THE SOCIAL RESPONSIBILITIES OF THE ATTORNEY

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In the summer of 1981 in Mexico City I spoke to members of the IVR on the significance of cultural values for legal ethics. Since then I have pursued this general issue in the case of the obligations of the attorney. Today, here in Helsinki, I am pleased to share my thoughts on the social responsibilities of the attorney and to do so as a contribution to the interest of this assembly in the foundations of the legal and social sciences. The basic insight for which I shall argue is that an attorney's social responsibilities are largely a function of the type of society within which he operates, that, in effect, the ruling social or political theory or context of his society is the foundation of the science of legal ethics in so far as the determination of the attorney's social responsibilities goes.

It is not difficult to isolate debates over the specific social obligations of the attorney. For example, the question has been much discussed recently of the extent to which lawyers should make their legal services available to society. Some argue that, so long as the profession assumes responsibility for this, one need not oblige each member of the bar to provide *pro bono* services in some form. Others, taking issue with this, argue that the true spirit of law as a profession cannot emerge if certain members of the bar can claim exemption from any aspect of service. Both sides of the debate, however, seem to agree that services should be made available, even to the poor, with the point of contention being over how to effect this. As an initial insight into my thesis, I suggest, with this example, that the point of agreement therein is indicative of no hard and fast truth about the profession's obligations *simpliciter* but rather about the commitment of members of a particular society; would it not seem incongruous to envisage such a commitment as obtaining in a merit society where the principle of distribution of goods, including legal services, was a function not of individual needs but strictly of individual accomplishment and contribution to the society? Again, I take it that this suggests that it is the society more than anything about the profession of law that bears on what particular social responsibilities can be ascribed to the attorney.

Further development of this thesis requires a consideration of colorable candidates for the social obligations of the attorney along with a cataloguing of the various types of society in which these obligations, arguably, vary. With regard to the first, I suggest the following as likely possibilities for the lawyer's social obligations:

(1) to promote justice

(2) to engage in *pro bono* activities

(3) to educate the laity about the legal system

(4) to improve the legal system

(5) to improve the penal system

(6) to make legal services available

(7) to uphold the rule of law

(8) to protect the rights of the state or its citizens

(9) to resolve controversy or conflict

(10) to further the goals of the state

(11) to further the goals of society

(12) to provide leadership when possible

(13) to simplify the law

(14) to amass large sums of money which might "trickle down" to the needy.

What I now wish to bring out is that further elucidation of the thesis that the attorney's social obligations are relative to his society or state requires a fresh look at our standard conceptions of states, societies, and political orientations. Consider some traditional orientations — fascist, contractual, Marxist, organic, anarchist. Consider the liberal state, the oligarchy, the democracy, the monarchy, the socialist state. Consider Rawls' conception of the end state contrasted with Nozick's historical conception. Consider a state with an adversarial system versus an inquisitorial system of justice, a code state versus a common law state; one where the goods are allocated according to merit, one according to need, one in an equal fashion, a liberal state, one where individual freedoms are great, one where they are few.

My feeling about the types of states listed or the ways in which a society or state may be run or structured is that there are certain confusions or uncertainties about just what we are dealing with. Although the following comments may be autobiographical to some degree, I think they are nonetheless indicative of the sorts of queries a reasonable person may have, upon examination of the literature on types of societies and states.

First, I find it less than clear what the intention of the advocates of some of these theories is, in so far as the pervasiveness of the theory goes. Consider, for example, the advocate of a society or state with an inquisitorial system of justice. One might, on the one hand, argue that such a system merely represents the fashion in which disputes between citizens or between citizens and the state will be settled and that no commitment to aspects of how the society will further be ordered is thereby made. On the other hand, one might recognize that certain freedoms which the citizen would be afforded in a liberal society, such as the accused's right to remain silent, would not easily obtain in such a system and that it is thus difficult to adopt such a system without also committing oneself to other aspects of structuring society. Further, these observations can be made regardless of the question of the intent of the theorist.

Next, it is not always clear whether features usually associated with various theories of state are to be construed as necessary or accidental properties of the state so conceived. For example, a socialist state is commonly conceived as one where communal ownership of land, production capabilities, *etc.* obtains, with distribution of goods based on need or a principle of equality. Nonetheless, is is not clear why, in principle, some principle of merit could not be operative for the distribution of all or some goods, recognizing the essence of socialism to be common ownership without any necessary commitment to the principle of distribution of goods and recognizing further that it is only a matter of empirical fact that most socialist states have opted for something other than a merit principle.

These two observations are not unrelated. Both are indicative of the conceptual confusion that hovers over various theories of state and just what we are committed to, conceptually, when we identify some state as socialist, fascist or monarchical. More specifically, to sort some of this out, it seems that it is unclear what conceptual load is carried by these various names of societies and states, and unclear, too, which of the following views is being subscribed to. I attempt here to set out the full range of possibilities to reveal the ways in which the theories could be construed:

(1) When we call a state/society an *s*-state/society, we mean that some feature(s) is (are) necessary to the conception.

(2) When we call a society an *s*-state/society, we mean that some feature(s) is (are) the only features of the conception.

(3) When we call a society an *s*-state/society, we mean that some feature(s) is (are) necessary to the conception and that others probably obtain.

(4) When we call a society an s-state/society, we mean that some feature(s) is (are) necessary to the conception and that others have always accompanied this conception as it actually obtains, and we expect them to do so in the future.

What I suggest, against this backdrop, is that, when speaking of some society or state, we clearly delineate its features, recognizing the variety of ways in which a mere labelling or naming of it can be interpreted and lead to confusion. The forms I suggest include:

Form A: In society s_1, features f_1, f_2, f_3 ..., f_n obtain and we will call this society ... .

Form B: The concept of society s_1 includes features f_1, f_2, f_3 ..., f_n and we will call this society ... .

In this fashion we can distinguish between an extant society that may happen to have features that diverge from some ordinary conception of that society with the same name and some theory of society or state that adopts certain defining features. With this distinction we can then go on simply to make whatever points we wish about the society being discussed. We might say, for example, that some existing "fascist" society with features f_1, f_2, and f_3 deviates from some conception of a "fascist" society with features f_1, f_3, and f_4 and that it ought not so to differ. Or we may wish to point out that although all existing "socialist" societies have features f_1, — f_{18}, the concept of a "socialist" society only contains features f_3 and f_{16} and that the others are merely contingent features of some existing socialist societies.

Besides allowing us to avoid the confusions identified above, I believe this approach will allow us both (1) to pause when speaking about some society or state and ensure that we are clear just what we are committing ourselves to when we speak of some society by name and (2) to recognize that the juxtaposition of elements or features of a society is not as rigidly defined as we may have thought, but allows for more creative conceptions of societies and for the recognition of possibilities for improvement in existing societies.

Let us now return to our initial query about the social obligations of the attorney. I argued earlier that no absolute obligations can be ascribed to the attorney, such being in part a function of the society in which he practises. The question now arises as to what assistance in determining these obligations we obtain from a clear delineation of the society in which he practises. First, it seems clear that no obligations are necessarily derived from the known features of the society unless it is the case that one of the features itself explicitly posits an obligation for the attorney. Next, it seems that we would have no guarantee that

certain obligations actually obtain in some society simply from knowing its features, unless, again, one of those features made direct reference to the attorney's social obligations.

The significance which, I think, knowledge of the features of a society does have for the issue of determining the attorney's social obligations is this. It provides a ground for intelligent discussion of what the obligations should be, what existing obligations he should be relieved of, and what new obligations he should reasonably undertake. In effect what I am suggesting is that we have located the proper ground on which we can proceed to debate the question of what the social obligations of the attorney are, regardless of where he practises, but recognizing that that very ground draws our immediate attention to where he practises, for our universal criterion for determining his social obligations leads us to consider the features of the particular society in which he is at bar.