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The Social Efficiency of Laws as an Element of Political and Economic Development

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I. Introduction.

When 10% of the population of a country disobeys or ignores a law, it is a problem of law enforcement. But, if the group that disobeys involves 40 or 50% of the population, then it has become a different problem, one of social efficiency of the law, that cannot be solved only by police action and sanctions of the courts, but a problem that requires an entirely different approach. This latter is the situation that represents at the threshold of the third millennium, the biggest challenge that Latin American legal systems face and one that we must solve in order to create an environment that is favorable for trade, investment, development, the expansion of markets, the integration in a global economy and a stable and effective democracy. The great damage that authoritarian and elitist legal systems and governments have caused in Latin America is that of nourishing a culture of indifference and skepticism about the law in which the general belief is that nothing can be changed, except by the government as a paternalistic gift, or by the use of physical force and violence. Thus, laws are obeyed formalistically but important sectors of the population try and find ways to skip their real objectives, breaking their monolithic rationality with either inertia or corruption. This syndrome, if deeply rooted in many parts of Latin America, by no means infects this region exclusively. Nations in Asia and Africa are also suffering from the same symptoms. And the same situation is widespread in many countries in central and eastern Europe in transition from state run economies into a competitive and open markets.

In most of Latin America, as in many nations of Asia and Africa, when it becomes necessary to write a new law, the main difficulty, nineteen times out of twenty, is that there is not enough information about the subject to legislate. No statistics, no studies, no analysis previously made, no other data. In fact, this is one of the symptoms of the lack of development. But legislators, research assistants, consultants or foreign and international experts have, however, one tool to which they can, and do, resort often (even though they do not always make use of its full possibilities and resources, and do not make the best of it). This tool is Comparative Law. If a legislator does not have enough information about the facts of the matter and can not perceive reality in a satisfactory measure, then, a foreign law, a uniform model law sometimes, or even an international treaty, become quite convenient sources from which to draw inspiration. To these we may add foreign legal writings, with all of their wisdom and learning.

As a result of this practice, developing countries have the best laws that money can buy. As one Belgian professor put it once, referring to the laws of civil procedure: "the best civil procedural codes in the world are in Latin America." And during the debates in the United States regarding the signing of NAFTA, the response to those who opposed it because Mexico did not pay as much attention to the environment as they thought it should is that Mexican laws on the environment were, perhaps, even more complete than those of the United States, and left nothing to be desired in that respect. And yet, in both of these examples, there is something that is not working. There is an important element that is yet missing, a spark of life that has not been summoned. The same happens with civil and commercial codes, antitrust laws, constitutions, bylaws regulating the functioning of restaurants, and many more.

The purpose of this paper is to explore some aspects of this phenomenon, as perceived mainly from the Latin American experience, to reaffirm how this experience coincides with the experience observed in other parts of the world, what, if any, is the common

denominator to all of them, that should not be taken for granted and by-passed by governments, law reformers and international institutions, and what is the impact of law reform in the economic and political system of a country.

II. The Natural Limits of Power.

Laws enacted in the way we have mentioned -- a practice that unfortunately occurs with much to great a frequency -- are, without a doubt, acts of authority and as such have behind them all the coercive and sanctioning strength of the police force and the courts of law. Apart from that strength, these laws possess little else. They lack the respect and the observance of the community. If they have any life in them, it is by chance or coincidence, and not by any conscious and deliberate effort of drafters or legislators. However, laws, like languages, are not only the rules or the words, but what those rules or those words are trying to convey, and without which they have very little, if any meaning at all. What laws are trying to convey is the social compromise between two or more existing interests in conflict: providers and users, buyers and sellers, landlords and tenants, employers and workers, citizens and the State, compromises to live together peacefully and in order. In a functioning democracy, laws are the expressions or records of these compromises. They may last for centuries, as is the case of the American Constitution, or nearly as long, as the Code Napoleon, or only a short time as the Exchange Control regulations or Landlord and Tenant laws in some countries. Laws are as good or as bad as the measure to which they adequately reflect the real conflicts and draw an equilibrium in society. To legislate without that in mind, and in a pure act of authority, is as blind an act as a doctor prescribing a medicine to a patient without a previous exam and based on what a sibling took on a similar case; or for an engineer building a bridge without taking the measure of the span and simply being guided by a more or less similar bridge. In all of these cases we should not be surprised if the result does not come up to what we expected and, of course, does not work efficiently.

Nevertheless, it is still possible to go a long way with pure acts of authority. Criminal law is one example. In Latin America, during the authoritarian and dictatorial regimes of General Pinochet in Chile and of General Stroessner in Paraguay, order prevailed and crime was reduced to an impressive extent. Chile and Paraguay were then very safe countries as long as you did not disagree with the government. The matter deserves better attention, but we will have to let it pass for the time being to continue with this point. It is argued also that another good example of how far authority can take us is the example of Ataturk in Turkey westernizing his country by law. But, in this case, this claim disregards the great loss of prestige suffered by both the last Ottoman emperors and the Islamic clergy by the end of the First World War in that country. Ataturk certainly exercised a great deal of authority, but he also rode in a wave of popular discontent with the establishment, a discontent that was looking for a secular approach to political, social, scientific and cultural affairs.

But pure power has its limits, even in the field of criminal law. In the upper Huallaga valley, in Peru, around seventeen thousand soldiers and policemen, with support from the air force, have not been able to curtail significantly, in more than ten years, the growing of coca plantations, the production of the basic paste of cocaine, and its export for refinement to Colombia. Even in such a great world power as the United States, the prohibition laws regarding the sale and consumption of alcohol could not be enforced effectively. The

problem is just as critical in commercial and civil law. In Lima, in public transport, strong leftist military governments, right wing powerful regimes, and civilian centrist governments have not been able to impose the use of meters by taxi drivers in spite of repeated announcements by each of these governments that they would do so in a short time. And in Mexico City, Rio de Janeiro, Lima, Caracas, and to a lesser extent, Santiago de Chile and Buenos Aires, there are extensive developments of housing, most of then mere shanty towns, completely outside of the regulations and procedures established by the official laws and the Civil Code that rule these activities. The answer to the question of social efficiency of laws has to lie somewhere else. What does make a law work? What are the qualities that make a good law?

III. The Model of What a Law Should Be.

Drafters, legislators and commentators frequently take for granted, and skip consciously or unconsciously, the question of what a good law is or should be. Looking at many examples of legislation in Latin America, one is tempted to think, sometimes, that the object that laws seek is not to regulate real life but a pure act of authority and power to be taught rationally at law schools. That is how perfectly drafted they are. In fact, teaching law in Latin America can be -- and is very often -- quite an intellectually gratifying experience in which speakers and orators can make brilliant and erudite presentations. Juridical discussions are many times about one school of thought or another, about one model or other, and only rarely about reality. In a continent that has been so prodigal in interruptions and violations to its constitutions and civic life, until recent times nothing had been written about the effects and practices of "de facto" governments. Perusing through law libraries gave the impression, for what one could read, that we were living in other countries. And the same could be said about family law, judicial procedures, business law and administrative law.

When we visit a country and talk to lawyers, law professor, jurists, and even judges, we can listen to one perception of the legal system. But if we talk to entrepreneurs, businessmen, human rights workers, trade union leaders, housewives, mechanics or butchers we get quite a different version. Several writers have pointed out this contrast[1] and the varied reactions of society to the artificiality of laws which are interwoven in a political and economic fabric of privileges and discriminations. We tend to think of laws as intellectual and academic pieces of work, and not as social tools, and we say that laws should be simple, clear, predictable, transparent, equally applicable to everybody, accessible, apt to be implemented, and enforceable.[2] And so they should be, because all these characteristics definitely aid in the purpose of our task. But it is not enough to make a law work and make it socially efficient.

1. HERNANDO DE SOTO, THE OTHER PATH (1991); JOSE MATOS MAR, DESBORDE POPULAR Y CRISIS DEL ESTADO (1983); ROGELIO PEREZ PERDOMO & PEDRO NIKKEN, EL DERECHO DE PROPIEDAD DE LA VIVIENDA EN LOS BARRIOS DE CARACAS (1983); TINA ROSENBERG, THE CHILDREN OF CAIN: VIOLENCE AND THE VIOLENT IN LATIN AMERICA (1991); Kenneth L. Karst, *Rights in Land and Housing in an Informal Legal System: The Barrios of Caracas*, 19 AM. J. COMP. L.550 (1971); Keith S. Rosenn, *Brazil's Legal Culture: The Jeito Revisited*, 1 FLA. J. INT'L L. 1 (1984)
2. Katarina Mathernova, presentation at Law and Judicial Reform Seminar at the World Bank, Washington, DC, 1997.

IV. Laws As Compromises of Interests in Conflict.

What makes a law work, the life and heartbeat that are to be found in laws, consists essentially of the conflicting interests it assembles in a workable whole. Its architecture is that of the structure and organization of ambitions, fears, hopes, toils, weaknesses, virtues and vices into a free and livable environment. In massive societies these compromises are made with the participation of bodies in which other interests that may be affected are also represented. Besides the interests of, let us say, landlords and tenants, the overall interests of the community are also taken into consideration and, in some cases, may influence the final outcome. Usually, laws are compromises that represent the situation that conflicting interests have reached in their relation at a given time and a given place. There is nothing static or universal about it, although drafters try, and can achieve, a certain degree of generality and permanence in order to embrace the multitude of possibilities that the simplest of statements may involve, especially in a changing environment. That is what a good law is.

When a foreign element is introduced in a relationship, sometimes it may fit well into the whole. All languages, and for that matter all legal systems, have been importantly enriched that way. And it can be a healthy process in order to become inserted into a wider international and global perspective. But, even then, we cannot afford to loose sight of the fact that still the only meaning that a law has is as a compromise between real and representative interests in a community. Outside of that context law has no significant meaning at all, except, perhaps, as a subject of academic study or erudite knowledge. If the foreign component helps to articulate an existing situation or to describe an intricate relationship taken from reality, it should be used by all means, but provided that, as a wild animal, we keep it fastened close, in this case, to real life. Now, how do we achieve this in changing and uneven societies? The way to keep rules close to life implies first that we understand the particular segments of life that we are trying to put in order, for the purpose of making exchanges and intercourses easier. The way we understand things depends to a great extent in how accurately we perceive them through the information we receive.

V. Public Opinion As the Foundation of Social Efficiency.

The essence of law, as of language, is not the rules or the words, but what those rules or words are trying to convey. Without that they have no or very little meaning. It is not possible to change the rules or meanings of a language or word without the consent or the acceptance of those who speak it. That is why in authoritarian and elitist societies, where the law is considered as a pure act of authority and power, the law commands so little respect, and I do not mean by criminals and outlaws, but by those who, otherwise, are groups of decent, hard working, honest and respectable individuals. The social efficiency of a law as of a word or phrase depends on its observance or use by an immense majority of the members of a community.

During the history of our continent we have seen enough of these extreme situations so as to use some of them as a test. When Bolivar, in Venezuela, Colombia, Ecuador, Bolivia and Peru, and San Martin, in Argentina, Chile and Peru, rebelled against the colonial government, established according to the legal system then in force, they were rebelling against the established legal order of the time and place. They were breaking the law. So did many others in Latin America in the nearly two centuries that have elapsed since then. But, Bolivar and San Martin are egregious figures in the Latin American pantheon, and many

of the others are definitely not. In fact quite to the contrary most of them are considered to be dictators and criminals. What is the difference then? Success? Even though there is the strong temptation to yield to the cynical hypothesis that Bolivar and San Martin were successful and many of the others were not, and that only their success accounts for the reverence they receive, in fact quite a few of the others, like the Somozas or Duvaliers, were in power long enough -- even for two generations -- to be considered successful. These however are almost unanimously condemned.

The difference -- I venture to say -- lies in that Bolivar and San Martin represented not only high personal qualities and virtues but, in that they carried, before or after, but in any case with them, the mainstream of the public opinion of their time. It is public opinion which in the last resort legitimizes a political or a legal action. This is not to say that it is any opinion of the public that legitimizes actions. Only when the opinion of the public is informed, analyzed, examined and discussed does it become public opinion. In a conversation with former U.S. Attorney General Edwin Meese, about these points, I mentioned the example of Pilate's referring to the populace the choice to free either Jesus Christ or the terrorist Barrabas. The populace's emotional choice of Barrabas is an example of opinion of the public which was not informed, analyzed, examined and discussed and therefore did not represent public opinion. Mr. Meese agreed on that, noting that this concern precisely had been present in the minds of the founding fathers of the United States in that matters such as the election of the President were not to be decided by a direct vote, nor were laws to be enacted by only one house in Congress.

Public opinion is the expression of thoughts and choices. The same happens with language, where the meaning of words is neither those defined officially in dictionaries and textbooks, but those meanings used and accepted by people in a real, daily life context.[3] There is a story that tells about three brilliant young students of linguistics who held exactly this theory and wanted to put it to a test. Their test started with their invention of a word that bore no resemblance to any other word in their language: "rappapiren". The first student took a train, and at the first stop went out to the station porter and told him, "Please! I want to rappapiren", to which the station porter answered: "Go to the bottom and turn right". The second one went to a barber shop and told the barber: "I would like to have my hair cut, be shaved, and rappapiren", to which the barber cut his hair, shaved him, and gave him a facial massage. The third one went to see a very attractive looking friend of his and told her: "Are you free tonight? If so, I would like to take you to the theater, then, we could go and have dinner at a French restaurant; after, we could go dancing, and when it gets really nice we could go and rappapiren", to which she indignantly said: "Is that the sort of girl you think I am?" and furiously turned her back and left!

Language and laws are social tools, one to communicate with each other, and the other to live together in order and peace. So their value is not in their beauty or excellence, but in their being useful, in their acceptance and observance by the community; in their use not by the elites but by the overwhelming majority of ordinary people. For both of them -- law and language -- in order to have any meaning and use, must be full not only or even mainly of ideas and concepts, not of logic, as Justice Holmes said,[4] but of life.

3. According to usage in everyday language, in Spanish a cock crows "kikiriki"; in English "cock-a-doodle-do"; in French "cocorico".
4. OLIVER WENDELL HOLMES, THE PATH OF THE LAW (1996).

VI. The Shaping of Opinion: Access to Information.

Access to information plays a central role in the way we perceive things and consequently in shaping public opinion. In most developing countries, however, at least two obstacles are almost invariably found: the non-existence of adequate information; and, even when that information exists, the unwillingness of those in government who have it, to share it with the rest.

Part of the state of under-development consists precisely in not being aware of what our own reality is. Years ago, in 1985, with this understanding, Prime Minister Rajiv Ghandi, of India, convened a conference in Delhi for the Non-Aligned countries to discuss exactly the problem of information as the starting point on the road towards development. Even in the field of international relations and trade, it is easier for someone in a Latin American country to find information about distant countries like the United States, Great Britain, Germany or Japan, than about immediately neighboring countries. The reverse is also true. It is easier to find information about Ecuador in the U.S. than in Colombia. And there are too many aspects of our economic and political life that have not yet been explored in quantitative and exact dimensions. Some governments only guess intuitively as to what is happening within its own boundaries. As a contrast, in former socialist countries, now in transition to a market economy, statistics abound about almost everything. However, experienced analysts in that region are of the opinion that the figures there are on the whole unreliable and subject to manipulation.

Drafters of laws and legislators face an impossible task: trying to draw, blindfolded, a three dimensional chart of the geography of a problem, to fix boundaries, assign rights and obligations, and invent a whole plot. At best these efforts are an amazing feat of pure imagination. More frequently for the worse, this is a prelude to a social fracture and a history of miscommunications, frustrations, and errors. What drafters and legislators usually do is resort to the reputedly best foreign legal models and, taking them out of their natural context, blindly adopt them without a good understanding of how or why they work successfully in their countries of origin. For example, the political success of the American Constitution does not lie, even mainly, in how well it was drafted or the language in which it was written, but in how well it represents the interests of the Federal government, the States and the individual, and how well it balances the different aspects of the relationships between these three groups of actors. It reflects the reality of political development and practice in the United States of America, both with its virtues and shortcomings. When that Constitution is taken out of its habitat, it ceases to be alive and becomes mere literature. Legislators in Latin America, as well as in other societies in transition in other parts of the world, take what seemingly is the easiest and most expeditious way to legislate, and in the process loose perspective of what they are really doing and the reasons why laws need to be enacted in the first place.

The other side of the problem is that, probably on account of these deficiencies, governments and government officials become very secretive about the process of decision making, and very defensive about making available the little information they have. In most Latin American countries there is no equivalent to the Freedom of Information Act of the U.S. by which any citizen can be provided with information about any public document. Ordinary citizens take no part, do not understand and do not know why and how decisions are reached and laws are passed. Consequently, it is not possible to criticize something that is not understood.

VII. The Shaping of Opinion: Alternative Sources of Information.

If the adequate information about a problem would reach the citizens, discussions could then take place among the different tendencies of opinion. The problem, as we have seen, is that information does not reach the citizens, and does not even reach drafters and legislators. Lacking that, the second best option would be to consider the testimony of the stakeholders, of those affected one way or another by the piece of legislation under consideration, to learn what is happening in the country to the different actors. Unfortunately, this almost never happens. New laws and regulations are issued profusely by executive branches and parliaments, and very little attention is paid to alternative sources of information such as these.

A. Executive Branch Issued Legislation.

One possible source of legislation could be the executive branch. By far, the largest proportion of legislation, in most countries, is issued by the executive and, usually, in developing countries, from the point of view of citizen participation, this is the most removed of legislative bodies from public participation. In a personal interview held some years ago with a Minister of Industry and Trade in a South American country, about a prohibition issued by him to import car and truck tires, he candidly confessed that his Ministry lacked information about the problem, but that he had consulted some of his friends for advice. These friends, who knew a great deal about the problem, were all local tire manufacturers. The Federation of Truck Drivers had not been consulted, nor the association of car assembly plants, among others. It is easy to imagine how they would see themselves in relation to a legal system that deals with their interests so light heartedly, and what degree of respect and observance these rules might solicit from them.

In another South American country, the government issued a regulation for the functioning of restaurants. There was actually nothing wrong with the rules themselves, except that from the thousands of restaurants that this country has, no more than 20 were in the realistic position to comply with the rules. The regulation seemed to be a regulation issued for Switzerland, Japan or Norway, because, of course, it had not been taken in consideration, in the least, what the diverse groups affected thought. It is also easy to imagine what those affected might think about that rule. Many other examples abound unfortunately. This method of enacting rules is not the exception but rather represents the general rule.

There is, however, a sign that things might be beginning to change. In Peru, a private think tank, ILD (Institute for Liberty and Democracy) has been sponsoring since the early eighties a process of democratization of decision making by the executive through consultations and hearings. Entities were created and commissioners appointed but, at the last crucial moment, three different governments got cold feet, and the attempts failed. In Mexico, however, as a result of the NAFTA, a rule was introduced[5] by which any new rule affecting industrial standards to be issued by a country member has to be pre-published in order to allow those affected directly or indirectly to offer their opinions and suggestions. In those cases the attitude of those affected will be quite different towards the regulations.

5. The North American Free Trade Agreement, Dec. 17, 1992, U.S.-Can.-Mex., 32 I.L.M. 605, ch. 9, art. 909.

B. LEGISLATION ISSUED BY PARLIAMENTS.

Legislatures are not much better in this respect. Bills are prepared and discussed in committees which very rarely invite interested parties to full hearings. Lobbying is considered an almost secret and illegal activity with the result that only those with connections are heard. It is interesting to examine the minutes of the committees that draft and approve important pieces of legislation, like Codes or Organic Laws, and see what the sources of information were regarding what was really happening in the community. Most of the sources are academic writings of foreign models. Very rarely is the opinion of interest groups cited. It is not uncommon that whole parts of a Civil Code, and even of Constitutions, are not put in practice for years, and are mostly decorative. This difference between law and reality, in many areas of the law, is already an accepted feature of Latin American legal and civic culture. Nobody turns his or her head at it, particularly lawyers. The ones who raise their voices are usually economists, sociologists, anthropologists, and NGOs.

VIII. The Shaping of Opinion: Debates About Perceptions and Options.

Even if information reaches the public, that arrival is not sufficient to have an opinion formed. Very frequently the same data can be interpreted in different ways according to the particular perspectives from which it is examined, analyzed and judged. It is important to provide opportunities to oppose and discuss the different possible solutions. In the case mentioned before, about the prohibition to import into a country foreign car and truck tires, it is important to counterbalance the interests of tire manufacturers, drivers associations, assembly plants, rubber planters, peasants' unions and also the opinion of economists and planners as to the overall cost for the community of the measure proposed. All sectors must be heard and all possibilities discussed. For that purpose there must be a functional freedom of assembly and a reasonable and acceptable freedom of the press. Meetings and written debates must take place openly in order to identify, if not a consensus, at least a mainstream of opinion. These debates will provide an amazing richness of information about the reality, an extraordinary creativity in solutions, and an enthusiastic civic involvement and commitment to the solutions. As an additional bonus it is a school and training ground in leadership and social responsibility.

IX. Transparency in Decision Making.

In order to create an effective process in decision making, beginning with the assembling of the necessary information, the last stages of producing the norm have to be absolutely transparent. This involves a summary presentation of the relevant facts and of the reasons to issue the norm, the findings of the hearings, the different options available and the reason or reasons to choose the one enacted. This apparently basic and simple set of principles presents very often a gigantic obstacle to those that have to work with legal rules in most of the developing world . Frequently, legislators are not interested in explaining the reasons -- the *ratio legis* -- behind a norm. Frequently also, legislators do not want to assume full individual responsibility for what they do and hide behind an anonymous consent, because it is common in developing countries that the votes in the legislatures are

not nominal, and as a consequence legislators are not even politically accountable. In Peru, for example, it is not possible for a citizen to follow the voting performance of the member of Congress she or he elected.

On the other hand, as aptly noted by Fernando de Trazegnies, the process of law making in itself presents its own difficulties in determining what the real intention of the legislator is or was.[6]

X. The Role of Judges in Making Laws Efficient.

For those reasons and in spite of our best efforts, reality is richer in possibilities than what the abstraction of a general rule can cover; and even more so in societies in transition. Consequently, the endeavors of legislators must be coupled with the assumption by judges of their discretionary powers in order to fill the interstices of the law, its ambiguities and ambivalences with the social, political, ethical, personal and economic values held by the public opinion of our time.[7] Judges could not be replaced by computers in the automatic application of statutes. Judges are not bureaucrats who merely repeat the text of the law. They make numerous decisions daily that involve value judgments. But those values must not be their personal ones only; and sometimes judges must even set apart their individual values when they are not representative of the system of values held by the community.[8] Judges must use their discretionary powers in order to help laws to become more efficient in the particular cases before them, to infuse them with life.

XI. The Effects of the Social Inefficiency of Laws.

When laws do not meet the expectations of those interested, several things happen. First, in a gradual way people begin to become skeptical about laws, indifferent to their mandates, and disrespectful in their observance. When this practice has been occurring for a long time, those feelings have become part of a culture, a way of living in which nobody asks anymore who or how. It is simply there and that is how it is. The result of this situation is the loss of prestige of legal and judicial systems as useless, irrelevant and purely formalistic. The second consequence is that, since the official legal system is useless, society needs to develop alternate rules that govern the true and real conflict of interests that exist. Some years ago, Keith Rosenn in his already classic article on the Brazilian "Jeito", showed us how society begins to cope with these situations.[9] Kenneth Karst[10] and Rogelio Pérez Perdomo[11] did something similar for Venezuela and, in perhaps the most exhaustive and analytical book on the subject, Hernando de Soto unveiled to us the rich experience of the Peruvian "informal" economy.[12] Thus, a form of Latin American common law is developing under a decaying body of many times, socially inefficient laws. To make the picture more complicated, Latin American judges do not know what to do with this situation:

6. LA MUERTA DEL LEGISLADOR, BOLETIN DEL INSTITUTO DE INVESTIGACIONES JURIDICAS, UNAM, MEXICO (1997).
7. A.V. DICEY, LAW AND OPINION IN ENGLAND IN THE 19TH CENTURY (1917).
8. MORRIS GINSBERG, LAW AND OPINION IN ENGLAND IN THE 20TH CENTURY (1974).
9. Rosenn, *supra* note 1.
10. Karst, *supra* note 1.
11. PERDOMO & NIKKEN, *supra* note 1.
12. DE SOTO, *supra* note 1.

whether to ignore the socially inefficient laws and apply the living rules, or to adhere firmly to the official laws and ignore what is happening around them. All of these are causes of duplication and unnecessary costs, effort and delays.

The problem is that while "official" laws do not work efficiently but are nevertheless observed by the elites, large majorities of the population are kept unrecognized and outside the system. The paradox of it all -- and it is impossible not to feel unwary about it -- is that at a time when Marxism is waning in the world, its doctrine about law as an instrument of domination fits surprisingly well to the situation of how legal systems still work in many places in the continent. When in the 8th century B.C., the prophet Isaiah was saying "Woe to those who make unjust laws, to those who issue oppressive decrees, to deprive the poor of their rights and withhold justice from the oppressed", he might as well have been referring to the present situation in many countries where the opinion of the public is only heard every few years to elect public officials. All of these factors contribute to the existing disparities in income and opportunities and to feelings of social injustice and unfair deprivation. Cuba, Guatemala, Peru and Bolivia are some of the nations where violent revolutions, civil war or terrorism developed out of these feelings. In Chile, Marxism won in a free election. It is surprising, under the circumstances, that these examples did not succeed, except in Cuba, and did not propagate to other countries. Marxism seems to now be disappearing from the map, but there are many other forms of potential disruptions in a continent with such high indices of poverty and differences in opportunities.

XII. The Role of Public Opinion in Law Making.

There are two ways in which this critical gap between legislation and reality can be bridged thereby avoiding even higher transaction costs, loss of opportunities, duplication of efforts, and an overall social inefficiency of laws with the consequences we already have noted.

The first one -- regarding the lack of adequate information -- is the absorption by law makers of the prevalent opinions among those concerned or affected by the proposed norm. Surveys, interviews, hearings and discussions should be encouraged as a way of supplementing the existing deficiencies. No one will know better than the people the true nature of the problems they face. By promoting active participation the following advantages will be perceived:

(a) legislators will call the attention of the community to the importance of proposed legislation by informing the public about the purposes and objectives of the norm;

(b) legislators will hear, from those directly affected, the true nature of the situation as it actually is in the respective field, from the different actors and perspectives of the problem;

(c) legislators will also have the opportunity to listen to suggestions coming from those involved and not from intermediaries with a mere secondhand knowledge, individuals who may succumb to the temptation of being unrealistic, utopical and academic;

(d) encouraging those involved in the civic duty to participate in the analysis, discussion and solution of problems, and promoting strong commitments from civil society;

(e) gaining as allies those participating who feel that they are part of the solution and that the new law belongs to them, breaking in this way the traditional indifference toward rules; and
(f) obtaining legitimization of the whole process by promoting participation and transparency.

Only then all the technicalities, logical structures, clear language, conciseness, precision, and other qualities can achieve meaning, become socially effective and create a fluent two-way relationship between lawmakers and citizens. Only then can laws become living expressions of what is actually happening in society: the conflicts; the issues; and the compromises.

But, as Portia says in "The Merchant of Venice": *If to do were as easy as to know what were good to do, chapels had been churches, and poor men's cottages prince's palaces.* Governments and officials are not always happy to provide access to information. Lawmakers are not always happy to share with other citizens the prerogative of exercising the authority to make rules. Lawmakers are not always happy to discuss publicly the different options available when facing a particular problem. Therefore, before going much further in any process of law reform, it is necessary:

(a) to assure that all the interested parties have access to available information;
(b) to assure that all interested parties have the opportunity to give their opinion and make their suggestions on the law;
(c) to assure that there is the opportunity to discuss publicly the different opinions, suggestions and options; and
(d) to assure that there is enough transparency in the process for the final outcome.

The second way of filling the gap between law and reality corresponds to judges. It is necessary for them to understand that the service they provide for society is not the intellectual and academic interpretation of the laws but the solving of social, political or economic conflicts. The purpose of laws is to create a framework in which those problems can be solved efficiently and judges must fulfill, within that framework, the same function in individual cases. Judges, therefore, must not be automatic bureaucrats, but leaders in defusing conflicts, experts in crisis, and promoters of dialogs and understanding.

XIII. How All of This Affects Political and Economic Development.

The main and more lasting effects of the social inefficiency of laws are the loss of credibility in the legal system that it generates, the distrust and skepticism that it causes on people about its application and enforcement and the indifference it produces on the citizens about their power to influence events in public life. These affect the working of democracy, the possibility of planning ahead business and investments, the unpredictability of the outcome of possible disputes, the lack of reliance on a judicial system to protect the individual against the state or large economic interest, and the fear of corruption and abuses of power.

Besides these effects these are also more terrestrial consequences in daily life, like the rise of transaction costs as a result of uncertainties, the reduction of equal opportunities for everybody and the development of privileged elites, the frustration that the situation encourages, as well as the political and social unrest that it can inspire, with the consequences we have witnessed in the last fifty years. The more socially efficient laws become, the better chance South Americans will have of living in a more peaceful, fulfilling and prosperous environment.

XIV. Conclusion.

Laws are not ends to be pursued but starting points for projecting human social behavior to unforeseeable heights and depths. They are not an end in themselves but an instrument for order, peace, prosperity, and happiness. They are not an intellectual academic device to amaze us, but a political tool to make society a better and more livable environment. Laws are not property of the State but belong to the community as a whole. Only in such a context citizens will behave as components of a system, and laws, even if not perfect, will be efficient in helping everybody to fulfill our expectations, achieve our projects and crown our ambitions.