Challenges in Law Making in Mass Societies

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INTRODUCTION

The setting for law making today and tomorrow is the mass society, or, more precisely, an evolving set of mass societies.

I. THE MASS SOCIETIES

The largest of the mass societies of course are China and India, each with a billion members.[1] Also very large are Europe and the United States. Europe is a multinational system having about 730 million in population (depending on which countries are included),[2] and has been interpreted as a federal system, actual or emergent.[3] The United States is a federal system having upward of 300 million in population. Other very large national systems include Brazil, Indonesia, Japan, Mexico, and Russia.[4] Large multinational regions having substantial transborder legal relationships include some of these national systems, such as the NAFTA countries (Canada, Mexico, and the United States); Mercosur in Ibero-America (Argentina, Brazil, Paraguay, and Uroguay); those in the Western Pacific interconnected with China and Indonesia (South Korea, Taiwan, Singapore, and Australia);[5] and the actual or potential relationships in Africa and in the Middle East.[6]

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1. Gilles Pison, *The Population of the World (2005)*, 414 POPULATION & SOCIETIES 1 (2005).

2. *See id.* at 3–4.

3. *See generally* John Pinder, THE BUILDING OF THE EUROPEAN UNION 3–26 (3d ed. 1998).

4. *See* Pison, *supra* note 1.

5. *See, e.g.*, Raj Bhala & Kevin Kennedy, *Regional Trade Obligations* § 2, *in* WORLD TRADE LAW: THE GATT-WTO SYSTEM, REGIONAL ARRANGEMENTS, AND U.S. LAW (1998).

6. *See, e.g.*, John H. Donboli & Farnaz Kashefi, *Doing Business in the Middle East: A Primer For U.S. Companies*, 38 CORNELL INT'L L.J. 413 (2005); Ryan McCormick, *The African Growth and Opportunity Act: The Perils of Pursuing African Development Through U.S. Trade Law*, 41 TEX. INT'L L.J. 339 (2006).

The extent to which the law making function addresses transborder relationships depends partly on geographical proximity and partly on the condition of underlying political and economic relationships. Geographical proximity is an important determinant in the movement of ordinary individuals, for example, laborers, and in commerce in ordinary goods, such as food stuffs.[7] At the same time, political and economic relationships can facilitate, reduce, or nullify the potential for transborder relationships between countries near and far.[8] Consider, for example, the transaction—facilitating relationships within the European Union and between Canada and the United States, compared with the strained relationships between Israel and Palestine, or Pakistan and India, or Cuba and the United States.

These geopolitical relationships between different communities are various and of course subject to continual changes. The complicated relationships between Israel and Egypt or between China and Taiwan are illustrative.

It is a common feature of most of these transborder relationships that they include a large national system, such as China in Asia, France and Germany in Europe, and the United States in the Western Hemisphere. Of course, these national systems are themselves of various size and political and legal complexity. France, for example, is relatively homogenous, while the United States has quite visible internal regional differences, suggested by the demarcation between the "red" and "blue" states in recent elections. However, whether relatively homogenous or internally diverse, the societies in these national regimes are mass societies whose legal systems must be adapted accordingly. Further dimensions of "scale" are confronted where national regimes coalesce in transnational arrangements such as the European Union or NAFTA: National mass communities become international mass communities.[9]

II. THE POLITICAL REGIME OF MASS SOCIETY

For simplicity of analysis, we can suppose that the model political unit in today's world is a system with 100 million in population. This is much smaller than China, and considerably

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7. *See, e.g.*, Paul Krugman, GEOGRAPHY AND TRADE (1991).

8. Paul Krugman, *The Move Toward Free Trade Zones*, 76 ECON. REV.—FED. RES. BANK KANSAS CITY 5 (1991).

9. John Whalley, *Why Do Countries Seek Regional Trade Agreements?*, *in* THE REGIONALIZATION OF THE WORLD ECONOMY 63, 63–82 (Jeffrey A. Frankel ed., 1998).

smaller than Europe and the United States, but it is about the size of Iran, Japan, and Mexico, for example.[10]

A political unit of this population already is in scale a mass society. Certainly it is so compared with the size of the nation states that came into being in Europe three or four hundred years ago, and which have become the prototype of the modern state.[11] Those were political units whose populations were in the model range of ten million or less, most of whom were living in the countryside or in small villages.[12]

Obviously there are many differences between the societies of three hundred years ago and those of today. Differences in communication and transportation are most salient, for example, between horse and buggy and canal barge, on one hand, and highways and airways on the other. However, the differences in scale are themselves of great significance. It is worth considering some of the differences in the tasks of maintaining community and carrying through governance that are implicated by this difference in scale.

One characteristic is urbanization. Most people in mass societies live in cities.[13] Virtually all modern communities are highly urbanized and are becoming more so. It is a universal phenomenon of our era that people on the farm and in the villages leave for the city and indeed for the megalopolis.[14] Cities have their own peculiar legal problems, from crowd control to handling household garbage and other nuisances.

Another characteristic is that most civic, economic, and political functions must respond not merely to occasional demands but to thousands or millions of participants and transactions on a routine basis: food supply and distribution; water and electricity supply; housing; transportation; education; police and other security systems; payment systems, banking and other financial systems; manufacturing services, such as repair or equipment; etc. The unfortunate present situation in Iraq is a vivid illustration of the effects of disrupting these networks.[15]

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10. Pison, *supra* note 1, at 4.

11. David Grigg, POPULATION GROWTH AND AGRARIAN CHANGE: AN HISTORICAL PERSPECTIVE 51–63 (1980).

12. *Id.* at 61, tbl. 7.

13. United Nations Population Fund, *State of World Population 1996: Changing Places: Population, Development and the Urban Future, Introduction* to Chapter 1 (Alex Marshall ed.), *available at* http://www.unfpa.org/swp/1996/index.htm.

14. *Id.* at Ch. 4.

15. *Struggling to Pick Up the Pieces*, ECONOMIST.COM/GLOBAL AGENDA, Aug. 23, 2005, at 1.

A related characteristic is that virtually all of these functions require continual cooperation among a large number of working groups that provide food supply, police, payment systems, etc. The functions are carried out in small enterprises and big businesses and in large and small government offices and bureaus. The peasant behind the plow and the housewife in the cottage are nearly obsolete figures. The epitome of the worker in a modern economy is the salary man, to use the Japanese term; the model residence for the modern worker is a high rise in the city. Both the worker and his or her abode require complex interacting arrangements to keep functioning.

Moreover, in most of these model political units, the members of the population are relatively young and correspondingly "alienated," that is, unstable in their place in society, in their affinities with others, and indeed in their self-identities.[16] They are, understandably, readily influenced by simple ideas that promise remedies for these afflictions—fashions such as consumer goods and services and instant political action. At the same time, some of these societies have to deal with aging populations of people who are also alienated on different terms. The millions of "grey-heads" in Europe and Japan, and many also in the United States, wonder where the good old days have gone, or are in prospect of going, such as their pensions and health benefits.[17]

III. BURGEONING OF LEGAL CONTROLS

These and other characteristics of mass society require correspondingly complex mechanisms of coordination. Mechanisms of coordination are of course required even in simple societies, but rural and village societies function primarily on local custom and usage. Mass societies have customs and usages but they also require a much higher quotient of formal legal regulations. Accordingly, mass societies experience an escalation of legal regulations and procedures.[18]

The basic mechanisms of social coordination are the market and the government agency. Both markets and government

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16. *See, e.g.*, *Survey: The Young: Know Future*, 357 THE ECONOMIST S6 (2001).

17. David E. Rosenbaum, *The 1992 Campaign: Polls; Older Americans Are Found More Alienated Than the Young*, N.Y. TIMES, July 8, 1992, at A13; Stephanie Strom, *In Japan, Golden Years Have Lost Their Glow*, N.Y. TIMES, Feb. 16, 2000, at H7; *see also* Bruno Contini & Roberto Leombruni, *From Work to Retirement: A Tale of Bumpy Routes*, 18 REV. POL. ECON. 359 (2006).

18. *See generally* Charles H. Koch, Jr., ADMINISTRATIVE LAW AND PRACTICE §§ 1.1–1.7 (2d ed. 1997 & Supp. 2006).

agencies operate in terms of legal rules and procedures, including rules of property and contract in market systems and rules of jurisdiction and bureaucratic procedure in operation of government. The law of property and contract in modern society is highly complex. Indeed, there is no longer "a" law of property or contract but several subspecies such as the law of condominiums in property law, consumer transactions in contract law, intellectual property, etc. The law governing government agencies has undergone parallel subdivision. That body of public law formerly was embraced in the concept of administrative law but it has now devolved into agency-specific technicalities.[19] The rules governing civil wrongs—"torts" in common law parlance—have undergone similar proliferation. The general concepts of "reasonable care," "nuisance," and "fiduciary duty" now only introduce the subject. The private law of civil wrongs merges into public law regulatory regimes involving particulars such as speed limits and legal requirements concerning the manufacture and maintenance of products offered in today's mass markets.

The *corpus juris* of every modern society—the complete book of governing regulations—would run to thousands of pages, if indeed such a book could be fully compiled. The sheer volume of regulations required in modern society is an important defining aspect of modern mass justice, but not the only one.

IV. SPECIAL CHARACTERISTICS OF MASS JUSTICE

Analysis of the special characteristics of mass justice can focus on those that appear most significant. These can be identified as follows:

1. Political "distance" between legislative policy-making and adjudicative administration of justice;
2. Dominance of "technicality" over "morality" in legal rules;
3. Estrangement among professional participants in administration of justice;
4. Impersonality of the adjudicative process itself, including a tendency to technicality;
5. The burden of quantity of caseload on quality of justice; and
6. Statistical dimensions of "justice" in mass justice.

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19. *Id.* at § 1.3.

Adequately exploring these characteristics is a major undertaking beyond the present occasion, but a brief sketch is possible.

A. Political Distance

The fundamental constitutional premise of modern democratic regimes is that public policy is made by a legislative body responsible to the electorate, or at least made under close supervision of such a legislature.[20] However, as the need for legal regulation has expanded quantitatively, the practical capacity of popular legislative participation has correspondingly receded. Regulations increasingly are initiated, formulated, and promulgated by professional officials in bureaucratic agencies. The formulation process involves varying degrees of interaction with representatives of interest groups, which can provide a measure of transparency and accountability to the policy-making involved. However, almost by definition, there is little or no interaction with truly representative spokespersons for the average citizen.

The result is a gap, often a chasm, between the content of policy and the constitutional basis of policy-making authority. The discrepancy has been widely deplored, for example in the European Union where the machinations of "Brussels bureaucrats" are complained of, and in the United States, where the culprits are the "Beltway bandits."[21] But the phenomenon is ubiquitous and the remedies not obvious, perhaps nonexistent. However, the result is a diminution of legitimacy at the policy level. The diminished legitimacy is felt through the system down to the level of adjudications.

B. Technicality over Morality

Modern legislation, especially regulations generated in the administrative bureaucracies, is the product of more or less well-informed analysis of the circumstances in which regulations are to be applied.[22] Regulatory language is crafted to balance competing value considerations and interest group demands, typically with elaborate qualifications and exceptions. The aim, understandable

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20. Robert A. Dahl, DEMOCRACY AND ITS CRITICS 232–33 (1989).

21. Tim Shipman, *New Map of Britain That Makes Kent Part of France . . . and It's a German Idea*, DAILY MAIL, Sept. 4, 2006, at 10; *It's Corruption, Stupid; After Jack Abramoff*, THE ECONOMIST, Jan. 7, 2006, at 13.

22. Koch, *supra* note 18, at § 4.10.

and commendable, is to strike an acceptable balance among rhetorical objectives that are functionally incompatible and to avoid unintended consequences. However, the result is also regulation often lacking much moral force. The ancient concept of obligation to obey the spirit of the law and not merely its letter is increasingly incoherent.[23]

C. Estrangement of the Professionals

The devolution of law into specialized subfields entails specialization of the professionals involved, among judges and other judicial officers, among the practicing legal profession, and among the academic commentators and critics. That specialization in turn results in estrangement between the subfield specialists. Adjudication at the first instance level is apportioned to specialized tribunals, such as labor courts, commercial courts, family courts, social welfare bureaus, etc. Judges at the appellate level may be similarly specialized or become unavoidably more preoccupied with problems of jurisdiction and procedure. The practicing bar and legal academia have undergone parallel fragmentation. In civil law systems, the traditional separation of the judiciary from the practicing bar perhaps has become greater; in common law systems, the old camaraderie of bench and bar is less intimate. Legal generalists are a dying breed.[24]

D. Impersonality of the Legal Process

In principle the law should be administered "impersonally" in the sense of being impartial. But it also should be intensely personal in concentrating on the unique features of every case. The classic model is King Solomon sitting as judge in the parental rights case and directly confronting the contending claimants of being mother of the child.[25] For litigants the essence of adjudication is the opportunity to state their case in their own words to someone who is actually listening. In contrast, justice in mass justice systems is unavoidably routinized, often into stereotyped decision-making. Most cases in mass justice systems are resolved not through adjudication but through negotiation in

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23. Thomas O. McGarity, *Some Thoughts on "Deossifying" the Rulemaking Process*, 41 DUKE L.J. 1385–86 (1992).

24. *See* Geoffrey C. Hazard, Jr., *Changing Structures in the Practice of Law*, 61 LA. L. REV. 167, 167–69 (2000).

25. 1 *Kings* 3:16–3:28.

which litigants tell their story only to legal counselors or caseworkers, and often only through a written form.

E. Quantity Determines Quality

The routinization of legal process is the system's necessary adaptation to the burden of volume.[26] Many legal systems in the modern era are starved for resources—not enough judges, not enough clerks, even not enough courtrooms. In some systems the delay in the calendar means effectively that all but a few cases will never get to trial. In some systems indefinite postponement is indeed a primary technique of disposition. But even systems that can handle the volumes must deal with the cases through techniques adjusted to sheer volume as such: separation of individual cases into discrete segments, waiting lines, standardized documentation, formulas for dispositions, etc.[27]

A further recourse that legal systems must make is to revise substantive legal standards to accommodate volume. Thus, compensation in industrial accidents is typically resolved by monetary formulas correlated with standardized definitions of injury; custody of children in marital dissolution is typically resolved by formulas correlated to the child's age and the parents' occupational situation; sentencing of convicted offenders is imposed according to prescriptions correlated with categories of offense and offender, etc. These standardizations may make for greater uniformity and therefore equality in disposition. Perhaps more important from the viewpoint of the legal system, however, they permit the cases to be resolved without extended discussion—but also without extended reflection.

F. Statistical Dimensions of "Justice" in Mass Justice

Intelligently addressing the problems of mass justice requires thinking of legal problems in statistical terms, as Justice Oliver Wendell Holmes implied over a century ago.[28] Statistical thinking simply means giving attention to the number and characteristics of

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26. *See, e.g.*, Christopher F. Carlton, *The Grinding Wheel of Justice Needs Some Grease: Designing the Federal Courts of the Twenty-First Century*, 6 KAN. J.L. & PUB. POL'Y 1 (1997).

27. *See id.*

28. Oliver Wendell Holmes, Supreme Judicial Court of Massachusetts, The Path of the Law, Address at the Dedication of New Hall of the Boston University School of Law (Jan. 8, 1897), *in* 10 HARV. L. REV. 457, 469 (1897) (asserting that "the man of the future is the man of statistics and the master of economics").

the type of legal case under consideration. It is contrasted with giving attention to the characteristics of an individual case. Statistical thinking is in tension, perhaps contradiction, with classic modes of legal thought in both common law and civil law traditions.

The tension between the common law case method and statistics is perhaps obvious. The model of the common law method is that of a judge deciding an individual case in the light of precedent. Legal pronouncements in the common law method come in specific formulations, tied to specific facts. The method impliedly excludes the legal generalizations of legislation, and its focus on specific instances excludes explicit consideration of a panorama of eventualities. The implicit premise is that wise judges can draw upon wisdom of previous wise judges and on their experience in life to deal serially with "cases of trouble."[29] A more deeply buried premise is that the judges' sense of justice and education in law adequately reflect community sentiment of the relevant political community. A still more deeply buried premise is that community life can in the meantime proceed satisfactorily, the future taking care of itself.

Legal pronouncement in the common law case method is in very realistic individualistic terms: The facts of the case directly confront the decision-makers. However, it is anti-quantitative and its logic is inductive, with the major premise often being only implicit or incompletely articulated. The picture of larger reality is obscure, being envisioned if at all only in the minds of the judges, advocates, and other professional participants.

Legislation in the common law system is essentially curative, cleaning up and restating the accumulation of particular decisions. Only in this retrospective posture are the broader quantitative dimensions taken into account.

The civil law system formally proceeds in the opposite logical direction, beginning with general legislative prescriptions.[30] Conventionally, the civil law ignores the fact that its original form, the Justinian Code, was synthesized from case law, and that its generalities should be interpreted in that light. In civil law theory, complete meaning can be extracted from the language of the rules. Discernment of meaning may not be problematic in clear cases, but it may not be recognized that the concept of a clear case is itself problematic. Legal concepts such as "reasonable care," "fair

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29. Karl N. Llewellyn & E. Adamson Hoebel, THE CHEYENNE WAY viii (1941).

30. *See* John Henry Merryman, THE CIVIL LAW TRADITION 40–49 (1969).

price," "privacy," and "public order" are inevitably dependent on the local community environment.

However, the civil law system like its common law companion does not ordinarily require or invite factual surveys of the relevant social environment.[31] The "Brandeis brief" setting forth background social facts, for example, is unfamiliar and indeed perhaps repugnant in civil law litigation. The extent to which legislation in civil law systems is based on adequate background information apparently is largely unexplored. As in the common law system, the operative social environment is that which is in the minds of the judges, advocates, and other professional participants.

CONCLUSION

The problem of mass justice confronts all modern legal systems, directly as in regimes with large populations, and at least indirectly in smaller regimes. Mass justice presents issues of epistemology, sociology, economics, and legal method quite different from the classic techniques of formulating legal rules and deciding legal disputes. There is much learning to be done in dealing with it.

31. *See id.* at 88.