# SOME FUNCTIONS OF A FUNCTIONAL VIEW: AN HISTORICAL GLANCE

## I

Questions about the function of law have a fairly modern flavor, at least in the sense in which an acceptable answer today would be responsive. The importance of the question and even the ability to ask it in a modern sense depended on radical changes in the view of man in his relation to nature, the humanizing of morality and of authority, an empirical view of institutions operating in an historically changing setting, and contemporary ways of treating total systems. Older theories tended to start with the question of the nature of law, and associated questions of ends with divine will, natural law, or legal axioms which captured reason. The changes came as man acquired greater control over his world and conceptions of planning and control began to weave their way into his intellectual constructions. Our aim in this paper is to look, even if briefly and somewhat insularly, at some of the changes which went into the making of the modern question, in an effort to diagnose contemporary needs and next steps.

Although one of the writers thinks that everything modern begins with Aristotle, we both agree that Bentham first adds the distinctively modern cast.

## II

Although Bentham (1) does not use our language of function, his ends

(1) It is of interest to note that Bentham was venerated in Spain at a time when it hoped for a break-through into the modern world. George Borrow, a Protestant missionary, tells the story of the mayor of Corcuvion who sang the praises of Bentham as a Solon, a Plato, a Lope de Vega, who kept the writings of Bentham on his shelf for worshipful perusal, and who expressed surprise that Borrow was carrying and old-fashioned monkish book like the *New Testament* when

of law are themselves thoroughly instrumental, being directed to the goal of human happiness. All institutions, then, from morals and custom to governmental and legal, must be tested at the bar of utility. The utilitarian doctrine of happiness as the ultimate end in all human action prevents any intermediate goal or supporting institution from claiming intrinsic value or sanctity; it is always open to critique and justification or condemnation in terms of its empirical consequences. Perhaps in the long run this has been the functional achievement of the utilitarian pleasure-pain theory (2), quite independent of the content of the psychology.

In treating concepts, Bentham also employs a kind of functional analysis. All legal conceptions are regarded by him as fictions. For example, he is insistent that property is metaphysical —a «mere conception of the mind». It is simply a name for an established expectation of enjoying things supported by the work of law. «Property and law are born together, and die together. Before laws were made there was no property; take away laws, and property ceases» (3). His attack on the idea of natural rights as nonsense on stilts is familiar enough. If all legal conceptions are fictions, or in a more neutral sense constructions, their justification lies only in their utility —in the consequences of their use.

Bentham's form of functional analysis can be illustrated from his central discussion of the «ends of civil law». Happiness here is pursued through four subordinate aims: subsistence, abundance, equality, secu-

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the works of Bentham were available! (Reported in Charles W. Everett, *Jeremy Bentham*, New York, 1966, pp. 9-10.) Bentham's *Theory of Legislation*, which the English-speaking world had to recover from the French of Dumont, was widely read in Latin America, as well as in Europe. Great indeed was the appeal of a proposed revision of law whose function would be to attune its content to the goal of human happiness.

(2) Bentham tells us in a note to Chapter 1 of his *Introduction to the Principles of Morals and Legislation* that Alexander Wedderburn, who rose to be Chancellor of England, attacked the greatest-happiness principle as a dangerous one. Bentham gladly pleads guilty: it is dangerous «to every government which has for its *actual* end or object, the greatest happines of a certain *one*, with or without the addition of some comparatively small number of others, whom it is a matter of pleasure or accomodation to him to admit, each of them, to a share in the concern, on the footing of so many junior partners». It is dangerous, he adds, to the sinister interests of a Wedderburn. In a more reflective mood, J. S. Mill in his essay on Bentham called him the great *subversive* of the age, meaning it in the honorable sense of critical spirit.

(3) JEREMY BENTHAM, *The Theory of Legilation*, edited by C. K. Ogden (New York, 1931). p. 113.

rity (4). Each is estimated in terms of the consequences of pursuing it through the law and the need for using legal instruments to achieve it. The work of law is minimal in relation to subsistence because men are sufficiently motivated to it and the law can help best by securing the results of men's labor. Abundance can take care of itself because it is produced by the same causes as support subsistence. Equality too is of lesser importance as an end of law; sometimes calling for a redistribution of property would be incompatible with security. Security is the preeminent end, the only one with an eye on the future.

Vigorous as is Bentham's reevaluation of the law in the light of the desirable ends, there is the assumption in his work that he is finding a permanent structure of desirable rules and institutions. The role of law is fixed in the light of the established subordinate goals of man, framed in this particular context. This collateral assumption limits the scope of his critical work, by suggesting it is brought to an end. But in fact there is no end. There is even an inner tension among the ends of law, for security is defined in terms of maintaining and guaranteeing expectations while reform changes men's expectations. This only shows that we have to look beyond the set of abstract principles or ends offered. This raises a new dimension in functional questions: to look for the meaning of ends or principles in the institutions in which they are operating and which they are guiding. René Demogue (5), for example, analyzes the different principles that security itself may cover by looking to the practices and institutions with which it is associated. Thus he distinguishes *static* security, which is concerned with maintaining the possessions that men have from *dynamic* security in which the emphasis falls on safeguarding the rapidity of transactions. The former stems from the older landed societies, and invokes such legal maxims as that a man may not transfer to another a greater estate than he hath at law. The latter stems from the commercial societies and counters with the maxim that possession is as good as title! The evaluation of ends, maxims and principles leads thus not to asking which is self-evidently true, but to which kind of institutions are more central in the life we want to live.

Is we carry this lesson back to Bentham, it is clear enough from his text that the security he wants is tied to the economic institutions of productivity. His justification is that security fosters productivity, while redistribution of property which makes equality of distribution the preemi-

(4) *Ibid.*, pp. 96 ff.

(5) René Demogue, «Analysis of Fundamental Notions», in *Modern Legal Philosophy Series*, vol. 7.

nent end deadens productivity. Given the relation of productivity to happiness, Bentham seems as insistent as Marx on the primacy of productive processes, not only in scientific but also in normative aspects.

Adding an institutional dimension to functional analysis becomes incompatible with the assumption of an unchanging order. For the conditions that enhance productivity may in the course of history undergo change. It is quite possible that a contemporary Bentham, reassessing his instrumental ends of law, would find abundance and equality more important than subsistence and security. For the forms of production having changed, the incentives of small-scale production may no longer be the heart of the matter. The law itself may be playing a large, often dominating part, in making possible and ensuring large-scale production, and maintaining a high level of productivity may be a major criterion in area after area of the civil law. Similarly, the question of distribution in a vastly more populated globe, divided into extremes of power and wealth, both internationally and intra-nationally, may be the focal point to which institutional reorientation has to be addressed.

Perhaps a contemporary Benthamite might retain an affection for the central place of security. If so, he might console himself with etymological considerations. The world «security» comes from «sine cura», without care (compare a «sinecure»). And so it could be said that security as a goal has not changed, merely the relevant forms of care and the causes and cures of care have undergone change. But if principles get their meaning from institutional forms and demands, then when changes have taken place in the character of human life, either the meaning of principles is diluted or different principles take over.

## III

The full recognition of change and development, and the attention to institutions —both of which are wanting in Bentham— came into legal philosophy through the Hegelian idealist schools. The march of the historical spirit, or more simply the growth of civilization, is developed in and through social, including legal, institutions. Thus change of function relative to a context, and a normative direction are built in. Yet often these views are characterized by assumptions of passivity and belated adjustment. It is Hegel's owl of Minerva, in judicial robes to be sure, with its insight after the fact. Thus law is reflective of, but not an instrument for social change.

The German emphasis on development and developing institutions is most strongly felt in North American legal theory in the work of Roscoe Pound. He was especially influenced by Jhering and Kohler. From Pound's point of view, Jhering's social interest theory might be seen as a welding of institutional and utilitarian elements. Approvingly, Pound presents Kohler's view of the function of law not merely as protecting established values but as shepherding emerging values —new ideas of right being rendered effective through the law. But for all his sympathy and use of Kohler's interpretation, Pound writes: «And yet I do not feel satisfied. It is at bottom an idealistic interpretation and I prefer an instrumentalist point of view. It treats its idea as causal, not instrumental. It gives us an idea operating from within and bringing about legal development in its growth and unfolding, not an instrument by which men understand legal development after the event and organize its phenomena and make them available for juristic purposes» (6). For Pound, the vital point is the instrumentalist = engineering idea— an engineering model for the legal theorist as against a rationalist view where the principles of law are antecedently given. But for a contemporary reader, half a century later, the punch in the quotation lies in the seemingly innocent phrase «after the event». Indeed, this note characterizes Pound's normative treatment of instrumental functionalism. Changing social aims can be discovered and given legal expression as jural postulates, but a new postulate cannot be accepted into the jural club till the social change is well on its way. Then the law can be brought instrumentally into line (7).

Of course there is more of the American mood and problems in Pound than merely the German ingredients. For his concern about the changing norms and his appeal to the actual consequences, say of technology, go hand in glove with the Holmes heritage. Coming from a very different tradition, Holmes (8) likewise challenged the view of law as embodying, in its precedent, antecedent and absolute principles. And he also saw legal institutions as intruments of social control. But in the background of this is the pragmatic philosophy of Peirce and James, based on a Darwinian evolutionary view of change that was more wide open than Hegelian derivatives. Importantly added in pragmatism is the notion of mind as actively engaged in designing a structure to face a future that it tries both to foretell and direct.

(6 Roscoe Pound, *Interpretations of Legal History* (New York, 1923), p. 150.
(7) Roscoe Pound, *Social Control Through Law* (New Haven, 1942), chapter IV.
(8) Olivier Wendell Holmes, Jr., *The Common Law* (1881).

Dewey's work puts in a single package most of the features of functional approaches that we have examined, and adds others (9). (Perhaps the parallel in European philosophy is Marxist theory, adding a social activism to the Hegelian schema.) He developed his ideas in connection with social scientists and philosophers of law, and in turn influenced them. And interestingly, he often appeals to the judicial process as a model for his own instrumentalism. He adds chiefly: a closer integration of law with other social institutions so that their functionings are seen as interactive; a more conscious and thorough-going instrumental view of concepts themselves in relation to the problem-situations to which they are applied; a consequent concern with the uniqueness of each situation as well as the continuities; a fresh psychology which puts individual and social planning at the very center of human activity in such a way that new vistas are continually opened as to the kind of associated living that might be realized. The net effect is to give law a critical role in the reconstruction of society.

## IV

It is time to recapitulate the steps of this snippet fo history and draw its lessons.

The Benthamite functionalism humanized law by looking to its human ends. But his general attitude left it possible still to think of fixed ends, of law as a set of fixed principles (even though instrumental), and of isolating the domain of law. As we have seen, each of these gave way as functionalism advanced.

Minimally, the lesson of the last two hundred years has been that when fixed ends are proposed, they have to be stated so generally that it suggests a specious identity. Such ends of law as peace, order, liberty, equality, etc., acquire their meaning from social context. There is a tremendous difference between: a *Pax Romana* under an imperial dominant power (or a concordat of two or three super-powers) and an organized international framework for settling disputes before conflict arises; law and order in an atmosphere of general security and the law and order» that institutionalizes violence and breaks loose with generally repressive

(9) See, for example, JOHN DEWEY, «Logical Method and Law», *Cornell Law Quarterly*, Dec. 1924, X, 17-27; «The Historic Background of Corporate Legal Personality», *Yale Law Journal*, April 1926, XXXV, 655-673; «Nature and Reason in Law», *International Journal of Ethics*, Oct. 1914, XXV, 25-32.

force; the happiness of passive enjoyment and the happiness of active realization; progress as a continually increasing gross national product and progress as improved quality of living for all. The changing content of objectives, moral as well as legal, is even more evident when they are framed negatively. For example, poverty now may mean hopelessness and alienation rather than lack of necessities; and war under the threat of nuclear weapons is quite different from limited conflict. Even more, new ends are spawned by developing problems —over-population, pollution, energy crises, exhaustion of natural resources.

A growing lesson of the last century is that principles take their meaning from the institutions to which they give theoretical expression and practical guidance, whether it be in a mood of institution =preserving or institution= remaking. The law has to be seen itself as a set of practices or institutions, whose actual consequences can be examined at a given time. Functions themselves undergo change; the same legal principle that at one time promotes initiative and innovation —for example, freedom of contract— can under changed conditions of the growth of industry and complex urban life be used to hinder social experiment in promoting health and well-being. (This was Holmes' complaint against the court's attempting to enshrine Herbert Spencer's *Social Statics* in the 14th Amendment of the United States constitution.) Hence a functional view of the law must draw up its functions with space-time coordinates.

Again, it is a powerful lesson of the last quarter of a century, though no doubt implicit before, that the domain of law is not isolated, and functional questions cannot be restricted to what is the law. Functional judgments involve the working of society as a whole and society's instrumentalities for achieving aims and getting results. These depend on the existent socio-cultural pattern and changing historical conditions. Thus whole domains of life are removed from legal control when better ways outside of the law are discovered for dealing with them —for example, the criminal model may come to be replaced by a medical model in dealing with drug addicts. Of course, where legal regulation has been long-standing, removal may take a legal form: thus considerable regulation of sexual relations is now removed in many legal systems by extending the scope of privacy and individual liberty. And in reverse direction, many matters traditionally outside the law may come to be brought within its operation, as for example happened in education and is happening in many areas of social welfare. Population pressure might produce a demand for some sort of legal controls. (This need not mean

rationing production of children; it may mean instead a new «human right» of access to birth control information and supplies.)

In general, anthropological theory has made us familiar with the fact that in different societal patterns or in a changing pattern, socially necessary functions may be carried out through different kinds of institutions and with different styles. An interesting current example is the contrast between Britain and United States with respect to the ways of calling attention to matters vital for democratic decision. The form of parliamentary government in Britain makes inquiry into government scandals a legal matter through the procedure of questions in parliament. In the United States, as evidenced in the Watergate scandal, the President seems to be able to remain silent till forced by the mounting pressure of information provided in the press and other media. The same result is thus secured through legal forms in one case, non-legal forms in the other.

Now if the work of legal institutions is not separable in any final way from the workings and problems of a society, it is not separated either from the society's resources, methods and opportunities. If technology has brought enormous problems along with its material gains, it has also forced upon us a new view of the human potential for control and design. Gone is the freedom to be irresponsible, individually or socially, once we can predict what is likely to happen when we do nothing. Not to decide is a decision. Intelligence in social affairs surely means that we are guided by what we foresee and what we at a given time can frame as desirable. And neither of these is static nor simply arbitrary. Legal institutions share in this human opportunity to help mold the future. The modern functional approach began with industrialism and vistas of progress. It matured when the growth of technology and the rapidity of change have forced the need to intervene and control.

At present in the United States, the courts sometimes take up the slack of promoting necessary social changes where the legislative and executive branches remain stalled through the strength of vested pressures. The effort to achieve racial equality in the United States through the 1950's and 1960's is a striking example of the initiative of the courts. This contrasts forcibly with the 1930's when the legislature and executive sought to bring about necessary economic reforms and found the way blocked by the courts. But the present movement for utilizing legal resources for social reform goes even further —for example, the phenomenon of Naderism, that is, using the law to advance neglected consumer interests common to the whole people. Similarly, the growing appeal

to the law to achieve a less polluted environment was initiated by private citizen organizations.

In brief, the clarification of the functional character of law has been followed by concrete concern with multiple functional possibilities of law with respect to the whole range of human life and its quality. To ask for the functions of law is no longer to ask for an inventory of ends or a set of perennial goals unique to it. Rather it is to call for constant creative philosophizing about the systematic workings of human association and its institutions, with an accent on the potentialities for reconstruction under conditions of constant change.

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