

and what it actually does. We will list a few of these functions. All are real; all are also functions that at least some people *expect* of the system. They are thus both manifest and latent—or can be.

The first, and in some ways most obvious, is *social control*. This means, essentially, that the system enforces rules of right conduct. Every society defines some behavior as deviant.² Every society has ideas about good and bad behavior. All societies, even those where we would be hard pressed to find a "legal system," take some steps to encourage good behavior and to control or punish bad behavior. Encouragement and control can be subtle and informal—the merest raising of an eyebrow. Informal means of social control are by no means neglected in a complex modern system: a police officer yells at a driver; the President praises companies that hold the line on their prices. But the state also makes heavy use of formal sanctions: arrest, imprisonment, fines, and civil penalties.

Legal institutions are an important cog in the machinery of social control. In the first place, legal institutions are responsible for the making, care and preservation of those rules and norms which define deviant behavior; they announce (in a penal code, for example) which acts may be officially punished and how and which ones may not be punished at all. In the second place, the legal system carries out many rules of social control. Police arrest burglars, prosecutors prosecute them, juries convict them, judges sentence them, prison-guards watch them, and parole boards release them.

The legal system, to be sure, has no monopoly on social control. In every complex society, many "deviants" do not run afoul of the law at all: people who are rude to pedestrians, who have wretched table manners, who refuse to give to charity, are "deviants" in a sense; but the state lets them alone, officially at least. A night watchman found sleeping on his job will probably be fired. This is a terrible sanction; but it is not (except in a strained and artificial sense) a legal one.³

2. Is there behavior that every culture considers deviant? Yes and no. It is hard to find a society with no concept of murder as an evil. But what is murder? Murder is deviant or unlawful killing. An act which is murder in one society, may be self-defense, or justifiable revenge, in another. Homicide (to use a more neutral word) is certainly not universally condemned. Hardly any society disapproves absolutely and entirely of homicide (killing). Quite the opposite: almost every society allows life to be taken under certain circumstances—in self-defense, as punishment, on the battlefield, and so on.

3. Of course, the law, openly or by implication, may give or allow the owner of a business the right to fire a guard who sleeps on the job. We can, if we wish, conceive of the law as a gapless whole; every situation must be "covered" by some rule of law, if only by the (imaginary) rule that everything not forbidden is allowed. In this sense, the business executive *is* applying an authorized sanction when he or she fires the guard. But we generally use the word "law" in a narrower, less far-fetched way.

CHAPTER 2

THE FUNCTIONS AND METHODS OF LAW

In other words, there are many patterns of authority within society. Authority will always try to control in some way behavior in the group which is under it. Parents, teachers, employers—leaders of all sorts—exercise social control, along with, and sometimes competing with, the law.

Dispute settlement is a second broad function of law. A *dispute* is the public assertion of inconsistent claims over something of value.⁴ Disputes can be dangerous; they may degenerate into fights, or worse. Two people quarrel about an issue. If the people who are quarreling are blood relations, their dispute may split apart the family. If they are in business together, the dispute may ruin their company. We usually speak of *dispute settlement* when we have in mind small-scale quarrels or disagreements: a broken contract, a failed marriage, a contested will, a fuzzy boundary-line between two plots of land. The phrase *conflict resolution* usually refers to bigger and broader disagreements between groups or classes: farm owners against farm workers, industrial laborers against management, or the like.

Organized communities may provide many sorts of mechanisms for settling disputes or resolving conflicts. Institutions doing this work come in many forms and styles. One institution that immediately leaps to mind, is the *court*; but there are many others (arbitration boards, grievance committees, and ombudsmen, for example). Many of these institutions do more than settle disputes; at times they also resolve conflicts. In a sense, so does the legislature when it hammers out a new law by finding some middle ground or compromise among the babel of contending voices.⁵

Every society needs social control and dispute settlement. Law also can have a *redistributive* or *innovative* function. At any point in time, a legal system enforces two types of rules of behavior. One type consists of basic rules that people are familiar with and which change very slowly, if at all. These include, for example, rules about killing and robbery. Other rules of law, particularly in modern societies, are much more volatile. There is constant tinkering with traffic codes. Many changes in law are the end product of jockeying for power among interest groups. The

4. Richard L. Abel, "A Comparative Theory of Dispute Institutions in Society," *Law and Society Review*, Vol. 8, pp. 217, 227, (1973). Abel distinguishes disputes from disagreements about mere facts (for example, in what year did Marco Polo reach China?)

5. Torstein Eckhoff in his article, "The Mediator, the Judge and the Administrator in Conflict-Resolution," *Acta Sociologica*, Vol. 10, 1-2, p. 148 (1967), distinguishes between the mediator (see below, p. 28), the judge, and the *administrator*. The administrator, according to Eckhoff, also decides cases, but "in contrast to the judge, who merely pretends to determine what already is right," the administrator "establishes an arrangement which has the character of being new."

process of accommodating interest groups is a kind of conflict resolution; but other changes merit a rather different category, which we could call *social engineering*, that is, planned change directed from above. To draft a five-year plan for Poland or Hungary is social engineering. When a Food and Drug Commission draws up a code to regulate food colors and additives, or when the city fathers of London or Rome specify rules about parking and traffic, these too may be forms of social engineering. Traffic and food colors have their pressure groups; nevertheless a branch of the state has seized the initiative, has taken over an architectural role. The difference between dispute settlement and social engineering is roughly the difference between a private lawsuit, in which neighbors complain about a noisy night club, and a zoning ordinance, forbidding night clubs on residential streets.

Social control means control by rulers over those who are ruled. In many societies, the law, or part of it, is supposed to keep an eye on the rulers themselves. This is the function of the Scandinavian *ombudsman*. It is one of the ideas behind judicial review—the right of courts to judge whether acts of government agencies are legal or not. Closely related are proceedings we may call *claims of right*: a wounded veteran lays claim to a pension in court or before a tribunal; a mother demands her family allowance, a taxpayer his rightful refund. Suits by private parties against the government help control abuse of power, but their primary aim is to redress some particular wrong.

Discussions of law tend to emphasize the repressive side of law: rules of criminal law, and other "thou-shalt-nots." But many important norms aim to *allow*, not prevent: religious freedom, for example, or foreign travel. Many rules and orders try to make some conduct easier or more productive, or to encourage people to carry on certain work. Consider, for example, the law of wills, the law of contracts, or the laws which allow merchants to form partnerships and tell them how to do it. These laws are, in a way, like a bridge over a river. The bridge, it is true, *controls* traffic; it confines it to a definite lane or path. But without the bridge, how could the river be crossed? People would have to detour, use a ferry, or, if necessary, swim. The bridge guides people and goods across the river—but in a facilitative way. In a similar fashion, law specifies a form or formality so that people may reach their goal without danger of mistake or invalidity. Do it this way, make out this kind of will, and your estate will pass on as you wish, trouble-free. Legal forms and institutions are like standardized goods—cans of soup in a super market. No one *has* to buy soup, but if one wants to, a ready-made product is available, uniform in quality, with standardized ingredients.

Legal systems also handle much of the drudge-work of modern civilization. They store information; they register status and change of status; they legitimate claims. The state keeps track of births, marriages,

and deaths. People sell and buy houses, and the deeds are recorded. Heirs probate wills. A modern society produces and consumes a staggering number of pieces of paper each day. Much of this is legal documentation: deeds, mortgages, contracts, articles of incorporation. *Notaries* in civil law countries draft many of these legal documents. Courts, too, have an important share of this humdrum but necessary business. People go to court to change their names or to get an (uncontested) divorce. The court merely rubber-stamps what parties have already agreed to; its role in the average divorce case is not much different from the role of a registry in accepting and recording a deed.⁶

Another legal function might be called *secondary social control*. A thief brought before a court is not only punished or controlled, he is also (one hopes) taught a lesson. Legal process aspires to be a kind of teacher, reformer, or parent. The law does more than *state* the norms; it tries to spread the word, explain the norms, convince its public to follow them. In many societies, trials are open to the public; people flock in to observe and absorb. In this way, they learn for themselves what is right and what is wrong behavior. In simple societies, everyone knows the basic rules; teaching goes on subtly, automatically. In complex societies there are so many norms and rules that knowledge of law can almost never be taken for granted. The system must devote great energy to teaching and persuading, that is, to secondary social control.⁷

The various functions of law can perhaps all be reduced to a single function: *social control*. Even dispute settlement is, in a way, a kind of social control. When a representative of society settles a dispute, norms and rules are imposed on the parties; in this way bad conduct is discouraged and good conduct fostered. Even so, it is useful to distinguish among the functions. One should also remember that there are many kinds of legal institutions; some perform one function, some perform others. Courts may or may not be instruments of social engineering or of claims of right. They will have different functions in different societies.

6. See Lawrence M. Friedman and Robert V. Percival, "A Tale of Two Courts," *Law and Society Review*, Vol. 10, p. 267 (1976).

7. Some social scientists feel that there are still other latent functions of law. For example, the punishment of criminals may act as a kind of catharsis, a release of aggression. Not everyone agrees; other social scientists insist that punishment has harmful side effects and, if anything, foments aggression. Albert Bandura, *Aggression: A Social Learning Analysis*, Englewood Cliffs, N.J.: Prentice-Hall, 1973, pp. 225-27. Depending on which side is right, hanging criminals in public, once a common practice, might be good (or bad) for society.

Neil Vidmar asked those Canadian adults who favored the death penalty why they felt as they did. About a third mentioned "retribution, vengeance, or punishment" as their reasons. Many people think law should make bad people suffer, or give murderers "what they deserve," or simply allow for revenge. These are reasons beyond the ordinary meaning of social control. The survey is reported in Neil Vidmar, "Retributive and Utilitarian Motives and Other Correlates of Canadian Attitudes toward the Death Penalty," *Canadian Psychologist*, Vol. 15, p. 337 (1974).

DYSFUNCTIONS OF LEGAL PROCESS

The functions have all been discussed in fairly positive terms; we have assumed that performing them is good for society, or at least a necessary evil. But institutions charged with these functions are certainly not universally good. (The Gestapo, Hitler's dreaded secret police, was an implement of social control.) Nor do legal institutions necessarily do their jobs well. From many cultures, we hear about courts that bungle the job of settling disputes or exacerbate conflict. Medieval litigation could, and often did, stretch on for years, entangled in endless formality. Charles Dickens, in *Bleak House*, drew a picture of English chancery courts in colors so dismal it has become proverbial. Robert L. Kidder describes a modern *Bleak House* in Bangalore, India:

A well-known case involved two neighbours who had been fighting each other for twenty-five years over a strip of dirt three feet wide which ran between two houses. . . . The twenty-five year figure . . . did not seem unusual. When I expressed surprise during one conversation about an eight-year delay experienced by one aged litigant over repayment of a loan, I was told of a case he was still involved in which had begun in 1921. The 85-year-old 'court bird' seemed to delight in the fact that all of his original opponents and their lawyers were no longer even living.⁸

There are societies where litigation seems to serve mainly as an outlet for vindictiveness. It almost becomes a ritual means of "war" between families or neighbors. This use of litigation is not possible unless the court system lends itself to delay, unless it is prone to red tape or technicality. Still, why would a society allow its courts to degenerate so? Does the endless litigation have some redeeming social value? The English legal historian, William Holdsworth, observing the quarrelsome lawsuits of medieval England, felt that law had substituted for private war. The courts were "besieged with angry litigants" who fought their lawsuits "with the same spirit as they would have fought their private or family feuds."⁹ People had transferred their "unscrupulousness and trickery" from war to litigation.

Sometimes, it is suggested, the sick court system is a kind of tumor, or alien growth, to be blamed on outside influence. This is how Bernard Cohn explains the endless, pointless lawsuits of India. The British

8. Robert L. Kidder, "Courts and Conflict in an Indian City: A Study in Legal Impact," *Journal of Commonwealth Political Studies*, Vol. 11, No. 2, pp. 121, 128, (1973).

9. William S. Holdsworth, *A History of English Law*, Vol. 3, London: Methuen & Co., 1923, p. 395.

imposed foreign procedures and concepts on the native population. The Indians, in response, "thought only of manipulating the new situation"; they "did not use the courts to settle disputes but only to further them."¹⁰ In some places, too, official law is used as an escape hatch, a way to avoid or nullify the norms of local courts. In Zinacantan, Mexico, for example, witchcraft carries severe penalties in the local (Indian) communities. Persons accused of witchcraft sometimes try to evade these punishments by appealing to Mexican authorities, who regard witchcraft as superstitious nonsense.¹¹ In general, the Indians play off one form of law against the other.

Not all pathologies can be explained, however, either as the product of a mismatch between two legal traditions (one rooted in custom, the other formalistic and foreign), or as substitutes for the feud. Manipulative, hostile use of litigation is far too widespread. Litigation can be an instrument of ordinary political and economic struggle. This was its use in the small county of San Benito, California, in 1890—not "as an efficient, ethical tool for resolving disruptive disputes, as an agent of social harmony and peace," but rather as "an extension of physical and social struggle." The law protected property against "aggressive attack," "exerted control over underlings and undesirables," and gave people weapons for use in the tough life-struggle for power and wealth.¹² In general, where law is technical, full of "tricks," and detached from everyday ideas of right and wrong, it can serve as a weapon of revenge or attack; as a source of unreasonable defense, as a means for delay and frustration of legitimate claims. If efficiency or harmony are the lodestars of the system, this use of legal institutions is much less likely to occur.

LEGAL SYSTEMS AS ALLOCATIVE SYSTEMS

In a brief and general way, we have described what the social functions of the legal system are. In this section, we will deal with the *methods* used by legal systems in performing their functions, that is, the techniques which a system of authoritative rules may employ to reach its decisions, and to carry them into effect.

Legal acts are, in an important sense, economic. They either dis-

10. Bernard S. Cohn, "Some Notes on Law and Change in North India," in Paul Bohannan, ed., *Law and Warfare*, Garden City, New York: Doubleday, 1967, pp. 139, 155.

11. Jane Collier, *Law and Social Change in Zinacantan*, Stanford, Cal: Stanford University Press, 1973, p. 147.

12. Lawrence M. Friedman, "San Benito 1890: Legal Snapshot of a County," *Stanford Law Review*, 27: 687, 697 (1975).

tribute scarce goods and services within a society or tell others how to distribute them. This, in the most general way, is the method by which law carries out its function. In other words, the legal system can be compared to a kind of rationing board. It issues commands, gives benefits and takes them away, tells people what they can or cannot do, and enforces its own rulings. All this has the effect of deciding who gets what, or who keeps what. For example, the system deals with transfer and inheritance of property. Law and legal process make it possible for people to leave part of their wealth to their families when they die. The state may, however, tax some of the wealth away and redistribute it. Even more fundamentally, law and legal process define what is meant by property (Is slavery legal? Private ownership of land?); rules and institutions maintain the existing distribution of property, settle disputes that arise within it, keep deviance in line, protect the rights of property (by punishing theft, for example), and, when occasion arises, permit orderly change.

How does the legal system carry out these functions? One way is through *rewards and punishments*. Subsidies give funds to some people; fines take money from others. The *market* itself is a means of allocation. Legal rules and institutions create, define, and maintain the market, that is, the domain of free bargaining or contract. Some kinds of agreements are forbidden. (People cannot sell themselves into slavery in modern societies. A contract that tends to create a monopoly is also illegal.) Rules about private property, banks, money, and stock markets are important for a market system. Criminal justice, as we have seen, acts as a watchdog, guarding property against embezzlement, violence, and theft.

But there are many other ways to distribute values or rights, and each of them, even *chance*, has at least some basis in law. People in doubt about personal decisions sometimes let fortune decide; they may for example, toss a coin. Torstein Eckhoff cites a ninstance in which courts of law followed this path in a matter of life and death. In Sweden and Finland, in the eighteenth and nineteenth centuries, chance was given an official role in cases of murder where two or more people were known to be involved, but it was not clear which one had delivered the fatal blow. The judge could decide by a toss of the dice which person would die, while the others suffered lesser punishments. The sense of the community was that someone had to die to atone, by law, for the victim's death. To kill the whole group was unjust. There was no way, rationally, to choose among the defendants. Only chance could end the uncertainty: "this way of settling the matter served to exempt the judge from taking responsibility for the fateful choice, and at the same time it made manifest that no partiality was involved."¹³

13. Torstein Eckhoff, "Impartiality, Separation of Powers, and Judicial Independence," *Scandinavian Studies in Law*, Vol. 9, pp. 9, 16-17 (1965).

The *lottery* is another way to make decisions at random. In a lottery, every ticket has the same chance to win. During the war in Vietnam, the United States government chose men to serve in the army in an order that was fixed by lottery.¹⁴ In old Albania, village elders used to divide a dead man's property among his sons, using pieces of paper (with or without holes) or beans of different colors, or other tokens to determine who got what.¹⁵

A lottery gives equal chances, but it produces unequal results. Goods can also be allocated *per capita* (by the head); here the outcome or result is perfectly equal. This method is common in rationing schemes (one pound of sugar per family, for example). The right to vote is also given out *per capita*; each registered voter has one vote, and only one. *Merit* is still another way of allocating. Any agreed upon standard can be used to measure merit. The state may allocate jobs in the civil service, for example, to those who score highest on standard tests. *Need* is another criterion. It too can be variously defined. Medical care is given to the sick; the wealthy (those with negative need) pay the highest taxes. Other criteria are *ascriptive* (based on status or birth)—the right to inherit from one's father, for example, or the rights of bastards and adopted children.

For any given situation, there are many ways that might be used to allocate. During wartime, rationing (in the literal sense) is used for scarce goods. They are handed out according to some principle—merit or need or simply in equal shares. If gasoline were tight, the state could allot it to those who deserved it most (by some standard), to those who needed it most, or by the head (5 gallons per person per week). The state could also allow the market to do its work; the price would rise and act as a kind of automatic rationing scheme. Or the state could fix a price and announce that the gas would be given out (in 20 gallon units, say) every Monday at noon, first-come-first-served. When supplies ran out, there would be no more gas for the week. Some people will get in line on Sunday and wait all night, to be sure of a good place in line. This too is a kind of market in which some people can be easily "priced out." There are those who cannot "afford" to wait in line. Some may not have the time. Some are too old or too sick. Some have small children they must care for. Others are able to make the effort but do not want to; they would rather take a bus than stand in line for gas.

When goods have no price, or a fixed price (and a limited supply), queuing (the time-and-effort market) takes over. Court services are an

example. The judge's time is "free;" but only so many judges sit. Litigants must therefore queue up; in some places trials are delayed, and a serious backlog results. Legal rules that set up or imply a time-and-effort system shift resources from people with money to people with patience or time. This is a frequent result when goods and processes are "socialized." In socialist countries there are constant complaints about shortages and long lines. These may be the "price" of cheap goods in effort and time.

How does society choose its schemes of legal allocation? Social structure, history, tradition, and ideology all enter in. Culture plays a vital role. Why is *chance*—in many ways so fair a method—rarely used by the law? It lacks cultural support, in short, legitimacy. A judge who decided lawsuits by a flip of a coin would be driven from the bench. Only "principle" is legitimate here.

Choices between markets (say) and a pure rationing system, or between merit, need, and the market are among the most fundamental a society can make. Indeed, we characterize societies (as socialist, liberal, and so on) by means of what we consider to be the *basic* allocative choices made within the legal system. The overall functions—such as social control—are fairly universal, but the mix of techniques for achieving the functions is as distinctive to a society as a fingerprint.

14. Proclamation No. 3945, Nov. 28, 1969, 34 F.R. 19017, "Random Selection for Military Service." The order depended on a man's birthday. The days of the year were picked at random, ranked from 1 to 365, and men were drafted in that order.

15. Margaret Hasiuck, *The Unwritten Law in Albania*. Cambridge: Cambridge Uni-