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The function of law and the role of the lawyer are usually intimately related to each other, but they are by no means necessarily interconnected or interdependent. Law can be—and in recent decades frequently has been—made by political commanders neither trained in nor concerned with law as a disciplined science or ideology. Political dictators, social revolutionaries, technocrats, all these may make the laws by political fiat, with only the minimum possible participation by the lawyer in the making and execution of these laws.

In societies that are based on the revolutionary upheaval of an established order and pursue radically new social and economic goals, the role of the lawyer tends to be depressed, his status lowly, his function limited. This is so in the contemporary Communist societies of Soviet Russia and China, although the importance of the lawyer appears to be gaining in the Soviet Union as it is being transformed from a revolutionary into an evolutionary and relatively developed society.

The fact that in revolutionary and other radically progressive societies—which include many of the newly sovereign emergent or under-developed countries outside Europe—the function and status of the lawyer tend to be modest underlines the traditionally conservative function of the lawyer as a defender of established interests rather than an innovator.

In the majority of contemporary democratic societies, the role of the lawyer is important, in some cases (such as the United States) predominant. This is so partly because a democratic constitution and legal order—for all the differences between the various types of democracy—are based on a delicate and precarious balance of functions and powers, which makes the role of the lawyer, as a trained balancer, important. But it is also connected with the fact that in the formative era of modern democracies, especially throughout the nine-

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For some of the thoughts developed in this paper, the writer is indebted to a discussion on law and economic development held in December 1962 under the auspices of the School of Industrial Management, Massachusetts Institute of Technology, and to a paper, as yet unpublished, by J. D. Nyhart, titled "Law and Economic Development."

teenth and early twentieth centuries, the predominant economic philosophy of democracy was that of *laissez faire*, with private enterprise as the chief instrument and promoter of economic activity and development. The function of the State remained restricted to defense, foreign affairs, and certain limited administrative and police activities, while the main stream of economic and social life proceeded through private channels. Hence the predominant training and function of the lawyer was in the field of private law, as counsel and advocate, as judge litigating between private parties, and as legal scholar analyzing the legal order and concepts of this type of society.

The change from *laissez faire*, free enterprise societies to welfare state societies, with an increasing proportion of planning, public social obligations, and public enterprise—a process that began in the Western world in the nineteenth century and has continued with ever increasing acceleration during the twentieth century—found the lawyer mentally and technically largely unprepared. It is significant, but not very surprising that, especially in the Anglo-American legal world, the analysis of the impact of planning and welfare ideology upon the law has been almost passed by; by far the best known, though sterile, contribution to the problem of planning and the rule of law has come from an economist, Professor Hayek.[1] Hayek's simple conclusion is that planning and the rule of law are incompatible, that the law should only "provide signposts" but not "command people which road to take."[2] I have attempted elsewhere to demonstrate the total inadequacy of this conception of law, even in developed countries, for the minimum needs of contemporary societies.[3]

Lawyers have of course played a more or less important part as legislators, in the shaping of modern planning and welfare legislation. Their function, in this respect, has been greater in some than in other countries. Essentially, however, they have contributed to this process in their capacity as politicians, as legislators who happen to be lawyers rather than economists, journalists, trade unionists, businessmen, or engineers. The lawyer's skill may have been helpful in the drafting of this or that piece of legislation but that is a very different matter from bringing the lawyer's study of law, as a comprehensive science, discipline, and technique, and as a vital instrument of social order, to bear on the function of law in societies whose ideals, conditions, and needs drastically differ from those of earlier times.

1. HAYEK, THE ROAD TO SERFDOM (1944).
2. *Id.* at 74.
3. See FRIEDMANN, LAW IN A CHANGING SOCIETY, chapters 1, 16 (1959); see also Jones, *The Rule of Law and the Welfare State*, 58 COLUM. L. REV. 143, 149 (1958). *Cf.* Fuller, *Some Reflections on Legal and Economic Freedoms—A Review of Robert L. Hale's "Freedom Through Law,"* 54 COLUM. L. REV. 70 (1954).

This reappraisal is particularly needed in the great majority of the so-called underdeveloped countries, *i.e.*, the great majority of nations that have recently acquired political independence, because of a generally very low and static economic and social level. The characteristic feature of an undeveloped country is the stark gap between its economic and social state and the minimum aspirations of a mid-twentieth century state modeled upon the values and objectives of the developed countries of the West. All these countries have an overwhelming need for rapid social and economic change. Much of this must express itself in legal change—in constitutions, statutes, and administrative regulations. Law in such a state of social evolution is less and less the recorder of established social, commercial, and other customs; it becomes a pioneer, the articulated expression of the new forces that seek to mold the life of the community according to new patterns. In this type of society—which the underdeveloped countries represent most radically, though by no means exclusively—it is essential to reassess not only the function of law but the role of the lawyer.

In the tradition of the West, the lawyer has contributed to the development of the legal system, and thus in some way to the development of society, mainly as judge, advocate, and scholar. He has also been concerned with legislative change—as a member of a law revision committee, a parliamentary or extra-parliamentary commission, as an expert in a government department, or as a parliamentary draftsman. But here, as already mentioned in connection with the role of the lawyer in planning and social welfare legislation, the technical and the policy functions must be distinguished. As a parliamentary draftsman or counsel, the lawyer is essentially the technician. As a member of a law revision commission, or more fundamentally, as a formulator of constitutional principles, the lawyer, usually in company with non-lawyers, may play a major role in the shaping and articulation of the basic political and social foundations of the legal system. In this latter role lawyers probably played a more important part through the eighteenth century than in the nineteenth and early twentieth centuries. One thinks of the role that men like Hamilton and Jefferson have played in the formative era of the American Constitution (and the latter also in other respects, such as in the codification of the Virginia laws). From the beginning of the nineteenth century, together with the rise of positivism as the predominant legal philosophy, the lawyer became more and more the craftsman, the technical expert essentially detached from the policy-making role of the social reformer and legislator. Jeremy Bentham stands out as the most notable exception from this trend. He used the training of the lawyer as well as the philosophy of a social utilitarian, combining

these in a life-long struggle for legal reform in a multitude of fields, from constitutions to civil codes, penal reform, and welfare institutions. To be sure, the society that Bentham sought and helped to achieve was one radically different from the society aimed at by contemporary developing countries; it was a politically democratic, post-feudal society, leaving the utmost scope and freedom to private commercial enterprise, with contracts as its most appropriate legal instrument, as the best means of achieving the greatest possible prosperity for the greatest possible number.[4]

Overwhelmingly, the lawyer has, in the recent evolution of Western society, functioned as judge, advocate, or scholar. Because of the differences between the inquisitorial type of procedure predominating in the civil law world, and the adversary process predominating in the common law world, the role of the advocate has, in the latter group of systems, been the more articulate and significant. Perhaps the role of the advocate in the shaping of basic legal principles is no longer as prominent as it was a century ago. One thinks for example of the part played by Daniel Webster in the evolution of the principles of contract and eminent domain, in the *Dartmouth College* and *West River Bridge* cases of 1819 and 1848.[5] The fact that in the great majority of American jurisdictions the argument of counsel is no longer reported contributes to the outward diminution of the role of the advocate. In fact, however, in the adversary processes of common law, and especially of American, litigation, the brief of counsel still is of great, and sometimes decisive, significance in the shaping—and often the decision—of the issues at hand. In this respect the role of the advocate in the continental legal process is far more limited. Nor does the continental judge, being an anonymous member of a collective body, whose names are not published in the law reports, and who must submit to majority decision behind closed doors, enjoy the same extolled status as the judge of the common law world. But apart from this difference of status and personal identification of great judges with the evolution of the law—there are no equivalents of Mansfield, Blackburn, Holmes, or Cardozo in the civil law world—the function of the judge in both groups of systems is essentially the same. With regard to the evolution of law as the major instrument of social order, this function is of necessity marginal. Although we have long departed from the illusion that the judge only applies the

4. The process by which the reforms in the British legislative processes and machinery, initiated by Bentham and his disciples, while designed to produce an extreme economic liberalism, came to serve as the instruments of social reform, welfare legislation, and a partly socialized economy, has been classically analyzed by Dicey. See DICEY, LAW AND PUBLIC OPINION IN ENGLAND IN THE NINETEENTH CENTURY (1905).

5. West River Bridge Co. v. Dix, 47 U.S. (6 How.) 507 (1848); Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 518 (1819).

law and does not make it, the law he "makes" is subject to the limitation imposed by the fact that he can decide only the issues that happen to come before the court and to the limitations imposed by statutes and precedent upon the judicial shaping of the law. The judge's function in the evolution of law, while important both in the continental and the common law systems, is essentially arbitral. It is, of course, considerably greater where, as in the United States, judges are called upon to interpret a constitution, *i.e.*, a set of basic principles governing the political, social, and economic life of the nation. But even here the function of interpretation, while often of decisive importance for the social life of the nation, is not part of a deliberate social plan.

By contrast, the legal scholar has the complete freedom—and it is his principal opportunity—to survey and appraise the legal system, both as a whole and in its individual manifestations, as an instrument and function of social order. In the reorientation and reassessment of the function of law as an instrument of social engineering, the work and thinking of such men as Bentham, Ihering, and Dicey in the nineteenth century and of Roscoe Pound and Francois Gény in the twentieth century have been of fundamental importance. An obvious limitation on the contribution of the scholar to the use of law as an instrument of social change is his remoteness from the practical tasks of making and administering the law in governments, parliaments, or administrative agencies.

When we look at the role played by the lawyer in the Western world in the last century and a half, not from the point of view of division of functions but of ideological attitudes, it is difficult to deny that he has overwhelmingly been a defender of the established order and of vested interests. If, in the axiology that has dominated Western political and legal philosophy since Locke, we regard property as an incorporation of the economic and commercial interests, and life and liberty as the incorporation of the interests in personal integrity, the lawyer has certainly been, in the economic sphere, overwhelmingly the defender of property interests, for the simple reason that in a society dominated by commerce and industry the individual and corporate owners of property have been the principal clients. Correspondingly, the role of the lawyer has been generally more important in the shaping of private than of public law. As stated earlier, private law was until recently the much more important and dynamic part of the Western legal systems.

With regard to individual liberties the lawyer, especially in criminal and administrative processes, has often been a vital defender of liberties against official arbitrariness. One thinks of the role played by

Lord Carson in the defense and ultimate vindication of a wrongly disciplined naval cadet against the stubbornness of official bureaucracy (as dramatized by "The Winslow Boy"). But one has only to look at the recurrent themes and contents of the annual speeches of Presidents, bar associations, law societies, and the like, on the role of law to see that the defense of individual liberty has almost been automatically identified with the ideology of a liberal society. Administrative arbitrariness—which does exist—has been all too often identified with social planning as such. The Dicey fallacy that wide discretionary power in the hands of government is of necessity also arbitrary power still looms very large in the minds and actions of contemporary lawyers, or at least in the pronouncements of their appointed representatives.

The continuing vital importance of the lawyer's function as a defender of both personal and economic rights against arbitrary interference can hardly be exaggerated. In these days of military dictatorships, the frequent muzzling of the press and other media of information, the stifling of open discussion, and confiscations of both national and foreign property interests, the protection of the legitimate interests of the individual, and most especially of his personal liberties as expressed in the minimum requisites of due process, remains one of the most important and noblest of the lawyer's functions.

But it is no longer sufficient. If the lawyer continues to be identified, as he predominantly is at the present time, with the defense of the existing order and of vested interests, against the urgent needs and interests of societies that must lift themselves from poverty and stagnation to a radically higher level of economic and social development, often within a desperately short time, the lawyer will eventually be reduced to an inferior and despised status in the developing nations. The contemporary lawyer in all states, but most emphatically so in the developing nations, must become an active and responsible participant in the shaping and formulation of development plans. He must guide and counsel but also warn where necessary. He must acknowledge the drastically increased role of public law in developing societies, which usually have inadequate resources, a totally inadequate quality and quantity of responsible private venture capital, gross educational deficiencies, and a minimum of technical skills and administrative experience. These nations must plan for their future; they must seek to use and develop their resources for the maximum benefit of the community, even where they admit and desire a large share of private investment and enterprise.

It may be helpful to illustrate the challenge to the lawyer in devel-

oping societies by a few typical examples. An all too frequent feature in developing societies is the presence of large private landholdings, often held by absentee owners, impeding the development of a healthy agricultural economy, whether based on a system of individual peasant holdings or on cooperative farming. Very often these large land areas will also be needed for irrigation or for industrial development purposes. On the other hand, an industrial development or resettlement scheme may affect not absentee landowners but working peasants and smallholders. In such situations, the political planners will tend, and justly so, to differentiate between the various types of interests affected, according to the social and economic equities. They cannot be expected to treat large absentee landholders, who have collected excessive rents—often through rapacious middlemen—for decades or centuries, in the same way as the working smallholder. The lawyer would traditionally tend to regard all vested rights as equally worthy of protection. It is precisely this attitude that would tend to bring him into disrespect in developing societies. On the other hand, the political planner, unaided by the lawyer, would tend to ride roughshod over any private interests that may stand in the path of rapid planning. It is the lawyer's task, not only to ensure a proper balance between these competing interests with a sense of justice that should be sharpened by his legal training, but also to ensure that the minimum safeguards of due process be preserved in order to have these matters ultimately settled by an impartial authority. But, for example, to let the courts decide the adequacy of compensation offered for expropriations made in the public interest, presupposes a judiciary that is not in ideological opposition to the very principles of the new order. Such a supposition may well be erroneous, as is illustrated by the conduct of the German judiciary during the Weimar Republic.

A related issue that has arisen quite often in recent decades and has been the predominant subject of debate among international lawyers and in the U.N. debates leading to the resolution on the permanent control over natural resources, is the expropriation of foreign interests and their transfer into national, usually public, control. These matters also normally form part of the national development policies and planning processes, even though in some cases an element of political retaliation may predominate (as in the cases of the nationalization of the Suez Canal, or of the Dutch tobacco interests in Indonesia, or the confiscation of American-owned sugar refineries in Cuba). Here again the discussion, and especially the predominant attitude of lawyers, has been characterized by a formalistic approach. The great majority of Western lawyers have based their opinions

solely on the theory of vested rights and demanded the same standards of compensation for the expropriation of foreign interests regardless of the manner of acquisition and exploitation. On the other side, the representatives of some of the underdeveloped countries have been equally one-sided in denying *any* right to compensation, other than as a matter of discretion by the expropriating government. I have suggested elsewhere[6] that the only way of attaining an orderly development of the process of adjustment between the once overwhelmingly colonial or quasi-colonial property interests, and the aspirations of developing countries, must consist in a linking of claims to the balance sheet of advantages and deprivations. If an expropriated enterprise has over a long period, under the protection of military or economic power, exploited native wealth and labor in excess of the benefits which it has brought to the country through the development of agricultural, commercial, or industrial values, then the claim to compensation has a much weaker and more limited basis than where the foreign enterprise has been developed on the basis of a free agreement, based on commercial principles, fair labor standards, and other welfare aspects. Here again it is of crucial importance that the lawyer should not identify himself one-sidedly with the defense of vested interests but should contribute actively, and with an understanding of the issues at stake, to the responsible development and regulation of the planning processes, and to the adjustment of the competing claims of the interests of capital exporting and capital importing countries.

An ever increasing—though in the analysis of the functions of law and the lawyer, much neglected—part of the work of the lawyer is neither litigation nor the resolution of disputes. It lies in the shaping and formulation of policies, in the exercise of legal powers, constructively establishing or altering the relations between private legal parties *inter se,* between public authorities and private parties, between governments and foreign investors, and the like. In the public international sphere this task consists increasingly—and most notably in the case of developing countries—in the formulation of economic policies expressed in accession to multilateral trade agreements (such as GATT) or the conclusion of bilateral treaties. In the latter sphere, a decisive difference exists between treaties concluded with a state trading nation and those made with a free trading nation. These are not matters of form only; they presuppose an appreciation of the role played by foreign trade in the national economic development. The implications of bilateral or multilateral trade agreements do not have

6. See Friedmann, *The Uses of "General Principles" in the Development of International Law,* 57 AM. J. INT'L LAW 279 (1963), and *Social Conflict and the Protection of Foreign Investment Proceedings,* 1963 AM. SOC. INT'L LAW 126.

only economic aspects; the decision, for example, whether a country like India or Tanganyika should accede to GATT—a multilateral treaty aspiring to international free trade, based on the principle of the most-favored-nation clause—or whether it should enter into a bilateral trade agreement with the United States or the Soviet Union, implies policy considerations of profound political importance. Similarly, whether to permit a foreign oil company to construct an oil refinery and, if so, whether to give it a monopoly of the crude oil supply or of tanker transport; whether to keep basic industries and utilities under public national ownership or, for the sake of more rapid and skilled development, to make exemptions in favor of private foreign entrepreneurs; whether to accompany such policy with special tax or other financial concessions, or modifications of import-export policy—these and a multitude of other questions vital in the life of any developing country today require a basic understanding of the political and economic issues involved. In all these questions, the lawyer must play an important, often a decisive, part. It is he who must draft the necessary legislation or the complex international agreements; it is he who will usually be the principal, or one of the principal, representatives of his country in international trade negotiations. It is he who must draft the applications for loans from national or international credit agencies, such as the World Bank or the United States Agency for International Development, or formulate the modalities and conditions of joint business ventures, between his own government or a private enterprise in his own country on the one side, and a private enterprise or a foreign consortium, a foreign government, or a public international agency on the other side.[7] It would be as artificial as it would be wasteful of the still desperately scarce trained manpower resources of developing countries to believe that the lawyer should or could confine himself to the strictly legal issues, such as the validity of the contract or treaty revision clause, or the legal position of a minority shareholder under company law. Indeed, the "general counsel," a concept notably developed in this country, implies far more than technical legal advice. The general counsel, both of public agencies such as AID and of private corporations, actively participates in the policies as well as in the ultimate formulation of international business transactions. In the case of transactions between developed and developing countries, legal counsel on both sides are inevitably involved in an intricate mixture of policy issues and questions of public law, private law, and administration. All this requires a type of lawyer, on both the public and the private level, who has a different

7. For example, the International Finance Corporation is now permitted and seeks to take equity participations in conjunction with loans granted for development aid.

approach and a different background of knowledge from his predecessors. He cannot be expected to be an expert economist or engineer, but he can be given an understanding of the basic issues. Indeed it is the generally recognized ability of the lawyer, by virtue of his training in organized thinking, to think himself into a number of different subjects that largely accounts for the preeminent role played by lawyers in the chairmanship of commissions that deal with a vast variety of subject matters, as well as for the high proportion of lawyers, at least in most Western countries, in legislative as well as administrative positions. A basic training in economics has long been regarded in a number of countries as an essential part of the introductory training of the lawyer. At the present time there are plans under way, in some of the developing countries, to give a general introduction to the subjects just mentioned, to lawyers and other general public servants.

Even within the province of the law, there will have to be a shift of emphasis, and again particularly so in the developing countries. Since most of the important planning decisions, both nationally and internationally, involve the relations between governments and private legal subjects (corporate or individuals), and since many of the major planning decisions inevitably involve some interference with property and other private interests, a study of administrative law becomes increasingly important. But it has to be a concept of administrative law wider than that prevalent in the teaching and scholarship of this country, where it entails essentially a study of the procedural safeguards of the citizen against administrative power. In the developing countries it must correspond more closely to the wider compass of the discipline as understood in England, and even more fully in France and other continental countries. *Droit administratif* comprises the totality of legal relations between public authorities *inter se*, and between public authorities and private subjects. As developed by the jurisprudence of the Conseil d'Etat and of corresponding continental tribunals, it involves not only the legal processes determining the limits of administrative discretion and the procedural safeguards of the citizen through judicial or quasi-judicial procedures; it involves also the study of the administrative contract as an important way of regulating the manifold relations between public authority and private citizens in the provision of supplies and services. This concept may have increasing significance to international transactions between governments and private foreign investors.[8] Internally, the function and status of the public enterprise is of crucial importance in almost

8. See FATOUROS, GOVERNMENT GUARANTEES TO FOREIGN INVESTORS (1962); Friedmann, *The Uses of "General Principles" in the Development of International Law*, 57 AM. J. INT'L LAW 279, 290 (1963).

all the developing countries which seek to combine the principle of public control over vital commodities and services with the retention of some freedom of movement and initiative in the development of resources and the conduct of business. Hence the significance of contemporary development corporations which are either public, mixed, or private corporations, but which almost inevitably involve a specific legal status, and special relations with the government. Understood in this wider sense, administrative law will be the principal instrument of adjusting the interests of the public, as represented by the government, and of the private citizens, as represented by contractors, foreign investors, and the like.

The preceding pages have attempted no more than to give a tentative, summary, and incomplete description of the role that the modern lawyer has to exercise in legal systems where the emphasis has largely shifted from the private to the public sphere, from a *laissez faire* economy to a mixed or a state-directed economy, and in any case to economies directed by an overall development plan.

It is only by actively entering into this process, by equipping himself as far as possible with the outlook and knowledge required for this more flexible, and also far more responsible, function of the law in the developing countries of our time that the lawyer can hope to retain or even broaden the role that he has traditionally played in the countries of the Western world.