of Arizona, V, 151-154 (1963).

(9 a) «International Organization and Internal Law» (Agenda IV.A.1). Reprint from *Legal Thought in the United States of America Under Contemporary Pressure...* VIII Congress of the International Academy of Comparative Law (Pescara). Editors: John N. Hazard and Wenceslas J. Wagner. Brussels, Etablissements Emile Bruylant, 1970, pp. 461-482.

(9 b) «International Organizations and International Law» (Paper delivered to the Eighth International Congress of the International Academy of Comparative Law, Pescara, Sept. 1, 1970). Printed in the *International Lawyer* (A Quarterly Publication of Section of International and Comparative Law, American Bar Association), vol. 6, n.º 1, pp. 16-33, January 1972.

(10) «Justice, Law, and Juridical Decision-Making» (Proceedings of the World Congress for Legal and Social Philosophy, 30 August-3 September, 1971); *Le Raisonnement juridique, legal reasoning, die juridische argumentation,* ed. by Hubert Hubien, Bruxelles, Etablissements Emile Bruylant, 1971, pp. 375-386.

(11) «Law and Power: A Task for Legal Education». Paper contributed to the *World Congress of Philosophy,* XV, 17-22 September 1973, Varna, Bulgaria (General Subject: «Science, Technology, Man». Section D. Research Group VIII, Philosophy of Law and Philosophy of Politics). 6 pages.