LAW AND SOCIETY: FROM PROSCRIPTION TO DISCOVERY

J. W. MOHR*

Ottawa

Tempora mutantur et nos mutamus in illis.

"All said and done, the lawyer as well as the layman occasionally needs to take stock of himself in relation to the social changes going on around him, otherwise his capacity for orientation is lost. Law viewed in any other light than as a social instrument is a bleak thing." So says the *Salutory* of the first issue of this *Review* and now, fifty years later, we can hardly disagree with this statement. In fact, we could have started this article in the same way and nobody would have noticed the time lapse; if anything, it might have been seen as one of those intrusions of social science into the law, which have become common place in the last decade. The first issue of the *Review* strikes other chords, which are equally familiar to us, such as the sense of crisis which propels us into action. "The Canadian Bar Association was born in the midst of alarms. Coming into being when civilization was confronted by an upheaval that threatened its very foundations . . ." are expressions that today too we read, hear and talk about as if they were new and only applied now. "Intolerable as it was, . . . the crank was permitted to use the struggle as a seed-field for his wild social theories and the criminal welcomed it as an opportunity for recidivism." We may use a slightly different language now to say essentially the same, or at least think essentially the same even if we read that: ". . . some of our 'emancipated' women talk like maenads drunk with the new wine of political power". There is the same fear today that, "The forces of anarchy once set in motion cannot be easily stemmed, . . ." and there seems to have been, if anything, a better recognition then, that "they will persist until the collective mind of the people reacts to those influences . . .". The founders of the *Review* already stated clearly that "it is not enough in these days that contempt of public or private law be redressed by punitive measures. It is a time for the refreshing of knowledge of the things that make social life worth the living".

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* J. W. Mohr. Law Reform Commission, Ottawa.

The content as well as the language of the first issue thus does express a sense of crisis and many a call for action. But, they are mediated by thought and reflection. When we now talk of crisis, future shock, the post-industrial society, change and change again, we experience a heated up language compared with that of the first issue of the *Review* and we tend to respond by more planning, more instrumentality and more haste and pressure. The legislative mills are grinding at high speeds, increasing complexity and decreasing visibility and accountability in terms of real results. We know that hard cases make bad law and yet we continuously exacerbate conflict to make it amenable to legal solutions. Crisis breeds control and control breeds crisis. Is this something in society, which the law reflects or is there something in our conception of law which feeds this accentuation? Or is there something in the relationship between law and society which potentiates negative effects in spite of, or maybe even because of our pious hopes that the law can give ". . . old-time leadership in the things that pertain to peace, order and good government" under the motto of the Association of *Justitia, Officium, Patria.* When, after fifty years, we find again that "it is time for the refreshing of knowledge of the things that make social life worth the living" and if we again take seriously that "law viewed in any other light than as a social instrument is a bleak thing", then we too (and again) have to reexamine what makes social life worth the living. We will have to raise questions about the nature of social life and what kind of instrument law is and how the two relate to each other.

Law and the Social Sciences

Before we are able to examine these questions, however, we have to take the somewhat tortuous route of examining legal concepts rather than law and the social sciences, rather than society. Because once we have adopted the motto *Justitia, Officium, Patria,* it is clear that we no longer speak of the *common* law, since common has always meant "belonging to everyone alike, free to be used by everyone, public, generally accessible"; neither do we speak of *civil* law, since civil too, means "of or belonging to citizens, pertaining to the community of citizens and befitting a citizen". *Justitia, Officium, Patria* tell us nothing of the common man, or of the citizen, but represent a formalization which not only begs the important questions, but hides them and even if we should not take the words of the motto seriously any more, their spirit remains in our basic assumptions.

Equally, when we speak of society today, we no longer think of what it means to be social—"to be capable of being associated or united to others, in war as well as in peace, characterized by

mutual intercourse, friendliness and geniality"—but rather of the kind of abstractions which have been aided and abetted by the social sciences. We have to remind ourselves, that "law" is derived from a verb, hence an activity of laying down and laying out before us that which happens between us and even if we accept its derivation from the Latin root, it suggests something which is collected, selected and elected. The support for the social sciences are based on their claims to theories and methods which permit the reduction and transformation of everyday social action into constructs and concepts. But, theory means originally no more (and no less) than "to view, to look at" and method "a way beyond". What is at stake here, in both the activities of law and the social sciences is the process of laying out, looking and finding a way.

The history of ideas shows us that these simple activities turn into notions, notions of knowledge, knowledge for future use, or as we would say today, positive knowledge. This is not the place to discuss the basic assumptions of positivism and utilitarianism (or any other "—ism" which converts adverbs, adjectives or names which give meaning to actions or things, to things in themselves) except to remind us and keep before us the operative assumptions in what we are actually doing in our everyday life process. Once the basic assumptions are set (and forgotten for all practical purposes) then, as one can observe in both law and the social sciences, the major activity becomes a refinement of logic with the consequence, as Wittgenstein observes, that the purer the logic the less it tells us about the world.

Having been around a law school for several years, I cannot pretend, even after some serious attempts, to understand the commonality of concepts or a consistent epistemology of various areas of law, and I suspect that this is a futile undertaking. Having been around longer in the social sciences, I am convinced that they are equally fractured and having been around people much longer, I know that various areas of living do not have the same conceptual consistency. Only that which is constructed, can be reasonably explained by constructs; machines function and they can be described in functional terms. Only that which is planned can be understood by knowing the concepts and measures which went into planning. One can hardly describe a beautiful woman by her skeleton (it is not what interests us) or a dance by the amount of energy expended, nor the drama of a trial by the rules of procedure. One cannot deny that there are areas of legal rule-making as well as segments in the social sciences which are structural, functional, planned and rule governed without any foundation in natural law or the nature of moral experience. Whether we drive on the left hand side of the road or the right is purely a matter of agreement in functional terms (given a road, fast moving vehicles

and a desire to survive). A great number of distributions and averages are highly predictable even though they may not represent anybody (the family with two and a half children is hard to find). If and where the basic proposition is functionality, there can be little doubt that the relationship of positive law and positive science is justifiable and important. But, the limitations of this model are serious and seriously underestimated because functional constructs, whether mechanical, electronic or conceptional, presuppose an image of man as an instrument. There was a time when among the social sciences only economics was seen as the dismal one. By now this adjective applies to much of what goes under the name of sociology or psychology (or behaviour science as some prefer to call it with unwitting honesty). In law, in a somewhat reverse fashion (because law and society is not a unity, but a dialectic polarity) criminal law has long been recognized as a dismal member of the family, but the pallor has extended itself over public law, administrative, welfare and family law and even the laws of economic regulation. Basic contract and torts may remain in a somewhat pristine fashion in the law schools, but have little influence on the real (sic) world in which the body has become a corporation and the mind a regulatory (and therefore regulatable) system. The person has largely become a legal fiction in law as he has become a science fiction in the social sciences. And every time the social planners and legal reformers get down to serious business, man—as we know him—tends to get a little bit more squeezed (or shaped, as the behaviour scientists will have it). No doubt, there are rewards, a plethora of them, produced by unencumbered machines, distributed by a regulated market and ever increasingly stimulated by knowledge factories. It is unlikely that this could have happened without the co-optation of the law or, for that matter the sciences, if *scientia* still means anything to us which for the *social* sciences must surely mean *con-scientia*.

When "peace, order and good government" overwhelmingly come to mean "be quiet, adjust well and be rewarded with goods" and when *Justitia, Officium, Patria* come to mean "we know what is good for you, the bureaucracy will tell you because they run your house", then indeed it is time for the refreshing of knowledge of the things that make social life worth the living.

Law and Society

Much of what we have said so far is unduly abstract even though we have attempted to engage in a discussion with the editor of fifty years ago. Large scale abstractions are involved in legal rulemaking and in particular brands of academic social science. They do not represent the law in action nor the life in the community.

They cannot be ignored, however, because they do represent the alienation we have undergone, but they are hardly the cure and become increasingly difficult to understand.

The relationship between law (or better, legal thinking) and the various enterprises of the social sciences is a different one than that of law and society. The latter relationship has to be conceived of, looked at and understood as a dialectic polarity, as being in tension. Objectivity in law, as it concerns itself with society, cannot be understood as neutrality, but as an over-against, not as value free, but as a backdrop and a grounding upon and against which values may become visible and play out their drama. Let us take as an example the notion of crime which we recognize has a foundation in law (*nullum crimen sine lege*) and the nature of social intercourse (*ignorantia legis neminem excusat*). We can trace the very word "crime" beyond *crimen* to *cerno*—"to differentiate, to recognize and to gain insight" which closely related to the activity of discerning under the mode of concern. Only in later Latin and the imperial, administrative and administered Rome in which law becomes formalized does *crimen* arise and becomes accusation, recrimination and finally guilt. Similarly, we tend to translate *mens rea* blithely as "the guilty mind" when originally it was, "the mind we make a thing of", a mind which is no longer private, a *res publica* which concerns us and which we have to discern. The origins of punishment also are originally no more than quit-money, fine and wergild and only later the notions of vengeance and revenge enter the word. Almost anything we touch in this central drama between law and society we find that we have moved from question to answer, from the activity of knowing to the position of judgment. (Even judgment—*judicium*—originally meant reason, opinion and taste, as did *sententia*, where the opinion comes from feeling and insight.)

What has been said and could be further amplified about the origin of legal concepts can also be found in the nature of the legal process and can be demonstrated in a more recent perspective. Let us again take the criminal law. The trial, rule structure and procedure can hardly be understood or make much sense in the present, highly anonymous, mobile society. They have to be seen against the backdrop of a stable community with a high degree of personal knowledge and directness of feelings which needed the control of rules and procedures to limit the tyranny of conflict-emotions as well as the tyranny of the state which becomes powerful exactly at the point where citizens can no longer come to terms with their differences. The adversary process makes sense in a stable society since negotiation, mediation, and arbitration are part of the everyday process of living together and only when those fail does adversity become adversary. The trial (which again comes

from trying, examining) has always been understood as drama and is clearly in need of an audience for whom it sharpens the conflict so that truth may arise, but not truth as fact as we tend to understand it, but truth as value and as a recognition of the mythopœic functions of our lives together. Most of this function, which has now been relegated to paper and celluloid, has become plastic and impersonal. The trial is almost dead, but we have not noticed it because we can still watch its substitute on the screen.

The most important areas in the criminal process today are the pre-trial and post-sentence phases. And we are ill-prepared for either. "Plea bargaining" or "pre-trial negotiations" are either denied or handled with unease because we know that they impinge on the trial and distort it. But, what is left of the trial, in any event, aside from a few showcases, when the overwhelming majority of accused plead guilty and the overwhelming majority is found guilty and when this finding has become the focus of the trial as such? Even the few old age pensioners and people who come in from the cold who represent the audience get bored; reporters have to look for juicy morsels and the institutional protagonists sound like tired actors who do not quite know the reason for their role, but want to get through the show, because somehow the show must go on. It is not inhuman and hostile as it is sometimes presented; most of the official participants look for reasonable solutions (whatever that means); it is just that the setting and the process were never intended for that purpose. Were it not for the mute suffering and frustration—not just of the accused, but of victims and others concerned—which pervades the courts, and were it not that the game pre-empts one of the most important societal functions, one could forget about it. And most people, including most lawyers, do. The obfuscation of the drama between people is equalled only by the denial of the drama within people which is silently stored in the filing cabinets of psychiatrists, again with the exception of some showcases.

So, what is there to be found? A finding of guilt is almost exclusively a "who has done it" (which is not tricky in most cases and has already been entered with the plea) and the sentence is usually a curious computation of time or non-time with a pragmatic eye towards principles of deterrence and reformation—the pragmatics of which criminologists are at a loss to document—and an uneasy recognition that retribution is somehow necessary. A whole industry of institutions is invoked to cover the embarrassment. It has been forgotten that both police and prisons are rather recent institutions, emanating from a century which believed in progress and planning, which believed in utility and instrumentality, believed in knowing as a fact and not an activity which in human terms remains ever open, and which, therefore, could pro-

ceed to codify ethical assumptions under its notion of peace, order and good government. Thus, in the following century, which is ours, the very notion of existence itself becomes a tortuous question.

From Proscription to Discovery

The few examples given are less than a satisfactory sketch of the relationship between law and society as people and a living process. But, surely it is clear by now that the social context has changed and a further discussion of alienation a hundred years after Marx is futile and it would be tiresome to spell out in the Freudian paradigm that law has moved from super-ego to ego functions in relation to society. One could draw further examples from family law, because we would surely admit that the family has changed, as well as from the law of property which came from an entirely different conception of lifespace—not so different to the way we feel, because we still feel that trespass is what really counts, trespass into our private space, that which we sit on (possession). However, there are other articles in this issue which will deal with specialized areas. Even if one could fill in the gaps here, one would be caught, because what would arise would be another construction and since the editor has admonished us to think of the future, it would be a construction which, in spite of our protestations, would define and limit the future. The practical man knows that the market of futures is the most volatile one.

Another handicap is language. What needs to occur in law and society is less definition and a decrease of formalization of content. Language too (and especially in learned journals) has become a definitional construct and a "communication instrument"; one only needs to compare the language of past judicial decisions and modern legislation, not an unfair comparison if one considers the direction in which the law has moved. Categorical language as well as categorical law cannot possibly express that which has become increasingly necessary. Even the most rudimentary social, legal and political categorization of conservative and radical is meaningless if it does not emerge, whether "radical" means going to the roots, discovering in uncovering, or simply destruction, or whether "conservative" means serving together to maintain life or just canned goods which have become tasteless. And yet this knowledge is in our heart and our senses, even if one is almost embarrassed to use such words in a learned journal.

All that can thus be said about the next half century is a direction and a direction of paradoxes at that. One would like to say clearly and unequivocally that the proscriptive, regulatory and formalized elements of the law have to diminish so that respon-

sibility can locate itself again on personal grounds. But, then one is also aware of the unequal power relations in our society which have to be controlled even if this control functions only poorly. One thinks of issues of pollution and environmental change and yet even there we have to keep in mind that every legal measure of coercive control, which can only be partial, tends to exacerbate the negative condition as a whole if it is not accompanied by a change of mind and a change of values. What is proscribed, but not subscribed to by those towards whom the restriction is directed is seen as a game to beat and raises the stakes. From alcohol prohibition to drug control, from antitrust legislation to antipollution measures, the lesson is fairly clear.

The law and the legal process have always been better as a mode of discovery of values than their imposition. To produce visibility, accountability and clarity and thus to produce "knowledge of the things that make social life worth the living" is a much more human task than the production of dogma and the standardization of procedure, especially in a time which is not sure of its values and not sure about the nature of tomorrow and, as many claim, not even sure whether there will be one. How we break out of the rational deadlock in which we have ensconsed ourselves and how we regain the trust that social life (as any other life) best proceeds on its own course rather than a planned and proscribed one, a course in which everyone is involved, is a question which can easily occupy us for the next half century.