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SOCIAL DECISION-MAKING: COMPARATIVE DECISION-MAKING PROCESSES

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INTRODUCTION

You will recall that the year-long, two part Social Decision-Making course is described in the Law School Catalogue as follows:

This two-semester course will deal with the perennial constitutive issues of human social life: who should decide what questions, according to what procedures, utilizing what resources, provided by whom, with what effects, on whom? The objective will be to develop an ability to understand, influence, and improve the workings of the many decision-making institutions -- "private" as well as "public" -- which lawyers encounter in their daily work. A wide range of such institutions will be surveyed at long range, and some will be selected for intensive study. Each instance of intensive study will involve, among other things, identifying the persons and modes associated with the performance of various decision-making functions: informing, recommending, prescribing, invoking, applying, appraising, and terminating. Considerable effort will be made to enrich the analysis with relevant material from fields such as decision theory, communications theory, social psychology, and systems analysis.

The objectives of the course have not changed since that description was published. However, it was the faculty's intention to divide the course neatly into two parts -- judicial decision-making and non-judicial decision-making -- and to treat the first part entirely in the first semester and the second part entirely in the second semester. (See Catalogue, p. 18) The fulfillment of that intention was determined, early last semester, to be overly ambitious. It quickly became apparent that the first semester course would have to be limited to study of the organization, jurisdiction and procedures of courts in civil actions and that the primary focus would be the development of "practical knowledge" about the rules of civil procedure and related statutes. This meant that some significant elements in the study of judicial decision-making, along with the examination of "quasi judicial" bodies, had to be deferred.

In consequence, the second semester portion of the course will not be limited to "non-judicial" decision-making, as advertised, but will undertake to examine and compare the judicial

process with legislative, administrative, arbitral and private organizational decision-making processes. Moreover, study of "federal constitutional law regarding judicial review and the separation of powers" (catalogue, p. 18) will be deferred until the first semester of the second year. Henceforth, the first-year course known as "social decision-making" will be the beginning of a two year, four course package of "Constitutive Law" courses which will cover Civil Procedure, Comparative Decision-Making Processes, Roles and Relationships of American Decision-Making Institutions and Federal Courts and the Federal System. The instant course comprises the second part of that package this year but will probably precede Civil Procedure next year.

WHAT IS THE COURSE ABOUT?

The decision-making institutions which will be studied in this course tend to specialize, or at least are generally assumed to specialize, in the performance of specific decision-making "functions". Thus, for example, courts are believed to specialize in the "applying" or "application" function whereby violation or deviation from law is identified and sanctions designated and imposed; legislatures specialize in "prescribing" -- adopting policies as authoritative or as law, "appraising" -- assessing the effects of particular laws and policies, and "terminating" -- abrogating existing laws and policies; administrative agencies generally divide their operations between "applying," the "quasi-judicial" function, and "prescribing," "appraising," and "terminating," the "rule-making" functions; and private organizations, such as labor unions and private corporations are assumed, in the public sphere at least, to be engaged in the "intelligence" function -- the gathering, processing and dissemination of information useful to the performance of the "prescribing" function, and the "promotion" function -- agitation for the adoption of certain preferred policies or laws by other official decision-making agencies (as with lobbying.)

It is the purpose of this course to examine and compare the manner in which these social decision functions are performed by the agencies being scrutinized and, in addition, to identify and examine other social decision functions performed by these agencies, functions which are often thought to be beyond their scope or legitimate authority. For example, we will inquire to what extent, for what purposes, under what conditions and with what social effects do courts, or labor unions or private corporations make law (prescribe) or perform other functions than those to which they are "legitimately" specialized or limited. In what manner and under what circumstances do appellate courts change existing law or create (prescribe) new law? How does the performance of the prescribing (or other) function by appellate courts differ from the performance of the prescribing (or other) function by trial courts or juries, administrative agencies, arbitration panels and large private corporations?

These are the kinds of questions we will explore in the course. However, it will be useful to limit our study by focusing mainly upon a single legal-policy problem. The problem we have selected is "Accidents and the Allocation of Accident Costs." By providing some background information about this problem we hope to be able to develop a more sophisticated understanding of the decisional processes under study than we could if we selected examples randomly from several policy areas. The broad question to be studied, then, is: with respect to the legal-policy problem of accidents and accident cost allocation, who, according to what procedures, utilizing what resources, provided by whom, performs which decision-making functions, with what effects, on whom?

THE LEVELS OF INQUIRY

It must constantly be kept in mind that what we are studying in this course is the way in which power is exercised; the performance of a decision-making function equals the exercise of power. There are several levels of inquiry at which this subject may be examined. We will try to explore each of them:

The doctrinal level. What are the rules and principles, expressed in constitutions, legislation, court decisions and other authoritative sources, which purport to dictate the procedures and other ground rules which decision-making agencies refer to when they perform various decision-making functions? (For example, in the performance of the applying and prescribing functions, appellate courts will look to principles of stare decisis; administrative agencies are bound by administrative procedure acts.)

The realistic level. How do decision-makers really go about performing the prescribing function? To what extent do the doctrinal rules and principles actually affect or control their decisions. What conditions and influences, personal and external, actually guide or affect their decisions? How do these influences operate?

The reality of decision-making may, and will, be studied anecdotally -- what specific events occurred and what specific forces operated to produce a particular decision? -- and through statistical and empirical studies -- what hypotheses about decision-making by various agencies have been tested "scientifically," with what results?

The theoretical level. What are the theories developed by legal philosophers, by social scientists, by participants in the

decision-making processes and by others about how prescribing is or ought to be performed by the decision-making agencies being studied? To what extent do these theories conform to the realities of decision-making?

THE LEGAL-POLICY QUESTION

While the basic purpose of this course is to provide a basic, yet sophisticated, understanding of important types of contemporary decision-making institutions, a secondary objective is to provide you with some understanding and insight about the law of accidents. This legal-policy area is a particularly appropriate vehicle for study of decision-making because of the unusually wide variety of decision-making agencies our society has used to develop and apply law and policy for preventing accidents and allocating their costs. These agencies include the common law courts (negligence law and products liability law); the state and federal legislatures (workmen's compensation, FELA, Occupational Safety and Health Acts, automobile safety laws, highway safety acts, product safety acts, etc.); administrative agencies (workmen's compensation commissions, Occupational Safety and Health Review Commission, Product Safety Commissions, etc.); insurance companies (accident, health and life insurance, etc.); arbitration panels (widely used to settle "uninsured motorist" claims); and the many private and professional agencies (Consumers' Union, the A.B.A., the American Trial Lawyers Association, the Defense Research Institute, the Insurance Institute for Highway Safety, etc. etc.) who directly participate in or have an impact upon decision-making in this area.

A caveat is in order. We are more concerned in this course with developing understanding of the decision-making processes themselves than with accident law and policy. We will not consider it a breach of etiquette to draw examples from other legal-policy areas when we feel they provide a better example of a point we are trying to make about decision-making than examples from accident law.

SOME EXPECTATIONS ABOUT TERMINOLOGY USED TO DESCRIBE DECISIONAL PROCESSES

For the purposes of this course, which is designed to examine and compare a variety of decision-making agencies, it will not suffice merely to refer to the traditional quadripartite division of institutions with which most of us are familiar: legislative, executive, judicial and administrative. Rather, we need descriptive words which will enable us to distinguish among a larger number of significant decision-making functions without being put off by the label of the particular agency being studied

or by the official or non-official status of that agency. The following excerpt from Reisman* and Simson,† Interstate Agreements in the American Federal System, 27 Rutgers L. Rev. 70 (1973) well describes some of the distinctions we think are important to an understanding of this course and also provides working definitions of some of the terminology which we will be using (and have already used in this introduction). [Ed. note: Some of the footnotes have been deleted].

I. THE FEDERAL PROCESS: A COMPARATIVE MODEL¹

Every political process may be viewed as the interactions—in patterns of collaboration and conflict—of smaller groups, varying in inclusivity, duration and power.² A “federal” system is distinctive in that a transgroup central institution has been established, and the normative code of interrelations between the component groups and the center

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† Yale, B. A. 1971; Yale Law School, J.D. 1974.

1. This study draws on more general theories developed in McDougal, Lasswell & Reisman, *The World Constitutive Process of Authoritative Decision* (pts. 1-2), 19 J. LEGAL ED. 253, 403 (1967), reprinted in 1 BLACK & FALK, *THE FUTURE OF THE INTERNATIONAL LEGAL ORDER* 73 (1969) [hereinafter cited as McDougal, Lasswell & Reisman]. The theories are located in the broader flow of jurisprudence in that work. *Theories about International Law: Prologue to a Configurative Jurisprudence*, 8 VA. J. INT'L LAW 188 (1968). All the work in this article, including the appendices and the adaptation of categorizations made elsewhere, has been prepared by the authors.

2. For a particularly useful formulation of this perspective, see Pospisil, *Legal Levels and Multiplicity of Legal Systems in Human Societies*, 11 J. CONFLICT RESOLUTION 2 (1967), republished in revised form in POSPISIL, *ANTHROPOLOGY OF LAW: A COMPARATIVE THEORY* 97-127 (1971).

is to a minimum extent formulated.³ The political scientist and legal scholar who study comparative federalization⁴ are primarily concerned with the authoritative code regarding allocation of power for decision-making. Schematically, the scholar asks himself the following question: *Who among the competing groups in the process under investigation is authorized by the formal code as well as the unformulated but operational code to make which decisions in which sectors of the common social process? By operational code, we mean the demands and related expectations actually held by politically relevant strata within the process about who is authorized to make decisions.*⁵

We distinguish the operational code from the "myth system." The myth system comprises those official ideas and concepts which participants within a system use to describe and perhaps actually believe

5. The term "operational code" seems first to have been used by Nathan Leites in *THE OPERATIONAL CODE OF THE POLITBURO* (1951) and in his more expanded work *A STUDY OF BOLSHEVISM* (1953). Leites used the term in a sense quite different from the one we propose to use and culled his data from only one component of behavior. Anxious to study "the spirit of a ruling group," he chose conceptions of political "strategy" and analyzed them by scrutiny of "the entire recorded verbal production of Lenin and Stalin." By operational code we mean the demands and related expectations *actually held* by politically relevant strata. Because of the fact that the elites about whose subjectivities we must make inferences are extremely sophisticated in the manipulation of signs and symbols, and because psychological self-censoring methods are known to be most effective in controlling overt expression, we are reluctant, as a matter of theory or practice, to rely solely on the *manifest* content of overt communication as a technique for inferring actual demands and expectations. In addition to manifest content, we urge that *latent* content also be studied, e.g., by content analysis. Most important, all inferences about operational normative codes should be gained and tested by references to practices actually undertaken. It is worth emphasizing that people may act on the basis of a code of which they are not consciously aware.

to be relevant to decision, but which the comparative observer concludes have only a mythic function.⁶ We also distinguish the operational code from pretended or semantic law, *i.e.*, from prescriptions which are formulated in their cultural context as law and which may have been intended to be law but which have no controlling base and are not widely expected to acquire such a base.⁷

Part of the operational code is "formulated" law, those prescribed expectations of which participants are comparatively aware. Formulated law may be produced in the formally expected legislative procedures of the process under consideration, but it will also include expectations which have been reached informally and perhaps in ways and by criteria dissonant with semantic law or myth system. The bulk of law in any process is "unformulated." It is comprised of complex shared expectations, most of which have been generated or reinforced in social interaction or have been transmitted as part of the general code in which all group-members are enculturated.⁸ The word "custom" has been used in the literature to refer to both formulated but non-legislated law as well as to the unformulated component of prescription.⁹

The lawyer distinguishes between sectors in which decisions are supervised and policed by the community with significant degrees of coercion and sectors which the community leaves to the private arrangements of the parties themselves. The former sector can be called the "public order," the latter the "civic order."¹⁰ The line between them shifts in response to other events. Public order may expand in times of high crisis. It may, for example, invade what is otherwise a "free" market or a family. While the student of comparative law is always concerned with where the line is drawn, he generally concen-

6. The myth system may, for example, record that it is the Oracle that makes decisions for the confederation of Hellenic city-states. The observer concludes, however, that the decisions are made by the elite of each city-state in a fluid but roughly coarchical system. The myth system may proclaim that all states in the international system are "sovereign and equal" and are bound only by those prescriptions to which they freely consent. The observer concludes, however, that significant parts of international lawmaking are a superpower prerogative with comparatively little consultation of less powerful communities. Whatever its self-description, myth system is not the whole of law.

7. LASSWELL & KAPLAN, *POWER AND SOCIETY* 137 *et seq.* (1950) [hereinafter cited as LASSWELL & KAPLAN].

8. McDougal, Lasswell & Reisman, *supra* note 1. See also GOFFMAN, *BEHAVIOR IN PUBLIC PLACES: NOTES ON THE SOCIAL ORGANIZATION OF GATHERINGS* 13 *et seq.* (1963).

9. For a comprehensive survey, see Raman, *Prescription of International Law by Customary Practice*, 1967 (unpublished doctoral dissertation in Yale Law School Library).

10. For discussion of the conceptions of public and civic order, see ARENS & LASSWELL, *IN DEFENSE OF PUBLIC ORDER: THE EMERGING FIELD OF SANCTION LAW* (1961); REISMAN, *NULLITY AND REVISION: THE REVIEW AND ENFORCEMENT OF INTERNATIONAL JUDGMENTS AND AWARDS* 252-58 (1971).

trates on the content of the operational code of the public order.

The operational authoritative code of any group or aggregate of groups is, then, those formulated and unformulated expectations about, *inter alia*, the allocation of decision competence in the public order.

Because the comparatist deals with a diversity of cultural, legal and political phenomena, he cannot adopt the descriptive or mythic language of any single system without distorting perceptions in different cultural settings. His investigation must follow a transcultural model in which dissimilar institutions which are functional equivalents and similar institutions which are functional disequivalents can be meaningfully compared.¹¹ We propose the following model.

By "decision" we will refer to choices about the production and allocation of values within a process. An "authoritative decision" is one made in conformity with the formulated or unformulated operational code or sets of expectations held by politically relevant strata about who is endowed with decision-making competence and what criteria ought to be applied.

A decision is comprised of seven component functions which may be sequential:¹²

the **intelligence function**—the gathering, processing and disseminating of information relevant to the social choices in all other decision functions,¹³

the **promotion function**—agitation for the adoption of certain preferred policies as "prescriptions" or as law,

the **prescription function**—the adoption of policies as authoritative or as law,

the **invocation function**—the assertion that a prescription has or is being violated and the provisional characterization of such deviation,

the **application function**—the authoritative specification of a violation or deviation from prescriptions and the designation and implementation of a sanction program,

the **termination function**—the abrogation of existing prescriptions and the designation and implementation of ameliorative programs,

the **appraisal function**—the assessment of the aggregate performance of the decision process in terms of its goals and the ascription of personal or structural responsibility for goal discrepancies or for brilliant goal achievements.

Decision competence is always allocated for a social purpose. We distinguish between allocations for power and other decisions. The most critical power decisions are those of constitutive magnitude, those

11. This aphorism is Yale Law School Professor Leon Lipson's *viva voce*.

12. McDUGAL & VLASSIC, LAW AND PUBLIC ORDER IN SPACE 1046-85 (1963).

13. This function is treated in detail in McDougal, Lasswell & Reisman, *The Intelligence Function and World Public Order*, 46 TEMPLE L.Q. 365 (1973).

which innovate, maintain or terminate fundamental institutionalized power or authority relations in the community.¹⁴ Hence, of fundamental import will be the code for allocation of constitutive competence.

Other decision sectors may be described by reference to community value processes: wealth, enlightenment, skill, affection, health and well-being, respect and rectitude.¹⁵ Thus, the proposed heuristic program for the comparative scholar of federalism provides a method for determining who in the system is authorized by the operational code to prescribe, for example, for wealth matters and market and commercial relations, for enlightenment matters such as the content and quality of education, and for the development and regulation of occupational and professional skills.

In a federal system, an authoritative code prescribes the conditions of participation in each of these functions. The code itself is established and maintained by a constitutive process which draws on authority and effective power in order to establish and maintain the fundamental institutions of authoritative decision-making.

A written constitution, a prominent documentary formality in a federal system, is a product of the constitutive process. Since it is usually formulated with certain problems paramount in the minds of its framers and is subject to all the cultural influences of the milieu, it ignores many major fundamental issues. Those which are so ignored become prescriptions of the unformulated code, often held at levels of consciousness so deep that those who are decisively influenced by them are quite unaware of their operation.

The American system is a case in point. At a rather high level of generality, the framers established an allocation of competence between the center and peripheries.¹⁶ But influenced by Hooker and Smith and the Montesquieu constitutional tradition,¹⁷ the formulation was a primarily negative one, constituting a limitation of powers. Much was left out and was established or confirmed thereafter in a complex code manifesting varying degrees of formulation. This code can be reconstructed by the comparative scholar by examination of documentary evidence and, to a great extent, by inferences of expectations from behavior.

14. See generally McDougal, Lasswell & Reisman, *supra* note 1, at 253, 256-59.

15. LASWELL & KAPLAN, *supra* note 7, at 55 *et seq.*

16. See text accompanying notes 20-24 *infra.*

17. The slow development of this focus is summarized in McILWAIN, CONSTITUTIONALISM: ANCIENT AND MODERN (rev. 1947).

QUESTIONS RELATING TO THE REISMAN AND SIMSON ARTICLE

1. What is the "operational code?" Define it in your own words. *observable behavior that is used for decision making*
2. What is a "myth system?" How is it distinguished from the operational code? *myth - way people thinks things are different from reality*
3. In the operational code what is the difference between "formulated" and "unformulated" law? Provide examples of each. *see notes*
4. Explain, in your own words, the difference between the "public order" and the "civic order."
5. Explain, in your own words, the difference between an "authoritative decision" and a "non-authoritative decision." Provide an example for each. *authoritative - conforms with expectations of some political group*
6. Provide one or more concrete examples of the performance of each of the seven decision functions listed on page 73.
7. Explain, in your own language, the distinction the authors draw between "a constitutive process" and other "community value processes."
8. What purpose may be served by using the "special" terminology used in the Reisman and Simson article? For example, why may it not be sufficient to refer simply to the "prosecuting" function rather than the "invoking" function, or the "law-making" function instead of the "prescribing" function? Attempt to find a rationale for using the Reisman and Simson terminology rather than more common or familiar language.