

ESSAYS

Author's Preface to the Chinese Edition of Jurisprudence: The Philosophy and Method of the Law

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It is a source of genuine satisfaction to me that my work on Jurisprudence will be published in a Chinese translation. For many years, and with great interest, I have watched the efforts made by the Chinese people not only to improve their social and economic conditions but also to lay the basis for a new form of human culture. Law is an important part of a nation's culture, and China has undertaken major projects, including the promulgation of new codes of law, that aim at the reconstruction of the Chinese legal system. It is my sincere hope that what I say with respect to the nature and functions of law and the manner in which it is implemented will be of some value to Chinese law students, members of the legal profession, and perhaps those members of the general public who wish to learn about some of the fundamental problems that face the makers and interpreters of the law.

Some may feel that a jurist like this author, who was trained in Roman, German, and Anglo-American law, cannot possibly provide any significant insights into the goals, sources, and methods of Chinese law, which is based on a different political, social, and economic philosophy. But I question whether a legal system must be considered to be nothing more than a reflex of a particular system of production and distribution. It seems to me that any system deserving to be called a legal system must pay attention to certain basic values that transcend the relativity of any particular social and economic structure. Prominent among

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these values are liberty, security, and equality. The relative rank of these values may vary, depending on whether a legal system is primitive, feudal, capitalist, or socialist in character. Also, all legal systems subordinate these values to certain imperative considerations of the public good, and the content and scope assigned to the concept of the public good will differ among various types of social organization. But notwithstanding variations attributable to the peculiar nature of a social and economic system, it is my conviction that a societal order that wholly ignores or neglects one or more of the basic values cannot be characterized as a genuine order of law.

The foregoing conclusions presuppose that certain uniformities of human nature exist that call for recognition by the law. Foremost among these uniformities is the coexistence of individualistic and communitarian impulses in the normal human being. Almost every individual has a drive for self-realization and personal growth, which will often manifest itself in self-assertive acts designed to further this individual's life aims. As stated by Marx and Engels in *The German Ideology*, "egoism, just as much as self-sacrifice, is in definite circumstances a necessary form of the self-assertion of individuals. Hence, the communists by no means want to do away with the 'private individual' for the sake of the 'general,' self-sacrificing man."

The values of freedom, security, and equality are rooted in the individualistic component of human nature. The sense of freedom impels human beings to engage in purposeful activity designed to develop their capabilities and to promote their personal happiness; it chafes at constraints that, without good cause, frustrate these goals. The desire for security seeks public protection against unlawful attacks upon a person's life, bodily integrity, reputation, and property. It also demands, in modern society, public assistance to help individuals cope with certain vicissitudes of life, such as old age, illness, accidents, and unemployment. The urge for equality militates against unequal treatment by law or administrative action of persons and situations that under a rational and informed standard of judgment must be deemed equal. It will also rebel against disparities in wealth or access to resources that are felt to be arbitrary and unjustified.

The individualistic strain in human nature is complemented by a communitarian ingredient. Human beings need to cultivate social bonds to give meaning to their lives and prevent them from withering in isolation. An individual feels lost, especially in a complex and overcrowded

world, unless he or she¹ is allowed to participate in some shared vision of the common good. The social impulse does not, however, necessarily lead to conformist identification of an individual with the established social order. Socrates, Plato, Rousseau, Jefferson, Marx, Lenin, and Mao Tse-tung were dissenters from the society into which they were born; they were determined to change their society by teaching or action. Such personalities normally are products of an epoch in which a certain form of social, economic, and cultural life has entered the stage of decline. In a healthy and developing civilization, most human beings desire to contribute to their society's well-being according to the measure of their capacities.

The communitarian component of human nature has its roots in the individual's perception that he cannot effectuate the fulfillment of the values cherished by him entirely by his own efforts, that he needs other human beings for an adequate realization of his desire for freedom, security, and equality. An individual's acceptance of the notion of the common good can be traced to this insight. It cannot be said that such insight is entirely the result of teaching and experience, that is, of environmental factors. An innate faculty exists that enables individuals to project themselves beyond their own egos and to become aware of the need for cooperation and joint effort. This is the faculty of reason. Without it, human beings would be adrift in a maelstrom of irrational, self-seeking, instinct-bound actions resulting in a multitude of hostile confrontations and clashes with other human beings. Reason is the fountain of socialization and other-regarding behavior. The voice of reason tells us that certain moral and legal restraints on individual action are indispensable to accommodate our own needs to the needs of others and to make life in a community worthwhile.

It bears emphasis that the two components of human nature, although they are genetic in their essential tendencies and potentialities, do not in every respect operate simultaneously throughout all stages of a person's life. The individualistic element appears to be particularly strong in childhood and youth. The American psychologist Gordon Allport has said that "while the infant is a socially dependent being, he is not even to the slightest degree a socialized being. Even at the age of two the child is, when measured by standards applied to adults, an unsocialized horror."

While that last statement may be too strong, it is probably true that in the life of the child, self-assertion tends to over-balance unselfish

¹ Whenever the masculine gender is used hereafter in this Preface, it is meant in a generic sense, including both the male and female sex.

behavior. Experience also demonstrates that rebellious, nonconformist attitudes are more frequently found among the young than among older people. As the individual matures, there comes, in the words of Allport, "a diminution in the preponderance and intensity of personal inclinations, and a growth and extension of other-regarding sentiments." This psychological phenomenon may reflect nature's wisdom. The young person must find himself, strengthen his ego and feeling of worth, develop his talents to become an individual capable of making a contribution to civilization. Self-transcendence in the service of community goals is naturally preceded by self-actualization, although the process of socialization needs, of course, to be started at an early period of an individual's life.

This picture of human nature might be open to challenge on the ground that it is painted with too wide a brush. It might be argued that human nature is not necessarily an amalgam of individual and social traits, but is formed entirely or almost entirely by environmental forces. A society committed to individualism would, under this theory, guide the individual, by example and education, toward becoming an autonomous, self-reliant, self-actualizing being. A collectivistic society would attempt to fashion human beings who will conduct themselves as dependent parts of a social whole and devote their energies primarily to the furtherance of community objectives. Only a society intent upon encouraging a symbiosis of self-regarding and other-regarding motivations would perhaps accept the image of the human personality I have portrayed.

There is some truth in this challenge, but it is not the whole truth. It is true that human nature is not a fixed, determinate, and self-consistent set of attributes, but rather a cluster of often conflicting essential tendencies. The directions that these tendencies will take and the strength of their activation in an individual's life can be decisively influenced by moral teaching and behavioral conditioning. One society may do everything in its power to foster striving after personal happiness, strong-willed competitiveness, and moral self-determination. Another society may emphasize the pursuit of common goals, the cultivation of cooperative attitudes, and strict adherence to principles of collective morality. And yet, it would seem that the dialectical interplay of individual and social motivations characteristic for most human beings sets limits on any radical policy of individualization or socialization. There is no historical evidence that the desire for recognition of individual rights can be completely eradicated from the human mind for any length of time. It would also seem that no society can dispense with the notion of the public interest, which has its roots in the commu-

nitarian component of human nature. Even a highly individualistic nation like the United States has not ignored this value in its legal system, although it has at times assigned a narrower scope to it than some other nations. In spite of the fact that the United States Constitution has its center of gravity in the recognition of individual rights, the United States Supreme Court has acknowledged an inherent power of government called the "police power"; it has defined it as the power to impose restrictions on the exercise of private rights for the purpose of safeguarding public order, safety, morals, and the general welfare. The pluralism prevailing in the United States has not, however, permitted the adoption of a uniform criterion for measuring the public interest.

On the other side of the spectrum, shifts in social and economic policy that have occurred in China and other socialist countries in recent years have been interpreted by Western observers as accommodations designed to assign a greater weight to the individual aspect of human nature. The new policies appear to accord an increased role to personal initiatives and private operations in some sectors of the economy.

I do hope that, at some time in the future, the governments and peoples of the world will arrive at a greater consensus than exists today on the type of social and economic order that conforms best to human needs and aspirations. If this should happen, the polarizations that now trouble the relations between nations may give way to the adoption of policies that harmonize individual and social objectives and help promote economic well-being, cultural bloom, and global peace.

