LEGAL JUSTICE AND SOCIAL CHANGE

A Thesis submitted to the Senate of Brunel University
for obtaining the degree of Doctor of Philosophy

by

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PART I

JUSTICE AND LEGAL JUSTICE

CONTENTS

I. THE SENSE OF JUSTICE

1. In 1843 Gen. Sir Charles Napier sent a message informing his superiors in the British East India Company of his victory over Indian tribes in the Sind Valley of North India. The message consisted of a single pun word, "Peccavi"[1], but didn't disclose that the price was 10,000 dead tribesmen.

Immediately afterwards he started replacing local law with the British, thereby making, among others, the crime of murder in its English sense, punishable by death. Eventually, the English legal system was enforced throughout India. Nevertheless, it took many years for the British to wipe out the killing or mutilation of wives by their husbands and unwanted daughters by their fathers.

In 1844-45, though, Sir Charles Burton told him that several paupers ("badals") were substitutes, hired by rich convicted murderers to be hung in their stead.

When asked by Burton why, answered one badal plainly:

"Sain! I have been a pauper all my life. My belly is empty. My wife and children are half starved. This is fate, but it is beyond my patience. I get two hundred and fifty rupees. With fifty I will buy rich food and fill myself before going out of the world. The rest I will leave to my family. What better can I do, Sain?"[2]

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(1) Latin - I have sinned.

(2) Fawn M. Brodie, The Devil Drives, 1971, pp. 65-6, 73.

Why did Gen. Napier's message read "Peccavi"? Did he have any doubts regarding his right to conquer Indian territories? Feelings of guilt and sorrow, maybe even remorse, about the dreadfully high cost in lives that the Indians paid in their attempt to remain independent?

Was the enforcement of English law, with its deep rooted optimistic belief in the power of man to control his own fate, fair and just in those circumstances, i.e. - a population whose survival was dependent upon resignation and belief in superpowers? Causation is an unsolved philosophical and legal problem.[3] And although in time Britain became the source for law and order, civilization and progress in India, going back to the case cited above, who was to be blamed for the badal's death and the release of the convicted rich man?

Poverty? The low cost of Indian life? The Indian belief in transmigration of soul? Napier, who subjected a population, which was not ready for the change, without sufficient educational, social or economic preparation, to a legal system entirely alien to it? Napier, who neglected to see to it that his laws were fully enforced and kept?

Was the use of force there in the 1840's done justly?

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[3] See, for example: H.L.A. Hart & A.M. Honeré, Causation in the Law, L.Q.R., 1956, Vol. 72, 58-90; 260-81, 398-417.

2. "Force:, says Ulysses in Shakespeare's Troilus and Cressida, "should be right; or, rather, right and wrong - between whose endless jar justice resides - should lose their names, and so should justice too". (1)

What is justice in this context? The quotation neither defines, nor explains it. But one may despairingly make the following deductions:

a) that although justice is, fortunately, not identified with "wrong", neither is it identified with "right", for between these two it resides;

b) that justice has some of each and therefore consists at least of both; (2)

c) that "right" can never win as the jar with "wrong" is endless;

d) that justice, being dependent on the relative positions of "right" and "wrong" in their jar, is amorphous. Otherwise it should not lose its name together with those of "right" and "wrong". It is

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(1) Act I, scene III

(2) Leibniz, for example, finds both good and evil in the spirit of God who permits "limitation and sin which arises from it... since... it should be redeemed by a greater good which cannot otherwise be obtained" (Philosophical Writings, 1973, pp. 109-110; also p. 40). Jewish religious philosophy of mysticism ("Kabbalah") also accepts the notion that evil derives from God, though it is by no means

obvious, therefore, that justice here cannot be static or solid nor objective or absolute;(3)

e) that although force should be right it can never be just. To be more precise: it must by necessary implication be unjust and therefore (perhaps) - contrary to justice (see below, sec. 8).

One might feel dismayed. Nevertheless, force is - according to Ulysses - an unavoidable, even desirable means of a necessary, rather advantageous social order based upon "degree, priority, and place, insisture, course, proportion, season, form and custom, in all line of order."(4)

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identified with Him and does not form a part of Him (Scholem, Kabbalah, 1974, p. 123). In the book of Job, Satan is, according to some of the Bible exegets (e.g. Y. Gordon) one of God's "sons" (1,6) though, for unknown reason, according to the New English Bible, he is one of the "members of the court of heaven." The following seems a more accurate tránslation of the Hebrew: "The day came when the sons of God came to present themselves to God, and Satan came among them."

(3) In his Also Sprach Zarathustra says Nietzsche (1972 ed. p. 13) that "justice is burning coal and fire" with the connotation that one may burn if one is not cautious enough in using it.

(4) Ibid.

"Take but degree away", he goes on, "untune that string, and hark what discord follows! ... Strength should be lord of imbecility, and the rude son should strike his father dead."

So, another deduction must be made, i.e. - that force should be used with wit and wisdom. Undoubtedly, the wisdom needed, among others, also for retaining that degree; that social order which Ulysses accepts as given and justified per se.[5] He does not question social structure, neither the rightness of the rules creating and keeping it. His attitude is dogmatic. Certainly - pragmatic. One might say: Positivistic.

Two hundred years later the German poet, novelist and dramatist, Goethe, would say that "disorder is worse than injustice."[6]

But Ulysses does not seem to be in a dilemma whatsoever. He does not bother himself with possible alternatives to the social order of his time. Nor, therefore, with the question "what does it

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[5] Which reminds us of India's Code of Manu. Some 1500 years before Shakespeare this Code laid down explicitly that "the King has been created (to be) the protector of the castes (varna) and orders, who, all according to their rank, discharge their several duties." (The Laws of Manu, in The Sacred Books of the East, Vol. XXV, 1886, p. 221).

[6] The dramatic words of an order loving German and a poet. But not really alarming when compared with similar ideas of former as well as later thinkers. Hobbes thought that "a good law is that, which is

really mean to say that a social order is a just one."(7)

He is interested only in facts and accepts them as neutral, not trying to derive any value-judgment out of them(8) nor to examine them in the light of any binding set of supreme, should we say:

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needful, for the good of the people, and withal perspicuous", it directs them not to hurt themselves, while the "good of the sovereign and people, cannot be separated" (Leviathan, 1962, p. 304 & passim). Roscoe Pound was of the opinion that justice, when applied to law, is merely "an adjustment of relations and ordering of conduct as will make the goods of existence... go... with the least friction and waste" (Social Control through Law, 1942, p. 65). Harold Lasky, strangely enough, saw law as the origin of peace, not necessarily the product or origin of justice (A Grammar of Politics, 1938, p. 287). Huntington Cairns one of the founders of the sociology of law, thought - and so did many of his followers - that the function of law is merely to deal with disorder and arrange "stable relations of social status" (The Theory of Legal Science, 1941, pp. 17-18, 55-56, 135).

(7) Kelsen, General Theory of Law and State, 1961, p. 6.

(8) Hume, in Treatise of Human Nature (III, I, i) lays down the challenge, ever since unsuccessfully met (e.g. J.R. Searle in Philosophical Review, 1964) that this cannot be done. If he was right, then, of course, no scientific criterion may be established for values to be

divine values.[9]

It is doubtful whether this attitude is merely a result of a politically hesitant approach of an Elizabethan play; it may confidently be assumed that even positivist Shakespeare of Troilus and Cressida would not have accepted the Western "renaissance" of artistic detachment from social problems. Rauschenberg, for example, has put it in the following fantastic contradiction in terms: "art has no problem. But - solutions."[10]

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based upon.

[9] As was done by advocates of Natural Law (i.e. Natural Justice). In this connection the Llewellyn-Pound juristic debate, where the first advocated separation of "is" from "ought" (not Hume's), while the latter contended that this was not possible neither desirable, may be noted here. See, Llewellyn, Jurisprudence: Realism in Theory and Practice, 1962, p.55; Pound, The Call for Realist Jurisprudence, 44 Harv. L. Rev. (1930), 697 (esp. pp. 710-711); Llewellyn, Some Realism about Realism, Ibid p. 1222. Consult also Twining, Karl Llewellyn and The Realist Movement, 1973; Stone, Social Dimensions of Law and Justice, 1966, Ch. 1, 21, and his notes there.

[10] Ha'aretz Literary Supplement, Tel-Aviv, 7 June 1974.

Human thought has for centuries been troubled by the incompatibility of justice as an idea and its distorted interpretation in reality. Reluctant as they were to doubt God's interference with man's fate - for questioning the justice in His laws and precepts, to say nothing of His deeds, was equivalent to sacrilege and heresy - people, nevertheless, tried to clear up discrepancies. True - in conformity with what they thought must have been God's will.

In Biblical times they were disturbed by "the righteous suffer, the wicked thrive."[11] The New Testament dealt with the same problem: the crucifixion of righteous Jesus. The solution of the Apostles is similar to that of the Bible at least in one respect - it is God's will. A will which is above and beyond us, earthly people, to grasp.

The rationalized justification for the "righteous suffering" is different though. The Biblical's being: "... no man (is) so righteous that he can ... never do wrong."[12] That of the Apostles explains

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[11] Genesis, 18, 23; Habakuk, 1, 13; Ecclesiastes 7, 15; 9, 2 etc.

The classic Book dealing with the problem is, of course, that of Job, who protested against God's unjust tyranny (e.g. 7, 21-22, The New English Bible, 1910, p. 793).

[12] Ecclesiastes, 7, 20.

that Jesus died to save all sinners; the whole world[13], while the persecuted righteous who suffers for the cause of right will inherit the Kingdom of Heaven[14] as reward for his suffering on earth.

The Judeo-Christian sense of injustice was never really satisfied, thus laying one of the foundations of Western philosophy in the last two thousand years and influencing literature.

The Jewish fate, especially during World War II, was treated by thinkers and poets as analogous to the sacrifice of Isaac by his father Abraham[15], Isaac being replaced by the whole Jewish people.

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[13] Matthew, 27, 52-3; Luke 17, 25; 22, 19-20; 20-26; 45-49; John 20, 31; Paul to the Romans 3, 24, etc.

[14] Matthew 5, 10.

[15] Genesis 22, 1-20. Soren Kierkegaard (Selected Writings, 1954) who analyzed the interrelations between God's precepts and moral obligations, concludes that the absolute evil (sacrifice of the son by his own father) may turn into an absolute good by God's breakthrough of a system for which he alone is reponsible, while Abraham proves complete faith and loyalty. Kierkegaard, however, doesn't raise and therefore has, of course, no answer to the question how would one know that a prima facie evil command is God's and not Satan's.

The slaughter of innocent Jews in Russia some seventy years ago shocked Jewish national poet Bialik to point an accusing finger towards man and God: "if justice exists - let it instantly appear!" If it does not - "let its throne be forever demolished... and the (slain) little boy's blood shall devour in the dark and subvert the

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Martin Buber (The Vision of Man, 1965, 311-15) compares Ch. 24, 1 of the Second Book of Samuel and Ch. 21, 1 of the First Book of the Chronicles and comes to the conclusion that King David, at any rate, didn't and couldn't tell, in that case, God's voice from that of Satan. Prophet Micah seems to have had some doubts about the justice in the sacrifice of Isaac when he asked his theoretical question (6, 7): "Shall I offer (God) my eldest son for my own wrongdoing, my children for my own sin?" (a phenomenon customary among the neighbouring peoples of his time). He was not alone in his criticism which I would not interpret as directed only against the punishment of children for their father's sins (as in Jeremiah 31, 29: "The fathers have eaten sour grapes and the children's teeth are set on edge") because he is speaking of an offering done by a father willingly, and not of the punishment of children by God. Neither Kierkegaard nor other Catholic thinkers (like Decartes who said, seemingly like Kierkegaard, that truth is not true because of itself but because God wishes it to be true) were aware of the legitimacy that their philosophy may accord to anarchy.

rotten foundations of earth". (16)

Bialik was but one in a long row of Jewish writers and thinkers who either protested against or tried to reason out the injustice of Jewish fate, i.e. - persecutions and poverty of the masses.

Persecution of other nations was, therefore, nonetheless, a casus belli for an intellectual war declared by other Jewish (17) and non-Jewish (18) writers and challengers.

Poverty and social injustice became the hotbed of many Jewish socialists and revolutionists. Likewise, it was the hotbed of outstanding English thinkers like Robert Owen and writers like Charles Dickens. French social injustice produced Emile Zola and Victor Hugo, and the Russian's - Lev Tolstoy and Maxim Gorky.

And furthermore - could God have commanded anything contrary to the Ten Commandments?

(16) "About the Slaughter", a poem.

(17) e.g. Franz Werfel, The Forty Days of Mussa Dag concerning the slaughter of Armenians by Turks in the 1920's.

(18) e.g. Dee Brown, Bury my Heart at Wounded Knee, concerning slaughter of Indians by American settlers in the 19th century.

Abraham, Moses and the Prophets, as well as the Apostles and the Catholic thinkers, had a definite concept of justice, for otherwise their protests against what they felt was unjust would have been meaningless. One aspect of this concept was that the righteous should be happy and that the wicked should suffer.

They felt what was unjust, but their approach to justice was "rational"; founded on the conviction that all were in accord as to the meaning of individual justice (i.e. - happiness). as to social justice (i.e. - minimizing the class discrepancies), and as to political (national) justice (i.e. - elimination of enemies unless, of course, their victory is planned by God as a "just" punishment).

But there was no explanation as to why justice should be that and no other, and there was no need for an explanation. For justice was divine and hence was to be done as ordered.

With the passing of centuries, divinity was replaced by other "absolute" principles. Equality was one of them (because "people are born equal"). Liberty was another. All "rational". Nevertheless, no satisfactory explanation was offered why, from the viewpoint of pure logic, the fact that people are born equal (a statement to which biologists and - not to mention them in the same breath - Nazis, would certainly object) should make it obligatory that they remain so.

Thus it seems that for the purposes of everyday planning, the expression "justice" - defective as it may be - has a rational

underlying notion. We can hardly speak, though, of a "sense" of justice because this "sense" is dormant until injustice is done. Only then can we refer to our sense of justice, the outcome of a stronger, spontaneous reaction to its opposite.

The sense of injustice is a strong and guiding impulse, a catalyst of human thought and social change. May Edmund Kahn be therefore correct in avoiding the insolvable question "what is justice" by suggesting that the sense of injustice should be used as a criterion instead.[19]

Kahn is particularly troubled about injustice in courts of law. So were Charles Dickens and other English writers[20], probably because of the strong attachment that British people had always had to the Old Testament, and their fundamental notion of fairness and decency.

Henry Fielding and Lewis Carroll, to pick only these two famous and loved ones, may serve as adequate examples.

Partridge's conviction of adultery, based on his own wife's lies, on the lack of his "correspondent"'s evidence (which "one should

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[19] The Sense of Injustice, 1964.

[20] I. P. Callison for example, expressly deals with "Courts of Injustice" in a book bearing this name (1956).

not believe anyway") and on his persistent refusal to confess to a "crime" he had never committed, is not only a masterpiece of literature and humor, but moreover - a mock analysis of the rules of evidence and criminal procedure in Fielding's times. The reader feels not only sorry for the 'felon" but also angry that injustice was done, as he also feels in many other passages of the book dealing with individual as well as with social injustice.

Less accute, no doubt, yet similarly convincing, is Carroll's description of the tarts 'thief's' trial. Here the sense of injustice rises against tyranny of a Queen who also judges, against stupid jurors, irrelevant "evidence" given under threats, rules that are being "enacted" while the "legal process" goes on, and against a conviction based on the assumption that the accused "must have meant some mischief, or else (he) would have signed (his) name like an honest man" on a meaningless and irrelevant document. At the last moment the whole pack of cards rises up into the air and comes flying down upon the Queen, the poor Knave of Heart is saved from a severe sentence (probably - death) which, incidentally, was supposed to be given before the verdict.

Edmund Kahn's examples are less literary and picturesque, but invoke strong feelings of injustice just the same.

II. THE SENSE OF INJUSTICE

3. Actually, says Kahn, we are not interested in justice as a state, but in justice as an active process of reform which should prevent that which may invoke feelings of injustice.

We shall feel that injustice is done, he says, when two prisoners, accused of the same crime, are punished differently, though there is nothing there to justify it. This injustice constitutes an offence against the principle of equality.

Likewise we shall feel that, in an atmosphere of public hysteria against radicalism, it is unjust to support a conviction of murder against two anarchists on doubtful circumstantial evidence, and to execute them in spite of world wide protest. We shall feel that this execution is contrary to another principle of equality, i.e. - that law should give each man that which he deserves with regard to the merit of the case and the relevant facts involved. Here, of course, Kahn hints at the Sacco-Vanzetti case (1920-27) of a shoe worker and a fish peddlar who were falsely identified, to whose "crime" another person confessed, and who were convicted and executed because of their beliefs.

An offence against yet another aspect of equality is to pervert justice through bribery. Our sense of injustice refuses also to accept cruel punishment as a means of revenge. We find it unjust that certain books are banned by law, or that a law should have

a retroactive effect.

Nature, says Kahn, has endowed man with the quality of regarding injustice towards another as an aggression towards himself. The sense of injustice is a means by which we foresee an attack and organize the defence. It is a general phenomenon which acts with regard to law and in its sphere we find the demand for equality, reward and punishment, human dignity, conscientious judging, limitation of government and materialization of general expectations.

It is a feeling guided simultaneously by history and present needs. And, though, he admits, those aspects of justice are not universal, there is no need that they be. Justice is not universal and is not categorically "right". Nevertheless, it is real, he thinks, in the sphere of human life, with no relevance whatsoever to any theory of "natural law".

He goes on to admit that the sense of injustice is not "just" per se, and is not "right", if we are looking for an absolute and rigid test, for - being a mixture of empathy and reason - its rightness may change. We cannot trust our intellect, he asserts, to grasp or even to see all relevant facts. Nevertheless, Kahn concludes, the justification for the suggested case of the sense of injustice is in its operative effects.

4. May I comment? If the sense of injustice cannot serve as absolute and rigid criterion, how can it serve as a criterion at all? (1)

In some communist states many communist disciples put up with their own destruction, even without being at all tortured, because they were convinced that their self-sacrifice would serve the party and the revolution, and that therefore it was justified.

Even when we accept Kahn's hint that the concept of injustice doesn't have a universal consensus, just as the concept of justice doesn't, we still find it hard to accept that the execution of loyal and innocent communists in the U.S.S.R., Poland, Czechoslovakia or Hungary was just only because it was, at least in the beginning, not considered unjust by Soviet, Polish, Czech or Hungarian societies.

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(1) Although Kahn doesn't mention it, the whole idea seems to be Aristotalian (in reverse).). "... when people speak of justice... they mean a state of mind which disposes them to perform just actions, and ... desire what is just. In the same way we mean by injustice a state of mind which disposes them to be unjust and desire unjust things.... We may... sometimes infer the existence of a disposition from the existence of its opposite... For example, if we know what is meant by a sound condition of the body, we also know what is meant by an unsound condition." (The Nicomachean Ethics, 1971, Book V, Chap. 1, p. 139).

5. But even if we do agree with Kahn's implied assumption that each society is sovereign to lay down its own concept of justice (therefore, naturally, also its own concept of injustice) - his proposition will still sound an oversimplification of a much debated complex.

First - because the "biological" (Kahn's expression) sense of injustice must, by definition, be individualistic and subject to influence of emotional factors and to the individual's state of mind at a given moment.

It cannot, or at least must not,be of a general nature, common to all. Moreover, it may change from one group in the population to another. It is easy to prove that the majority of the white population in the U.S.A., South Africa or Rhodesia feels differently about that which the majority of the black population in the same societies may feel is unjust.

The sense of injustice was not enough to abolish Judge Lynch in the West of the U.S. in the 19th century. On the contrary, these "judicial" murders conformed with the Westerns' "sense" of justice.

In Israel, the sense of injustice may operate differently among Jews, Arabs or Druzes. New immigrants and old settlers.

It may operate differently, in any given society, among groups of young people, old people, men, women, educated, uneducated, religious, non-religious and nearly any other definable group.

It is possible, perhaps, to accept as valid and binding - that private concept of justice, which is generally accepted by a certain society, and any change in that concept which such a society may occasionally adopt. It is hard to accept the private, moody, biological sense of injustice, even if - as Kahn puts it - it is guided simultaneously by history and present needs. Though history and present needs are of an objective nature, the individual's interpretation must always be a by-product of environment, education, upbringing and personal temper. No Common denominator can be established for a whole society if it is the added "sense" of injustice (to differ from <u>concepts</u> of justice) of its individuals put together.

Strange as it may seem, the arguments which I have just presented against Kahn's proposition, are founded on his own reservations. So is the second set of arguments that follows.

6. The sense of injustice, as Kahn himself rightly admits, is uncertain. May I add that it is, therefore, unreliable and unfit to serve as criterion altogether. For if we can never be certain that that sense is guided by all the relevant facts, if it is a spontaneous reaction of our "biological equipment" (his expression), then, not only that we cannot count on it - we must be forbidden to do so.

Moreover, we have no means to decide in all cases (and therefore we should avoid a decision in any) what really <u>are</u> the relevant facts. Neither, of course, can we decide what facts are irrelevant

as long as we don't know what justice is.

Without knowing that, we are not immune to not only passing judgment supported by a defective set of facts, but also to judging under the influence of the irrelevant ones. Isn't this exactly what some white juries in the South of the U.S. used to do while trying black prisoners? Isn't it exactly what happened in the Sacco-Vanzetti case, which was criticized by Kahn himself?

7. If we agree with Kahn and accept that instead of solving the problem of what is justice we should better resort to defining the opposite, then why shouldn't we always deal with opposites? We can avoid the problem of good by hiding behind the sense of evil, or the problem of beauty - by using the sense of ugliness; we may even solve the problem of truth by counting on our sense of falsehood and so ad infinitum: we can deposit our intellect and reason in the hands of spontaneous emotional reaction. In the hands of our "biological equipment".

We can agree, for the sake of argument, that evil is the opposite of good, ugliness - the opposite of beauty and falsehood - the opposite of truth. Though this may also be open to logical objections, for it seems not altogether refuted to contend that falsehood is the opposite of beauty, or that ugliness is the opposite of truth. Or, maybe, that ugliness or falsehood is the opposite of justice.

At any rate, it is certainly easier, and maybe less debatable, to argue that the opposite of a term is its direct negation. So far, I may presume, Kahn would go along with me. Therefore, the opposite of good is "contrary to good"; the opposite of beauty is "contrary to beauty"; the opposite of truth is "contrary to truth". If so - how can one know or even feel what is contrary to something without knowing what is that something?

Furthermore, is "not good" equivalent to "contrary to good"; "no beauty" to "contrary to beauty" and "no truth" to "contrary to truth"? If not - then only that which is an absolute opposite of justice is injustice, but the sense of injustice shall not suffice for the distinction between a mere "injustice" and "justice". Our "biological equipment" may not be good enough, even according to Kahn, to tell justice from that which is not justice, though not exactly injustice. For, if at the one end (justice) there is "100", and at the other (injustice) there is "0", what happens on that long way, and how would one be able to differentiate less justice from "lesser" and then the "least"; between 100 to 99 or 90? Or should one protest only when it reaches 49?

3. I doubt, though, whether "no justice" doesn't always correspond to "contrary to justice", for it may be argued that anything which is less than absolute justice is different from justice and therefore must be both "no" and "contrary to justice" (Aristotle, for one, doesn't differentiate between them in the quotation cited above. See Footnote 1 Sec. 5). If, as many agree, equality is one of the ingredients, if not the essence of justice, then total

equality must, prima facie, always be looked for in "absolute" justice.

There are several aspects of equality. "To each the same" is one of them. "To each according to his merits" is another. Yet another is "to each according to his needs" or "that which he deserves according to law", or "according to his deeds".[1] There are other aspects which I leave unmentioned. It may look absurd to allege that "to each according to the arbitrary will of the sovereign" is also a form of equality, though it is, nevertheless, arguable. Some forms contradict the others. "Each according to his needs" may contradict "each according to his merit" or "according to his deeds". Today many will agree that it is a fundamental principle of equality that two workers should be paid the same for the same work, and that women should enjoy the same rights and privileges enjoyed by men. When a woman receives for a certain work done by her half the pay that a man gets for it - it is undoubtedly contrary to justice. Shall we say that it is only "not just" that she receives 90% of the man's pay? Is the differentiation not <u>contrary</u> to justice, i.e. - to the principle of equality, no matter how far inequality has gone?

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[1] Ch. Perelman, De la Justice, 1945.

If truth is one of the synonyms of justice, as some assert[2], then the above contention may be even better clarified. For it cannot be refuted that, formally, that which is not true, no matter to what extent, must be absolutely false.

In order, therefore, to decide what injustice is, the principle, i.e. - justice, must be generally agreed upon and unequivocal.

9. I have already pointed out that many agree that equality is the essence of justice. But it is easy to show, not only as I have already done, that the meaning of justice is arguable but, further - that sometimes <u>inequality</u> corresponds to it. Tenants[1], ex-servicemen[2],

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[2] See, for example, Haim Cohn: Justice, in the Encyclopaedia of Social Sciences, 1969.

[1] E.g. Tenants' Protection Law (Consolidated Version) 5732-1972, according to which certain groups of tenants become "legal tenants" and are immune to eviction in spite of the expiration of their leases.

[2] E.g. Discharged Soldiers (Reinstatement in Employment) Law, 5709-1949, which, under certain conditions, obliges former employers to reinstate discharged soldiers and employ them in their former jobs (clauses 6, 8, 9); Discharged Soldiers (Temporary Provisions), 1973, which grants ex-servicemen certain privileges with regard to vacant governmental jobs (5a), to their admittance as students to academic

workers[3], women[4],

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institutes (9) or to the rehabilitation of their sources of livelihood (13).

[3] There is a considerable number of laws relating to labour relations and labour conditions. Many of them were enacted with a view to comply with the I. L. O. conventions and recommendations to which Israel is either a party or considers herself bound. Others were enacted to give workers in general, or certain groups of workers in particular, special protection which the socialistic majority of the Knesset (Parliament) thought was necessary. See, for example, Collective Agreements Law, 5717-1957, which lays down in clause 19 that ... "participation in a strike shall not be regarded as breach of personal obligation" (though to some extent this immunity was lately abridged) and in clause 20 that "rights granted to an employee by personal provisions of a collective agreement cannot be waived". See also Settlement of Labour Disputes Law, 5717-1957, and the laws regarding the protection of Workers' Wages (Wage Protection Law, 5718-1958. A minimum sum per month cannot - clause 8 - be attached, transferred or made subject to any other charge, and a delayed wage is - clause 17 - increased under certain conditions, by 10% a week), working hours, annual leave , etc. Civil Wrongs Ordinance (New Version) 1973, gives an exemption from the wrong of "causing breach of contract" to participants in strikes.

[4] In spite of the rise of the "women's lib" and the growing protest of

children[5], youth[6],

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women activists, women are still considered as a weak link of the population, especially of the working class, who need a protection greater than male workers. See, for example, Male and Female Workers (Equal Pay) Law, 5724-1964, which obliges employers (clause 1) to "pay to a female worker a wage equal to the wage paid to a male worker at the place of employment for similar work" (the word "similar" replaced in 1973 the original word "same" to overcome the usual excuse of employers not to pay an equal pay, i.e. - that two works are never the same). But mainly - Employment of Women Law, 5714-1954, which makes it a punishable offence to employ a female worker at night (clause 2 (a)) without a special permit, and obliges an employer to grant his female worker who "is shortly to give birth ... maternity leave" and not to employ her during such leave (6(a)). The same law gives a female worker who has had a miscarriage the permission to be absent from work for one week after the miscarriage (7(a)). See also Marriage Age Law, 5710-1950, which forbids the marriage of women under 17, without the court's permission.

(5) E.g. Apprenticeship Law, 5713-1953 (clause 2(a): "A juvenile shall not be employed in a trade otherwise than as an apprentice...").

(6) E.g. Youth Labour Law, 5713-1953. Clause 2 - "A child who has not yet attained the age of 15 shall not be employed." Clauses 6, 7 - empower the Minister of Labour to restrict the employment of juveniles in

minors[7], members of Parliament[8], judges[9], prisoners[10], civil servants[11], indigents[12], each of the groups mentioned and

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work which is likely to prejudice their health, well-being,or physical, educational, mental or moral development. And Compulsory Education Law, 5713-1953.

[7] See Capacity and Guardianship Law, 5722-1962, whose name speaks for itself.

[8] By virtue of clause 17 of the Basic Law:(the Knesset), 5718-1958, the members of the Knesset have immunity with regard to anything said or done by them in discharge of their parliamentary duties.

[9] Judges Law, 5713-1953, according to which judges are generally appointed for life, and are not subject to the ordinary rules of discipline applicable to state servants, while a criminal action against a judge may be brought only by the Attorney General before a District Court consisting of three judges (clause 26).

[10] See Police Ordinance, and Criminal Procedure (Arrest and Searches) Ordinance (New Version), 5729-1969.

[11] See, for example, State Service (Discipline) Law, 5723-1963, and the regulations which lay down offences particular to state servants.

[12] For example - Welfare Services Law, 5718-1958, and the regulations of 1960 regarding the care of and the extension of relief to indigent persons (clauses 2(a), 6(a) of the law; regulations 2, 3, 8). See also

others which are not mentioned (e.g. lunatics, unemployed, underpaid, ministers, convicts, policemen, etc.) may have some special privileges or obligations which the others have not. One may say that this does not contradict equality and does not prove inequality, because the members of each group are <u>equal</u> among themselves. But this isn't so: there are sub-groups among these groups, and further sub-groups in these sub-groups, each having its own privileges or obligations.

If we accept that the principle of equality remains uninjured because equality is being retained among members of a certain group, what is there then to stop us from further sub-division, until we may deal with micro-groups, consisting of a few dozens, or even - of two persons only?

Homes (Supervision) Law, 5725-1965; Safety of Protected Persons Law, 5726-1966 (e.g. clauses 4 and 6 which deal with persons who are "likely to be seriously impaired through lack of proper care"); Youth (Care and Supervision) Law, 5720-1960, which deals with the protection of minors; Invalids (Pension and Rehabilitation) Law, 5719-1959 (Consolidated Version) which secures livelihood, medical care, etc., of disabled soldiers. The National Insurance Law, 5713-1953, deals with labour invalids and other groups of needed persons.

It is obvious that priorities, privileges and concessions, though not maintaining the principle of equality may be granted in support of some other principle of justice. Hence, we will have to say that in those cases where equality means justice - Kahn's "injustice" may be identified by symptoms of inequality. But, in the reverse cases, one shall have to use one's "biological equipment" to decide that equality means injustice. Isn't it too much to expect of our poor equipment? How can we know when inequality does not mean injustice?

Is it not impossible to count on our sense of injustice to decide that it is unjust that new immigrants should be entitled to long-term and low-interest loans, exemption from customs duty and other taxes, free dwelling, or the right to keep foreign currency?(13)

10. Also in other cases, the decision cannot be left to the individual's feelings and senses. For example, the decision that it is unjust to shift the onus of proof, and demand of the prisoner evidence that his meetings with a foreign agent were not meant to damage state security.(1) Or, that it is unjust that, in murder cases, the amount of the victim's provocation should be tested objectively, not

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(13) For example - Land Regulations (Fees), 5730-1970, which gave an exemption from registration fees to the private residence or business of a new immigrant is concerned; Labour Exchange Rules, 5734-1974, about priorities given to new immigrants.

(1) Cohen v. Attorney General (1962) 17 P.D. 2257

subjectively, and that a prisoner whom the court believes to have, in fact, been extremely provoked and acted in uncontrollable fury, shall be convicted of murder, just because the "reasonable man" would have, in the eyes of the court, not committed the crime of manslaughter.(2)

Or, that it is unjust that a political movement shall not be allowed to participate in elections to a parliament of a democratic country, because its members are known to advocate its destruction.(3)

Or, that Lt. Col. Beri was unjustly found guilty of manslaughter when, in 1948, during Israel's War of Independence he (illegally as was later decided) set up a military court which sentenced Capt. Tobiansky to death after convicting him of high treason,with no sufficient evidence to support that conviction, but in a general atmosphere of suspicion of espionage.(4)

Or that Baurjian Momish Oulley was wrong in executing fictitious Sgt. Barambeyev during World War II, without a proper trial just

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(2) Segal v. Attorney General (1954) 9P. D. 393

(3) Yerdor v. Chairman of the Central Commission for the Elections to the 6th Knesset, (1965) P. D. 19, Vol. III, 365.

(4) Beri v. Attorney General, 1949, unpublished.

because the sergeant had cowardly deserted from military manoeuvres thinking that it was really a German attack.[5]

In the last two cases the problem of motive, combined with very special circumstances of time and place, rises in its extremity. In the eyes of formal criminal law motive plays no role in the process of conviction.[6] But, it is not irrelevant when the question of justice arises.

Can our "biological equipment" be of any assistance in these two cases and the others which were, or were not mentioned? The answer should be given in the negative. This equipment may, and often will, undoubtedly, mislead us towards unjust conclusions. We cannot logically sort out and give the right weight to the relevant facts and considerations of this complex of motive, criminal intention, and the conflicting interests of state (political justice), society (social justice) and accused (individual justice).

Here the question which arises is always not that of poetic justice,

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[5] Alexander Beck, Panpilov's Men, 1946, pp. 27-37.

[6] Clause 11(3) of the Israeli Criminal Code Ordinance, 1936, reads as follows: "Unless otherwise expressly declared, the motive by which a person is induced to do or omit to do an act or to form an intention, is immaterial so far as regards criminal responsibility."

neither of any absolute criteria, but of relative justice. All its aspects are sought to be fulfilled, while none can really be satisfied to their full extent. The solution is usually in the choice of some "unjustness" without reaching total "injustice", if one is ready and willing to accept that something which is short of justice can be just (or "relatively" just), and does not think that to say "relative" with regard to justice is really a contradiction in terms.

In the wide range of the two extremes: "justice" and "injustice" there are countless necessary, and therefore justified partial "justices" which represent compromises between the desirable and the possible.[7] Only in very few cases of unequivocal injustice can our "biological equipment" serve us with some certainty. Too few to justify the use

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[7] The compromise is often made not only between contradicting principles, but also between a principle and the damaging outcome of its implementation. Immediately after the establishment of the communist regime, an attempt was made in the U.S.S.R. in the name of equality, to equalize wages. But very shortly afterwards it became clear that the pecuniary incentive was vital for the Soviet economy. The attempt was therefore stopped until a new Soviet man was educated, probably - when the final stage of Soviet destiny is achieved, i.e. - socialism. In Jewish Palestine a similar attempt (within the "Workers' Economy") resisted, with considerable success, the temptations of the "capitalistic" economy but finally collapsed in the early 1950's at the end of some 25

its use. Too dangerous because it is based on a spontaneous reaction lead by emotions of anger or disgust.

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years of stubborn struggle. I know not of any proposition to change the definition of the equality principle as a component of justice, as a consequence of the said failure.

III. THE CONCEPT OF JUSTICE

A. Proclamation of Independence of the State of Israel

11. In its third part, the Proclamation of Independence of the State of Israel, of 14th May, 1948 (official title: "Declaration on the Establishment of the State of Israel"), specifies as follows:-

> "The State of Israel will be open for Jewish immigration and for the Ingathering of the Exiles; it will foster the development of the country for the benefit of all its inhabitants (Hebrew original "citizens"); it will be based on freedom justice and peace as envisaged by the Prophets of Israel; it will ensure complete equality of social and political rights to all its inhabitants ("citizens"), irrespective of religion, race or sex; it will guarantee freedom of religion, conscience, language, education and culture; it will safeguard the Holy Places of all religions and it will be faithful to the principles of the Charter of the United Nations".

Although, under a judgment of the Israeli Supreme Court, this proclamation constitutes no law, that same judgment specifies that "to the extent to which it expresses the vision of the people and its credo... we shall be duty-bound to bear in mind the things proclaimed in it".[1] Every authority in the State should be guided by the principles

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[1] Ziv v. Gubernik (1948), P.D. 1, 85; Alkarbutly v. The Minister of

of the Proclamation of Independence", the Court said elsewhere.[2]

Let us study the principles emerging from the Proclamation as quoted above. The principles included in it and on which the state will be

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Defence (1948), P. D. 2, 5; Goldstein v. Goldstein (1948), Pssakim E. 1, 193; Elchuri v. The Chief of Staff (1949), P. D. 4, 34; Yossifof v. The Attorney General (1950), P. D. 5, 481; Kol Ha'am v. The Minister of the Interior (1953), P. D. 7, 871; Ben Gurion's (first Prime Minister of Israel) speech before the People's Council (provisional parliament), on the date of proclamation (minutes of the P. C., p. 20) said that the Proclamation "is not a constitution. There will be a separate constitution." In Divrei Haknesset (Proceedings of the Knesset), Vol. 4, 729, he is quoted to have said that by enacting the Transition Law 5709-1949 Israel had fulfilled its obligation to enact a constitution as per the requirements of the U. N. Resolution of 29th November 1947 by virtue of whose international recognition the State was established. See, Rubenstein, The Constitutional Law of the State of Israel 21-30; Likhovsky, Can the Knesset Adopt a Constitution which will be the Supreme Law of the Land? (1969), Isr. L. R., 4, 61.

(2) Peretz v. Kefar Shemariahu (1962), P. D. 16, 2101; in Ornan v. The Director of Israel Lands (1967), Pssakim M. 67, 284 the judge relied on the Proclamation to nullify a stipulation in a standard lease signed between the parties, limiting the petitioner's right to physically work on Saturday and Jewish holidays.

based may be divided and classified into four groups: Group A - freedom, justice and peace (as envisaged by the Prophets of Israel). Group B - equality of social and political rights (without discrimination on any of the grounds mentioned). Group C - freedom of religion, conscience, language, education and culture. Group D - the principles of the Charter of the United Nations.

A perusal of the Proclamation gives rise to several questions and reflections though the elaboration hereinbelow, will not concern itself with the answers.

"Justice" may not be identical with 'freedom", but could justice prevail without freedom? Could "equality of social and political rights" exist in a regime which does not ensure justice, namely - where there exists no equality in social and political obligations, or where all enjoy equal rights but the list of rights is limited and closed. Is "justice" possible without freedom of religion, conscience, language, education and culture? If the signatories of the Proclamation took pains to specify the individual freedoms which would be granted to the inhabitants (rather - citizens) of the state, why did they fail to mention freedom of speech, the right to work and to personal fulfilment and the rest of a dozen of personal liberties? Again, when they listed the grounds on which there should be no discrimination between one inhabitant and another, did they refer to a closed list? If so - is discrimination allowed on grounds of position, for instance, or political belief (in the absence of a declaration on freedom of speech this omission receives more significance) or on

grounds of organizational affiliation? If "equality in social and political rights" is meant to reply to these reflections - why at all to specify? For specification, be it detailed as it may , is usually restrictive.(3)

12. But, let us go back to that which really interests us here, namely - the "justice" mentioned in the Proclamation. After all, the Supreme Court has told us that this justice, as other principles expresses "the vision of the people and its credo" and ordered us to interpret (unless there is a specific provision to the contrary) all the laws of the state (including the laws which existed on the date of its establishment and

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(3) All, or most of these questions will be answered when the Bill of Basic Law: Human and Civil Rights, is passed by the Knesset. Accepted specification of personal liberties can be drawn from the French Declaration of Rights of Man and of the Citizen, 1789; The American Bill of Rights, 1791; The Universal Declaration of Human Rights, 1948; Convention for the Protection of Human Rights and Fundamental Freedoms, 1950; the Bills of Canada, Nigeria, Nyasaland, Sierra Leone (Southern Rhodesia), Trinidad, Uganda, Aden, Australia, New Zealand, Ceylon, etc. and constitutions like that of the U.S., the U.S.S.R., Italy, and West Germany (the most advanced of all). See Ezejiofos, Protection of Human Rights Under Law, 1964 and a comparative research prepared by Klein and others for the Knesset's sub-committee on human rights,

were thus adopted by its legislator) while bearing in mind the contents of the Proclamation.

Before we attempt to understand this term, this "justice", we should point at one additional difficulty, possibly a syntactical one. The Proclamation says that the state "will be based on (in the Hebrew version the words "the foundations" are added here), freedom, justice and peace as envisaged by the prophets of Israel".

Why wasn't it simply said that it "will be based on freedom, justice and peace"? Why only on their "foundations"? Or, maybe, the word "foundations" applies to the state and not to "freedom, justice and peace". From the semantic and logical viewpoints, the first interpretation seems correct. But what is really the intention of the Proclamation requires further consideration.

Now, as to the "vision" (Hebrew version) of freedom, justice and peace "envisaged" by the prophets of Israel, several difficulties emerge immediately in this context. No principles or concepts are mentioned, while "vision" has a connotation of utopia and not reality,

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which was published by the Hebrew University of Jerusalem under the name On the Basic Laws: Human & Citizen's Rights (1972). Also the comparative tables prepared by the Israeli Ministry of Justice (1974); Shapiro and Bracha, The Constitutional Status of Personal Rights (1971) and the volumes of the Israel Yearbook of Human Rights (since 1971).

existing or attainable. Why, then, the reference to "vision"?

That the prophets were put in to "replace" the Pentateuch which was intentionally left out as a criterion of justice is quite clear, and the historic reasons for this omission are known. There were political reasons behind the desire to avoid a "commitment" that the new state would adopt the Jewish religious laws.[1] And yet, it prima facie implies that the principle derived from the discussion between Abraham and God, as quoted below, is not binding on the State of Israel, unless it is dealt with separately by the visions of the prophets of Israel. This principle is expressed in the following quotations:

"That be far from thee to do after this manner, to slay the righteous with the wicked; and that the righteous should be as the wicked, that be far from thee. Shall not the Judge of all the earth do right?"[2]

The same applies to the principles of the Book of Deuteronomy: "If there be a controversy between men, and they come unto judgment, that the judges may judge them; then they shall justify the righteous and condemn the wicked".[3] In the books of prophets, visions consistent with these principles can be found, but they are not

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(1) Proceedings of the People's Council, 1st Session, 4 May, 1948. Espcially Pinkas' (the religious party's representative) and Zizling's (left wing) speeches.

(2) Genesis, 18, 25.

(3) Deuteronomy 25, 1.

specified in detail.

Maybe this is why it is said that Israel "will be based on the foundations of freedom, justice and peace as envisaged by the prophets of Israel". "As envisaged", not - "according to". The last question remains - does this vision apply only to "peace" which in the proclamation closely precedes "vision", or else freedom and justice are also included. If the second interpretation is correct - what is there unusual to be found in the vision of the prophets of Israel regarding "freedom"?

Granted that "justice" is the one envisaged by the prophets of Israel - what then is this justice? Both in the Pentateuch and in the Prophets, the term "justice" is vague and deals with righteousness and the righteous rather than actually with justice.

Maybe the vision of Ezekiel is what the proclamation has "in mind": "Behold all souls are mine; as the soul of the father so also the soul of the son is mine; the soul that sinneth, it shall die. But if a man be just and do that which is lawful and right. And hath not eaten upon the mountains, neither hath lifted up his eyes to the idols of the house of Israel, neither hath defiled his neighbour's wife, neither hath come near to a menstruous woman. And hath not oppressed any, but hath restored to the debtor his pledge, hath spoiled none by violence, hath given his bread to the hungry and hath covered the naked with a garment. He that hath not given forth any usury, neither hath taken any increase, that hath withdrawn his hand from iniquity, hath

executed true judgment, between man and man. Hath walked in my statutes, and hath kept my judgments, to deal truly; he is just, he shall surely live, saith the Lord God". (4)

The quotation seems to manifest encroachments: its reference to justice is limited ' that man shall suffer punishment for his own crimes and not for the crimes of others; that a true judgment (?) shall be executed and, generally, that man must walk in the statutes of God. Maybe this vision may take us, by reference, back to the Laws of Moses. At any rate, all the remainder is merely a specification of acts of righteousness which the prophet expects men to perform and a very poor specification of prohibitions relating to the relationship between people.

Other pertinent passages in the Books of the Prophets are obscure and vague as much as the one quoted above. Jeremiah's "execute ye judgment and righteousness" (5) does not teach us more about justice than does Ezekiel, neither does Isaiah ("judging and seeking judgment and hasting righteousness"; (6) "hearken to me, ye that follow after righteousness, ye that seek the Lord" (7), though the parallelism of

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(4) Ezekiel 18, 4-9.

(5) 22, 3

(6) 16, 5

(7) 51, 1

"justice" and "God" is interesting per se: he who seeks the one will automatically find the other).

Perhaps we may learn more from the ewe lamb parable of the Prophet Nathan, when he reproved David for having taken Bathsheba by sending her husband Uriah to his death. Or from Isaiah's vineyard parable ("which justify the wicked for reward, and take away the righteousness of the righteous away from him";[8] "that join house to house, that lay field to field"[9] - a wrathful preaching over social deprivation).

Or, again, maybe from the case of Naboth's vineyard which Ahab coveted and which his wife, Jezebel, took after having falsely accused Naboth, produced false witnesses against him and caused his judicial murder.

All this, however, is meagre, and we do not know - even after examining the vision of the prophets of Israel - what is this justice which should be our guiding light. True, we were happy to find that the "rule of law" was presented already by the Bible and that it is applied even to a king who covets his neighbour's wife, even though neither sanctions to enforce it nor a procedure for establishing his guilt are secured.

On the whole, the Bible does not deal with procedure. We were all

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(8) 5, 23

(9) 5, 8

brought up on the wisdom of King Solomon who said to the two mothers who claimed the same child "divide it", but though this statement reveals a fine psychological perception, it constitutes no justice.(10)

The justice of the prophets is, in the main, social righteousness and - sometimes - social justice. But not much more than that can we learn about its ingredients and even less about individual justice. Hence, no wiser than before.(11)

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(10) Procedure and rules of evidence are not, however, entirely disregarded, e.g. the demand that the court should sit at the "gate" (Amos 5, 12, 15) or that a judgment may never be passed unless the criminal (or civil) liability is properly proved, sometimes under oath (Exodus 10, 22; and indirectly - Deuteronomy 6, 17; the witnesses in a murder case are first to start the execution) and under the threat of sanctions (Deuteronomy 19, 19) by reliable and truthful witnesses (Exodus 20, 15 - the Ten Commandments; Leviticus 5, 1 - including the obligation to testify; Deuteronomy 19, 17 - including the demand that the two litigants be present at the hearing. Proberbs 21, 28; Psalms 35, 11, etc.). There are provisions also with regard to transactions which should be authenticated in public by witnesses (Jer. 32).

(11) But this, of course, should by no means be interpreted to mean that Jewish justice is a vague idea. On the contrary, the teachings of the great Jewish scholars are based on the Bible (though - very little on the prophets) and their guidance as to what is just is derived from it.

Maybe we can find succour at the end of the Proclamation of Independence which says that the State of Israel "will be faithful to the principles of the Charter of the United Nations" (note - not to the Universal Declaration of Human Rights, which was not yet made). Again: "principles" are mentioned rather than complete adherence to the "directives" of the Charter. It is worth recalling that on the day the Proclamation was declared, the Universal Declaration of Human Rights, of 10.12.1948, had not yet been signed.

What are these <u>principles</u>? Do they include anything not mentioned in the first part of the quotation? Without hesitation, I say that they include nothing of tangible value. The preamble of the Universal Declaration of Human Rights speaks of "fundamental human rights" without specifying them, about "the dignity and worth of a human person", about "equal rights of men and women". It speaks of

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See, for example, Maimonides' (Rabbi Moses Ben Maimon) Guide of the Perplexed (1946 ed.) part 3, chaps. 17 (on the proportion of punishment to crime), 40 (man's liability with regard to damage caused by him; accidental killing), 41 (Jewish "talio" and pecuniary compensation; perjury; the logic and purpose of punishment; the "scale" of offences in relation to the amount of criminal intent), 42(honesty in dealings; trusts and deposits). Not even once, though, could I find in those chapters, that Maimonides had quoted any of the prophets as a direct authority to support his elaboration on the <u>application</u> of justice.

respect for international charters, of the creation of conditions conducive to the maintenance of justice and so on.

In conclusion, if justice is a foundation, different from other foundations mentioned in the Proclamation of Independence - we know nothing about it and this explains the series of questions I have asked at the beginning of this sub-chapter.

If one is to treat the Proclamation tolerantly and assume that it includes repetitions and emphases and that, in point of fact, the only thing specified in it is justice, then we know that this justice, the justice which the State of Israel meant and which is its guiding light is: the development of the country for the benefit of all its inhabitants; freedom, peace, equality of social and political rights without discrimination on grounds of religion, race, sex; freedom of religion, conscience, language, education and culture. And that's all - at least as far as the Proclamation of Independence is concerned.

13. Could the list emerging from the Proclamation of Independence exhaust the concept of Justice? Of course, if the Proclamation meant to exhaust the concept by including justice among the foundations on which the state will rest, then the moment it said so it appeared to have exhausted justice. It is as if it said: "justice" epitomizes justice.

But if, as I suggest, one should detect in the third part of the Proclamation of Independence purely declarative items as compared to concrete "commitments", then the statement will be based on

(the foundations) of freedom, justice and peace", etc., is a mere declaration.[1] This declaration is preceded by two "commitments" pertaining to Jewish immigration ("The State of Israel will be open for Jewish immigration and the Ingathering of Exiles") and the development of the country ("for the benefit of its inhabitants") and is followed by a list of "commitments" resulting from it.[2] The list is not designed to elaborate (what more can be said, after declaring that the state will rest on justice?), but merely to specify, even though this specification is somewhat odd.[3]

It is usually assumed that equality is one of the foundations of justice. Some even believe that justice is epitomized in equality,

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(1) Rubenstein disagrees (The Constitutional Law of the State of Israel, 2nd ed., 20) so does Akzin: The Declaration on the Establishment of the State of Israel in the Jubilee in Honour of Pinhas Rosen, 1962, 57)

(2) From Yerdor v. Chairman of the Central Commission for the Elections to the 6th Knesset (ibid) it can be interpreted that the Jewish character of the State amounts to being a "superior justice" though, of course, not in the proper constitutional sense.

(3) But it should be born in mind that article 46 of the Palestine Order in Council remained in force and with it the doctrines of English equity, though I don't think it is enough to justify the vague and somewhat negligent phrasing of the Proclamation.

and I shall dwell on this later. But when the Proclamation specifies that justice means (inter alia) "complete equality of social and political rights to all its citizens", the reader can but wonder: does this exhaust the aspiration for equality as a foundation of justice? What about that equality in obligations I have already touched upon? Could it be that it is not mentioned so as not to impose conscription on national minorities? What about equality before the law, namely the "rule of law". And why should equality of rights be granted to citizens only (as is clear from the Hebrew binding version)? Did the Proclamation of Independence intend to deny this equality from "the stranger that sojourneth among us"? (4) One may possibly understand the denial of political rights from a person who is not a citizen - either because he has never been a citizen or he has decided to renounce his citizenship, - but why deprive him of social rights? The matter becomes odder still when we examine the list of grounds for non-discimination in benefitting from equality: religion, race and sex. Only these three and no more!

Did the Proclamation really intend to give the legislator and the Government an opening for discriminating between citizens and denying social and political rights on grounds other than those enumerated? Did it intend (see n. 3 supra) to allow discrimination owing to a person's nationality (as distinct from his religion), colour

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(4) Leviticus 17, 12

(as distinct from his race), origin, community, language, conception, social position, economic position and so on?

The statement that follows, "will guarantee freedom of religion, conscience, language, education and culture" includes nothing to prevent such a discrimination. Freedom of language can be guaranteed, without preventing a discrimination on this ground. These freedoms certainly do not prevent discrimination on other grounds. In conclusion - the Proclamation does not exhaust the concept of justice from all agreed and acceptable aspects. Did I say "agreed and acceptable"?

B. Synonyms and Manifestations of Justice

14. What is agreed and acceptable to us in "justice" and what, on the whole, is this "justice"? Is it identical with "morality"? Is it identical with religious ideals? Is it identical with "decency? with honesty? with truth? with beauty? Who could guarantee that what is agreed among us as justice, is truly justice and what is agreed in other societies - is not justice? Could justice be absolute or is it relative to the society from which it has sprung? Are there different kinds of justice: political, social, personal? If so, are there uniform, possibly absolute, criteria for all its categories, or maybe each category of justice has its own "private" criteria? Is anything causing injustice contradictory to justice? Is everything just - justice?

These are but very few of the questions arising automatically from the term "justice".

15. In 1966, a Papuan, who lived in the highland of south New Guinea and was convicted of the murder of his wife, claimed in his defence before the Supreme Court of Australia, "my wife burnt the 'kava-kava' (a kind of food), and I became angry and cut her up with an axe, because she had done this many times". Another accused from Wabas, claimed in his defence to a similar charge that "the pigs (which are the main criterion of a Papuan's wealth) had been neglected by my wife who only wanted to sit in the village talking with other women, so I took my spear and killed her". Yet a third one thought he should have been acquitted justifying the killing of his wife with the following justification:

"when I saw my wife had not mended the fence and had let the pigs into the gardens I was very cross and I cut her neck with my bushknife."[1]

The father of a Papuan child who was run over by a car, waited for two days on the high road for a passing car and avenged the death of his son by murdering the car's driver who, of course, had nothing to do with the running over of the child.[2]

On the other hand, a five year old girl was burnt by her own mother and was left to die, for not having guarded her smaller brother.[3] Vendetta is compulsory, while a man whose integrity is doubted and is suspected of having malicious intentions may be killed.[4] When killed, his brain, as the brains of people who die of illness, may be served as food for necrophagous Papuans of at least one of the 700 small tribes which inhabit New Guinea.[5]

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[1] Anderson & Hogg, New Guinea, 1969, pp. 35-37.

[2] Reported to me in a private meeting (1972) by M. Avni, an Israeli traveller.

[3] Mann, New Guinea, 1972.

[4] Avni's report.

[5] Reported to me in a private meeting (1972) by A. Adam, an Israeli physician who had served in New Guinea on behalf of the W. H. O.

As Margaret Mead reports[6], this Papuan tribe, and many others, have no special respect towards death, and no "God" or "deity" prevails among them, as recognized by the three large religions, or even by religions in the Far East. The Papuan language does not have, either, any word corresponding to "friend" in other languages.

On the other hand, a man's rights are not determined by social status, inasmuch as this status results from economic advantages. The position of a woman, however, is among the lowest. A married woman is "tabu" on one hand, while on the other she is practically being raped by her omnipotent husband. Even her children are taken away from her after weaning.

At the same time, marriage in some Papuan tribes is performed only after a trial period of about six months, during which the young couple ascertains their mutual compatibility towards married life, while being strictly forbidden sexual intercourse during that period of time. The trial period is preceded by an agreement which

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It should be noted that the total population of New Guinea amounts to about 2 millions. Thus each tribe consists of a rather small population and occupies one small village or a few small villages. This report and Avni's (n. 4) refer to the experience of the travellers only in a few out of the 700 villages.

(6) Growing-up in New Guinea, 1953, passim.

includes payment of dowry, to be returned if the trial proves a failure.[7]

The supreme value among the Papuans is property - economic activity. Everything is measured by it, and social order, including marriage rules, is established in coordination with economic activity and as a complement to it. Marriage is first and foremost a commercial transaction, which involves many scores of relatives on both sides, who should give certain "gifts" to the young couple. The latter is bound in due course to reciprocate in similar "gifts" so that practically everybody owes to everybody all throughout life.[8]

16. Among the Barotse tribes in Zambia[1], economy has a less pronounced effect on family relations and a stronger impact on social justice. This is due to the fact that the sources of wealth of the Barotse society are placed, more or less equally, at the disposal of every man - whose economic prosperity depends mainly, and possible only, on personal diligence. As a result, there are no classes

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[7] Avni's report. Doesn't it remind us of the doctrine regarding "frustration of contract"? A similar arrangement, as far as trial period goes, prevails also in Samoa, although there pre-marital sexual relations are permitted (Mead, Coming of Age in Samoa, 1949, pp. 66-7).

[8] Mead, Growing-up in New-Guinea, 1953.

[1] Gluckman, The Ideas in Barotse Jurisprudence, 1965.

and no class struggle among the Barotse tribes[2], and if social justice means equality in the division of means of production, equality in possibilities of consumption and equality in opportunities - then this concept of justice is achieved there almost in full (at least during the period investigated by Gluckman).[3]

The position of women in Zambia[4] is by far better than that of the Papuan woman. And yet, the "sanctity" of family is preserved there, a sanctity whose protection is mainly borne by the woman who must

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[2] But see Beattie, Bunyoro 1960, pp. 29-41; Forde, Habitat, Economy and Society, 1963, passim.

[3] And yet, to the consternation of Marxists, this does not prevent wars from breaking out among groups of interests in the Barotse society. Gluckman attributes this fact to two main reasons. To begin with, the central government possesses no fighting means superior to those which any inhabitant can obtain - a spear, an axe and so forth. Secondly, power is not identical with economic strength, but with the number of persons prepared to recognize as leader a man among them who strives for the rule as such.

[4] As to her position among the Bantu, see Fallers, Bantu Bureaucracy, 1965, p. 85.

remain faithful to her husband.[5] For his part, the husband - as was

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[5] Though the husband's remedy in a case of an adulterous wife is usually not divorce but rather damages (among the Yorubas and Bolokis all offences except flagrant murder are civil ones: Forde, Habitat, Economy and Society, 1963, p.162). In a case (No. 27, p.130) cited by Gluckman in The Judicial Process among the Barotse, 1967, the adulterer, a schoolboy, received a letter from the plaintiff's wife inviting him to come to her. When consulting his friends what he should do, said one of them: "no woman tempts a man". The judge is quoted to have said to the wife on cross examination: "I do not believe that a woman would just tell her husband the name of her true lover... you women learn at the puberty ceremony to name someone else if you are trapped... You must pay damages to the defendant because you have made trouble for him." She was ordered to pay kuta (damages) also to her husband. The possibility of divorce was not mentioned although she was pronounced by the court "a whore and a liar". In another case (No. 45 p. 172) a wife was granted divorce on the ground that her husband had infected her with syphilis and was allowed to take "half the crops which she had planted". This was the law. But the court could not order the husband to give 'a blanket and a dress and some plates" because it had no power to make the husband "behave like an upright man". As to discrimination of women see Herbert's amusing

the case in Japan of the 10th century and in 19th century[6] in India[7]

Uncommon Law, 1935, p. 1 ff. where he "proves" that a "reasonable woman" doesn't exist in English law, while in Zambia "a husband must not go to his wife's granary... and must care for (her) properly (Gluckman, 163). The comparison between English legal institutions like "the reasonable man", "negligence", "proof of guilt" etc., with those of the Barotse is most enlightening but would require an "unreasonable" widening of the present work. I shall only mention that according to the Barotse law "even the king is a slave of the law" (Mulao, p. 164) and that the courts apply "the laws of God" and "the laws of human-kind", the latter being "the axiomatic principles patent to all reasonable men ... and constitute ... and embryonic jus naturale." They also recognize rules common to all African tribes of the region (jus gentium) but are quite flexible in adapting the law to the changing concepts of justice (Ibid. 363-3). See also Fallers, Bantu Bureaucracy, 184. These concepts of justice lead the indaba (Council) of a Bushman tribe to order the forceful lashing of a group of 8-10 year old children for not having prevented the prey of a cow and a goat by a lion and a crocodile (Van der Post, A Story Like the Wind, 1972, pp. 65-75).

[6] See, for example, Murasaki, The Tale of Genji, 1971.

[7] See, for example, Brodie, The Devil Drives, 1971; Klaf (ed.), Kama Sutra, 1964.

is exempt ' from the duty of faithfulness.[8]

17. The Aztec woman[1] could own property in her name, get council for justice and could obtain a divorce if she was cruelly treated. Nevertheless, her rights were limited as compared with those of man. She was forbidden to have extramarital sexual relations although a man could, provided it was with a married woman.[2] A woman could be executed for

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[8] Doesn't this remind us of Jewish and Christian (let alone Moslem) concepts of justice. Under the Jewish religious law (which in Israel prevails by statute as far as Jews are concerned) a wife's unfaithfulness provides the husband with good cause of action for divorce, but this does not apply (except in extreme cases) to the husband's unfaithfulness. Adultery is considered an offence in Germany down to this day (although the law is not enforced). Needless to mention Italy or Spain in this respect.

[1] Von Hagen, The Aztec, 1958, pp. 59-61.

[2] I have found no explanation to settle the contradiction, unless it is simply that the "sinning" partners were being treated differently, whereupon the justice here seems unbalanced even more than at first sight, for the man is allowed to have an affair with a woman who is not allowed to have the very same affair. The Maya man, however, was not allowed this

adultery[3], but the uncles, brothers and even the father of the bride had the "jus primae noctis". In many respects the woman was cattle and could be sold into another tribe.

Stealing, (especially highway robbery and robbing of temples), killing, drunkenness - as has just been mentioned - adultery were capital crimes.[4] So was certain witchcraft and blasphemy or even doubting the efficacy of prayers.[5]

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concession and the aggrieved husband was entitled, upon the adulterer being brought before him, arms bound behind, to killl him by throwing a large stone on his head (Von Hagen, World of the Maya, 1960, p. 51).

[3] Not the Maya woman, who upon being "convicted" of adultery was "disgraced", and the husband could, if he wished, repudiate her.

[4] The Incas (Von Hagen, Realm of the Incas, 1957, p. 99) added lying, violence and laziness, although they were not always considered capital crimes. And the punishment for a murder in self-defence in a rage against an adulterous wife - was mitigated. The Inca society consisted of nobles and common people. But if crime was commited, the noble was more severely punished than the common person.

[5] Ibid 104 - 6; It was no different in the Christian world, says Von Hagen, quoting from the Fugger New-Letters a report on auto-da-fe in 1579 in

The Navaho Indians have no equivalent term to match with "government". The authority is vested in The People, and it "extends only indefinitely and transitorily beyond the established rules of behavior between sex groups, age groups, and, especially, classes of relatives. There are headmen, but the sphere of their influence widens and narrows with the passage of time, the emergence of a new leader, the rise of a new faction... By and large... control of individual action rests in The People as a group and not in any authoritative individual or body". (6)

Maybe this may account for the Navaho approach that all clansmen are responsible for the crimes and debts of other members of their clan. (7) Witchcraft is considered a crime, and marrying one's own clan or the father's clan constitutes a forbidden incest. (8) Crimes are also cheating,

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Seville: "sentence the third; Juan de Color, slave, 35, reviled the name of our Dear Lady and other saints - disputed her miracles... burning at the stake." In view of the fervent petitioning of one who was tried for misdeeds of witchcraft, her sentence has been lightened: "... first she will be strangled and only then burned".

(6) Kluckhohn and Leighton, The Navaho, 1962, p. 121.

(7) Ibid. 112-3.

(8) As with other Indian tribes (Lowie, Indians of the Plains, 1963 79, Holmberg, Nomads of the Long Bow, 1969, 168; Farb, Man's Rise to Civilization, 1971, 25-7). An interesting explanation for the origin of the worldwide prohibition.

lying, stealing, murder, etc., though punishments are relatively light, and usually pecuniary ones suffice. The concept of "goodness" stresses productiveness, ability to get along with people, dependability and helpfulness, generosity in giving and spending. 'Badness" means stinginess, laziness, being cruel to others, being destructive.[9] In short, "good" and "bad" are judged according to pragmatical criteria. "Good" is what makes communal life possible. However, extramarital sex relations are not considered a crime. To the Navahos "sex is natural, necessary and no more or no less concerned with moral than eating".[10] It has nothing to do with ethics or justice. Justice is, at least to some Indian tribes, "a private matter. Grievances are settled between the

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of incest is suggested by Sheffer in Love and Marriage Among Kibbutz Members (Science, 1974, Vol. 18, No. 6, 340). He thinks that the answer is to be found in the natural biological feelings of disgust for sexual relations within a closed group based on psychological "imprinting", the outcome of which is the rejection of the 'crime" as unnatural (abnormal?) behaviour. The Navaho thinks that incestuous persons are, or doomed to become, insane (The Navaho, 112).

[9] Ibid. 303.

[10] Ibid. 316. But not to other tribes who punish severely or allow the husband to kill an adultrous woman (The Indians of the Plains, 82, 141).

individuals involved, or among the members of the family in which they occur... The maintenance of law and order vests largely on the principle of reciprocity (however forced), the fear of supernatural sanctions and retaliation, and the desire for public approval."[11] In this context the value of blood revenge should be mentioned (when no settlement is desirable or possible).[12]

18. Confucius did not actually deal with "justice". Instead, he devoted himself to the significance of moral life.[1] This is conceived in the Five Relations: ruler-subject; father-son; husband-wife; elder-younger brothers; friend-friend. The husband should be just and the wife - obedient. The father should be kind and the son filial. The elder brother considerate and the younger - obedient. Friends should be faithful to each other and sincere in their mutual relations.

This system of relationship - centered around the family, as a basic cell - has created strongly defined social classes, each one of which with its own particular privileges and obligations. Under the Shinto religion, the

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[11] Nomads of the Long Bow, 153.

[12] For further details see Karsten, Blood Revenge and War among the Jibaro Indians of Eastern Equador, in Law and Warfare (Bohannan, ed.), 1967, 303-325 (esp. 309-18).

[1] Hodous, Confucianism in The Great Religions of the Modern World (Jurji, ed.), 1947, 5.

characteristic element of Japanese national structure is the fact that authority is not vested in man himself, but in God as revealing himself in a man, namely - in the divine Emperor. This is, of course, sufficient for every word coming out of the mouth of the Emperor to be divine and, therefore, just.[2]

Anyone in search of the particular character of Catholic Christianity of the medieval papal church state will, I think, have to twist his way to really distinguish between the Pope's authority and task and those of Japanese Hirohito. Unless, of course, he wishes to claim that the Pope represents values more "just" than the values represented by the Japanese Emperor.

For a Confucian, government is like the pole star which remains in its static place, while all the remaining stars revolve around it.[3]

Chinese decency ("justice") is possibly especially expressed in the Tao-te ching doctrine (The Way and its Virtue) by Lao-Tzu:-[3a]

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[2] Holtom, Shintoism, Ibid. 161.

[3] In Confucius' words: "to be Excellent when engaged in administration is to be like the North Star. As it remains in its own position, all the other stars surround it" (The Saying of Confucius, Ware Trans., 1955, 25).

[3a] Blakney, (trans.), Lao Tzu, 1955, 60.

The highest goodness, water like,

Does good to everything and goes

Unmurmuring to places men despise;

But so, is close in nature to the way.

If the good of the house is from land,

Or the good of the mind is its depth,

Or love is the virtue of friendship,

Or honesty blesses ones' talk,

Or in government, goodness is order,

Or in business, skill is admired,

Or the worth of an act lies in timing,

Then peace is the goal of the Way

By which no one goes astray.

The important thing here is "order"; not necessarily its nature and particulars. Peace and a man's attitude towards himself, his family, [4]

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[4] "It was ancestor-worship which was basically responsible for concubinage undertaken in order to guarantee continuity when the first wife had no son, and for the low status accorded to girl-children because ultimately they could play no part in securing the family line" (Dawson, ed. The Legacy of China, 1971, 366). The ever-present Chinese morality of family obligation is expressed in "plays of good women", at the centre

his friend and his occupation are the guiding line, the main theme in which the secret of happiness lies.[5] This mentality leads, of course, also to submission to every injustice, outside one's home. An injustice, whose redress should be, according to Confucianism, the concern of the government, not of the individual, who makes his contribution through humility, modesty and submission.[6] All this applies, of course, to the

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of which there is a testing or an ordeal. Their heroines are martyrs. And one of them makes a false confession of murder to save her mother-in-law from torture (ibid. 141-2).

[5] For Confucius "conceived his mission as purely conservative, to be the guardian and restorer of the deteriorating culture and manners of Chou, a transmitter and not an originator, trusting in and loving the ancients... In applying the rites, he said, harmony is to be valued most."(ibid. 30).

[6] As Han Fei Tzu (who reminds us of Machiavelli, to a certain extent), a representative of the Chinese legalistic school of philosophy, puts it, from the point of view of the ruler: "the people will bow naturally to authority, but few of them can be moved by righteousness.. he who wields authority may easily command men to submit; therefore Confucius remains a subject and Duke Ai continues to be his ruler. (Han Fei Tzu, Basic Writings, Watson trans., 1970, 102). And elsewhere, this famous passage: "When the skin grows stouter than the

period preceding Chinese communism and it conforms with the general spirit of Budhism, which educates for submission and resignation, being concerned with honesty, decency, truth but not with justice as such, and certainly not with political or social justice.(7)

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thigh, it is hard to run; when the ruler loses his godlike qualities, tigers prowl behind him. If the ruler fails to take notice of them, then he and his ministers, who should be tigers themselves, become as impotent as dogs... Let the ruler apply the laws, and the greatest tigers will tremble... If laws and punishments are justly applied, then tigers will be transformed into men again and revert to their true form" (ibid. 39-40). Legalism addressed itself exclusively to the rulers, taking no interest in private individuals... except to the extent that they affected the interests of the ruling class (pp. 6-7).

(7) As per the Hymn to Love from the Satta-Nipata selection, being the Budhist Thirteen Chapter of First Corinthians: "in weal and peace; may all/be blessed with peace always/all creatures weak or strong/ all creatures great and small/ creatures unseen or seen/ dwelling afar or near/ born or awaiting birth - /may all be blessed with peace!/ Let none cajole or flout/ his fellow anywhere/ let none wish others harm/ in dudgeon or in hate// Just as with her own life/ a mother shields from hurt/her own, her only child - /let all embracing thoughts/ for all that lives be thine/ - an all-embracing love/ for all the universe/

The Benares sermon, which embodies several basic principles of

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in all its heights and depths/ and breadth, unstinted love, unmarred by hate within/ not rising enmity// So as you stand or walk/ or sit, or lie, reflect/ with all your might on this:/ - 'tis deemed 'a state divine'" (The Teaching of the Compassionate Buddha, Burtt trans., 1955, 46-7). In the same spirit Zen Buddhism (Selected Writings of D. T. Suzuki, Barrett ed. 1956) "emphasizes the purposelessness of our action... of our work... not leaving any trace behind as one lives one's life... it lives beyond time, relativity, causality, morality...", and advocates that we live a life "free from all theological vexations and humanly intentional complexities" (p. 264). Zen is realized in "ekaksana" i.e. - the absolute present, the "eternal now" (268). Zen takes everything in as it is, and contradictions resolve themselves without much ado. This is the nature of "tathata". "A" cannot be itself unless it stands against what is not 'A', 'not-A' is needed to make "A" - "A", which means that 'not-A' is in "A". When "A" wants to be itself, it is already outside itself, that is, 'not - A' . But this is the work of the logician. Zen knows no contradictions (269). If we put under 'A' "enslavement", "discrimination" and "injustice", then for Zen they also include their opposites (freedom, equality and justice) and the believers must feel quite happy with that "identity of contradictions", or "opposites", (If I may borrow Hegel's terminology) which free them from any social responsibility (find supporting analysis in Pardue's Buddhism, 1971,

Buddhism, recommends the "middle path" and, warning against both compromise and self-castigation, proclaims[8] "four noble truths": The first - human life is, first and foremost, an existence of suffering. The second - presents its version as to the source of this suffering: craving for lust which can never be satisfied. The third - pain, which results from ignorance, can be stopped. The fourth - suggests the way for deliverance and refers, through the "noble eightfold paths" to the activity of the individual and his own reformation.

19. Doesn't this remind us (without, of course, detracting from his contribution to political thinking, and to the understanding of "justice" of Dante Alighieri and his "Divine Comedy". He too, meets a tiger (lust), a lion (pride) and a she-wolf (avarice), which embody only part of the sins he will subsequently meet in inferno, on the gate of which the famous inscription is found:

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65 ff., especially 66-7; See also Conze, Buddhism, its Essence and Development, 1959; Humphreys, Exploring Buddhism 1974, 60-1). On this background we may re-evaluate the tremendous revolution which Chinese communism has brought about in the Chinese way of thinking. A revolution without which the political one could not survive.

(8) The Teachings of the Compassionate Buddha, 29-32.

"Through me is the way into the doleful city;

through me the way into the eternal pain;

through me the way among the people lost.

Justice moved my High Maker; Divine Power

made me, Wisdom Supreme, and Primal

Love.

Before me were no things created, but eternal;

and eternal I endure: leave all hope, ye that

enter."(1)

Inferno is therefore a product of justice, at least a just product of creation itself. Sorrow, suffering and ruination are products of wisdom and love.

Why is inferno just? Apprently, because it repays sinners as they deserve (even though somewhat exaggerated by our conception of punishment and its aims).

20. Perhaps this question of retribution may serve as our point of departure for the examination of "justice" in the sources of Western civilization.

The actual execution, to the letter, of the "an eye for an eye" of the Code of Hammurabi, the laws of Moses and the Roman law ("talio") was replaced by the sages of Israel and Rome, who determined financial compensation

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(1) Canto III, p. 27, Carlyle's translation.

instead of the maiming of the offender as against his mutilation of the victim.

Much slower progress was made as regards the institution of slavery which was legitimate in many societies, from ancient times until not long ago. Several travellers claim that slavery is practiced even now, and U.N. reports attest to this fact. Needless to mention American slavery which was formally abrogated only one hundred and ten years ago (though the scope of its abrogation depends on the definition of freedom). At any rate, slavery did not contradict the ancient Jewish concept of justice and definitely conformed to the concept of justice of Babylonian society which flourished the day the first Hebrew was born. Greece and Rome too accepted slavery as an obvious phenomenon. The same applies to primitive societies in Africa and in Asia which enslaved the wives and children of a vanquished enemy tribe.

Indeed, different societies had different slavery laws. This difference is particularly pronounced in the laws of Moses and the Hammurabi code, but obviously, these differences cannot change the fact that certain categories of human beings were enslaved.

In the code of Hammurabi, the price of a baby still-born through the fault of the offender was ten shekels[1], but only five shekels if his mother was poor[2]

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[1] The Laws of Hammurabi, 1923 ed. p. 37, law no. 209.

[2] Ibid. Law no. 211.

and two if she was a slave.[3] The same discrimination applied to other corporal injuries.[4] When the victim was a slave, the Roman "talio" did not take action. Instead, monetary compensation was exacted, not in accordance with the pain suffered by the slave-victim, but with the loss incurred by his master.[5] The Pentateuch grants slaves almost all the privileges of free men.[6] Moreover, it specifies that "a man shall be put to death only for his own sins"[7], contrary to the Hammurabi code which determines "a son for a son", "a daughter for a daughter", "a slave for a slave", even though the offender is not a son, a daughter, or a slave, as the case may be.

21. The concept of justice in Greece has a double aspect. One aspect is human justice as ensured by the Gods and embodied in the supreme and decisive

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[3] Ibid. Law no. 213.

[4] Ibid. E.g. 199, 203, 204, 208.

[5] Eisenstadt, Roman Law, History and Elements, 1953, 192.

[6] E.g. "You shall not surrender to his master a slave who has taken refuge with you. Let him stay with you anywhere he chooses in any one of your settlements, wherever suits him best; you shall not force him" (Deuteronomy 23, 15-16).

[7] Ibid. 24, 16.

power of destiny, usually without appeal. This is, therefore, a justice whose criteria are not clear at all, are not uniform and which incur an element of surrender to a superhuman power or will. A will, which is very frequently arbitrary and incomprehensible, even though it normally aligns itself with the victim rather than with the offender.

This is so, but not always, and at any rate not entirely. Take the famous Trojan war. It begins with the judgement of Paris, son of Priam, King of Troy, who gave the golden apple, which the goddess Eris had thrown, to Aphrodite, because he preferred the bribe she offered him (possession of the most beautiful woman in the world) to the bribe offered by the two other goddesses: Hera, wife of Zeus, and Athene.

Hence, the story opens with an injustice. It continues, as it is well known, with the abduction of Hèlen,wife of Menelaus, King of Sparta, the most beautiful woman in the world, by the King's guest and friend - Paris. Following a preliminary undertaking, all the Greek princes proceed to destroy Troy and bring Helen back. Their fleet, however, could not pass the Aegian sea, because the goddess Artemis refused to calm the wind and guarantee safe passage, unless Iphigenia, daughter of Agamemnon was sacrificed, because the Greeks had killed Artemis' hare and cub. And in fact, Iphigenia was sacrificed after her father deceived her mother into sending her to him in order to marry Achilles. The father killed the daughter and the fleet could sail to its destination.

And so, the injustice which the Greeks sought to redress - the abduction

of Helen - began with a case of bribery in which the recipient of the bribe would be punished while those who gave it - the goddesses - would go unpunished. It continued with the murder of an innocent daughter by her father and deceit of her mother. Later on, when Chryseis, daughter of the priest Apollo, was abducted by Agamemnon who refused to release her, Apollo punished Agamemnon by causing many casualties in the Greek Army. Under pressure by the Army, Agamemnon returned Chryseis. Here is one more odd execution of justice with Chryseis, at the expense of innocent dead men, with the criminal Agamemnon not subjected to any punishment. On the contrary, he received from Achilles the maiden Briseis in exchange for Chryseis.

It is superfluous to dwell on the whole of Homer's Iliad. Suffice it to conclude by stressing that it was Paris - a criminal under any possible criterion - who in the long run hit the heel of Achilles, the Greek warrior, who had proceeded to a holy war, with an arrow aimed by the God Apollo; that Helen, who had betrayed her husband and eloped with Paris, was not punished at all, for some reason or another, and returned to her husband, Menelaus, while Paris alone bore all the wrath; that Troy paid with its destruction for the sin of Paris; that Troy was conquered through a deceitful action by Odysseus who tricked the Trojans into believing in the withdrawal of the Greeks and into taking into their walls a large wooden horse filled with Greek fighters; that Trojan Laocoon, who objected to the taking of the horse and his two completely innocent sons were strangled by sea serpents; that the small son of Hector, son of the King of Troy and

commander of the army, was killed "for his father's sins" by Greek soldiers.

And thus spoke the courier who came to Andromachi, wife of Hector, to take her son and kill him by hurling him from the walls:-

"He must be hurled from battlements of Troy.
Nay, let this be, so wiser shalt thou show,
Nor cling to him but queenlike bear thy pain...
For nowhere hast thou help; needs must thou mark
City and Lord are gone, thou art held in thrall;"

And thus replied Andromachi:-

"Child dost thou weep? dost comprehend thy doom?...
But, falling from on high with horrible plunge,
Unpitied shalt thou dash away thy breath...
Now, and no more for ever, kiss thy mother..."(1)

The death of innocent children for the sin of their parents, or one of their parents, and even for no sin at all, is told in Greek mythology and in the

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(1) Euripides, The Daughters of Troy, (A.S. Way trans.), 1959 ed. 415, at 417. As to the rivalry between the laws of God and the laws of man and the protest against the unjust latter, see Sophocles, Antigone, lines 437-521.

great tragedies which immortalize it.[2] This is the justice of Greek gods, who themselves were free from its restrictions and shackles.

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(2) Euripides, Medea, the mother who slayed her two sons to revenge Jason's betrayal.

C. Highlights of the Philosophy of Justice

22. The second aspect of the concept of Greek justice is manifested in its philosophy, especially that of Plato and Aristotle.

Justice, according to Plato - which I take the liberty to term "political" - is expressed in Socrates' famous speech before he drank the hemlock, and Plato proceeded to consolidate and improve Socrates' ideas. Although the facts are known, it may be worth reproducing a passage from that speech. Socrates replied to Crito and other disciples of his who had come to persuade him to flee from prison where he was detained pending the execution of the death sentence passed against him, and said that as long as he was alive he would continue to teach every one in Athens ("this large, strong and wise city"), that he should be ashamed of his pursuit of money, honour and fame, when he was indifferent to wisdom, truth, and the perfection of his soul.

Socrates imagines the laws speaking to him, on the eve of his death, as follows:-

> "Know, Socrates; be advised by us, your guardians, and do not think more of your children, or of your life or of anything else than you think of what is right; so that when you enter the next world you may have all this to plead in your defence before the authorities there... As it is, you will leave this place, when you do, as the victim of a wrong done not by us, the Laws, but by your fellowmen.

> But if you leave in that dishonourable way, returning wrong for wrong and evil for evil, breaking your agreements and covenants with us and injuring those whom you least ought to injure, yourself, your friends, your country and us - then you will have to face our anger in your lifetime... Do not take Crito's advice, but follow ours."(1)

We shall,apparently, never know why Socrates wished, as he was wont to do, to pour a few drops (of poison) in honour of the gods, out of the hemlock presented to him. At any rate, the quantity of hemlock was lethal and he drank it all in one gulp. We shall leave it to poets and philosophers to speculate on this gesture and offer us their conclusions.

It is interesting that Pericles, the Greek statesman, who died one year before the birth of Plato and about forty years before Aristotle, emphasized political justice. He insisted on the Aristotelian arithmetic equality (a term not yet born in his time) and considered law as a guarantee for equal justice to all, with democracy (which Plato opposed) ensuring political equality to all, while granting privileges to none.

23.1 But, let us discuss Plato and Aristotle more thoroughly.

"On Justice" is, very often, a sub-title of Plato's "Republic"(1) and rightly

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(1)Plato, Crito, in The Last Days of Socrates, 1959 ed., 95-6.

(1)In Plato Writings, 1968, Vol. II, pp. 157-577.

so, because it is mainly dedicated to an investigation into the meaning and nature of justice. The conclusion that may be inferred is twofold, with regard to what justice is and what justice is not according to Plato. It has nothing to do with individual justice. As a matter of fact, it has nothing to do with the individual at all, apart from the individual's obligations towards society, rather - the state. It conforms with the state's interests, and it is in the interest of the state (the "Ideal State" to be more exact and to use Plato's terminology) that there be (three) different classes, each of which having its specific functions and obligatory contribution to the general good. But, this "good" is not equivalent to the summed-up "goods" of the individuals of which the state consists.

Unlike many of the philosophers who came later, Plato's problem in the Republic is not equality.[2] Neither is he troubled about freedom, certainly

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[2] Though in Gorgias 488, he says that "justice is equality". Both Plato (see notes below) and Aristotle thought that slavery is Nature's product and that "Justice... is an equality of ratios" (Aristotle's Nicomachean Ethics, Book I, Ch. 3; see also his Politics, Book III, Ch. 12). But Plato differentiates between "arithmetical" equality (in measure, weight or number; The Laws , Book VI, 757; 744) and "geometrical" (Gorgias, 508) equality - the "genuine best" equality - which constitutes the "natural" "political justice", and is distributed to each according to his merit and nature ("much to the great and less to the less great, adjusting what you

not about personal liberties in their modern sense. His justice equals

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give to take account of the real nature of each - specifically, to confer high recognition on great virtue, but when you come to the poorly educated in this respect, to treat them as they deserve"(!)).

"Indiscriminate equality for all", says Plato (ibid.), "amounts to inequality, and both fill the state with quarrels between its citizens". This Plato's "political justice" is similar to Aristotle's "distributive justice" which will be dealt with later in this work. Slavery in its "classical" form still exists, as is well known, in some countries in East Africa and in Saudi-Arabia, in spite of U.N. resolutions which proclaim its illegality and call for its abolition. In this connection the question of social classes arises, both in its Western and in its Eastern forms, for - at least according to Marxism - the lower classes, the proletariate in particular, are being slaved by the higher ones, though this slavery is more "subtle". Many works were written analyzing the interrelations of social strata. May I remind two popular ones which relate to the Western world: Ferkiss' Technological Man, 1971 and Toffler's Future Shock,and two which relate to the communist world: the famous book of the Yugoslav Milovan Djilas, The New Class, 1957 and David Rousset's La Societé éclatée, 1974 (which emphasizes the intellectuals' struggle in the new technological world). One of the foremost dramatists of Israel, Hanoch Levin (like, perhaps, Jean Genet in Les Negres and Samuel Becket in Attendant Godot), suggests that degradation

harmony[3], i.e. - the dictated pragmatic distribution of the state into his famous three classes and the harmonious functioning of each of these three. Each man should engage himself only with that particular business for which he is, by nature, most capable.[4] This includes slaves, whom Plato accepts

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and self-degradation are both at the bottom of the emotional setup of human relations, thus offering a socio-psychological foundation for what he thinks must be a compulsory class-structure of all societies (his plays Hefetz, Yacobi and Leidenthal, Vardale's Youth). In his One Day in the Life of Ivan Denisovitch, 1963, Solzhenitsyn recounts a conversation between Ivan and another prisoner. The latter answers Ivan's question why should the time be one in the afternoon when the sun is at its zenith, by explaining that this was the Soviet authorities' decision. To this Ivan reacts: "maybe also the sun obeys their decrees" (55).

(3) It is a historical fantasy or gimmick that this was also Confucius' approach: "the idea of harmony is richer than the idea of justice (and it) includes justice. (Though) at any rate lack of justice bespeaks lack of harmony." Unbalanced harmony means injustice, so is disproportionate distribution of burdens and pleasures among men (The Chinese Mind, Essentials of Chinese Philosophy and Culture, 228).

(4) Republic, 433.

unhesitantly[5]; certainly - the barbarian ones.[6] Moreover, the moment the ideal state is established, there is, by definition, no room for a change in either the social structure or the division of functions. Once established, the state should "justly" exist forever. In other words - class struggle is out, while class privilege is eternal. According to Plato, concludes Popper, "the state is just if it is healthy, strong, united - stable."[7]

23.2 Plato clearly attacked Athenian democracy and its concept of justice and equality. Thanks to Thucydides[8] - Pericles' famous funeral oration, some fifty years before the Republic, was preserved, thus leaving us the following

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[5] Ibid. 471, with respect to non-Greek P.O.W. See also 590, and "Statesman" 289 ("all property in tame animals, except slaves") and 309. In his "Laws" (757) he says: "... even if you proclaim that a master and his slave shall have equal status, friendship between them is inherently impossible. The same applies to the relations between an honest man and a scoundrel." (!).

[6] Ibid. 469.

[7] The Open Society and its Enemies, 1966, Vol. I, p. 90.

[8] II, 37-40.

credo of democracy: "... our administration favours the many instead of the few; this is why it is called a democracy. The laws afford equal justice to all alike in their private disputes, but we do not ignore the claims of the excellence. When a citizen distinguishes himself, then he will be called to serve the state, in preference to others, not as a matter of privilege, but as a reward of merit, and poverty is no bar... We are not suspicious of one another, and do not nag our neighbour if he chooses to go his own way... But... we are taught to respect... the laws and never to forget that we must protect the injured. And we are also taught to observe those unwritten laws whose sanction lies only in the universal feeling of what is right[(9)]... To admit one's poverty is no disgrace with us, but we consider it disgraceful not to make an effort to avoid it. We do not look upon discussion as a stumbling-block in the way of political action, but as an indispensable preliminary to acting wisely..."

[(9)] Democritus said: "... out of feeling what is right we should abstain from doing wrong... We ought to do our utmost to help those who have suffered injustice... The poverty of democracy is better than the prosperity which allegedly goes with aristocracy... just as liberty is better than slavery" (quoted from Popper, The Open Society and its Enemies, p. 185). Hence his way of reasoning is Aristotalian and contrary to that of Edmund Kahn (Supra Ch. II).

It is clear that the differences between Pericles and Plato amount to real strife. In Pericles' view, the Athenian democratic city-state's raison d'être are the individuals of which it consists. To be more precise - each of these individuals. Therefore, Pericles is interested in the happiness of each of the citizens of Athens ("equal justice to all alike") and the road to this happiness starts at general equality and personal freedom. Justice in its Pericles' interpretation is identical to and derives from equality and liberty. He does not differentiate between political, social and individual justice.

23.3 Plato's approach is based on the opposite assumption, i.e. - that the individual's raison d'être are the services that can and should render the state. "You exist for the sake of the universe", says Plato. "Creation is not for your benefit... Nothing is created except to provide the entire universe with a life of prosperity."(10)

But what is the purpose of this prosperity? Whom is it to serve? Who is

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(10) The Laws, Book X, 903. This is contrary to the view taken by both the Bible and the New Testament according to which a man is the centre of universe, and universe was created to serve him. But, it is identical with the ancient Mesopotamian cosmological concept (Finkelstein, World and Man in the Cosmology of Ancient East and the Bible, 31 Molad, 1974, 122-133).

to enjoy it? "The supervisor of the universe has arranged everything with an eye to its preservation and excellence", says Plato[11], but I couldn't find his answer to the question why, or what for. His ruling class was not to prosper materially. The others didn't really count.

It seems to me that Plato was unhappy with what he saw in Athens, for "indiscriminate equality for all... (fills) the state with quarrels".[12] I have nothing to support the following proposition, but I shall take the risk and suggest that Plato, argumentatively, sought resort in the Gods, contrary to his otherwise logically founded way of thinking, only because he could find no better way to approach his Greek listener. But that he, too, as much as Pericles, thought that the welfare, the happiness, the freedom and the security of the individual are to be looked for in a state. That the prosperity is calculated for the benefit of the state so as to provide it with the means needed to secure its existence and happiness as a functioning homogenous entity, thus securing both the existence and the happiness of its classes and their members.[13] He came to the conclusion

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[11] The Laws, Book X, 903.

[12] The Laws, Book VI, 757. See n. 2 supra.

[13] For the sake of the Ruling Class. In this I am, to a certain extent, in disaccord with K.R. Popper (The Open Society and its Enemies, 1966,

though, that democracy did not prove appropriate and efficient for the purpose. What was the point, he must have thought, in preserving a

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pp. 46-8 & passim) who is of the opinion that because of the contempt that Plato felt towards his proposed state's Working Class, he was not at all interested that it would be happy. I beg to differ. It's true that Plato never thought of this happiness as an end. But he did consider it a means to secure the state's harmony, a condition precedent, he thought, to the securing of the Ruling Class' privileges, as the latter was to be dependent on the Workers' production (as much as they were dependent on the Guardians and Soldiers' services). Otherwise, it will be hard to understand what Plato meant when he assigned (Republic 414) to the Guardians the mission to defend the state so that "its exterior enemies won't be able and its citizens won't <u>wish</u> to cause harm." It is obvious, I think, that the citizens wouldn't wish to harm, only as long as they were satisfied. May I replace the last word of the previous sentence with the word "happy". Therefore, Plato accepted also that the state's main goal was to protect its citizens (Gorgias 483; Republic 358). <u>All</u> its citizens. And I don't think Popper is right when he argues, in his brilliant analysis, that in bringing this statement, Plato was either ironical and dishonest or put it in the mouth of an adversary to hint that this was not what Socrates really thought. Lastly - as Popper puts it - Plato was an admirer of Sparta. But, since he recommended that his

democracy which couldn't fulfil its destiny? If it collapsed, how would its members benefit from it? Thus, he must have been in formal disagreement with the supporters of democracy, who, presumably, alleged that there was really no contradiction between the happiness of the individual and the secure existence of the state.

An individual may disappear without affecting the existence of the state, but the vice versa is, of course, impossible. The tendencies of these two are in constant contradiction: the individual wishes the maximum of freedom, sometimes on the account of his neighbours, and also of the state, while the state must limit this freedom to a necessary minimum in order to function and provide the individual with the essential necessities, both with regard to everyday survival and to physical security.

23.4 The question for Plato was, therefore, what comes first, as was the question for Pericles. Their answers were different. Or, rather, Pericles thought that the Athenian democracy did not endanger the Athenian state. Hence, for Pericles, Plato's objections could have been (had he been living in Plato's time) meaningless.

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state should follow that example - it can hardly be disputable that he knew that the Spartan regime had been formed the way it was, so that it might defend <u>all</u> its individuals.

Plato, on the other hand, must have arranged his own order of priorities, thinking that Pericles had put the horses before the cart; the means before its end; i. e. - that the physical existence of the citizens should come before anything else, including freedom, happiness and justice (i. e. - equality). He was certain that a compromise should be suggested, and a compromise he did suggest, namely - the three class state, with one of them, that of the Guardians (rather - Statesmen) forever and incontestably at the reigns of government. By this he thought he would secure a collective (wise) political thinking (of the ruling class members) and reciprocal control (within that class through education, common ownership of women and children and the abolition of private property) on the one hand, and the safeguard of a minimum freedom and equality (within each of the classes, respectively), on the other.

This would be done with the help of persuasion[14], so that relative

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[14] Ibid. Book IV, 720-22. The nature of this "persuasion" (compare with the forthcoming sections dealing with the law in the U. S. S. R.), and, hence, a glimpse of Plato's concept of justice, at least - of ethics, may be illustrated by the passage (Republic 414) where Socrates gives an example of a useful lie with the help of which he may persuade the Guardians, the Rulers, the Soldiers and then - the rest of the state. See also 389 - the ruler may lie in the cause of the state, but should punish any layman who may be caught lying.

happiness (justice) may ensue. But he didn't think that there really was, or should be, a free choice between "equal justice to all alike" of the democratic state, and relative justice of the best, ideal state, which he suggested, as the whole structure was planned to perpetuate the Guardians' "rights" through the establishment of a contented Working Class without whose services the Guardians could not survive.

To attack democracy successfully he "kicked its soft belly", namely, its theory regarding the right of equality, and showed easily that no logical conclusion was an obligatory outcome of the fact to which he didn't agree anyway, that people are initially equal.[15] Shaking the foundations of that theory, he, thus, could go on to justify his ideal state.

23.5 But there are flaws in his own theory. The first relates to his own arguments. For as much as he may have been correct in opposing the assumption that all were alike (and therefore were entitled to equal justice) - so can his counter-assumption be refuted.

Let me elaborate on it. Plato took for granted that slaves were not equal to free manual labourers and that these two classes had no ground for claiming equality with the class of statesmen. This is based on two foundations, the first - emotional, i.e. - the intuitive objection of men to having no priority over slaves. The second - "rational", i.e. - that citizens should be differentiated by the contribution that each of them can

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[15] See Popper, The Open Society and its Enemies, 1966, Vol. I, Ch. 6.

make towards general prosperity of the state, city or community.

There is no need to react to the emotional argument. And as to the "rational" one, the answer may, I think, be twofold and quite simple: a) that there is no valid explanation why the potential contribution should be the criterion. b) That there is no valid argument to explain what makes others, non-statesmen, forever incompetent to participate in the government, unless Plato thought that initially all those others were equal in their (eternal!) incompetence. But this argument, and I can find no other in "favour" of Plato's theory is, of course, a boomerang, because the moment he accepts that people, moreover: a large group of them, may be alike in any socio-psychological respect - his attack against democracy's contention of equality loses its "teeth".

The criterion of contribution is no better. Firstly - because it is based on the assumption that the existence and prosperity of a state is a supreme value, but there is no explanation (beside the one counting on Gods) why it should be so. Even in Plato's own times the state was only one, and not necessarily the dominant form of human existence. Secondly - if it is the supreme value, where does justice "enter the picture"?

Suppose the state is above the "unnecessary" equality" - is it also above other aspects of justice? Even Platonic justice? If not - how is this "justice" secured in that "best" state? And what comes thirdly is that if justice, or anything else should be preferred (military skill, honesty, wisdom, physical strength, age, sex or - maybe - productivity), then the meaning of contribution must be adjusted accordingly.

Forthly - that if I was correct in assuming that Plato too considers his classes not as an end but as a means to a prosperous state (as a whole), then there is no valid explanation why non-statesmen should be deprived of a "say" in the government. There is no explanation - beside the description of the "historical" origin of the Guardians' power, a mere "fact" with no attempt to justify it - why tho Guardians should remain the rulers. On the contrary, from the stress that Plato puts on the Guardians' education and the lack of similar efforts for the working class, one can easily infer that the latter, too, could participate in government if it were properly educated.

To sum up: according to Plato justice and political (social) harmony are identical. It is a "state" or collective justice, which ignores the individual

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As are justice and harmony according to Chinese philosophy. The Chinese zeal for harmony is the significant characteristic of this nation, whose first government had a minister of music. Causing disharmony is, therefore, identical to injustice, as much as it is injustice that the division of burdens and pleasures among men be disproportionate. Actually, "the idea of harmony is richer than the idea of justice", according to Chinese thought, but, of course, it includes justice. "At any rate, lack of justice bespeaks lack of harmony", and both concepts are dynamic (Wu, Chinese Legal and Political Philosophy, in The Chinese Mind, Essentials of Chinese Philosophy and Culture, 220, 218).

and the justice to which he is entitled. Hence, a social change means injustice for it must result in the destruction of Plato's class structure. Plato's is a political justice, neither individual nor social, which - whether it was or was not his aim - perpetuates aristocracy and its privileges so that they may never be abolished or even changed.

24. 1 Discussing the oligarchic and democractic views of Justice Aristotle agrees that they both aim at justice of some kind, but that they do not proceed beyond a certain point and are not referring to the whole of absolute justice when they speak of it. "Thus", he carries on, "it appears that the just is equal; and so it is, but not for all persons, only for those that are equal. The unequal also appears to be just, and so it is, but not for all, only for the unequal."(1)

He believes that "nature has distinguished between female and slave", and complains that some non-Greek communities fail to understand this and "assign to female and slave exactly the same status"... having "no section of the community which is by nature fitted to rule or command". He concludes

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(1) The Politics, Book III, Chap. 9 (p. 118, 1969 ed.). Also in the The Nichomachean Ethics, Book V, Chap. C (p. 146, 1971 ed.). As has already been pointed out Plato "solves" the problem by granting "much to the great and less to the less great"... by conferring "high recognition on great virtue"... and treating(the less educated) "as they deserve" (The Laws, Book VI, 757; p. 230, 1970 ed.)

by saying that "barbarians and slaves are by nature identical" and that, therefore,"Hellenes should rule over barbarians."[2] As to rulers, naturally, only "he that can by his intelligence forsee things needed is by nature ruler and master, while he whose bodily strength enables him to perform them is by nature a slave, one of those who are ruled. Thus there is a common interest uniting master and slave."[3] No answer can, of course, be found in this passage to the question why he whose bodily strength does <u>not</u> enable him to perform those "things" should remain a slave.

The end of every activity is "good", and when the state is concerned this goal is justice, i.e. - what is for the good of the whole community. Justice (good) in the community means equality for all, while "equality must be equal for equals". Therefore, though "superiority in height or complexion or any other good thing (should not confer) an advantage in the distribution of political rights, ... qualities which have an importance in a society" (such as noble birth, free birth,property and the virtues of justice and military prowess) should.[4]

Nevertheless, Aristotle prefers democracy to oligarchy. Democracy is based on the idea that "those who are equal in any respect are equal absolutely", while oligarchy is based on the supposition that "those who are

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[2] The Politics, Book I, Chap. 2 (ibid. pp. 26-7).

[3] Ibid. p. 26.

[4] The Politics, Book III, Chap. 12 (ibid. pp. 127-8); see also elaborations in Chap. 13.

unequal in one respect are unequal absolutely". Neither may be thought of as absolute justice, and, therefore, either can cause discontent. And, when people are discontent "they find themselves in a situation of potential revolution". (5) But, since there is less inequality in democracy than in oligarchy, democracy is more immune to revolutions, and Aristotle, like Plato, is interested in keeping the state (city) stable.

24.2 As has been quoted in the beginning of this section, Aristotle complains that people "are not referring to the whole of absolute justice when they speak of it". Further he complains that 'while men agree that absolute justice is proportionate justice based on value, they differ... about the value". (6) When speaking of value he refers to equality. So one may infer that, according to Aristotle, at least in his Politics, absolute justice should be identified with absolute equality. But, since he does not advocate absolute equality, therefore, he also cannot be deemed to advocate absolute justice, though he believes that it exists (n. 1 supra). However, while believing in its existence, he agrees with those who contend that absolute justice is only proportionate (n. 6).

If this may be treated as a definition, we may generally imagine what Aristotle means when he says "absolute" and "proportionate. We still do not

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(5) Ibid. Book V, Chap. 1 (pp. 189-90).

(6) Ibid. p. 191.

know what, according to him, is justice in general.[7] He does not answer this question in his Politics and he need not do it. Because there he is interested in justice as a means to defend democracy, rather - the stability of the state, and he find it in (proportionate) equality. In other words, like Plato in his Republic, he deals in his Politics with political justice.

With justice in its more "general" sense he deals in an earlier work - Ethics.[8] That he deals with it in a book bearing this name is in itself an interesting and intriguing fact on which I shall elaborate later. In the meantime I shall only suggest that much of the confusion and vagueness which ensue from The Ethics with regard to the meaning of Aristotalian justice may, I think, be attributed to the confused association of justice and morality in that book.

24.3 The first difficulty arises when Aristotle, loyal to his philosophical method, lays down that justice is a mean [9], i.e. - the "middle" between two extremes. It is, I think, a mistake to suppose, as many do, that Aristotle was against an "exaggeration" of the "genus of virtue". That he was for mediocrity. For he says that the "choice of mean is not possible in every

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[7] He does explain, though, what is a just act or conduct. A thing is just, he says "because nature or a generally accepted principle makes it so" (Ethics, Book V, Chap. 7, pp. 158-9).

[8] Known as The Nichomachean Ethics. References will be made to the 1970 ed.

[9] Book V, p. 139.

action or every feeling. The very names of some have an immediate connotation of evil. Such are malice, shamelessness, envy among feelings and among actions adultery, theft, murder. All these and more like them have a bad name as being evil in themselves; it is not merely the excess or deficiency of them that we censure. In their case, then, it is impossible to act rightly; whatever we do is wrong... Just as in temperance and justice there can be no mean or excess or deficiency, because the mean in a sense is an extreme... There is no mean in the extremes, and no extremes in the mean, to be observed by anybody.[10] Looked at from the point of view of its essence as embodied in its definition, virtue no doubt is a mean; judged by the standard of what is right and best, it is an extreme."[11]

It is the logical outcome of what he says earlier when he speaks of fear, boldness, desire, anger, pity and pleasure and pain generally.[12] If we feel them too much or too little, we are wrong, he says. But "to have these feelings at the right times, on the right occasions, towards the right people, for the right motive, and in the right way, is to have them in the right measures, that is, somewhere between the extremes, and this is what characterizes goodness. The same may be said of the mean and extremes in actions... it is in the field of actions and feelings that goodness operates; in them we find excess, deficiency, and, between them, the mean, the

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(10) Book II, p. 67

(11) Ibid. pp. 66-7.

(12) Ibid. p. 65.

first two being wrong, the mean right, and praised as such. Goodness, then, is a mean condition in the sense that it aims at and hits the mean."[13]

If I am correct in my understanding that the Aristotalian mean is, with regard to justice, the virtue of justice itself, what, then, is the meaning of the last of his three queries: "what are the extremes between which justice lies" (the first two are: "what sort of actions come within its scope" and - "justice being a mean, what is the nature of that mean").[14]

Moreover, since Aristotalian justice equals good[15], and since good, as has just been quoted, means to feel (and act) "at the right time, on the right occasions, towards the right people, for the right motive and in the right way" - how can one know what is just if one doesn't know when one is being good. For there is no answer to the question what is the right time, when is the right occasion, who are the right people, which is the right motive and which is the right way.

24.4 "Just", goes on Aristotle, "means (a) lawful and (b) what is equal, that is fair."[16] So now we have the following equation: rightness=goodness=

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[13] Ibid. pp. 65-6.

[14] Book V, p. 139. Shakespeare seems to have no difficulty in determining that these extremes are right and wrong (see sec. 2 supra).

[15] Book V, p. 140.

[16] Ibid. Nevertheless this is only "half true" even according to Aristotle, for "everything that is unfair being unlawful, but not everything unlawful

equality=fairness=lawfulness=justice.

Aristotle admits that more than one meaning is attached to the word "justice" but asserts that the different conceptions come very close to each other to the extent that we fail to note the differences between them. This is strange even if we remember his small world, which consisted practically only of Greece. Having dealt in the same book with the difference between democracy and oligarchy, and having in mind, as he must have had, Sparta, Thebes, the Persians,[17] Minor Asia, the barbarians and the political and social changes in Athens itself, as well as the changes in the Greek concept of justice in the 300-400 years that had preceded him since Homer - it is hard to understand this assertion. Unless the justification for his inductive way of reasoning is to be found in the concept of justice that he had in mind, and which he thought should be taught and should govern Greek Society. Perhaps this may also explain the lack of any regard on Aristotle's part for the contents of the law as an expression of justice. For, as can easily be inferred from what has just been cited, his assumption is that law must always be the overt interpretation of what is just ("the description 'unjust' is held to apply both to the man who takes more than his due and to the man who breaks the law").[18] But if so - why should we bother

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being unfair" (ibid 144). "Criminal" intention and the pursuit of gain are characteristics of the unfairness which is also unlawful (p. 143). Unfair behaviour is bad behaviour, i.e. - "that which we condemn..." (143).

(17) See, for example, his discussion of natural political justice, where he refers explicitly to Persia (ibid. 158).

(18) It is put even clearer in p. 141 ibid: "the lawless man is... unjust and

ourselves with the problem of justice at all? Except, maybe, for the sake of preventing injustice which has not been prohibited by law yet.

Hence, if this is correct, no law should ever be repealed or changed, and the demands of justice (dictated by social needs) must be met by new enactments, which may never contradict the old laws. But since laws were in fact repealed and amended in Aristotle's Greece, it becomes again hard to understand how he could claim as he did, that all Greek laws were just.

These laws, says Aristotle, aim at the good of the community as a whole, or a select class to whom power is entrusted on the ground of higher qualifications or some such (what?) reason. So, he goes on, we have one

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the law-abiding man just; all lawful things may be regarded as just, where by 'lawful' we mean what is plainly prescribed by the legislative power". For the avoidance of any doubt, Aristotle adds here the following footnote: "we imply that these ordinances are every one of them 'just'." Though, only a few lines earlier he states that law deals with all virtues and vices, and that "if it has been rightly enacted it will do this rightly". It seems that in this last sentence Aristotle does not refer to the contents of the law but to the <u>way</u> in which it may be enacted, for immediately afterwards he continues to say that the law will not (do) so rightly, it if is a hastily devised expedient."

meaning of the word "just". It is applied, he says, to "whatever creates or conserves for a political association its happiness or the happiness of some part thereof."[19] When it deals with virtues and vices (i.e. - rules of behaviour), enjoining the former and prohibiting the latter - it is "complete virtue".

It is complete ("perfect") justice because the highest virtue is shown 'by the man who performs the difficult task of practising it towards another".[20]

Thus, says Aristotle, righteousness or justice... is the whole of virtue.[21]

And thus we may add to our "equation" the seventh member: "happiness", and maybe even an eighth - 'righteousness".[22]

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(19) Ibid. Though whenever the ruling class looks to its own advantage only - it is a deviation (The Politics, Chap. 7, p. 115), but what is there to prevent this deviation?

(20) Ibid. 142.

(21) Nevertheless, law and justice are two different things and both are tools of political organization, without which man "is the worst of all animals" (Politics, Book I, 1253a, E. Barker transl. 1946 ed.). It should be noted, though, that T.A. Sinclair translates the same passage as follows: "As man is the best of all animals when he has reached his full development, so he is worst of all when divorced from law and morals"(Book I, Chap. 2, p. 29, 1969 ed.).

(22) By righteousness Aristotle means a way of life: being good as a result of

24.5 After having asserted that the different conceptions of justice are so close to each other that we fail to note the difference between them[23] Aristotle moves to analyse the cases where justice forms a part of the general virtue.[24] By doing this he practically accepts the notion that there are different "justices", though, of course, he hints at the possibility that the adding up of all those parts may paint an overall picture of justice.

From his analyses of the different parts one cannot, however, infer any general binding and convincing common denominator.

He first asserts that differentiation must be made between two "particular

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a certain disposition based on the knowledge how, to whom, and when to be good (p. 165). He does not volunteer, though, the necessary information which may establish such a disposition.

[23] Supra. Sec. 24.4.

[24] Without actually suggesting an overall definition for justice, except, perhaps, when he explains political justice, about which he says that "it is natural when it has the same validity everywhere and is unaffected by any view we may take about the justice of it" (Ethics, Book V, Chap. 7, p. 157). But this, of course, is not a definition of and does not relate to the contents of justice but to the meaning of "natural".

justices[25]: "distributive" and "corrective", the latter (referring to private transactions of individuals) being further divided to justice in "voluntary" and "involuntary" transactions. While involuntary transactions are sub-divided to "secret" and "violent" "transactions".[26]

The need for distributive justice arises when "people who are equal have not got equal shares or vice versa."[27] Justice in this sense is the expression

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[25] When by particular justice he means that justice which is not "universal" (absolute?), i.e. - "those very actions which conform to law. For behaviour in accordance with this or that particular virtue is enjoined on us, and behaviour in accordance with the particular vices forbidden, by the law" (ibid. 144).

[26] "Voluntary" because the first step in the bargaining (of buying, selling, loaning, pledging, depositing or hiring out) is voluntary. Involuntary "transactions" are such as theft, adultery, poisoning, procuring, alienating of slaves, killing by stealth, perjury (i.e. - "secret") and assault and battery, casting people into prison, homicide, robbery, mutilation, insulting language or insulting treatment of others (i.e. - "violent"). Ibid. 145.

[27] Ibid. 146. Equality here is consisted of four elements: it is both a mean and justice, but as mean it must have extremes between which it lies (though the division of the distributive justice need not be equal, p. 145), it must be expressed in two equal parts, and - in its character as just

of proportion; "equality of ratios". In other words, what Aristotle means is that the need for distributive justice arises from the need that a person may receive his share in proportion to his merit (i.e. - right). Therefore, if (a) represents A's (a person) rights and (b) - B's (another person) rights, then they should share the 'thing" (money, honour, etc.) at the ration (a)/(b) and the equation is: (a)/(b) = (c)/(d), the last two members representing the shares in the "thing" shared. Hence the equation (a)/(c) = (b)/(d) is, generally, also correct as is the equation (a)/(b) = (a)+(c)/(b)+(d).

This is the fair division at which Aristotle aims when applying his distributive justice and which Greek mathematicians call "geometrical justice" to differentiate from the "corrective justice" which is "arithmetical".

24.6 Aristotle does not give us any clue as to how to measure the relative rights or merits.[28] At the same time he agrees that by "merit" people do not

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there must be <u>certain</u> persons to whom it is just. If the persons are not equal their shares will not be equal. But equality of persons depends, inter alia, on "merit".

[28] The principle embodied in the idea of distributive justice had a great influence on human thought either by having been accepted in its Aristotalian structure or by having been rejected or amended. David Hume in his Treatise of Human Nature admits that "without justice, society must immediately dissolve and every one fall into that savage and solitary condition, which is infinitely worse than the worst situation that can

all mean the same things, while people's <u>needs</u> play, of course, no role

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possibly be supposed in society" (1949 ed. Book III, part II, sec. 2, p. 497), though it is hard to reconcile this phrase with his assertion that "our property is established by the laws of society, that is by the <u>laws of nature</u>" (ibid. 491). Doesn't this remind us of Marcus Aurelius' "Everything that happens, happens justly"? (The Stoic and Epicurean Philosophers, 1940, Book IV, Chap. 10, p. 510), for justice equals logic (IX, 1, 571) and rules everything. Furthermore, one can easily infer from Humes' words "the worst situation that can possibly be supposed in society" that he prefers and accepts as possible) a totally unjust society to "solitary conditions". It seems to me that Swabey is right in saying that Hume "does not use the word justice in sense of fair or equitable distribution of good or evil" and that justice for Hume "was, by definition, the status quo" with no suggestion of "any other idea of justice which might serve as a basis for criticism of the existing distribution" (Ethical Theory from Hobbes to Kant, 1961, p. 155). Hence, Swabey, for one, regards (just) distribution as an element of justice. Many others do the same. Rescher (Distributive Justice, 1973) thinks that distributive justice should be applied to all people according to one or more of 7 criteria, e.g. all are equal; to each according to his needs; according to his ability or achievements; according to his efforts and sacrifice; or - to his productive contribution; or - to the requirements of public good, public interest, the general good of mankind or the more good to the greater many; or according to the social importance of his service by economic standards

in his geometrical games. Moreover, there is no convincing explanation why

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of supply and demand. Though the criteria are different from those of Aristotle, the principle is, to my mind, the same, namely - that there is no (and cannot be) one decisive criterion. Therefore, I sould say - there is no criterion at all, unless there is a definite and overall criterion of an unequivocal principle according to which the different forms of distributive justice may be distributed. Such principle was suggested by socialism (all who contribute to the national product should be equally rewarded). John Ayan was therefore wrong, I think, in assuming that no one, beside Bernard Shaw, defended this rule, while founding his criticism on the argument that "it is unjust because it would treat unequals equally", although, he admits, "men are equal as moral entities, as human persons". He is against this kind of distributive justice, as people are "unequal in desires, capacities and powers" (Distributive Justice. 1942, 180-1). The flaw here is evident: there is no definition of equality while desires and powers are regarded as elements of a so called equality, which should be taken into account. Does that mean that equality, according to Ayan, can be achieved only when all desire the same or have the same power (to fulfil their desires), or - perhaps - when all desires, different as they are, may be satisfied? Raphael sounds more realistic when he refers in his Moral Judgement (1955, 62-94) to distributive justice, and asks to what it may relate: opportunities? goods? happiness? And Edel (Ethical Judgment, 1955, 322-3) suggests that there should be a <u>relative</u> justice, based on a general consent as to the minimum, beneath which

at all should merit be taken into account, or which of these "merits". In this regard, Plato's demand that people's contribution to the state should be the crite rion for conferring privileges on them - seems at least arguable. Plato's proposition is also more workable for he is referring to definable class privileges (and obligations).

Furthermore, it is not quite clear, what does Aristotle mean by "universal

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no one might be allowed to sink. In this he may be close to the first part of Hobhouse's definition of distributive justice, i.e. - "equal satisfaction of equal needs, subject to the adequate maintenance of useful functions". This sounds more like a communist definition, with many queries, such as: what does "needs" mean, who is and how is he to decide when they are equal, how can they equally be satisfied, etc. Karl Jaspers, when dealing with justice to the many (as different from justice to the few) says simply, that that justice "is concerned with the rights of all men qua men" and that "it is the claim of this justice on a moral-political foundation continuously to improve the order of existence in terms of equalization of opportunity". (The Philosophy of Karl Jaspers, 1957, 758-9). Thus Jasper's distributive justice is narrowly defined, while the question whether personal inheritance (capacities, potence, etc.) or the family and environment into which a person is being born should be regarded as ingredients of "opportunity" remains unanswered.

justice"[29]. If it is not the sum of the different justices put together, it certainly must be something which is either entirely alien to all of them or has some of each. In the latter case it is also obvious that each of the

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[29] The following quotation doesn't make this term any clearer: "The rules of law and justice are in each case related to the actions performed in conformity with them, as is universal to particular (i.e. - the distributive, which relates to equality between persons according to their merit, and the corrective, which relates to the equalizing of rights of people in their private transactions or as a result of criminal offences. See below), for the actions are many, the law governing them only one, being universal" (ibid 158). It seems that what he actually means is "a generally accepted principle" (159) without referring to the justice in it. And although "just means lawful" (see sec. 24.4 supra) legal justice is not identical with absolute justice (even if it may, perhaps, be identical with universal justice as a "generally accepted principle"). A judge who gives a wrong decision in ignorance is not guilty of injustice nor is his decision wrong in law (p. 164). Nevertheless, correct decisions are not a guarantee that justice is done, because the law states a general rule which may be unjust in specific cases. There, equity should be used, i.e. - modification of the kind the law gives would have made had he known of the special circumstances of the case in question. Equity, says Aristotle, is sometimes better than justice, though not than absolute justice. It is better than the error which is generated by the unqualified language in which absolute justice must be stated. It is superior to legal justice (p. 167).

different justices has in it something which is of a universal character but it is never identical with universal justice. In the former - it is either no justice at all or it is absolute equality. A term with a vague Aristotalian meaning (See supra notes 1, 6). Now, Aristotle claims, as we have seen, that equality - proportionate as it may be - is the main, if not only, element to be sought in justice. What is, then, the kind of equality that universal justice is supposed to ensure? And if universal justice is identical with the absolute justice mentioned above, then the different justices are proportionate in two meanings: the first - in that they are only parts of the general (universal? absolute? proportionate?) virtue. The second - in that they aim at securing only proportionate equality even within the limited sphere in which each of them operates.

Lastly, as we have seen - Aristotle divides the "virtue" (universal justice) a few times. He differentiates between universal and particular justices, and in the sphere of the particular he again differentiates between corrective and distributive. He has explained what he means by distributive justice and I shall hereafter bring his explanation as to what he means by the corrective. But what is the reason for the differentiation between voluntary and involuntary transactions, between secret and violent ones? Are we to find a kind of justice specific to those sub-divisions? If so - what is it, and in what is it different from the whole and from each other?

But Aristotle doesn't stop there, as will be shown later, he goes on to deal with other parts of justice, i.e. domestic, political, etc. Some of those parts are further divided, and to each sub-division specific criteria are related. Here, I feel, lies the principal mistake of the theory. For what is

there to stop us (or Aristotle) from further division until we may deal with petty groups, as petty as we wish. The king or other absolute ruler may form a group, as may form old people, or wise, or rich. As a matter of fact this is exactly what Aristotle does when he speaks of merit, though it is the merit related to people who (by a mere chance), function within the framework of a specific setup of matters; of social substance (politics, commercial, certain transactions, etc), i.e. - of a "partial justice". This, I think, is no valid answer because, firstly - the fact remains unchanged that under the cover of "substance" Aristotle creates groups of people. Secondly - there is no problem in creating more "substances", where people are related to each other not by having some similar quality, but by belonging to the same specific setup of matters. By one of the elements which form a social phenomenon.

In what Aristotle says there is, therefore, no general "theory" or theorem which may be valid with regard to justice, but sets of rules of behaviour, i.e. - ethics "for all seasons" as are the people to whom those rules relate. They are required to follow certain rules, or social norms when they are at home and others - when they are dealing with state affairs or commercial business, etc. They not only may, but actually must, act unjustly according to the principles of one "justice", while acting justly according to the principles of another.[30]

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[30] One may assert, as an answer to my criticism, that Aristotle's justice is of a general character, as it relates to all people indiscriminately, though - in various changing conditions, and that, therefore, my criticism

24.7 Corrective (commutative, emendatory) justice is the one done by the judge who redresses the inequality (i.e. - injustice) between people caused by one or some of them, and is arithmetical as opposed to the complicated distributive (geometrical) justice.

The qualities of the person who caused injury are irrelevant and the parties involved are looked upon as equals. The judge restores the inequality caused by one person to the other so that the agressor may not gain by the damage that he had inflicted on the other. And he does it by imposing penalty or by ordering him to return or compensate that which he had unjustly taken in excess of what he was entitled. The purpose is that no one should have too much or too little with regard to the case in dispute.(31)

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may be justified only with regard to his distributive justice.

(31) Ibid. Chap. 4. In chap. 5 he attacks the Pythagoreans' theory of reciprocity, and explains the introduction of money as a measure of "the more or less than the mean in value", which enables negotiating parties to equalize their respective commodities thus achieving equality between them through the unifying factor: demand (pp. 152-3). Money, he says, is also a commodity, subject to the vagaries of the market. His objection to "vulgar" reciprocity preceded the abolishment of the Roman "talio" by a few hundred years (and the modern theory of money by over two thousand years). As he puts it: "without exchange there could be no association, without equality there could be no exchange, without commensurability there could be no equality" (p. 154).

24.8 Equality, "actual or proportionate" is also one of the two elements of political justice[32], the other being freedom. The reason for the indispensability of these two elements is, according to Aristotle, that "justice can exist only among those whose relations to one another are governed by law, and law exists only among those who may be guilty of injustice".[33] Therefore, we must have the law for our ruler[34], while

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[32] Ibid. Chap. VI, p. 156. Aristotle uses with regard to political justice another term: "social justice", which is supposed to be a synonym of the first. This shouldn't mislead us, since he doesn't mean, of course, that kind of social justice to which we refer when using this term. On the other hand, as much as we may not agree with his consequences, his distributive, and to a certain extent also his corrective justice, refer to some aspects of social justice as understood by us.

[33] As I understand it, Aristotle means that "people who share a common way of life... in which they (may) have all that they need for an independent existence" form a political organization (society) in which injustice is inevitable, since it is an organization of "free and equal" people. Therefore law is called in as the only means appropriate for the enforcement of justice. In other words, injustice is inherent in human society (only) and law is a product unique to it.

[34] This, undoubtedly, is the "rule of law" of the philosophical embryo (ibid. 156).

a human ruler must see to it that political justice is done, i.e. - "the good of others".

Aristotle differentiates between two forms of political justice: the natural, namely - that which has the same validity everywhere "and is unaffected by any view we may take about the justice of it". The conventional - which is reached by agreement and there is no original reason "why it should take one form or another".(35)

The result, of course, is that in neither of these two forms of justice - justice is an obligatory element. For regarding the first form - it is, as quoted, unaffected by any view we may take about the justice of it. Hence, if it is not a probability it is nevertheless at least a possibility that that natural political (social) justice will be unjust. Regarding the second, the question of the justice in this conventional justice is irrelevant in Aristotle's view, since it is the outcome of an agreement. The assumption must therefore be also here that conventional justice could be unjust.

If this is so, then Aristotle seems to have contradicted what he said earlier. Didn't he say that "the function of a ruler is to be the guardian of justice and, if of justice, of equality"?(36) He also said that we must have the law

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(35) Apart from the reason that it is the product of different forms of government (ibid. 158).

(36) Ibid. 156.

for our ruler, and that (political) justice is the good of others. But, if political justice could be unjust, as has been shown above - how may any of these goals be achieved?

24.9 Though he doesn't name it so, Aristotle deals also with a special aspect of individual justice[37], and says that no human action may be considered unjust unless it is committed voluntarily.[38] Only then, says he, "the moral issue presents itself."[39]

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[37] Corrective justice undoubtedly deals with another. Also distributive justice is connected with some aspects of individual justice (Aristotalian style).

[38] Aristotle raises later (chap. 9) a question whether the suffering of wrong is always involuntary, thus laying the ideological foundation for the Roman maxim "volenti non fit injuria" and, maybe, also for the modern theory of "victimology", though - with regard to the latter, his point of departure is that "nobody wishes to be wronged". The stress here is put on the wish of the victim. Earlier (p. 163) he is aware of the man who "through moral weakness may submit to injustice at the hands of another".

[39] Ibid. 159. It is amazing how close he is to the modern concept of "mens rea". Voluntary action, according to Aristotle, is one which (a) was the person's choice to do or refrain from doing; (b) was done by him knowingly (with regard to the person affected, the instrument used and

His "domestic justice", another form of justice, is directly linked with, and is a natural outcome of the Aristotalian individual justice, though Aristotle links it with the political. Domestic justice is relative, he says, because the slave is part of his master and a child - of his father, and nobody deliberately injures himself. Hence he cannot politically[40] be either just or unjust. The true form of domestic justice is the one which manifests itself in the relations between husband and wife.[41]

24.10 The diagram shown below may, I hope, serve as a summary of Aristotle's view of justice.

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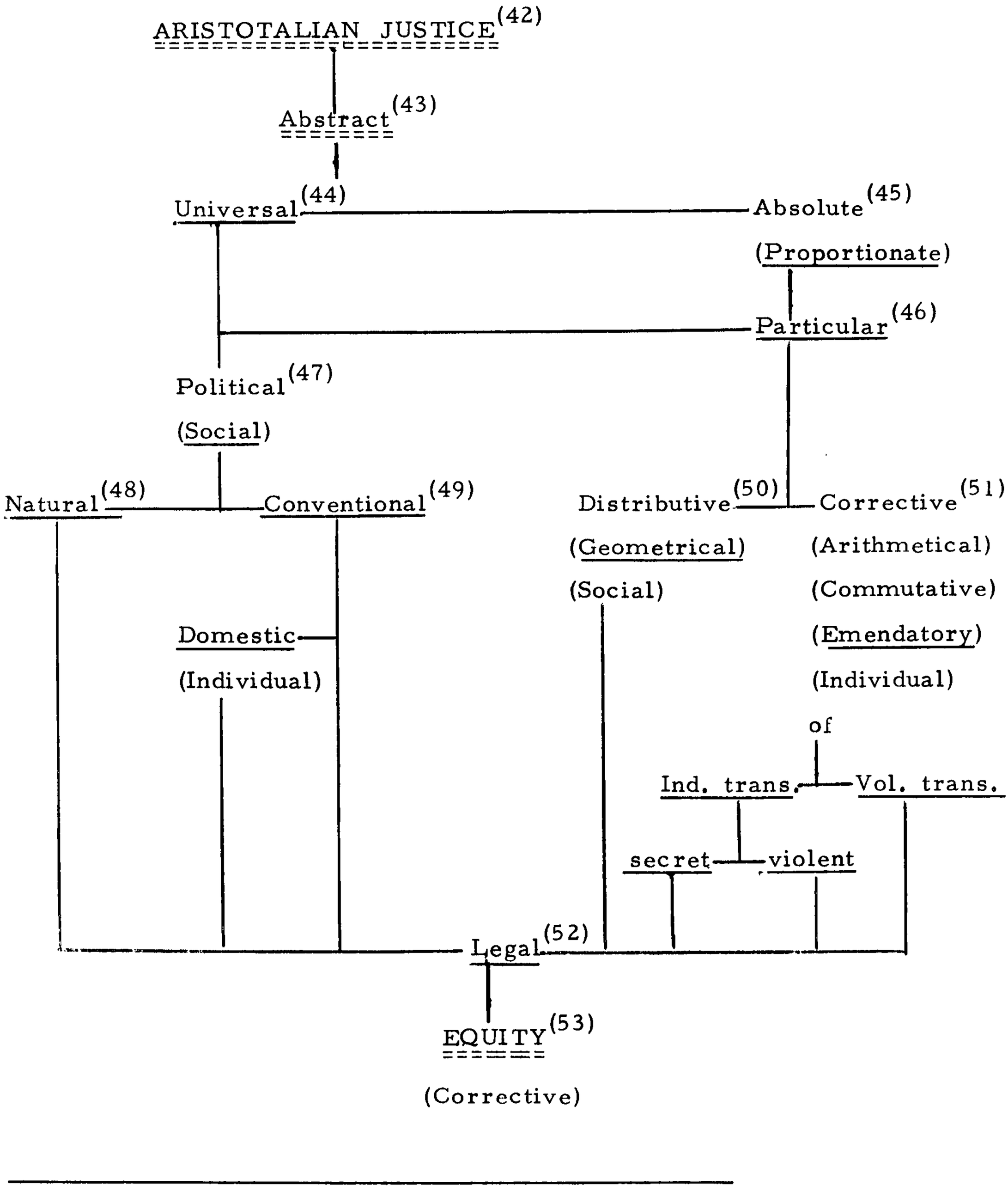
the object he seeks to attain); (c) was not an accident. He also inserts the test of forseeability, i.e. - reasonable expectation (on the part of the wrongdoer) and a few others which are still valid and adds (p. 163) that such voluntary wrong action may not constitute an offence unless it is done "against the will of the (victim)".

(40) "Politically" because, I presume, political justice is the one which should secure equality ("actual or proportionate") in society. Aristotle finds it necessary here to furnish another argument for the inequality of slaves by putting them in the same line together with minors who are the property of their father as much as slaves are the property of their master. No explanation is offered, though, as to why it should be so.

(41) Ibid. 157.



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(42) I. e. - rightness, goodness, equality, fairness, lawfulness, righteousness, happiness, general virtue of value (see sec. 24.4) etc. The "synonyms" above the lines are Aristotle's; under the line - mine.

24.11 The diagram represents quite a mass which is due, I think, to two reasons. The first, that Aristotle - unlike himself as a real scientist - had laid down the end of his research before analyzing the facts. In other words he took

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(43) Undefined, but, to my mind, expressed in equity. See n. 53 below.

(44) Perhaps: "a generally accepted principal" (see 24.2, 6).

(45) Aristotle quotes with approval people who think that it is proportionate (sec. 24.2)

(46) A partial justice; part of the general virtue (see 24.5)

(47) I.e. - equality and freedom (sec. 24.8)

(48) I.e. - that which has the same validity everywhere and is unaffected by any view we may take about the justice in it (Ibid.).

(49) The outcome of an agreement (ibid).

(50) According to merit. Represents Aristotle's social approach (sec. 24.5)

(51) Relating to the nature of the transaction regardless of the inequality of the parties, and referring practically to individual justice. The only case where Aristotle's justice treats people as equals (sec. 24.7)

(52) Which in particular cases is often imperfect and unjust. It is not identical with absolute justice though it is not unjust even when the judge passes an erroneous judgment. Judges' justice (sec. 24.6 n. 29)

(53) This is the truly corrective justice. It is superior to legal justice and even to absolute justice (when the latter is expressed in unqualified language). Ibid.

for granted the existence of some, mostly psychological and sociological, regarding man and society, and had started at the conclusion which he had reached beforehand, namely - that, taking those facts into account, democracy is the best form of political organization.

The second that, as a natural outcome, he didn't explicitly differentiate between justice and ethics or morals. Therefore logical mistakes ensued, e.g. - that law is identical with justice and that the lawful man is also a just man. The contradiction which he must have been aware of couldn't be settled, and hence the multitude of adjectives which are prima facie identical but are, in fact, very often entirely incompatible.

Many legal provisions in his and our times have nothing to do with justice, but are aimed at the enforcement of morals, namely - those rules of behaviour which the legislator thinks must be observed so that public peace and order is kept.

24.12 To understand Aristotle's mistake and for future reference, may I be allowed to dwell here upon the differences between law, morals and justice, so that the way for the development of this thesis may be cleared.

"The life of the law", says Holmes in his "Common Law", "has not been logic; it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed."(54)

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(54) 1923 ed. p. 1.

Holmes doesn't mention justice in this connection. Pound does. In his "Jurisprudence" he says that "justice according to law" means "administration according to authoritative precepts or norms (patterns) or guides, developed and applied by an authoritative technique, which individuals may ascertain in advance of controversy and by which all are reasonably assured of receiving like treatment". (55)

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(55) Vol. II, pp. 374-5; this aspect of justice is similar to one of the Bible's. In his 'Introduction to the Philosophy of Law" (1954, p. 47) he says that law is a social institution to satisfy social wants, "the claims and demands and expectations involved in the existence of civilized society... by an ordering of human conduct through politically organized society... (by) social control." Jhering, who in some other aspects thought differently, agrees too that "law is the sum of the conditions of social life in the widest sense of the term, as secured by the power of the State through the means of external compulsion" (Law as a Means to an End, 1924, 380). Kelsen, one of the foremost positivists (as was Pound) thinks that "law is characterized not as an end but as a specific means, as an apparatus of compulsion to which as such, there adheres no political or ethical value." It is, he adds, a vague idea, "an apparatus whose value derives... from some end which transcends the law (The Pure Theory of Law, 50 L.Q.R. 1934, p. 474, at p. 488). And in another article, bearing the same name and published a year later (51 L.Q.R. 1935, p. 513, 517-18) he adds that "any content whatsoever can be legal; there is no human behaviour which

The quotation from Pound's "Jurisprudence" is not incompatible with the quotation from Holmes' "Common Law". The law whose development and origin are described by the latter is to be applied indiscriminately, according to the first. Holmes wouldn't have argued against it. But, while he was interested in the interrelatioh of law and justice and in having just laws, Pound(and Kelson too, only more so; see n. 55 supra), as positivist, was interested in their application only.

Pound might have accepted as a fact also Holmes' contention that "prevalent moral theories" are among the factors which determine "the rules by which men should be governed", but would have attached no importance to it, because of the same reason. The history of law wasn't of his concern in this context. Pound and Holmes would probably have agreed with the following argument, too, namely, that Holmes' description of the development of law may be adequate for the description of the history of justice as well. Therefore, that justice and law can hardly be identical, though changing

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could not function as the content of a legal norm". Ross in "On Law and Justice" (1959, p. 58) thinks, however, that law "is an instrument of power, and the relations between those who decide what is to be the law and those who are subject to the law is one of power". These last words would undoubtedly have shaken Locke (as they would have shaken him Pound and Kelsen) who thought that the end of law is not to abolish or restrain, but to preserve and enlarge freedom (Of Civil Government, 1924 ed. Book II, Chap. 4, sec. 57).

concepts of justice may have an important influence, as have prevalent moral theories, on the legal norms of a given society.

Nevertheless, and for the reasons specified by Holmes, the law does aim at the enforcement of moral norms, i.e. - the partial manifestation of prevalent moral theories. I said "partial" because of the other factors, mentioned by Holmes, which intervene in the legislator's activity, and which may, and usually dictate a compulsory compromise.

By this I do not mean to say that moral norms cannot manifest society's theories and concepts of justice. Only that - that identity between the two is not obligatory. I dare say that a moral norm may be enforced by law while being unjust according to one or another of the accepted social concepts of justice. No proof is needed that it can happen in a totalitarian regime. But it can be done also by a democratic legislator.[56] At least by keeping a

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[56] For example: "equal opportunity" is a slogan understood to manifest one of the elements of liberal justice in its capitalistic form, namely - (economic) freedom. It is accepted as both legal and social norm by the Western world, the legal being, inter alia: "freedom of contract". In Lord Jessel's words in Printing and Numerical Registering Co. v. Sampson (1875) L.R. 19 Eq. 462 (at 465): "... men of full age and competent understanding (should) have the utmost liberty of contracting, and... their contracts when entered into freely and voluntarily (should) be held sacred and (should) be enforced by Courts of justice" (see also

legal provision unchanged in the face of a change in the concept of

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Meggary, Miscellany at Law, 1956, pp. 270-77). This approach was accepted also in Israel (e.g. C.A. 61/48.I, Pssakim (new series) 188; C.A. 309/54 27 Pssakim, 11 and others). The American anti-trust laws (Sherman Act, 1890; Clayton Act, 1914; Robinson Patman Act, 1936, and the amendment of 1950) were enacted, inter alia, to secure this freedom. (See also Isaacs, The Standardizing of Contracts, 27, Yale L.R. 1917-18, pp. 34-8). But it is now generally accepted that "the legal order may and indeed should set socially approved limits to the support which it gives to the terms which one party is in a position to impose on the other" (Stone, Social Dimensions of Law and Justice, 1966, p. 253), and that (254) "the day is done when we can excuse an unforseen injustice by saying to the sufferer: it is your own folly". See also Friedman's Legal Theory, 1953, p. 479 . (As to the situation in the U.S.S.R. see Romashkin, Fundamentals of Soviet Law, pp. 160-245; David and Brierly, Major Legal Systems in the World Today, 1968, paras. 129, 166, 210, 218-226; Cornell, The Soviet Political System, 1970; Gsovski and Grzybowsky, Government Law and Courts in the Soviet Union and Eastern Europe, 1959). Israel attempted a partial solution by its Standard Contracts Law, 5724-1964. Hence, we see here a moral norm (of, so called, freedom and equality) enforced by law in the name of some socio-political belief but contradicting justice as understood by the same society. This discussion is carried further in my article: Freedom of Contract as Social Anachronism in 27, Hapraklit (1971) 228-31, 372-85.

justice.[57]

Quite a number of legal provisions have nothing to do with either justice or ethics but, perhaps, with the keeping of public order. One may say that this is not a valid differentiation, for maintaining public order is done in the light of some concepts that the society must have as to the nature of this order, and that these concepts are linked to and are derived from its concept of justice. I doubt if this can be always true. The United States, Great Britain and France have, generally speaking, the same view with regard to freedom of speech and assembly. But the laws which they have produced to secure it are very different.

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(57) The law forbidding homosexual relations of consenting adults in private had never anything to do with justice from the point of view of the legislator but only with the enforcement of morals required by society. In time it became obvious that this prohibition is incompatible with the modern concept of individual freedom. The law has nevertheless not been changed. English and Israeli courts are still of the opinion that they are entitled, in fact - obliged, to enforce morals; Shaw v. Director of Public Prosecutions (1961) 2 A.E.R. 446. See the most interesting debate between Devlin (The Enforcement of Morals, 1970) who is in principle for it and Hart (Law, Liberty and Morality, 1971) who is against. As to the distinction between justice and morality see Hart, The Concept of Law, 1972. Chap. VIII.

A good answer to this example may, prima facie, be that the differences between one set of rules and the other are only in the interpretation of that freedom. I find it hard, however, to accept this answer, for if it is really good - it should remain so also when this interpretation leads to a total abolishment of the freedom of speech or to its total dependence on the arbitrary will of some administrative authority or other...

But other examples may, I think, serve the purpose: I find it hard to link with justice legal prohibitions relating to incest (including marriages of relatives), certain sexual behaviour (including bestiality), the use of drugs or even euthanasia, though I admit that with the help of a complicated intellectual acrobatics even this may be done. As may also be done (though I wouldn't know how exactly) with regard to permits, taxes and fees (especially the fixing of their rates). Even Devlin would not have accepted the idea of such obligatory linkage.[58]

24.13 To sum up my criticism of Aristotle's Ethics in this context, may I be allowed to repeat that, to my mind, his mistake was in that he refrained from differentiating between justice and morality;[59] between what is just and

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[58] For example: The Enforcement of Morals, 1970 ed. 10.

[59] Kant says that "a free will and will subject to moral laws are one and the same" (Fundamental Principles of the Metaphysics of Morals, 1969 ed. p. 64). His famous "categorical imperative" (i.e. - act only on such a maxim as you can will that it should become a universal law, Ibid. 78 in

what is right, fair or even good. Between values and their common, every day, interpretation in reality. Between ethics and rules of behaviour, dictated by social needs. Between that which is according to Kant internal and relevant to man's own soul (moral) and that which is external order (justice). He was not aware, as was Fichte, that justice is the rationalization of a moral ideal.[60] And he had, so it seems, a certain image of society, a set of sociological findings, which though brilliantly arrived at and manifesting his tremendous power of observation - were never varified by him, and which, together with his political credo, made him reverse the proper scientific procedure by putting the conclusions he had intended to reach ahead of the facts which were to support them.

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the 1954 Hebrew trans.) is directly connected with his theory of "good will" as the only unlimited good. We should never infer the law, he says; never infer that which we are obliged to do from that which has been done. This would be a mistaken reliance on experience (Critique of Pure Reason, p. 193 in the 1966 Hebrew trans.). Cf. Spencer (Justice, 1891, 46): "every man is free to do that which he wills, provided he infringes not the equal freedom of any other man", and compare also with Locke, Mill and others (infra).

(60) What Fichte means is that the moral ideal is irrational; it manifests itself in the willful activity of the individual. An activity which may be, and usually is, different from that of another individual. Justice limits the intuitive moral activity of the individual by mixing it with logical judgment.

25. What is Hebrew justice under Jewish religious law? We have already seen how comprehensive, one may say obscure, are the prophets' concepts of justice, to which the Proclamation of Independence of the State of Israel referred us. Their main point is social justice on the one hand and the "execution of justice" on the other, with the term "law" very often used as a synonym for "justice". Usually, the duty of the individual is expressed in a directive to refrain from committing an offence, and to follow the path of God.

Both the Pentateuch and the Oral Law are no great help either, and fail to dispel the fog. They consist of a specification of precepts imposed on society and on the individual by God and His exegets. The violation of these rules incurs punishment, but their compilation cannot define justice. At best, it can define the "righteous" and the act of "righteousness" which sometimes appears as parallel to "judgment".[1]

What is the meaning "and judge righteously, between every man and his brother?"[2] It means no doubt, a just judgment, according to law, without bias and without discrimination, Like "then hear thou in heaven and do, and judge thy servants, condemning the wicked... and justifying the righteous to give him according to his righteousness"[3]. Actually, even the Book of Job does not import more than a sense of justice, or rather a sense of

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[1] But see n. 10, sec. 12 supra.

[2] Deut. 1, 16.

[3] 1 Kings 8, 32.

injustice, with no concrete definition. It seems that the Biblical concept of justice is limited to "that which is altogether just thou follow"[4], justice being identical with God (I have already mentioned the verse "hearken to me, ye that follow after righteousness, ye that seek the Lord".[5]

The fact that the concept of justice is identical with God and derives from divine will appears to be the reason for its non-elucidation, either in the Scriptures or the Oral Law. Whatever takes place is by the will of God and therefore must express justice. This applies to all the orders, positive or prohibitive, obligatory or self imposed, which derive from God, and it is superfluous and pointless to define this will and these orders under the heading "justice" or under any other heading. An attempt at definition may even be heresy, as if one could conceive the idea that God could perform an action or issue orders not conforming with justice.

26. In Islam too, all laws derive from God. Law is nothing without the will of God and the protection of law is a social duty and a religious precept alike.[1] A man who violates the laws of Islam - apart from harming legal

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[4] Deut. 17, 20.

[5] Isaiah 51, 1.

[1] His rule is right and just, because He alone comprehends reality and none else is in a position to give unerring guidance (Sharif, A History of Muslim Philosophy, 1963-6, Vol. I, 192).

order - sins against God by Whose will everything is given.[2] Accordingly, all solutions - social and legal - should be religious. At the same time, the Koran considers itself a law of freedom on the one hand and of mercy on the other and God guarantees the maintenance of this law to human beings. From a certain point of view, Islamic law is like a repetition of "natural law" which had allegedly been distorted by Judaism and Christianity, and it aims at adjusting itself to the frailties of humanity and its practical needs.[3]

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[2] "That is the rule of law, though the rule of piety requires just the contrary". Apart from public opinion, breaching of the latter rules are punished in the world beyond (ibid. 1223).

[3] De Santillana, Law and Society, in The Legacy of Islam, 1931, 284-310. The structure of law is determined by that of society. Hence, law should express the object of Government, which is "to lead men to prosperity in this world and to salvation in the next". The crime of Cain brought about the end of the state of peaceful anarchy, according to the precepts of natural law. The passions of men brought about social disorder, the loss of true faith and the introduction of particular laws. The object of law is the prevention of evil, hence two main principles: equality and good faith. As to equality: "all men are equal before their Maker"... but only believers (Muslims) are equal before the civil law. The "good faith" allows a wide scope to the human will, which is sufficient to create a legal bond. Thus, social utility and the concept of free will made Muslim law, unlike the Canon law, flexible and changeable. "The legal rule... is

Anyone who wishes to assert that freedom is one of the traits and foundations of justice, could find in Islamic law one of the traits of justice, but this will obviously be putting the cart before the horse. It will be a conclusion with regard to the existence of something based on a pre-conception of its characteristic traits, when we have not yet determined its nature and have no logical reason to attribute these traits to it.

27. The difficulty to discover the nature of justice exists also in Christian thought which also ascribes the source of law and social order to God. The Christian "innovation" of righteousness (or mercy) and love cannot help us in this respect. These two are concerned with morality but not with justice, which remains a religious matter and, on the whole, for the End of Days. This justice, divine by nature, is embodied and revealed in the Church, so that whatever it says is justice. The laws of the state have nothing to do with justice, if they are laws coming from a secular legislator. This was the opinion of St. Augustin and St. Thomas Aquinas expanded it. (1)

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not the same as the rules of grammar and logic. It expresses what generally happens and changes with the circumstances which have produced it" (304-5). However, resignation to one's lot is "an imperishable treasure" (Jurji, Islam in The Great Religions of the Modern World, 1947, 191). See also Andrae, Mohammed the Man and his Faith, 1960, 135-6.

(1) Infra.

St. Thomas Aquinas supported a distinction between human justice and divine justice. The state may serve justice, but the Church - which represents divine justice - is above it and its justice is preferable to that of the state.

He determined several "truths"[2]: "that the natural law is nothing but the rational creature's participation of the eternal law. Nothing but an imprint on us of the divine light". [3] While the eternal law "is the sovereign type to which we must always conform". [4] That it is "the Supreme Reason... unchangeable". [5] That law "is nothing else but a dictate of practical reason emanating from the ruler who governs a perfect community."[6] That all human laws are derived from the natural law and that if they deviate from it they are no longer laws but a distortion of the natural law. [7] Moreover, that "that which is not just seems to be no law at all, and it doesn't bind a man in conscience". [8] Finally - that the obligation to obey God comes

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[2] The Summa Theologica Book II, part 1, in The Political Ideas of St. Thomas Aquinas, 1969.

[3] Ibid. Question 91, 14.

[4] Ibid. Question 93, 29-30.

[5] Ibid. Question 91, 11.

[6] Ibid. Question 93.

[7] Ibid. Question 93, 57-8.

[8] Ibid. 70-72.

before the obligation to obey man, and there is no obligation to obey the superior (ruler) always.[9]

Hence, according to St. Thomas Aquinas, there are three (actually only two) "layers" of laws: the highest is the human law, which is the manifestation of the middle, the natural, i.e. - the moral imperative within man's soul ("the rational creature's participation of the eternal law"), while the foundation is the eternal (divine) law.[10] Since it is the foundation, concludes St. Thomas Aquinas, whenever the divine law and the human law are not concurrent - the individual must obey the divine law.

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[9] Ibid. 168-69. Milton Konviz in Conscience, Natural Law and Civil Disobedience in the Jewish Tradition (in Of Law and Man, 1971, 159) says that the Biblical civil disobedience preceeded that of the Catholic church, his proof being, among many others, the refusal of the Egyptian midwives to obey Pharaoh's royal command to kill all male infants born to Hebrew women, because they "feared God..."

[10] Cicero said some fourteen hundred years earlier that "true law is right reason in argument with nature, it is of universal application, unchanging and everlasting... it is a sin to try to alter this law, nor is it allowable to attempt to repeal any part of it, and it is impossible to abolish it entirely... there will not be different laws at Rome and at Athens, or different laws now and in the future, but one eternal and unchangeable law will be valid for all nations and all times and there will be one

Like Aristotle, he too distinguishes between arithmetic and geometric, cumutative and distributive, justice. However, he defines them differently. Cumutative justice is individual justice expressed in contracts and barter. Distributive justice is embodied in the state and is responsible for its integrity, reformation and internal concord.[11] In brief, for its harmony as a state. Through this definition, he takes one step forward in the promotion of secular justice. It was St. Thomas Aquinas who indirectly gave birth to the idea propounded by Grotius in the 17th century that justice would exist even if God did not.[12]

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master and ruler, that is God, over us all, for He is the author of this law, its promulgator and its enforcing judge" (De Re Publica, 1928 ed. book III, XXII).

(11) "Justice is a habit whereby a man renders to each one his due by a constant and perpetual will (ibid. trans. Fathers of the English Dominican Province 1913-25, Part II, 2nd Part, q. 58, art. I). But, distributive justice "allots various things to various persons in proportion to their personal dignity" (ibid. q. 63, art. I).

(12) "Even the will of an omnipotent being, cannot change the principles of morality or abrogate those fundamental rights that are guaranteed by natural law. These laws would maintain their objective validity even if we should assume - per impossible - that there is no God or that he does not care for Human affairs" (quoted from Cassirer, The Myth of the State, 1955, 216). See Augustine. E. g. "Justice being taken away then

28. Indirectly, I venture to suggest, he also foretold the appearance of Dante[1] and that - two hundred years later - of Machiavelli. Machiavelli and not Machiavellism, for what is related to Machiavelli is a misconception intentionally planted by ecclesiastical preachers.[2]

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what are kingdoms but great robberies" (Basic Writings of St. Augustine, Oates ed. 1948, 51).

[1] The church has its foundations (Jesus) and the empire - its <u>own</u> (human law), he said. Laws must be given for the benefit of people, but since all forms of government (democracy included) enslave man, justice may be achieved only by the king of the world, the emperor, whose will and power to do justice is superior and unlimited by any other will. Justice is dependent on freedom (of will) and is expressed mainly in equality, i. e. in giving each one that which is due to him (Dante, On Monarchy, in The Book of Man and State, Ben-Shamai ed., 1948, vol. 2, 477-82).

[2] Shakespeare was only one in a long line of poets and thinkers who were thus misled. Hence, the lines from King Henry the Sixth (third part, Act III, scene 2):

"Why, I can smile and murder whiles I smile,

And cry Content to that which grieves my heart,

And wet my cheeks with artificial tears,

And frame my face to all occasions.

I'll drown more sailors than the mermaid shall;

I'll slay more gazers than the basilisk;

Law and justice, according to Machiavelli are expressions of the fundamental necessity to prevent the evils which are inherent in human society and in each individual.[3] People's purpose is to foster the "good and honourable... as opposed to the destructive and bad".[4] Hence, his approach is pragmatic. The state is of paramount importance[5], for without it - anarchy might prevail and bring about a total disaster. Such a disaster may be the outcome of tyranny, while the latter is the result of a corrupt government in the hands of an unworthy prince. "Unworthy", when he rules by virtue of inheritance and not of law, i.e. - not because the people have elected him as ruler.

I'll play the orator as well as Nestor,
Deceive more slily than Ulysses could;
And, like a Sinon, take another Troy.
I can add colours to the chamelon,
Change shapes with Proteus for advantages,
And set the murderous Machiavel to school."

(3) "The lawgiver must presume that all men are evil and are always ready to do evil" (Machiavelli, Discorsi Sopra la Prima Deca di Tito Livio, in Political Writings, 1948 ed., Book I, Chap. 2, p. 54).

(4) Ibid. pp. 49-50. Therefore, he continues, people started electing their leaders not from among the strongest but from among the best and wisest.

(5) The two evils which the state should overcome by means of adequate institutes and regulations, are the arrogant despots and the people's

The worship of God and honouring religious rituals are conditions precedent to the happy existence of a united state, which is the result of a compulsory historical development, not of moral directives. That this worship and rituals are not kept in the Christian republics is the reason for their political deterioration.[6] And the source of this deterioration is the Pope's court, which constituted "a corruptive example of incredibility".[7] No wonder that the church condemned Machiavelli and libeled him as infidel and immoral. But he only fought against the distorted church (and hence - the Principalities that had been established in its name) and describes the princes as they were; not as they should be.[8].

Freedom is not an aim but a necessary tool as much as religion is, and cities (states) which were not born in freedom don't survive. On the other hand, laws should be enacted to limit that same freedom.[9] Machiavelli

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anarchic masses (ibid. 52).

[6] And therefore, "there is no doubt that Christianity is on the verge of total destruction and that doomsday is nearing" he forecasted (ibid. 63) about fifteen years before the outbreak of the German Reformation movement.

[7] Ibid. 64.

[8] Machiavelli, The Prince, Chap. 6, in Political Writings, 1948, p. 118.

[9] Ibid. Discoursi, 44-6.

was not a fanatic democrat, for there is nothing in democracy which makes it automatically good. Democracy may turn into an anarchy, aristocracy may turn into oligarchy and monarchy may turn into tyranny. So its not the form of the regime that counts but its contents, and the contents may be secured by decent God loving and honourable rulers who put the good of the state before anything else, protecting its genuine interests by enforcing justly but firmly the appropriate laws.[10]

These laws are, however, open for discussion as is any other social or political issue[11] and the freedom of speech should therefore not be abridged. Moreover, it's a given historical fact that the people is wiser than its prince, and its views are more correct.[12] Freedom means the rule of law (which should be forcibly enforced), for there can be none without maintaining good order, peace and security. Security multiplies

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[10] Ibid. 48, 69 passim.

[11] Ibid. 69.

[12] This may be the reason why some of the critics of anti-Machiavellism alleged that he had supported democracy. But as I have shown he was indifferent to the form of regime. On the other hand, the quoted view could, of course, serve as justification for popular resistance. For further elaboration on Machiavellism see Cassirer, The Myth of the State, 1955, 144-173. Spinoza seems to have been the first of the great thinkers of modern times to defend Machiavelli (Works, Elmes trans. 1900, I, 315).

wealth and population and these, in turn, ensure freedom.

29. An immortal wiseman is reported to have said that there is no certain way to win a chess game, although there is a certain way not to lose one. When asked what this way might be he answered: not to play chess... because a chess game consists of movements, and where there is movement good and bad may equally result, thus giving an opportunity for grief or repentence.(1)

In Western thought this movement may have been the birth of the idea of the "social contract" between the "absolute" ruler and his people. The most important contribution to the removal of "justice" from divine jurisdiction.(2) The forerunner of individualistic as well as political and social doctrines of justice in later centuries.

The idea of "social contract", however, could not have emerged without the preparatory thinking of Thomas Aquinas and Augustine coupled with the development of science in the "renaissance"; it is a rational idea supported by, and founded, on a "mathematical" premise, an axiom, namely:

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(1) The Book of Changes and Cosmology of the Huai-Nan-Tzu, in Yu-Lan's History of Chinese Philosophy, Vol. 1, 390.

(2) Though theologists such as Luther and, to a certain extent, Calvin (The Book of Man and State, 589-601) or Leibniz (see infra) earlier supported the idea that such a contract had existed (with a divine seal; thus making its breach by a king a sin against God and against divine

a social contract from which power and authority of the state, rather - of government - are derived (sometimes - together with the rights of the governed to resist any infringement of the contract on the part of the ruler, see infra). While being one of the first and most important thinkers to have suggested the "secular" social contract as foundation for political theory, Spinoza refused to grant any relief to the aggrieved "party" against the ruler in default, contrary to his own arguments, especially the famous one regarding the unbinding undertaking that a person might take towards a robber under threats. As Spinoza himself puts it, such undertaking is valid only insofar as it is of use. As to why the governed may not be exempted from their obligations upon the contract being breached by the ruler, the answer may be found in his definition of (freely translated by me) democracy: "a general association of people, which is entitled to do whatever it can with no law to limit its superior power, and to whose orders all must submit themselves because of the agreement entered into by them, either expressly or impliedly, when they surrendered <u>all</u> their rights unconditionally". It is only a natural outcome of this theory that despite his strong support of the freedom of speech, he accepts as justified limitations on this same freedom, when it may endanger "the peace of the state and the rights of the superior authorities."(3)

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justice. This was the Jewish approach as in the nomination of King Saul by the prophet Samuel in the name of God. 1 Samuel Chap. 8).

(3) Spinoza, Tractatus Theologico-Politicus, in The Book of Man and State, 1948, 646-58.

Also Grotius, who preceded Spinoza, is of the opinion that civil society was created to maintain public peace and complete sovereignty is entrusted in its hands for that purpose. For the same purpose it is allowed to abolish the people's right of resistance.[4] Grotius was one of the first, as far as I know, to differentiate between two natural laws: one relating to God and the other expressing moral truisms which "though their source is to be found in the inner foundations of man... it is derived from Him".[5]

Leibniz, who was born a year after Grotius had died, is in some respects a retreat. Justice, taken in a very general sense is, according to Leibniz, nothing other than "goodness in conformity with wisdom" and therefore

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[4] Grotius, De Jure Belli et Pacis, ibid. 638-46, esp. at 644. It is not at all surprising that non-Catholic Cicero, who related to God "true universal unchanging and everlasting law", i.e. - the "right reason in agreement with nature" (De Re Publica, Keyes trans., 1928, Book III, XXII) was of the opinion that a law which is absolutely unjust is no law (De Finibus Bonorum et Malorum, Rockham trans., 1951, Book I XVI, 43-4; Book II, V, 13) and that the right of self defence may not be abrogated (De Inventione, Hubbel trans., 1913, Book II, III, 61). And in Justinian's Corpus Iuris Civilis (Dig. I.I. 10) we may find: "justice is the constant and perpetual will to render to everyone that to which he is entitled."

[5] De Jure Belli et Pacis, ibid. 640.

"supreme justice" may be found only in God.[6] It is observed in the universe, for it is "simply order or perfection with respect to minds"[7] and that order is "the very law... which dictates that each should have a part in the perfection of the universe and in (the individual's) happiness in proportion to his own virtue and to the extent to which his will is directed towards the common good."[8] Thus God "fulfills the function of Prince or Legislator" and enters with us "into a social community of which he is the chief"; the City of God - reference is clearly made here to Augustine's famous book which bears the same name[9] - "must not lose any person... and... every mind should be immune from those revolutions of the universe;"[10] each mind "must always play its part in the way most suited to contribute to the perfection of that society of all minds which constitutes their moral union in the City of God..."[11]

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[6] Leibniz, Principles of Nature and of Grace, in Philosophical Writings, 1973, 200.

[7] A Resumé of Metaphysics, ibid. 147.

[8] On the Ultimate Origination of Things, ibid. 143.

[9] Saint Augustin, La Cité de Dieu, trad. Perret, 1960; Id. trad. De Labriolle, 1941.

[10] Correspondence with Arnauld, Philosophical Writings, 73-4.

[11] New System and Explanation of Union in the City of God, ibid. 124.

Hence, without expressly saying it, it is quite clear that Leibniz does not and cannot grant any right of resistance to the citizens of the city of God, and the retreat is, therefore, not in the conclusion but in the argumentation, though from other aspects (reliance on science and human mind) his work marked an advancement.

While it may be explained why Grotius and Spinoza insisted that, once he has submitted his rights, a man is no longer entitled to contradict, far less to resist his ruler, and while it is similarly understandable, insofar as a rational theologian thinker like Leibniz is concerned, it is somewhat puzzling that Hobbes too declined to recognize the right of active resistance. It is, to my mind, not a compulsive conclusion of his own political theory, and may, perhaps, be explained by the insurrections of his own time on the one hand (his Leviathan was first published in 1651), and on the influence of British traditionalism, on the other.

His "social contract" is the legal foundation of a state, but nevertheless it may not be dissolved when breached by the ruler. The individual loses, so to say, his own will which he had deposited in the hands of the state and it is the unrestricted social will that henceforth replaces it, incorporated with the ruler. This, of course, is not compatible with Hobbes' own assertion that "the right of nature... is the liberty each man hath, to use his own power, as he will himself, for the preservation of his own nature; that is to say, of his own life" when by "liberty" Hobbes recognizes "the absence of external impediments."(12)

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(12) Hobbes, Leviathan, 1962, 145-6.

It is a false doctrine, he argues, that every private man is judge of good and evil actions[13], or that "he that hath the sovereign power is subject to the civil laws".[14] Those laws which the ruler alone has the right to declare and the transgression of which is a sin.[15]

Justice "is the constant will of giving to every man his own" and what is his own may be derived from the social contract, for "where covenant hath preceded, there hath no right been transferred, and every man has right to every thing; and consequently, no action can be unjust: and the definition of injustice, is no other than the non performance of covenant. And whatsoever is not unjust is just."[16] According to Hobbes people have willingly enslaved themselves by entering the social contract.

Locke disagrees. The Law of Nature, he argues, "stands as an eternal rule to all men, legislators as well as others"[17] and the legislator or supreme authority "cannot assume to itself a power to rule by extemporary arbitrary decrees... it is bound to dispense justice and decide the rights of the subject by promulgated standing law and known authorized judges."[18]

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[13] Ibid. 286.

[14] Ibid. 288.

[15] Ibid. 291.

[16] Ibid. 156.

[17] Locke, of Civil Government, 1924, Book II, Chap. XI, sec. 135.

[18] Ibid. sec. 136.

What is that justice? It is in the laws that are "not to be varied in particular cases, but to have one rule for rich and poor, for the favourite in court and the countryman at plough."[19] He speaks of libery, the foundation of which is the pursuit of true happiness.[20]

So does Mill, who makes another step forward by speaking also of the rights of the minority, thus finally liberating political philosophy from the bonds of the social contract.[21]

In supporting the minority's rights Mill actually adopts Rousseau's approach that it is "against natural order that the majority should lead and the minority be led".[22] He does not, however, go as far as may be deduced from Rousseau's political theory, namely - that upon a breach of covenant on the part of the ruler, the individual may draw his private conclusions and regard himself unbound and free from his own obligations according to the same covenant.[23]

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[19] Ibid. sec. 141

[20] Locke, Philosophical Works, Book II, Chap. XXI, 392.

[21] Mill, On Liberty, 1946, Chap. 4, 133-173; esp. 133, 156-7, 166-8.

[22] Rousseau, Du Contrat Social, 1932, Book II, chap. 4, 124. But, nevertheless, the minority should submit to decisions by majority of votes by virtue of "the law which was laid down in the social contract to that effect" (ibid. Book I, chap. 5, 27-8).

[23] Unlimited obedience may not, and should not, be required of the

On the other hand, the opportunity for such a conclusion to be justly drawn is rather rare, for a law enacted by the sovereign by the authority of the social contract can never be unjust[24], while justice is totally derived from God and He alone is its origin. This justice means liberty and equality. Liberty is "civil". It is subject to the "general will" but also fulfils itself, or rather - comes into being only in the framework of an organized society whose members have freely entered the "social contract". By equality Rousseau means mainly economic equality[26], but the political one should, of course, also be added.[27]

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individual, unless it is founded on "slavery compact" to which Rousseau objects. This false compact proves a contradiction in terms for no real obligation can be expected of he who is entitled to expect total obedience of the other party (ibid., Book I, chap. 4, 20). The same conclusion may be derived from Rousseau's justification for the execution of a criminal; the criminal is deprived of his "membership" in the state on account of the breach of the social contract which he has committed (ibid. Book II, chap. 5, 65). Nevertheless, both of them are supposed to be equal, according to Rousseau (ibid. Book I, chaps. 6, 7, 8 & passim). See also p. 107.

(24) Ibid. Book II, Chap. 6, 71.

(25) Ibid. 68.

(26) Ibid. Chap. 11, 96-100.

(27) For general reference see Vaughan, The Political Writings of Jean-Jacques Rousseau, 1915.

30. With the development of the "secular" doctrines of "natural law" (or "natural justice"), especially - the doctrine of "social contract", the first serious attempt was made to clarify the term "justice" and establish it as a "natural law" based on human rationality, freed from divine superhuman power.

This three hundred years old attempt may be traced back to Leibniz[1], (and Spinoza to a lesser extent), who was, I believe, the first to examine rationally divine given concepts though, still, with the purpose to arrive at some sort of a conciliation.. Grotius made, as was shown, a further step, although he preceded Leibniz in time.

While these two philosophers were developing their social-universal trend of thought - Hobbes, Locke and Rousseau developed their individualistic one. Only now could Hobbes expressly assert, as would be implied by Rousseau later, that a subject may refuse, "without injustice", to do certain things though commanded by the sovereign; that "the obligation a man may sometimes have, upon the command of the sovereign to execute any dangerous or dishonourable office, dependeth not on the words of our submission" (in the social contract); "but on the intention, which is to be

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[1] Leibniz's natural law is divided to three kinds: jus strictum of state and nature, whose purpose is peace among equals; acquitas, which governs society with a view to keep it happy; pietas, whose purpose is to keep a high moral-religious standard (Friedrich, Philosophical Reflections of Leibniz on Law, Politics and the State, in Leibniz, Collection of

understood by the end thereof" (i.e. - the protection of the individual and the peace of the state; the Leviathan). "When therefore our refusal to obey, frustrates the end for which the sovereignty was ordained; then there is no liberty to refuse: otherwise there is."(2)

Critical Essays, Frankfurt ed., 1972, 47, 52). Emmet (Rules, Roles and Relations, 1970, 101), suggests that instead of natural law is universal code we should better refer to natural procedural justice, which is what courts usually do, and is actually the Biblical approach to the subject.

(2) Hobbes, Leviathan, 1962 ed., 209-10. Hume and Mill, see infra) would agree that "justice arises from a sense of common interest" but - presumably, like Rousseau (Shklar, Men and Citizens - Rousseau's Social Theory, 1969, 38) who was of the opinion that the social contract is a permanent transformation of justice to replace instinct (i.e. - conscience. This, incidentally, was also Voltaire's opinion in his Dictionnaire Philosophique, Benda ed., 269, who said that the sense of justice was given to us by God, though the dogmas are human) - would, at the same time assert that that "sense of common interest" each man feels in his heart (as to Rousseau's theory of "instinctive justice", see also his Emile, Foxley trans., 1948). Hume speaks of "senses", not of a legal document (e.g. social contract) or rational justification on the one hand and - rather like Hobbes, though in a different context - of the need to examine the possible result of any given action with regard to the system as a whole (Hume's Moral and Political Philosophy, Aiken ed.,

The name of Kant should be added to those of Hobbes, Locke and Rousseau as another great contributor to the individualist trend. For he too crowned human free will[3] as a vital factor, one of the two foremost (the other

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1970, 278), as justice and loyalty are absolute necessities for the happiness of mankind (276). Hobbes' influence may be noticed even today, at least partly, in the works of modern scholars, e.g. Salmond, who says that "the rule of justice determines the sphere of individual liberty in the pursuit of individual welfare, so as to confine that liberty within the limits which are consistent with the general welfare of mankind" (Jurisprudence 1957, 63). In the following two Salmond's "definition" is different from that of Hobbes, firstly - in that he totally eliminated the element of equality, and secondly - in that he inserts a vague criterion, namely: "the general welfare of mankind".

[3] In its Kantian sense: "the autonomy of the will is the exclusive principle of all moral laws and the corresponding obligations; any heteronomy of volition... is opposed to its principle and to the morality of the will... This autonomy is freedom in its negative sense, while the autonomous legislation of pure reason... is a freedom in its positive sense" (Critique of Practical Reason, 1973, 35; see also Critique of Pure Reason, 1966, 277, 395, 397).

being man's intelligence) of human activity. Somewhat like Rousseau his point of departure is morality[4] (though - not instinctive) which, inasmuch as it may lead to justice, is not identical with it.[5] That justice being,

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[4] In its positive sense, which is the result of a free choice of man's intelligence (Critique of Pure Reason, Kant's Introduction, p. 21) thus opposing utilitarianism, e.g. - "justice is the animal desire to repel or retaliate a hurt... widened so as to include all persons... by the human conception of intelligent self-interest (Mill, Utilitarianism, Piest ed., 1951, 65).

[5] Equality is not necessarily a part of Kantian justice. Quite the opposite, e.g. - "proficiency of mankind will not develop properly but through the inequality of people" and wars, dreadful as they may be, are inevitable and serve as "catalysts of all talents that serve civilization" (The Critique of Judgment, 1969, 232-3). As Kant speaks of human mind and the role of intelligence, may I mention in this context another critique, that of Marx: "legal relations, as well as forms of the State could neither be understood by themselves, nor explained by the so-called general progress of the human mind, but they are rooted in the material conditions of life..." (A Contribution to the Critique of Political Economy, Stone trans., 1904, 11). Kant regards the state simply and dryly as "a union of a number of men under judicial laws" (The Science of Right, Hastie trans., in Great Books of the Western World, Hutchins ed., 1952, 436).

unlike morality, the external freedom of every man restricted only by the freedom of others.[6]

Fichte, a disciple of Kant, derived his philosophy from Kant's critical idealism, but placed the ego[7] as an exclusive reality, thus indirectly, rejecting Kant's assertion that reality can never have access to human mind. He also used the idea of social contract but regarded individuals and each one of them separately as its only parties, thus rejecting another idea of some thinkers, i.e. - that there was a party of the other part , a ruler or an organized society. Hence his social contract is a "union compact", the outcome of private agreements by virtue of which each individual joins the association for protection and becomes a part of it by a "protection compact".[8]

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[6] As Kant puts it, law is "the totality of the conditions under which the arbitrary will of one can coexist with the arbitrary will of another according to a general law of freedom (Grundlegung zur Metaphysik der Sitten, 1922, 34-5).

[7] In The Science of Right, Kroeger trans., 1970 (p. 205) Fichte says that the object of the common will of the members of a society "is common security; but since only self-love and not morality is supposed to exist - the willing of the security of the others emanates from the willing of the security of himself in each person."

[8] Ibid. 226-7. The basis of Civil law is the first "property compact", which

The state (or other organization) is thus entrusted with the authority to pass binding laws[9], but in cases of absolute necessity "the general assembly of the people may abolish the government. However, the decision must be just, namely - in accordance with the original general will of the people."[10]

It seems to me not altogether incorrect to argue that Fichte tried, unsuccessfully in my view, to reconcile idealism and utilitarianism, and that he arrived at impractical, if not inapplicable conclusions, such as that "one general law cannot be applied in any particular case until all previous cases have been decided according to it."[11]

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is also the original basis of the legal relation between the persons who form the organization (289). As to criminal law, e.g. capital punishment, it is not being executed by virtue of any positive right, but simply out of necessity, and since it is not honourable, it should be executed secretly (343-73).

[9] But, "if that organization is to establish a general legal relation between individuals, each individual must agree with all others concerning the property, rights and liabilities he has to have and which he has to cede to others" (ibid. 213).

[10] Ibid. 258-60.

[11] Ibid. 241.

If the specific provisions of the executive "are unjust or unlawful, the 'Ephorata' holds them responsible".[12] To ensure justice and security each governmental activity must establish a general rule, for if it doesn't do justice in one particular case, injustice is bound to follow in all future cases.[13]

Though in his early writings[14] Hegel advocated the use of violence whenever a constitution is left unchanged in spite of fundamental changes in social relations (provided that the idea of violence expresses the natural emergence of an actual historical force) in his later writings he became the rock of conservatism.[15] Indeed, he treated custom as a supreme ethical value.[16]

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[12] Ibid. 245.

[13] Ibid. 255.

[14] The German Constitution, see infra in part II.

[15] In his own words: "... the notion of the realization of self-conscious reason... finds its actual fulfilment in the life of a nation. Reason... here... breaks up into many entirely independent beings... They are conscious within themselves of being these individual independent beings through the fact that they surrender and sacrifice their particular individuality, and that this universal substance is their soul and essence" (Hegel, Phenomenology of Mind, Baillie trans., 1931, I, 341 f.). A "political" retreat, so it looks, back to Spinoza and Leibniz.

[16] Hegel's Philosophy of Right, Dyde trans., 1896, 161.

Nevertheless, "as the essence of matter is gravity, so - on the other hand... the essence of Spirit is freedom... all the qualities of Spirit exist only through Freedom... Freedom is the sole truth of Spirit."[17] And again: Providence manifests itself in Universal History, and reconciles the thinking Spirit with the fact of the existence of evil.[18] That evil with which man has to learn to live, for "he is happy who finds his condition suited to his special character, will and fancy and so enjoys himself in that condition!".[19] The real world is as it ought to be.[20] Revolutions are out of place and out of time for "we have... to do with what is present".[21] Hence we are not supposed (rather - we cannot) do anything about the future. And, of course, Hegel rejects all theories of natural law by simply asserting that morality is subjective. Naturally, Hegel must now go further to reject also Kant's categorical imperative.

There is no social contract and there has never been. The state is the production of history "in the very progress of its own being".[21] When

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[17] Hegel, Lectures on the Philosophy of History, 1857, 18.

[18] Ibid. 16.

[19] Ibid. 28. Amazing how close Hegel is here to the old Jewish maxim:

"Who is wealthy? he who is content with what he has."

[20] Ibid. 38

[21] Ibid. 10.

conceiving the State one must "contemplate the idea, God as actual on earth, alone"[22], and accept it as something above oneself.

And what about justice? - The power of passions prevails. It lies in the fact that "they respect none of the limitations which justice and morality would impose on them... These natural impulses have a more direct influence over man than the artificial and tedious discipline that tends to order and self restraint, law and morality".[23]

What about evil, then? - "The history of the world is the world's court

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[22] Philosophy of Right, 244-7.

[23] Philosophy of History, 34. As to state and justice, it is interesting to note an approach, which, on the face of it, also grants the authority of the state a mythical superiority to the point of identifying the ruler (emperor) with Godlike image, but nevertheless doesn't find it necessary (indeed, why should it?) to free either him (or the individual) from the bonds of justice. I refer, of course, to Japan. Where "righteousness, or justice, is required from those at the top and those below at the same time. They are equal from the point of view of justice" (Kosaka Masaaki, The Status and the Role of the Individual in Japanese Society, in The Japanese Mind, Moore Ed., 258), although, the concept of 'right' (Of the citizen vis-a-vis the authorities) doesn't exist. On the contrary, the citizen is supposed to identify himself with the government through a process of self-denial. But law is entrusted in the hands of the ruler

of judgment". (24)

31. At the end of the 19th and in the beginning of the 20th centuries two thinkers stand out in their contributions to the analysis of justice: Bergson in France and Jaspers in Germany. The first, by his "élan vital" (the creative life force); the latter, by his "transcendent existentialism."

Bergson says that of all moral ideas justice is the most constructive for it combines most of them and is being expressed more simply in spite of its unusual richness. Justice, he says, has always stirred the idea of equality, proportion and compensation. "Pensare, from which we derive 'compensation' and 'recompense' means to weigh. Justice is represented as holding the scales. Equity signifies equality. Rules and regulations, rights and righteousness, are words which suggest a straight line. Those references to arithmetic and geometry are characteristic of justice throughout its history." (1)

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less for practical purposes and more as a symbol of power and authority. Therefore, he is expected to use his powers with self-restraint. The courts have a wide discretion when punishment is considered, while civil claims generally end in compromise (The Status of the Individual in the Notion of Law, Right and Social Order in Japan. Ibid. 267-8).

(24) Philosophy of Right, 341.

(1) Bergson, The Two Sources of Morality and Religion, Audra & Brereton trans. 1964, 69.

Justice can be found in a society of natural barter as the exchange of objects is dependent on their being of equal value. Indeed, equality of values is a rule of justice as it operates also within the relations between people, hence - "an eye for an eye", only that here qualitative considerations are being added, so that the eye of the upper class is worth more, quality wise, from that of the lower. "Equality may connote a ratio and become a proportion."(2)

But our justice doesn't relate itself to the ideas of proportion and equality but to that which is incommensurable, i.e. - to the absolute. In this sense, justice is formulated precisely and categorically only by prohibitions. Its implementation may be achieved only by legal measures and is dependent on the consent of society. This is the kind of justice preached by the prophets of Israel. To this meaning of justice Christianity contributed the idea of universal fraternity with its projection on the ideas of the equality of rights and sanctity of man (in the American and French constitutions).

Bergson differentiates between 'closed' and 'open' justice. The first expresses the automatic equilibrium in society, as is secured by nature. The latter is the fruit of man's genius - open by means of public opinion it brings gradual slow changes in the specific justice.(3)

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(2) Ibid. 70.

(3) Ibid. 78.

This justice... "finds itself continually broadened by pity; 'charity' assumes more and more the shape of justice."[4] Hence, Bergson purported to bridge the gap between morality and justice. Between instinctive justice and the rational one. Between individual sense of justice (or injustice) and the "objective", generally accepted rational concept of justice.

It was an inevitable consequence of his "open justice" and, in my view, it did not actually contribute anything new to either philosophical, historical or sociological thought relating to justice or its place in social development. Perhaps the only novelty is in his suggestion that "pity" and "charity" should be counted among the socio-psychological factors that influence man's mind. There is nothing more in it than an emphasis of one factor, which has always been only a by-product of other developments rather than their cause, and which was given by Bergson an unjustified priority. I very much doubt if the replacement of the "talio" may be ascribed only (or even also) to pity and charity. There is no proof to support such a proposition and there are a few to support the opposite.(5)

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(4)Ibid. 85.

(5)Indian thought, for example, would reject Bergson's theory, for - unlike Bergson's - Indian approach to the question of justice is purely rational. In the process of doing justice, the Indians would say, logic (nyaya) is a major factor. When an ordinary man is fined one coin the king will be fined a thousand. (Datta, Some Philosophical Aspects of Indian Political Legal and Economic Thought, in the Indian Mind, Moore ed., 267 at 289, 291).

Jaspers[6], too, differentiates between two kinds of justice, one relating to the few and the other - to all. One "is concerned with the salvation of the effectiveness of the best. Unjust envy, which pulls everyone down to the equality of one's own nothingness, is not permissible. There must remain the interest in the representative activity, creativity and existence of the best, on whom the free man can look with love for improvement."

The other "is concerned with the rights of all men qua men... It is the claim of this justice on a moral-political foundation continuously to improve the order of existence in terms of equalization of opportunity."

The two "justices" are, according to Jaspers, inseparable and when separated both become unjust.[7]

32. We have seen that Kant's point of departure - like that of Rousseau - is individual justice, which leads us to a distinction between justice and

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[6] The Philosophy of Karl Jaspers, Schilp ed., 1957, 758 ff.

[7] Diogenes Lasetius would say: "... just as a stick may be either straight or crooked, so a man must be either just or unjust. Nor again, are there degrees of justice or injustice" (Greek and Roman Philosophy after Aristotle, Saunders ed., 1966, SUF III, 536), and Marcus Aurelius, on the other hand, that "everything that happens happens justly" (Meditations, in The Stoic and Epicurean Philosophers, Oates ed., 1940, Book IV, 10, 510).

morality.[1] Kant's justice is the external freedom of every man restricted only by the freedom of others. Whatever goes on in his heart - his religious beliefs and conceptions - is, therefore, protected against the intervention of society, because justice restricts itself to the settlement of external relations between human beings. What goes on in a man's soul is a matter of morality, not of justice, and shouldn't be the concern of society.

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[1] Fichte, as we have seen, develops this idea by saying that justice is the rationalization of a moral ideal, an ideal which is irrational in itself. Morality is expressed by a voluntary action of the individual in a manner different from the action of all other human beings, because the substantial meaning of the internal moral feeling of one man is different from that of the other. According to Fichte, justice restricts intuitive moral action and combines it with rational judgment. Justice is that which lends recognition to the social value of intuitive moral action. To elucidate Fichte's idea, one may resort to the famous words so often quoted to explain the meaning of democracy: "I disagree with every single word you have said, but I am prepared to lay down my life for your right to say it". Our agreement (or disagreement) is derived from our moral approach. Our opponent's right to have his say is a recognition of the moral idea embodied in justice, the result of rational judgment.

According to Kant, justice is a means to prevent friction between human beings, but it does not create a society with a common will. Furthermore, this external control necessitates an executive power. It is therefore no wonder that Hobbes found this power in the shape of the state.

As against the individualist trend, Grotius and Leibniz, who represent the social-universal trend, created a synthesis between commutative and distributive justice together with universal justice. They needed this synthesis to secure a social collaboration between rational human beings and the removal of the contradiction - even struggle - between personal justice and social-universal justice. This is a supreme justice and preferable to personal, individual and even collective justice, a sort of objective justice which creates the equilibrium necessary for the life of an orderly society. Justice is, therefore, righteousness adjusted by wisdom, morality purified by intellect.

Marx was not prepared to accept this formal justice. He sought a remedy to economic inequality, class deprivation,and,for this purpose,needed a far more concrete and substantial justice. As far as he was concerned, formal abstract ideas of freedom and equality were devoid of significance as long as the means of production were not in the hands of society for the benefit of all its members, with a view to creating economic equality in a classless society. Only in such a society could equality and freedom be tangibly expressed.

33. It was Aristotle who said that law is a condition for justice, while it exists only where there is no justice. Hence, we cannot say that justice is what

law tries to achieve, unless we could claim successfully that law really achieves it.

Justice Haim Cohn rightly claims[1] that there exists no absolute, equal for all, justice. I find it more difficult to accept his contention that "justice" is a synonym for "truth", for "honesty", for "goodness" (sometimes, for mercy, too), to the extent to which "it is adjusted to the needs of men, and to the extent to which they are bound to adapt it in practice". Maybe, whatever is "just" is also good; but is whatever "good" (for whom?) also "justice"? And what is this common good which is adjusted to the needs of men? I feel that the substitution of "good" for "justice" does not facilitate the solution of the problem. As for "honesty" (and mercy) - this I think is a matter for morality rather than justice, unless a fair judgment without bias is intended. This "honesty" (or "fairness") will administer "righteous judgment" in its Biblical sense, but it neither relates to nor defines or explains the quality of justice in that judgment. As to "truth", as synonym for justice, see supra.

Edmund Kahn, as has already been shown, claims that justice should not be defined at all; that it could be detacted through injustice which is intuitively felt by every man. A feeling which apparently cannot prove a better criterion than the feeling of justice, as both are subjective. What

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[1] Justice, in The Encyclopedia of Social Sciences, 1969.

we are interested in is objective, abstract, "absolute" justice and not "subjective justice" (a term which no doubt exists and is known) emanating from the individual's feeling and conception. Accordingly, we should look for objective criteria.

Is the comutative-distributive justice of Aristotle - justice? Is it formal justice - expressed in law implemented equally and without discrimination in respect of all men and applying to all of them? Is it social justice? Is it Bentham's utilitarianism which is measured by the extent of happiness it brings to the majority of human beings? Or could it be that which is the embodiment of "freedom" and"equality", or of other values, the contents and definition of which could be agreed upon?

While wishing to advance a reply of his own, Ch. Perelman[2] quotes Proudhon, the 19th century anarchist philosopher, who claimed that property was theft and who proposed work as a basic social value, while replacing the state with a multi-lateral contract among its individuals: -

"Justice reigns, under different names, over the whole world, over nature and over humanity, over science and the conscious, logic and morality, political economy, politics, history, literature and arts. Justice is the primeval impulse of the human soul, the very foundation of society, the holiest of conceptions, the firmest demand of the masses in our time.

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[2] De la Justice, Banit trans., 1962.

Justice is the essence of religion, just as it is the shape of wisdom, the secret trend of faith, the beginning, middle and end of knowledge. Could there be a more universal, tremendous, perfect thing than justice?"[3]. Proudhon proposes equality as a common denominator for all the aspirations of justice, for all the social concepts, for all the wars and for all the revolutions and upheavals which upheld it.

Perelman says that if we review the social struggles which have taken place during thousands of years of history, we shall find that rivals have always declared that justice was on their side, when they usually meant one of the following six conceptions: "to each the same"; or "to each according to his merits"; or "to each according to his achievements"; or "to each according to his needs"; or "to each according to his class"; or "to each according to his due under the law".

And he goes on to explain: "to each the same", meaning without any distinction. One law for the old and the young, for the sick and the healthy, for the righteous and the wicked, for the white and the black. Under this conception, Perelman adds, death is supremely righteous, because it is impartial and indiscriminating.

"To each according to his merits" - is impossible, because it rests on an undefinable criterion which is determined every time again by every individual separately, under his own private-moral criterion.

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(3) De la Justice dans la Revolution et dans l'Eglise, 1868, 44.

"To each according to his achievements" - is the conception of those who wish to give every man according to the results of his ability. But, Perelman says, although it is easier to determine a criterion to gauge results, disregard of the intention behind that activity or of the victims sacrificed for the attainment of these results, it cannot satisfy our sense of morality.

"To each according to his needs" - is a principle closer to charity than to justice, because it is meant to alleviate the suffering of human beings resulting from their inability to supply their needs and it does not take into account a man's qualities or achievements.

"To each according to his class" - is the aristocratic formula of justice, under which different laws of justice would apply to persons from different classes. This is a formula, Perelman says, deriving from power and it is unreasonable.

As for the last formula, "to each according to his due under the law" - this, he says, is an evasive formula which leads us into a vicious circle, as we have to start by determining what is due to every man. This criterion does not attribute value to law and is satisfied with its just operation.

What is commonly shared by all these approaches, Perelman asks, and replies: their common denominator is equality. But not as a compromise between the different formulae, because such a compromise is impossible, but as a joint basis for abstract justice, which includes a "dependent variable" to suit every single value of that abstract justice.

How is equality to be defined as a joint basis? Perelman proposes

the following definition: " a principle of action providing for an equal treatment of men belonging to the same substantive category". He is aware, of course, of the difficulties aroused by the definition even in respect of the first formula of equality ("to each the same"), which is a total and sweeping formula applying to all humanity. If so, how may a variable factor which restricts the demand for equality only to persons "belonging to the same substantive category" be applied in this case?

Perelman proposes to distinguish - in fact, he argues, this is what history has always done - between different categories of human beings by their nature, and thus save his definition. Only that, to my mind, he thus actually erases completely the first formula of equality and "divides" it among all other formulae. He also creates similar difficulties with regard to each of the other five formulae. Actually, he is aware of the difficulty to define when human beings should be considered as belonging to the same substantive category. Hence, he proposes to make one more distinction: on the one hand - abstract justice, and on the other - concrete justice, i.e. the practical revelation of abstract justice.

Under this distinction, continues Perelman, criteria should be determined to decide the affiliation of a person with a certain substantive category. This determination is the principle of acting "equitably" although, he admits, equity is not identical with justice. Furthermore, since the determination of criteria is a complex matter, due to the great number of elements needed for describing the nature of one substantive category or another (e.g. family status, profession, skill or level of income) - only the most pronounced and important trait of such substantive category should be taken into account.

The decision as to the nature of this trait should be guided by a principle of "equity" namely - "the tendency not to treat with too unequal a justice persons belonging to the same substantive category". (How shall we determine that they belong to that substantive category? I think we have reached a stalemate, but not so Perelman).

He produces what he feels is an intelligible example: it is not possible, he claims, that under the conception "to each according to his needs" we should pay equal wages to two workers, of whom one has a family and the other is a bachelor, just because both are workers and, consequently, fall into the same substantive category of persons. Therefore, we should create a combined element which takes into account both the fact that a man is a worker and his having a family. Again, to the question of the weight we should ascribe to each one of the traits, his reply will presumably be: the same weight... necessitated by equity. From this point on, no difficulty exists any longer and concrete justice has happily been attained.

The difficulty in the mechanism proposed by Perelman is possibly most manifested in one of the examples which he himself presents later in his research, to show the actual administration of concrete justice. "Suppose", he says, "that there is a legacy in which the share of the sons is double than that of the daughters. If the heirs consist of two sons and two daughters, we presume that each son will receive the same share and the share of each daughter will be equal to that of the other..."

That the share of a son is not identical with that of the daughter - does not bother Perelman unduly. He apparently does not consider sons and daughters

as belonging to the same substantive category of persons. This, to put it mildly, is an odd conception of a research dealing with justice.

He does not consider as arbitrary the succession rules, that emerge from this example. He admits, however, that his entire structure might collapse if we allow the determination of arbitrary rules with regard to any substantive category of persons, in respect of whom we wish to behave under the rules of "concrete" justice. To prevent such arbitrariness, he suggests that we examine each rule in the light of moral values, namely: accepted moral axioms.

In view of the fact that, under his definition, every such value is arbitrary, the result - as Perelman himself admits - is that there exists no absolute justice (other than in respect of identical persons). He adds, almost in brackets, that no value may serve as a foundation for a system of justice, if it is unjust in itself.

But how shall we determine whether it is just or not? Haven't we returned to our point of departure?

Perelman's experiment is interesting no doubt, but it seems to leave too many questions and gives rise to too many others to be successful.

As was mentioned, he claims that arbitrary rules should not be applied to define the foundations of equality, which determine a person's affiliation to a certain substantive category; he also says that every such "non-arbitrary" rule must be examined in the light of axiomatic moral value - and it is difficult not to wonder: is an axiom not arbitrary?

After all, what is an axiom? According to Aristotle - and this, presumably, is what Perelman had in mind - it is a principle (namely, a supposition) which cannot and should not be proved and which serves as a foundation to any provable science.

Obviously, freedom is considered by Perelman an axiom. Hence, any rule which contradicts it, while purporting to define the foundations of an equality of whatever nature, will, according to Perelman, be arbitrary. A "substantive category" of equality in a society of slaves may therefore not constitute equality, because it clashes with this axiom.

However, the axiom of freedom is recognized as such only during a fractional period in the history of the homo sapiens and only by Western philosophy. Societies of slaves were considered a just phenomenon among different civilizations, during most years of history, and are still considered just in some parts of our present world. Hence, Perelman's axiom is refutable.

In an analogy from geometry, one may claim that the axiom of freedom exists on the "plane" of Western civilization alone and even there it is generally accepted only the last hundred years. It does not exist in the "solid" of human existence.

We said that an axiom is a generally accepted supposition, which cannot be refuted. The axiom of freedom did not fulfil the first condition and, consequently, it did not meet the second one either. It did not fulfil the second condition and, consequently, did not meet the first one either. The result is that there is no general axiom, either in plane human geometry or

in the solid one; furthermore - that there are different "axioms" applying to different societies in different places and during different periods, and even in the same place during different periods.

If so, there is no rule under which we can determine the foundations of equality of a "certain substantive category", At any rate, there exists no such rule applicable to all. If so, the attempt to determine objective criteria is meaningless; either for Perelman's abstract (absolute) justice or for his concrete justice, expressed in the materialization of the flexible rule of equality propounded by him. The way out evidently lies in either of the following two premises: the first one - that there exist rules which are prima facie axioms, and which we are entitled to enforce even on those who disagree with them, although they may not be generally accepted (and thus - no axioms at all). This approach is derived from the Judeo-Christian concept, under which moral values are to be exclusively determined by God and His precepts, and disregards the remaining four fifths of the world which is neither Christian nor Jewish. A disregard usually displayed by the Judeo-Christian civilization, which ignores whatever preceded it or differs from it.

The second - that every society may have its own axioms and that it is its privilege to adapt them to changing conditions and requirements. This second determination puts, of course, an end to "absolute justice".

In other words, to "rescue" Perelman's axiom a new axiom should be suggested, which will be above the basic axioms proposed by him, i.e. that there are axioms which stand against the "vicissitutes" of time and

also against the proof that they are incorrect. It is not, therefore, an axiom at all, but a religious-moral principle which, by virtue of human authority, receives absolute validity.

Furthermore: Perelman's theory leads to another "axiom", namely, the one derived from his supposition that it is possible to determine the "non-arbitrary" foundations of "concrete" equality. The supposition that a general agreement can be reached as to the equalizing data which constitutes one foundation or another, because these data are "necessitated by equity".

It is difficult to understand how it may be practically possible to determine the weight of each one of the factors likely to influence the wages of the two workers in his example. He assumes that family status is such a factor. What if it appears that the worker who has a bigger family also inherits a large sum of money or that his wife inherits it? What influence, if at all, will the fact carry that one worker has heavy debts while the other owes nothing. Or that the children of one are all grown up, or that one has a high education. Or that a heavier responsibility is imposed on him, or that he has more seniority at work, or that he is older, or that he is sick?

What will be the weighed average of all these factors? What test could be held to ascertain that all factors have been taken into account, and no important factor able to influence qualitative equality has been neglected?

Is it possible, according to Perelman, that men and women may ever belong to the same "substantive category"? The suffragettes, at the beginning of the century and in our days believe that women are deprived, and fight for

full equality with men. Bernard Shaw said that to attain equality women should only renounce some of their privileges.

The Women's Liberation movement was, no doubt, one of the factors responsible for the far reaching recommendations made by the International Labour Organization and for social legislation in many a country, with a view to equalizing women to men. I already mentioned the Israeli law providing for equal pay to men and women for equal work. Does this law conform with Perelman's principles? - definitely not, if seen in the light of his suggested sample criteria for the determination of bases for comparison. Maybe another criterion: the extent of the relative effort exerted by men and women, should replace the criterion of equal or similar work.

The implementation of pay equalization laws meets with difficulties, owing to the employers' claim that very seldon can the work of a man be compared with that of a woman. On the other hand, when more women occupy certain branches and release men for jobs which they (the women) are unable to perform, owing to the physical effort incurred - could it not be argued that as far as the production of the enterprise is concerned, no distinction can be made between the work of men and that of women? The enterprise will be unable to function without production workers (men), but also without typists, draftswomen, secretaries or women in light works. Therefore, maybe all the workers in the enterprise, men and women, are equal?

Latest researches of the human mind reveal[4] - much to the consternation of fighters for equal rights to women - that, by nature, most women display a tendency for verbal skill and keep away from analytic proficiency. The same researches reveal that women have by nature a smaller competitive instinct. A research among monkeys held by Harry Harlow reveals that young females and males who were separated from the adults and were, therefore, unable to adopt a typical behaviour by imitating the adults, nevertheless behaved according to their sex.

Don't these researches necessitate a reconsideration of the foundations of equality for one substantive category of human beings or another? Maybe it will be found that to attain actual equality, it is necessary to add (and possibly even put in the first place) the trend to allow women to emphasize their femininity and men to stress their manliness?

Perelman would probably find no formal difficulty in applying his criterion of substantive equality to the famous case of the two sailors who fed upon the body and blood of a boy after having murdered him in the rescue boat in which they, together with a fourth one,had been.[5] But, actually, by doing this he would simply apply - under the guise of a principle of equality - one of the "absolute natural rights enshrined in positive law" namely, the

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[4] Calder, the Mind of Man, 1970, 39-40.

[5] The Queen v. Dudley and Stephens (1884) 14 Q. B. D. 273.

right of life.[6]

I am curious, however, as to how he would apply his criterion to either of the two Israeli precedents, already quoted, in which the court first dismissed a woman's case against a married man for breach of promise of marriage and then upheld a similar case, a few years later.

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[6] Stone, quoting Blackstone, in Human Law and Human Justice, 1965, 89 (In the words of Lord Coleridge in the case cited above: "... the temptation to the act which existed here was not what the law has ever called necessity. Nor is this to be regretted. Though law and morality are not the same, and many things may be immoral which are not necessarily illegal, yet the absolute divorce of law from morality would follow if the temptation to murder in this case were to be held by law an absolute defence of it. It is not so. To preserve one's life is generally speaking a duty, but it may be the plainest and the highest duty to sacrifice it"). The other rights are to personal security, personal liberty and private property. See also Friedmann, Law in a Changing Society, 1959, 492-3; Law and Social Change in Contemporary Britain, 1951, 157-8, where he rightly states that the main protection of personal liberty in Britain "lies in the strength of public opinion, and in the determination of an independent judiciary to protect the basic liberties", except when the courts are prepared to sacrifice protection of personal liberty for "raison d'état" (as in Liversidge v. Anderson, 1942, A.C. 206).

Would an English court have convicted of murder that wealthy Indian I mentioned in my first section, in whose stead an Indian beggar was executed for the sum of 250 rupies? Would an Indian court have convicted him?

The accepted principle in the English legal system is that every person charged with a penal offence is presumed innocent until proved guilty beyond any reasonable doubt. Why is this principle less just or more just than the opposite one? The equality formula among Perelman's six formulae "to each according to his due under the law" is manifest here. But what is the rule applying to it? That axiom - what is it?

What is the hierarchy proposed by Perelman for the "axioms" among themselves? Is the axiom of public or state security among them? If so, is it superior to another axiom pertaining to the foundations of substantive equality of persons and applying to them as individuals? If not - under which axiom, superior to both, could we tell good from good?

When, in not many years to come, human life could be prolonged by rejuvenating operations, who will determine, and on the basis of which rule or foundation of substantive equality, whose life to prolong? Will all leaders be "more equal" for this purpose (George Orwel, Animal Farm)? Again, how will a "leader" be determined for the purpose of rejuvenating operations?

What is the conclusion? - that there exists political justice and social justice. There exists objective justice and formal justice. Personal justice may be epitomized in Perelman's six formulae - sometimes in some of

them and sometimes in one of them; sometimes in none (e.g. when political justice is involved).

An electoral system like the one prevailing in Israel: general and proportionate - is it, according to Perelman, more just or less so than the regional constituency system? Is a numerus clausus of one percent more just or less so than, say, two or five percent?

There exists, apparently, a network of axioms superior to any other axioms - that every society is entitled to determine its own axiomatic rules and the foundations of concrete justice which it administers. That it is entitled to make bona fide mistakes. That every man is entitled to struggle so as to induce society to admit its mistakes and apply a different concrete justice, and even different rules, in its midst.

IV. ASPECTS OF LEGAL JUSTICE

34.1 My main dispute is with legal positivism.

Allen, for example, refrains from dealing with the nature of abstract justice alleging that it is irrelevant to law[1], though he agrees that in the application of law justice is an absolute requirement "whatever the quality of the law may be". Thus he is joining a long line of positivists who consciously limit their discussion to the law as they find it while disconnecting its content and purpose from any value-judgment.

"There is nothing inherently paradoxical in the notion of an unjust law" claims Allen and, with a flick of the finger, he destroys not only Hobbes' theory (of this he himself is aware), but also the doctrine of many disciples of "natural law" and other ideologists who seek the source of law and its justification in principles superior to it.[2]

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[1] Allen, Aspects of Justice, 1958, chap. 3: Justice and Justice According to Law pp. 65-83.

[2] In addition to the many quoted or mentioned in the present work, the name of Stammler may serve as an appropriate example of one, rather important, of these ideologists. He suggests "four principles of just law which may be treated in two corresponding pairs: A. The Principles of Respect. - (1) The content of a person's volition must not be made subject to the arbitrary desire of another. (2) Every legal demand must be maintained in such a manner that the person obligated may be his own

"An unjust law" says Allen,"may be administered justly" and "an unjust law justly". He thus adopts one of Perelman's tests of equality ("to each according to his due under the law"), but neglects, at this stage, to adopt any of the others.

It seems that Allen himself is conscious of the tautology he creates by referring to an "unjust law" that can be "justly" administered, while proposing no criteria which determine any law as "just" or "unjust". He does not propose, either, criteria for its "unjust" or "just" administration,

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neighbour. B. The Principles of Participation - (1) A person under legal obligation must not be arbitrarily excluded from a legal community. (2) Every ability of disposing that is granted by law may be exclusive only in the sense that the person excluded may be his own neighbour"

(Stammler, Theory of Justice, in Legal Philosophy Series, Husik trans., 1925, 158-63). For further elaboration on Stammler's Neo-Kantian Social Idealism, see: Friedmann, Legal Theory, 1953, 100-7 and Stone, Human Law and Human Justice 1965, 167-8. The purpose of Stammler's theory, as he himself puts it, is to find "a universally valid formal method, by mean of which the necessarily changing material of empirically conditioned legal rules may be so worked out, judged, and determined that it shall have the quality of objective justice", as the law of nature is foredoomed to failure for being unchangeable, and thus is unable to satisfy human constantly changing wants; to regulate human social life.

except, of course, as far as the "equality test" is concerned. We shall see further down that he does not limit himself to this test only.

His starting point - although he does not say so - is double: one - that there exists "justice", and possibly even "abstract justice". Two - that it should not be treated as a factor in the evaluation of law.

Allen differentiates between justice and justness. The latter, he suggests, is an "ethical aspect", a "moral principle" of justice. He does not make any attempt to explain or describe what is that justice which is <u>not</u> justness. while arguing that law is not necessarily even that (justness). Hence, I presume, law may certainly not be justice and since law in its content, or even in its aim "has no necessary relationship at all to morality or even to utility" - all three of them (law, justice and justness) must, I venture to deduce, be classified as mere "empirical abstracts".

Allen totally disregards Kant, Fichte or even his contemporaries Denning, Devlin or Hart, who either insist or agree that morality and justice are two different institutions. Much of the confusion in his work may, I think, be attributed to his unwillingness to make this differentiation, or to his unawareness that such a difference exists. One aspect of this confusion may be found in his analysis of justness. For if law is an abstract, namely - just an empirical fact which should (as Kelsen thinks, see infra in the next section) be disconnected from any value-judgment then, why should the question of justness rise at all?

What I mean is, that one may assert that, logically, the relations between law and anything outside it, is immaterial and irrelevant (unless cause-and-

effect relationship may be established) inasmuch as the relations between a mathematical phenomenon and any phenomenon outside it is irrelevant. But, the moment Allen finds it necessary or permissible to deal with such "outside" phenomenon as justness, he must provide us with an answer to the question: why stop there? Why should we not examine also the relations between law and justice (or any other "external" factor). In other words, if Allen's argument that, as was quoted above, "in the application of law... justice is an absolute requirement", is correct - what is the rational excuse for not going further, i.e. for not looking into the content of law?

34.2 At the end of the previous section, I proposed to let every society determine its law under justice, as it understands it from time to time. I have left unanswered the question of whether international community may determine a stand on its own laws and on the laws of the societies functioning in its midst. Because, in the absence of an absolute world embracing justice, in the light of which every society examines its law, how and under which authority could international community react, for instance, to the Biafra war, the slave trade in Saudi Arabia or to the restrictions on emigration from the Soviet Union?

The answer I would suggest to anyone who poses this question is that within the global framework of international cooperation, international responsibility and the mutual dependence of nations - every single nation or state, separately, is considered as an individual in his national society, whereas all of them together, as one community, are considered as one of the separate societies. This is why, I shall go on with my answer - the

international community is entitled to determine its own laws under concepts of justice as it understands them from time to time and every separate national society - as is the case with every individual in his own state or society - may disagree with these laws and even refuse to maintain them and fight them, with all the risks incurred. Justice cannot, and should not, be the monopoly of anyone while the "freedom to err" should be added to the list of "personal liberties".

Furthermore, just as every individual or groups of population are entitled to refuse to be "legally" liquidated - so also every society may refuse to maintain a law, or rather an international consent, the maintenance of which may be suicidical for it. This will be a case of confrontation between political justice (in the case of the international community) or political and social justice (in the case of any national society) on one hand, and personal justice, namely, a clash with life instinct, on the other.

I do not, however, doubt the right of a society to fight for its survival, even at the cost of some of its individuals. I am not prepared to lend priority to "personal" justice over "political" or "social" justice, because I cannot determine, and I do not believe that there exists, a criterion which gives preference to the existence of either of them. At the same time, I feel that every society is entitled, and even bound, to examine its laws in the light of its own concepts of justice.

34.3 Allen ignores this problematic issue, and any of its ramifications. As far as he is concerned, what matters first and foremost is the extent of fairness

in the practical application of a law, with no regard to its contents; a retreat to the basic approach of original Judaism and Christianity. Hence, for Allen, no question of personal or other justice may arise with regard to the penalty of mutilation (e.g. for theft or housebreaking in Libya and Saudi Arabia).

Allen may have felt that his proposition cannot be easily digested by a generation which has barely escaped the "new (legal) order" of Nazi Germany, and therefore resorted to great authorities. Isn't that, he argues, what Socrates did when he considered himself bound by an unjust law only because it was the will of the majority? We too, says Allen, must obey unjust laws (apparently - unjust under any criterion), to prevent confusion and disobedience.

In his argumentation to prove this thesis, Allen slips into a tautology similar to the previous one. After all, he argues, we have come across judges who give judgment under laws contrary to their conscience. Judges who pass a death sentence, even though they oppose capital punishment. Who grant divorce, even though (as religious men) they object to it. Allen goes on to argue that these judges are able to apply a law without any scruples. I take it that he means their conscience as judges who are subject to law and not their personal conscience as human beings, since otherwise he would slip into one more contradiction.

In fact, he says further on, in massive modern legislation, there are many laws which judges consider unjust in principle or harsh in their consequences (or both), but they would not do their duty if they did not apply them to the

best of their knowledge.

Indeed, they would not do their "duty", but what has this got to do with justice? German judges who judged under the Nuremberg racial laws were convicted under international law. According to Allen, they had done their duty. Does he disagree with their conviction? What about judges, in certain totalitarian countries, who convict prisoners on the basis of their "confessions"? Judges who, by definition, constitute a formal part of their country's political system and serve as a means of attaining the regime's social aims?

Allen had apparently only Britain's example in mind. In British society, as in Israel and in similar democratic societies, a judge should pass judgment to the best of his (legal) conscience, even though he may, in a few isolated cases, be forced - for the sake of legal safety and "to prevent confusion and disobedience" - to rule against his conscience.

But quantity may denote quality. One should not discuss every law separately, but all the laws put together, the entire system, and see whether it is just to the extent that it may "justify" an isolated deviation. Contrary to Socrates, justification does not result from the fact that the deviation has been effected by the will of the majority, nor from the sense of duty or social security, but from the justness of the entire system.

Everything has its price, security and stability included. This price may, in isolated cases, consist of inevitable injustices. The "rightness" of the injustices is a function of quantity (i.e. quality as aforesaid)and of motive

and it is conditional on their being reconciled with the general trend of the system and with the social aspiration for justice.

34.4 The principle that the judge should do justice by adhering faithfully to the law leads Allen to an impasse. A judge, he says, acts "justly" if he cannot prevent a result with which he disagrees. But how will he try to prevent it? According to Allen's version - by interpreting the law.

That's strange, since we were under the impression that the duty of a judge is to interpret the law only in those cases when it is ambiguous, and even then - with a view to materialize the real intention of the legislator. Not the intention of the judge, nor his private conceptions of justice.

Allen also suggests that in criminal law, the judge may "balance" injustice by mercy, but he fails to mention how this may be done in the framework of a legal system which negates individual freedom, or prohibits everything which is not specifically permitted, or prescribes an obligatory penalty (e.g. death or a minimum period of imprisonment).

Allen too feels that the judiciary alone cannot ensure personal justice. Accordingly, he "permits" the individual to take the risk of disobeying a law which seems unjust to him. But, on what basis? Didn't Allen himself teach us that there is nothing paradoxical in an unjust law; that the justness in law is an irrelevant factor. Or, maybe, he limits this right of the individual only to cases in which law has been applied unjustly.

Furthermore, this "right" of disobedience cannot be logically limited to the

individual alone, and hence it contradicts the duty imposed on us by Allen to obey the law, so as "to prevent confusion and disobedience". By what logic can the right of "disobedience" be denied from a group in the population, or from the entire population? Could it be "permitted" to one individual and not to the others? When should this disobedience be prohibited again?

It seems that the moment Allen grants the individual the right to disobey a law which he considers unjust, he immediately draws back. Though this right exists, he says, we had better bear in mind that concepts of justice change.

What is the conclusion? Could it be that because our concepts of justice change and there can be no absolute criteria to tell just from unjust - we may (and according to Allen, we are possibly even bound) to free ourselves from weighing considerations of justice? If it is not absurd - why stop at law?

In our relations with people, in our marital relations, in our relations with our children, our neighbours, our colleagues, as well as our superiors or subordinates at work, we do not always know what is just. According to Allen we may treat each one of them arbitrarily, because none of them can determine whether we were right (likewise, we ourselves could not determine whether we behaved arbitrarily), in the absence of criteria for justice.

And in fact, Allen goes on to say: modern world is complicated, and in its complex legal system designed to protect economic, social and other interest, it is difficult - if possible at all - to determine what is justice.

If so, we would apparently be unable, according to him, to determine as wicked and cynical, the slogans of George Orwell in "1984": "war is peace"; "freedom is slavery"; "ignorance is power" - slogans which serve as a "constitution" of the demonic state, against which he has warned us all.

If, owing to the complexity of the matter, neither the individual nor society is able to determine that a law is unjust, then when the law "every son that is born, ye shall cast into the river" (Exodus 1, 22) is enacted by the legislator, we should respect it and not explore what is beyond our comprehension. After all, this law professed to solve demographic, economic and ethnographic problems which we, laymen, are not familiar with. Do we have to accept this law as just, only because we cannot examine it or prove that it is not just? Allen admits that there are values which society holds sacred and to which it is duty bound to be loyal under any circumstances. But by whom and how is it to be determined? Is every individual bound by such a "vote"?

Furthermore - if no one among us can determine when any law is just and when it is not, then, of course, the legislator too is no better. But Allen argues that the legislator has at his disposal experts and tools to weigh all these complex and complicated considerations. Can't we all have it? Don't individual members of parliament have it? Members of the opposition, for example!

If the legislator too is free from considerations of justice - what will his considerations be? Considerations of efficacy only? After all, the sense of justice of the public and, consequently, its readiness to accept the decrees

imposed by the legislator is one of the considerations of efficacy which the legislator is bound to assume when he proceeds to enact laws. Being restricted as an individual, could the legislator estimate the sense of justice or that individual who, by himself, is not capable of weighing considerations of justice in our complex modern world? I feel that we have again entered the realm of intolerable absurdity.

34.5 Allen felt this and he hastens, surprisingly enough, to determine that:

to begin with, the law of a despot or of a madman is law. However, secondly - law "must, in the main, accord with prevailing ideas of justice, morality and expediency, or it will not receive obedience".[3] Hence, out of considerations of feasibility, the restriction self imposed by the unlimited power of the state in its legislative activity. Not because it aspires at administering justice, not as an end, but as a means. In order to attain obedience, as if obedience is an end in itself.

Could it be that the purpose of all welfare laws in a welfare state is merely to attain obedience? Weren't they enacted out of conviction of known principles of justice and equality, of the responsibility of society towards the weak in its midst?

The considerations regarding the penalty to be imposed on two prisoners convicted of the same offence, e.g. age, intelligence, social background and the like, don't they aim at <u>personal</u> justice, to appease the concept of

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[1] See a similar explanation in Denning's The Road to Justice, 1955, 3.

justice commonly shared by society as a whole? Isn't it the same concept of justice that expresses itself in laws of "inequality", i.e. - which give preference to soldiers, workers or tenants, and others?

Even during ancient times the "an eye for an eye" rule of Hammurabi, of Moses and of Rome, was determined on the basis of the concept of justice of these societies, because revenge too is a component of justice. When this rule was replaced by pecuniary compensation - the decisive consideration was, again, a compromise between that justice (revenge) and the creation of a new social order.

34.6 It appears that Allen's main mistake lies in his advice to the judge that he should resort to "natural law" whenever the law does not provide a clear reply to the problem he faces. Not the "natural justice" emanating from his "inner light", but the one which results from an analogy with legal precedents. Only that which <u>are</u> legal precedents if not decisions, based on the classical "natural justice", i.e. - those basic principles of justice, whether divine or not.

The prisoner's right to be present at his trial, to hear the evidence produced against him, to interrogate the witnesses brought against him and produce witnesses of his own,, his right to remain silent and his right to plead and to be heard, and other similar rights presently identified with "natural justice" - all these do not result from precedents alone, but from the sense of justice prevailing in society, as interpreted by thousands of judges throughout hundreds of years of judiciary history.

Furthermore, when a judge proceeds to act according to Allen's advice and chooses a precedent, would he not select the precedent most conforming with the sense of justice emanating from his "inner light"? A sense of elementary justice, the voice of conscience to which the judge - like all of us - should listen , knowing that our concept of justice is likely to change sometime in the future.

This is why we are bound to combat abortions, if they contradict, and so long that they contradict, our concept of justice. Likewise, we are bound to fight for permitting them if our concept has changed, and do so with the same zeal, subject to certain limits which will be discussed later. We should be true to ourselves and to our conscience alike, even if in due course we appear to have been mistaken.

If we say in advance that we are due to change our concepts of justice in the future, then we must, by necessary implication, be wrong today, and none of us may have any justification to aspire, or fight, for any change, as the change we wish must again, by the same implication, be wrong and it is wrong to wish the wrong. Furthermore, the legislator will have to remain idle and do nothing. What legislator will knowingly enact mistaken and unjust laws?

I suggest that the bona fide search for justice is part of doing justice. It's the ethics of justice and it's a just path that society must choose. As we know that justice may never be reached; that, therefore, our way of life must always include some seeds of evil - we, as human beings, must always aspire for reform and advancement or else our society may become

a botanic garden. The knowledge that we may err should not stop us from trying, or else we will be living under the laws of the Queen of Hearts, or worse - in a Kafkian reality.

If the legislator does this, if he lives under the shadow of fear of mistake, he will be unable to enact laws, were it only to lend validity to an established custom, as demanded by the historical school of Savigny and Maine. Moreover, the legislator will be unable to enact laws designed to change and renew, in the spirit of Bentham's utilitarian school.

Friedmann, who dealt with the mutual relationship between law and social changes, remarks (though in a different context) that no man - regardless of his outlook - would disagree with the right and duty of Government to enact a law on one-way roads, because this is necessary to protect the safety and life of the population.[4] The alternative to this legislation is to restrict the use of cars. Both are interventions in the freedoms of citizen - the former in freedom of movement, and the latter in freedom of private property. But could the legislator refrain from both, because he is not certain that the law enacted will be "good" or "just"?

I believe that the right significance of representative democracy is that power (legislative, executive and judiciary) is granted within the limits of the terms of reference. Also, that he who wields power is entitled to make a bona fide and reasonable mistake, while the arbitrary refusal to

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[4] For further elaboration see Friedmann, Law and Social Change in Contemporary Britain, 1951, 157-63; Legal Theory 1953, 502-10.

use power is a breach of duty and a violation of confidence, although its use cannot be completely free of mistakes. As put by Friedmann[5], only the Hegelian theory which turns the state into "an abstract and mystical entity", as epitomized in fascism, has supposedly imparted to the state "a mind and soul of its own". We believe that the state is the organized force of the community, equipped with means of action and, as such, it faces a stormy public opinion. Groups and individuals who control the organized power of the state administration, should produce the changes expected to act inside the society, which are being brought about by changes in its conceptions.

34.7 As under Allen's theory, there exists no legislation which can possibly be proved "just" on the one hand, while on the other he does not claim that the legislator should cease to legislate, it follows - as hinted already - that every single act of legislation must be arbitrary.

No importance whatever may, thus, be attached to its mutual relationship with changes in the conceptions of society (according to Friedmann) or with social changes (as suggested by me). No importance can be ascribed to it because, in the absence of criteria to determine that a certain law is just or unjust, the determination that it conforms or does not conform with any social change is again meaningless.

Isn't Allen's theory likely to lead us to the refutable conclusion that the

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[5] Friedmann, Law in a Changing Society, 1959, 6.

legislator is an arbitrary body, who enacts arbitrary laws by virtue of practically absolute powers renewed every electoral campaign? Doesn't it lead each one of us, as voters, to the conclusion that, as far as the legislative body is concerned, we have no reason to cause its replacement by another body, in the absence of criteria which will enable us to determine whether its legislative activity since the last elections has been just or not?

According to Allen, our only concern is the just application of a law. He deals with its application by the courts only, but I shall expand his version to include its application by the executive. This application too should be just and any discrimination in its application will - I presume - go against Allen's conception of justice to the same extent as an unjust application of a law by the courts.

Unless I expand the theory, we shall reach the same absurd conclusions as before, namely: that the voter has never had, and can never have, any reason to vote differently, let alone a reason for disobedience, demonstrations, assemblies, gatherings or any action, journalistic or other, against the administration. Furthermore, unless I elaborate, we shall be entitled to ask Allen what is the good of laws which grant freedom of speech and demonstration.

And yet, this elaboration cannot always be useful. If Pharaoh really threw <u>every</u> son (not only Jewish) into the river, there would have been no reason for anyone to revolt, according to Allen. He would not even be prepared to accept Konvitz's theory, who claims that when a man says (as did

Hannah's seven sons)that he would be ready to die rather than violate the laws of his forefathers, he declares, in fact, that he accepts in advance the penalty provided by law against those who violate it and, consequently, also - that he considers himself subject to the law which he is not prepared to obey.(6)

Allen will not agree to this because justification of such civil disobedience is based on a conception alien to him, i.e. - that of the "natural law", which allows (sometimes forces) to examine the justification of laws under the criteria of abstract justice.

Our differences of approach may emanate from the conception (which I share) grounded in Jewish morality as against the formalistic conception deriving from the Roman legal tradition.

In fact, Allen wishes to justify his approach by recalling in his thesis that Roman jurists too never confused justice with justice under the law.

The two approaches can be reconciled. The moral approach of Judaism and its support of civil disobedience as a means of struggle did not prevent it from adhering to formalism. On the contrary, it is this approach which caused it to stress formalism excessively, even to a larger extent than in English law. The most outstanding example to this effect is found in the rule of evidence, expressed in the following passage:-

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(6) Conscience, Natural Law and Civil Disobedience in the Jewish Tradition, in Of Law and Man, 1971, 159-175, at 165.

"He (the judge) says to them: perhaps you saw him running after this fellow into a ruin, ye pursued him and found him sword in hand with blood dripping from it, whilst the murdered man was writhing (in agony), if this is what ye saw, ye saw nothing". (7)

In English criminal law, such circumstantial evidence would most likely convict the man holding a sword of having killed the victim. But the same English law also rejects (as do Jewish and Israeli laws) a defence plea of "necessity", when the accused protects his life at the cost of the victim's life.

It seems, therefore, that although Allen forbids us to examine the justice in one law or another - the English legislator considers himself able and authorized to do so.

35.1 I shall accept Austin's statement that "every positive law is set by a given sovereign to a person or persons in a state of subjection to its author". (1) This is merely a statement of fact, one element in the definition of law which, per ser, may of course not serve as a definition.

I can easily agree also with his other statement, namely that "the terms just and unjust imply a standard and a conformity to that standard and a

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(7) The Babylonian Talmud, Tractate Sanhedrin, Ballei ed., Epstein trans., 1935, Ch. 4, p. 37 (235).

(1) Province of Jurisprudence, 201.

deviation from it; else they signify a mere dislike, which it would be far better to signify by a grunt or a groan than by a mischievous and detestable abuse of articulate language".(2)

I am even ready to go along with Kelsen in criticizing Austin's "traditional opinion according to which law and State are two different entities" and in stating that "the State as a social order must necessarily be identical with the law or, at least, with a specific, a relatively centralized, legal order".(3)

What makes Kelsen so proud is precisely what I cannot accept, namely, that the "Pure Theory of Law" (or any other theory of law) should be "kept free from all the elements foreign to the specific method of a science whose only purpose is the cognition of law, not its formation. A science", says

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(2) Ibid. 190. Hart, in The Concept of Law, 154 rightly says that "just and unjust are more specific forms of moral criticism than good and bad or right and wrong". Therefore, he continues, "we might intelligibly claim that a law was good because it was just, or that it was bad because it was unjust, but not that it was just because good, or unjust because bad."

(3) P. XVI in his preface to The General Theory of Law and State, 1961 (hereafter - General Theory). In this, mainly, and also in its demand that differentiation be made between legal norms on the one hand and legal rights and duties on the other (i.e. - between law in an objective and law in a subjective sense; ibid. XV). Kelsen's positivism (which he describes as Pure Theory of Law) is different from Austin's. Kelsen

Kelsen, "has to describe its object as it actually is, not to prescribe how it should be or should not be from the point of view of some specific value judgments."(4)

One term he fails to define, though, namely - the term "science", and he gives no explanation as to what is wrong in having a science whose sphere of research is exactly the one which Kelsen opposes, i.e. the extent to which something (e.g. law) conforms or does not conform with something which is exterior to it (values, e.g. justice), whether this latter something is superior to the first or not.

Sociology does it. Other sciences do it. And if Kelsen's "problem" is the name of the science in whose research he is engaged (legal theory, law, jurisprudence, etc.) this can easily be solved by changing it or giving it a new name. As did Eugene Ehrlich, one of the founders of the "Sociology of Law".(5) Isn't this a science? It may, as its name indicates, be an

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refers to Austin's positivism as Analytical Jurisprudence. Cf. Kelsen, The Pure Theory of Law and Analytical Jurisprudence, 1941, 55 Harv. L. Rev. 44-70.

(4) Ibid. XIV.

(5) Cf. Ehrlich, Fundamental Principles of the Sociology of Law, 1936. In p. 21, he suggests that people not always perform their duties (as Kelsen asserts) "because they know that the courts could eventually compel them to perform them" and Kelsen tries to show that Ehrlich is wrong, without

interdisciplinary science, but again what is wrong with that? So is bio-chemistry, chemical-physics and dozens of other sciences.

35.2 Justice, according to Kelsen, is one of the "foreign elements" which the science of law should be "kept free from". He complains[6] about traditional jurisprudence which "confuses the theory of positive law with political ideologies disguised[7] either as metaphysical speculation about

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any attempt on his part to disqualify Ehrlich's theory on the ground that it is not "scientific" (General Theory 24 ff.). As to the question if law is at all "science" or if it should be, see infra.

[6] General Theory, XV.

[7] Does he mean to say that the notion of and aspiration for justice has always been nothing but a disguise? Not only that, but specifically a political disguise? If he refers to something which is done with a view only to reach a political aim then, of course, he denies not only the existence of a sense of injustice, independent of tradition and education, but also that justice may be or has ever been a social end. Then justice is, and has always been, a diabolic excuse in the hands of politicians, a means of power, and the Prophets and Jesus, the great philosophers and the saints were all imposters. It seems to me that Kelsen here, as also in many other places which will be dealt with later, was carried away by either his cynicism or fanatic defence of legal positivism, and his Pure Theory may not be so "pure", at least in this context.

justice or as natural law doctrine."(8)

An unjust law, says Kelsen, is "law", though it may not include the elements which one thinks must be found in it, for law and justice are two different concepts. Positive law, he says, is an order of coercion which derives from the arbitrary will of human authority. It cannot have the quality of immediate self-evidence and those whose conduct is regulated in this fashion cannot be assumed to acquire with its rules the conviction of their rightness and justice too.(9)

As to the question why should one be entitled to prescribe and the other obligated to act in accordance with the prescription, Kelsen's answer is

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(8) Kelsen refers here to the "classical" doctrine of natural law, as was expressed by Blackstone in his Introduction to the Commentaries on the Laws of England (secs. 36-9) i.e., that laws which denote the rules of human action or conduct are prescribed by the Supreme Being, and that man should in all points conform to his Maker's will (the law of nature), for man depends absolutely on his Maker, whose laws regulate and restrain man's free will. These laws were found "in those relations of justice that existed in the nature of things antedecent to any positive precept. They are the eternal, immutable laws of good and evil, to which the Creator Himself in all his dispensations conforms; and which He has enabled human reason to discover, so far as they are necessary for the conduct of human actions".

(9) General Theory, 392. See also at p. 115.

that that act is based upon "a norm, a general rule, a statute". And does this "statute" represent a norm, why it is objectively valid? Prima facie, says Kelsen, the "statute" is a mere factual matter, namely, the event of several people having expressed their will that other people should henceforth act in a certain way. That will, he goes on, signifies a "statute" because "the event which we interpret as the making of (it) is in accordance with a still higher norm, the constitution, because these persons have been entrusted by the constitution with the power of making laws". This constitution derives its normative meaning from a prior constitution, and the latter from a still prior one until this recourse must ultimately end "in the original constitution which can no longer be derived from a still earlier one. The positivistic jurist, who cannot go beyond the fundamental facts, assumes that this original historical fact has the meaning of "constitution", that the resolution of an assembly of men or the order of an usurper has the normative significance of a fundamental law". (10)

As Kelsen himself puts it, it is the assumption of the positivistic jurist. He assumes the existence of some first, original constitution, "a basic norm which establishes the supreme, law-creating authority. The validity of this basic norm", says Kelsen, "is unproved and must remain so within the sphere of positive law itself." (11)

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(10) Ibid. 395-6.

(11) Ibid. 394-5, and 115. As to his explanation, of how and why a basic norm may be replaced by a new basic norm, when a revolution or a coup d'etat has occured, see ibid. at p. 117-8.

Isn't it pure mysticism? I venture to say more than that - that the theory of natural law is proven by Kelsen himself to be positivistic not less than his own "pure theory of law", for don't advocates of natural law speak too of a basic norm, a "supreme law-creating authority".[12] With one difference, may I suggest, that although it too "must remain within the sphere of (natural) law", it is not unproved. On the contrary - it is identified with God, justice, or any other specific set of rules or values.

If natural law is not a positivistic theory, what is there in legal positivism as far as the quotation from Kelsen's General Theory is concerned to differentiate it from natural law? As I see it, it's either that Kelsen's "basic norm" makes natural law positivistic or that it makes legal positivism rigid and unchangeable, as much as natural law.

That is, if - as Kelsen claims - natural law is unchangeable. But, in order to clarify this point we must agree as to the meaning of the term "natural law". Kelsen refers to the "classical" meaning[13] and from this viewpoint he may be right in arguing against its immutability. But, only to a certain extent. For though it is true that as long as natural law confines itself to

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(12) He expressly admits that "the basic norm of a religious norm system says that one ought to behave as God and the authorities instituted by Him command"(ibid. 115).

(13) See n.8 supra.

God's will the law is relatively rigid - it is hasty, if not wrong to assert, as Kelsen does, that natural law - even in its "classical" meaning - has ever claimed "absolute validity and, therefore, in harmony with its pure idea" and that it has ever presented itself as a "permanent, unchangeable order". (14)

Firstly, it never presented itself as an "order" but only as a principle to which law must conform. Secondly, history proves that legal systems which were subjected to the natural law theory did change. Perhaps, more slowly than was actually needed, but nevertheless speedily enough to delay the appearance of legal positivisn for a few thousands of years. What I mean is that many religious legal systems were practically based on the classical theory of natural law in the sense that they related themselves to God's will and that secular laws were supposed to be enacted in conformity with this will only.

As is well known, religious laws were changed by means of interpretation. The Biblical "an eye for an eye" was replaced through interpretation by pecuniary compensation (as was the Roman "talio"), interest was allowed by both Christianity and Judaism and these, of course, are only two out of innumerable examples.

If religious law was rigid and slow to change, it is not because "natural law" was immutable, but because its advocates were either fanatic or

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(14) General Theory 396-7.

corrupt. Catholicism of Medieval Europe may serve as an appropriate example of fanatic inquisitors[15], not less fanatic than the contemporaries King Feisal of Saudi-Arabia or Col. Kaddafi of Libya who force their countries to live by the word of the original Moslem law.

Neither St. Augustinus nor St. Thomas Aquinas or many other Catholic, as well as Jewish and Moslem thinkers have ever expressed total opposition to secular legislation. They only demanded that whenever it is incompatible with God's - His "natural law" should prevail. But, by saying this they practically did nothing but attach to natural law the significance of a "basic norm" in the light of which "secondary", human, secular enactment should be examined and <u>interpreted</u>. Therefore, it is more correct, I think, to say that these thinkers actually <u>opened</u> the way for changes through interpretation, rather than closed it by clinging to the alleged dead letter of natural law.

From this point of view I can see no difference between Kelsen's "basic norm", the theory of natural law and any other existing constitution. For every constitution, like the constitution of the United States, lays down principles to which lower legislation must adhere and which may be declared unconstitutional and therefore void by the appropriate judicial institutes if it does not.

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(15) See for example Beinart's fascinating research: "Conversos on Trial by the Inquisition, 1965; Fisher, A History of Europe, Book III, chaps. 11, 13, 14 and Irving Stone's breathtaking description of Pope Julius II

This institute's task is to interpret the constitution, and it has the same powers that the Church used to have. As to the possible argument that constitutions may be changed by the people, my answer is twofold: (a) that what the people does when it changes a constitution is, actually, a new interpretation of old needs or the declaration of new needs; (b) that the Church has always had exactly the same power, a power which the Church never hesitated to wield.

In both cases the change is always done subject to a statement, expressed or implied, that it is done in the spirit of the existing constitution, or "natural law", as the case may be.

But Kelsen carries his argument further to what seems to me absurd when he argues[16] on the one hand that natural law is an "order" (not only a principle) and, on the other - that the norms which may be enforced by whichever of its institutes must be "individual", hence - arbitrary in the sense that they cannot be absolute and general.

If natural law is a legal order, as Kelsen puts it, how is it different from positive law? Doesn't positive law have, as Kelsen himself testifies, a basic norm? Moreover, don't positive law judges have to apply the principles

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(1443-1513) unlimited powers (and cruelty) in The Agony and the Ecstasy, 1972, Book II, 544-5.

[16] Ibid. 397-8.

and criteria of positive laws to each set of facts each time anew? And lastly, is British Common Law, for example, not a positive law according to Kelsen? And since it is clear that it is - has it not been developed as a case law, i.e. - along the lines laid down by the interpretations of individuals (judges) in the light of given norms, basic or not?

Therefore, I readily accept that "an 'ought' can only be derived from an 'ought' and not from an 'is'"[17] but am not ready to accept that this does not also apply to "natural law". As a matter of fact, I think that ecclesiastical law is such law, founded on the basic norm of natural law as interpreted by "God's representative", namely - the Church. I also don't accept Kelsen's argument that there is anything more coercive in positive law than in natural law. Coercion is manifested and implemented in the power which is willing, and able to enforce its law, be it derived from a mysterious "basic norm" ("constitution") or God. That assembly of men (or usurper), to whom Kelsen refers, who had enacted "their basic, supreme "constitution" could have declared (or - "re-enacted") natural law as their basic constitution and make it equally binding.

35.3 People would never resort to mysterious powers (God or any superhuman power) unless they thought logically. What I mean is that only pure logic can lead to an "illogical" consequence like the existence of some unidentified superpower. This must be the result of a consistent process of logical

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[17] Ibid. 399.

thinking, of a causal chain, and of such a chain only. In this respect, there is no difference between belief and "scientific" reasoning. They both are proofs of, as well as solutions to man's inability to explain to himself the "whys" and "hows" of things.

Kelsen's twists and turns are definitely incompatible with that statement. In his attacks against natural law, he dealt, as has been pointed out earlier, with its classical formula, and left is wider meaning for a separate discussion, trying to convince the reader that justice is none of the positivist's business. I shall go back to this discussion later. But right now, I would like to suggest that natural law in its wider sense[18], namely - justice or any other set of socially accepted values - may be quite far less vulnerable to attack. As a matter of fact, it may satisfy even Kelsen's demand that the "basic norm" be dependent on man's will. As he puts it: "different norms constitute one order and belong to one system of norms if ultimately they must all be traced back to the same reason of validity, if they flow from the same "source" - to use the common expression - or to use the faimiliar anthropomorphic phrase, if the same "will" is the reason of their validity. This last formula has already a strongly positivistic tinge. It works on the assumption that norms are made by human will."[19]

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[18] Kelsen himself indirectly accepts this wider formula when he says (p. 5) that "law as distinguished from justice is positive law".

[19] Ibid. 399. At p. 116 he tries to differentiate between positivistic and

As also does, no doubt, the "basic norm". But if classical natural law is not a basic norm"made by human will (and I fail to understand why not) - natural law in its wider sense certainly is, for it is the phrasing of man's aspirations and convictions, the basic norm with which he wishes to govern legal order of his society.

35.4 Kelson attacks both formulae of natural law also indirectly. "Legal norms may have any kind of content" he says; the validity of a legal norm "cannot be questioned on the ground that its contents are incompatible with some moral or political value."(20)

This is an interesting statement, and it leads Kelsen to two conclusions. The first - that legal norm may be valid only "if it belongs to a certain legal order", which it does "if this norm has been created in a definite way ultimately determined by the basic norm of that legal order."(21) The second is, in my view, the real cause of the first, namely - Kelsen's conviction that this "pure theory of law - a science - cannot answer" the question whether a given law is just or not, "because this question cannot

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natural law "basic norms" and rejects the latter's answer that "the fathers of the first constitution" were empowered by God, though he doesn't supply any other, unless one is willing to accept as valid the answer that the positivistic basic norm is ..."presupposed as a valid norm"... (ibid.).

(20) Ibid. 113

(21) Ibid.

be answered scientifically at all". (22)

His statement and conclusions raise many problems. For example: what does the term "political value" mean? And would Kelsen have changed his statement if we had shaped such a political value and given it the form of a "legal norm"? He would have, and rightly so. As we have already seen, Kelsen never rejected constitution as a legal norm. On the contrary, his theory is based on the assumption that such constitution actually exists, or that "an original historical fact has the meaning of "constitution"; of an improved basic norm". (23) And I suggest that every constitution is a political document which represents political and moral values of the people, or at least of its legislator.

I further suggest that according to positivism the imaginary one-section constitution hereafter quoted is valid and should be followed: (24) "each

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(22) Ibid. p. 6

(23) Ibid. 394-6.

(24) For the reasons specified by Kelsen himself, who says (at p. 115) that "to the question why a certain act of coercion... is a legal act, the answer is: because it has been prescribed by an individual norm, a judicial decision. To the question why this individual norm is valid as part of a definite legal order, the answer is: because it has been created in conformity with a... statute. This statute, finally, receives its validity from the constitution, since it has been established by the

and every enactment must be just and any unjust enactment shall be declared void by the Constitutional Court".

Lastly, I suggest that this is actually what many constitutions prescribe, the constitutions of the United States and of the Soviet Union included.

35.5 The Soviet constitution is, no doubt, valid in the eyes of legal positivism. It is recognized by international law; it is effective within the boundaries of the Soviet Socialist Republics and it is respected by their peoples.(25)

If, however, we include in our definition of "legal order" a certain minimum of personal freedom and the possibility of private property, then - says Kelsen - the social orders prevailing in Russia, Italy and Germany could no longer be recognized as legal orders.(26) But, he goes on, there is no

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competent organ in the way the constitution prescribes". A declaration of "my" Constitutional Court will therefore be binding and the constitution itself valid according to Kelsen's principle of "Legitimacy" (p. 117) or "Reception" (in the case of revolution) and "Effectiveness" (118-9) both with regard to the actual behaviour of men, and from the standpoint of international law (p. 121).

(25) Ibid. 5.

(26) Ibid. The General Theory was first published in 1945 and the reference is here to Nazi Germany and Fascist Italy. As has already been mentioned in note 24 supra, Kelsen accepts that the attitude of international

reason why the concept of law should be defined so as to exclude any of them, as the concept of law has no moral connotation whatsoever. It just designates a specific technique of social organization.

"Social organization", says Kelsen. Couldn't we replace this expression by "political organization" without changing its meaning? I think we can, and that Kelsen would not have argued against it. I also think that it is quite easy to prove that most legal orders, most "basic norms" (i.e. - constitutions) represent "political values"[27], that they represent political organizations, and that, in spite of Kelsen's objection, these basic norms themselves do insist categorically that they be examined and analyzed in the light of the political values (organizations) along the lines of which, and to whose purposes, these basic norms were enacted.

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law is one of the criteria determining the validity of a constitution (i.e. - of a legal order). Nevertheless, he left this passage unchanged in the 1961 edition in spite of the fact that in the meantime the Nuremberg (and Tokyo) Trials refused to recognize as valid certain German (and Japanese) enactments which had been enacted, as well as practices and acts which had been done by virtue of their "basic norms" and declared them void.

[27] See n. 20 supra.

The Soviet constitution opens with the same motto as did the Communist Manifesto: "Workers of all countries - unite!" and very few will seriously dispute the contention that this is a political statement in its purity. Its first chapter is titled: "The Social Structure", and the first clause there reads very plainly that "the United Soviet Socialist Republics is a Socialist state of workers and peasants". If this is not a political statement (value) I wonder what is.[28]

The measures prescribed by Soviet criminal law to punish "persons deemed socially dangerous"[29] are in conformity with the spirit of the Soviet constitution. It is a political offence as much as treason is in English or Israeli law. That "social danger" was not specifically defined in 1934[30]

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[28] In this context see also notes 31, 32, 39-43 below.

[29] A statute of 5 November 1934 (to be repealed and re-enacted with amendments in 1958; see note below). The measures were administrative and included exile, confinement in a camp of correctional labour up to five years and deportation abroad (Grovski & Grzybowski, Government Law & Courts in the S. U., 1959, Vol. 2, 934).

[30] In 1958 this article was replaced by sec. 7 of the Basic (Fundamental) Principles of Criminal Law, which states that "as a crime shall be considered, if it so specified by a criminal statute, any socially dangerous act (of commission or omission) attacking the Soviet social or political order; socialist system of economy; socialist property; persons; political, labor, property and other rights of citizens, as well

and served as a means of coercion and terrorism is beside the point.[31] That it was phrased in general terms is also no novelty.[32] It is not uncommon and in the eyes of Kelsen's positivism may not be regarded as unbinding or not "law".[33]

The U.S. constitution is by no means different. While its principles are, of course, entirely different from those of the Soviet[34], it expresses the

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as any other socially dangerous act attacking the socialist legal order if so specified by a criminal statute (Grovski & Grzybowski, Vol. 2, 1912). The novelty here is, of course, in the prima facie adoption as legal principle of the old "nullum crimen sine lege". But see note 43 below.

(31) For, as Vyshinski put it, "the OGPU and the courts represent various forms of the class struggle of the proletarian dictatorship" (ibid, 922). A political statement in its purity.

(32) By the post-Han Chinese criminal law it was an offence to commit anything which was "immoral" (Wu, Chinese Legal and Political Philosophy, in The Chinese Mind, Essentials of Chinese Philosophy and Culture, I, 219, Moore ed.).

(33) Kelsen, General Theory, 57.

(34) One shouldn't be misled by those provisions of the Soviet constitution which prima facie appear to be granting democratic rights and personal liberties, e.g. clause 125 which grants freedom of speech, of the press,

political credo, of the fathers of the American constitution as much as the 1936 Soviet constitution expresses the political credo, should we better say - needs of Stalin's draftsmen.

The preamble of the U.S. constitution opens with the words: "We, the people of the United States, in order to form... Justice... promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution", which words stand on the same political level as do the words quoted from the Soviet constitution.

Actually, the 7 articles of the U.S. constitution and its 25 amendments are nothing more than an elaboration on "justice", as are the other principles which do practically nothing more than to specify the conditions which the draftsmen of the constitution thought were needed for the establishment of "justice" (a perfect union; domestic tranquility, common defence) or to interpret the term (general welfare, blessing of liberty). When the constitution does not "interpret" justice it "translates" it into minimal measures which are supposed to supply justice with the mechanism to ensure

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of assembly and of demonstration, or clauses 3 and 136 - which grant general right of vote (but only to workers). The true meaning of these "rights" can easily be inferred from the constitution itself and the mechanism of laws, edicts and administrative measures which are designated to enforce it. See n. 30 supra, or clause 130 of the constitution which obliges every citizen of the U.S.S.R. to ..."respect the rules of socialist society".

its preservation.

The U.S. constitution doesn't expressly give the Supreme Court the right nor does it confer upon it the obligation to declare a law, which has been passed in due parliamentary process by either the federal or a states legislator, unconstitutional and void.(35)

Nevertheless, the Supreme Court interpreted the constitution as giving it (and the lower courts) exactly these powers, thus, bringing under its jurisdiction all enactments which may contradict or be incompatible with the constitution.(36)

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(35) Article III of the constitution simply states that ..."the judicial Power (of the United States) shall extend to all Cases, in Law and Equity, arising under this Constitution... to Controversies to which the United States shall be a Party..." Article VI refers to "this Constitution, and the Laws of the United States which shall be made in Pursuance thereof..." and states that they "shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding..." and later that "all... judicial officers... shall be bound by Oath or Affirmation, to support this Constitution..."

(36) It was first decided by Justice Marshall in the famous case of Marbury v. Madison, 1803 (1 Cranch 137), as a consequence of a logical analysis (the wording of the oath of office and art. VI were also mentioned) based,

Hence, in fact, the U.S. constitution may be reduced to that imaginary

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mainly on the argument that the opposite conclusion must lead to absurdity, for "it would declare that an act which, according to the principles and theory of our government is entirely void, is yet, in practice, completely obligatory. It would declare that if the legislature, shall do what is expressly forbidden, such act, notwithstanding the express prohibition, is in reality effectual. It would be giving to the legislature a practical and real omnipotence, with the same breath which professes to restrict their powers within narrow limits. It is prescribing limits and declaring that those limits may be passed at pleasure". Actually, Marbury v. Madison was the second case in which a law of Congress was declared unconstitutional. It was preceded by U.S. v. Yale Todd in 1794 (reported in U.S. v. Ferreira, 1851, 13 How. 40). The other famous case of the negro slave Dred Scott v. Sanford in 1857 was therefore the third, and others followed, especially in the second half of the 19th century and in the 20th, e.g. Tot v. U.S. (1943) 319 U.S. 463; U.S. v. Lovett (1946) 328 U.S. 303; Aptheker v. Sec. of State (1964) 378 U.S. 500 (relating to the constitutional right to travel); Lamont v. Postmaster General (1965) 381 U.S. 301 (which dealt with the constitutional right to the freedom of speech); U.S. v. Brown (1965) 381 U.S. 437; Afroyim v. Rusk (1967) 387 U.S. 253 and the abolishment of capital punishment as contradicting the 8th Amendment, by being "cruel and unusual". Edward S. Corwin (Encyclopedia of the Social Sciences, Vol. 8 (1932) p. 457 quoted from Tresolini and Shapiro, American Constitutional Law, 3rd ed.

one-clause-constitution to which I have referred earlier.

But, whether I am right or not in supporting it, it is, I think, uncontestable that the U.S. and the Soviet constitutions, as well as the one-clause constitution refer to themselves, and to the legal orders which they lead single-valuedly, each one - from the standpoint of that specific set of values, be they moral, social or political, which created them.

As has been pointed out, positivism accepts the Soviet legal order as it is. Consequently, it must accept the Soviet law's self-definition, i.e. - its principle that law forms an integral part of government and thus - a servant of the principles, beliefs and aspirations of the regime.(37)

1971, 65) sums up the three branches of judicial review existing now as follows: "National" Judicial Review, i.e. - the power of all American courts to pass upon the validity of acts of Congress under the Constitution; "Federal" Judicial Review, i.e. - the power and duty of all courts to abide by the supremacy clause of the Constitution (Article VI); "State" Judicial Review, i.e. - the power of state courts to review laws of the state legislature under the respective state constitutions.

(37) So is, to a great extent, domestic military law and military law in occupied territories. Judges according to both laws are nominated by the military commander, and the fact that in occupied territories they may be civilians (see Von Glahn, The Occupation of Enemy Territory, 1957, 116) doesn't, of course, take anything of the military character of the nomination. More important is, that the military commander in an

As Krylenko, the notorious Soviet prosecutor (1918-1936) put it: "to a

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occupied territory may remove judges from office at pleasure, e.g. if he is dissatisfied with their judgments, although military courts should be "non-political" (4th Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 1949, article 66). Pictet in his commentary on this article explains that by "non-political" the draftsmen of the convention forbade "certain practices resorted to during the Second World War when the judicial machinery was sometimes used as an instrument of political or racial persecution"; Commentary, 1958, III, 340. But it is quite clear that by forbidding such political decisions the Convention practically, though indirectly, confirmed that decisions intended to serve military purposes of the occupant are to be expected and are permissible. This is clear also from the second paragraph of art. 64, which entitles the Occupying Power to subject the population to provisions "which are essential to enable the Occupying Power... to ensure the security of the Occupying Power, of the members and property of the occupying forces or administration, and likewise of the establishments and lines of communication used by them". It is exactly and explicitly for this purpose that the military "non political" military courts are instituted according to art. 66. This, undoubtedly, is also the reason why the Geneva Convention does not stipulate that military judges be subject only to the law and not to their commanders - as does clause 184 of the Israeli domestic Military Jurisdiction Law, 1955. In Israeli military law of the Occupied Territories many references are

certain extent the courts must be just like the Cheka[38] an instrument of terrorism. The courts and the Cheka, being agencies of the government authority, perform the same tasks".[39] Therefore, it is only natural that

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made, however, to "justice" as guidance to her military courts, e.g. clauses 9, 10 in the order Relating to Security Instructions, 1967. As to military courts being servants of the occupant's needs, see also Madsen v. Kinsella, 343 U.S. 341. Art. 67 of the 4th Geneva Convention which lays down that the military courts in occupied territories should apply only such provisions of the law as are in accordance with general principles of law, is actually a dead letter, for the courts are obliged to apply the law as enacted. See no. 1 p. 454 in Vol. 2 of Oppenheim's International Law, 1952. Though, perhaps, the occupant power does not create legal obligations for the inhabitants inasmuch as its laws purport to do more than to maintain the normal life of the community. See the decision of the Special Criminal Court at The Hague in re Van Huis, Annual Digest and Reports of Public International Law, Cases, 1946).

(38) The administrative agency which was entrusted with the internal state security, succeeded by Vecheka, OGPU, NKVD, MVD and now KGB.

(39) As quoted by Grovski and Grzybowski in Government Law and Courts in the Soviet Union, 1957, Vol. 2, p. 922. In his Gulag Archipelago (1974, 246) Solzhenitsyn quotes another passage of Krylenko who wrote in a book of his that "the Tribunal is nothing but a weapon in the class struggle of the workers... It must operate in the vital interests of the revolution...

Soviet citizens can hardly lay their hands on a book of Soviet law and that they very seldom rely on legal provisions in a struggle to "maintain" their "legal" rights; the few that can be found in that book.

In the Soviet Union the political structure aims at the implementation of what is believed by the Executive to be just, and in this light the regime examines its legal order and those who are entrusted with the enforcement of its laws and edicts, be they administrative officials or judges.(40)

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and strive towards the best results for the workers and peasants".

See also Kamenka, The Soviet View of Law, in The Soviet Political System, 1970, 313; Schapiro, The Communist Party of the Soviet Union, 1961, 358-63 & passim; Abramovitch, The Soviet Revolution 1917-1939, 1966, 340-79, & passim; Mehnert, De Sowyetmensch, 1967. The application of this theory is further described by Solzhenitsyn with quotations from Lenin and other authorities to support it (see for example Chaps. 9-10). Hence, the fact that there practically was no criminal law in force in the Soviet Union between the years 1918-22 while people were tried and severely punished (Government, Law & Courts, 921) shouldn't surprise us.

(40) Judges were tried and punished for being too lenient with truants who were convicted of offences contrary to an edict of the Presidium of the Supreme Soviet of 26 June 1940, though these judges were perfectly within the law (Schwarz, Labor in the Soviet Union, 1952, 94 ff). There are reasonable grounds to assume that the sources of this approach

Though, by virtue of article 112 of the Soviet Constitution "judges are independent and are subject only to the law".

Therefore people are obliged to obey illegal orders [41] and laws may contradict the constitution or be incompatible with other laws and legal

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should be looked for in the French revolution. Justice, according to Robespierre, is a function of the political-social struggle and a tool in the hands of the victor (Talmon, The Rise of the Totalitarian Democracy, 1955, 89).

(41) E.g. of a manager or foreman to a worker, while absence from work with the permission of the management is an offence if the permission was illegal (ibid). Soviet military law lays down an absolute obedience to superior orders though, perhaps, not to orders which are "obviously" criminal (Schwarzenberger, in International Law, 1968, Vol. II, 535). Article 125 of the Israeli Military Jurisdiction Law 5715-1955 which discharges a soldier from criminal responsibility for not obeying an order which is "manifestly" illegal (Appeal 72/56, 1956, Selected Judgments of the A.C.M. p. 82) was enlarged in 1957 by the Kefar Kassem case (Military Prosecutor v. Malinki, Pssakim M. Vol. 17, 90) with reference to clause 19 of the Criminal Code Ordinance 1936, making it a punishable offence to obey such an order.

principles.[42] Moreover, and mainly, it is perfectly within the spirit of

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[42] E.g. according to article 102 of the Soviet constitution justice should be done by the various courts, starting at the People's Tribunal and ending at the Supreme Court of the Federation. In fact, however, administrative authorities have legal jurisdiction regarding a wide range of crimes (see for example, n. 29 supra). In the words of Krylenko: "the Soviet rulers did not intend to have their own hands bounds by codification of criminal law" so that much room is left for arbitrary imposition of punishment (Government Law & Courts in the S.U., 926); thus, "antisocial parasitic elements" in the Uzbec Republic may, by virtue of section 1 of the law dealing with their crimes, be deported from 2 to 5 years by a "popular judgment" of a simple majority in a meeting of "citizens residing in the area of the house management, street" etc., i.e. - 26% of the total number of residents in the area concerned. As section 3 of the same law explains that this punishment ("measure" to be more exact, for in the USSR there are usually no punishments; only "social measures") should not be applied to persons who "have committed an offence subject to criminal law" this law applies to those who have not committed any offence punishable under criminal law and thus it contradicts the new (1958) Act on Criminal Law (General Part: Fundamentals) which states in section 7 that "as a crime shall be considered, if it is so specified by a criminal statute, any socially dangerous act" (ibid. 965-7, 1911-12). Under section 1.3 of

Soviet legal concept that criminal offences may, and sometimes should,

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the U.S.S.R. Statute of Political Crimes of June 8, 1934, innocent persons living with or dependent upon a man who, while in military service took flight abroad, are subject to exile to remote localities of Siberia for five years, though they had no knowledge of his crime. On the other hand, a person may, by virtue of section 8, be exempted from penalty for a crime committed if his act "has lost its socially dangerous character by... the mere fact of a change in the social or political situation" etc. Ibid. 931-3. (This provision should not be compared or confused with the police authority in Israel and other democratic countries to "close a file" against a suspected offender for "lack of public interest" or with the Attorney General's to order a "stay of proceedings" for similar reasons. Firstly, in these two cases proceedings must be stopped (by the police) before the case even reached the court or (by the A.G.) before a judgment has been pronounced by the court. Secondly, the decision of the police is subject to a review by the A.G., and the A.G.'s decision is subject to a review by the High Court of Justice). As to the "administration of justice" in the U.S.S.R., it is enough to mention Lezis' very moderate estimate (quoted in Solzhenitsyn's The Gulag Archipelago, 1974, 240) of executions-without-trial within 18 months in 1918-19 in only 20 regions of the Russian Socialist Republic alone (one, though, the largest in territory and population, of the 16 republics which combine the Union): 8389 persons.

be inferred by analogy or described in general, vague terms, thus ignoring

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In addition, of course, to "proper" executions (according to Soviet law death penalty "is imposed only by a sentence of the court"; Chkhikvadze and Kirischenko, Criminal Law in Romashkin's Fundamentals of Soviet Law, 1962 (?), 413) for violation of any of the 74 crimes punishable by death according to Soviet Criminal Law. The General Part of the Criminal Code of 1926 treats the death penalty as "a measure of correctional nature" in the framework of "measures of social defence" (Government, Law & Courts, 929; Fundamentals of Soviet Law, 413-3. The latter specifies some 15 groups of crimes punishable by death, including "embezzlement of state or social property on a particularly large scale", "especially dangerous, recidivists... who in places of confinement... attack officials". But "the Soviet State combats crime and other anti-social acts above all by persuasion", and "punishment is imposed both for the purpose of reforming offenders and exerting an educational effect on the unstable members of society". The Soviet criminal law "reflects the principles of socialist humanism inherent in the Soviet state and law"; ibid. 401-2. Therefore, according to section 14 of the Fundamentals of Criminal Law, it is prohibited to make the accused give testimony by use of violence, threats or any other unlawful means"; p. 450. The horrors described by Solzhenitsyn and many others relate, it should be noted, to pre-trial inquisitions when persons are not yet formally accused. As to judges, they "are not bound by any formal requirements in the

the principle (though it was never formally rejected by the U.S.S.R.) that nullum crimen, nulla poena, sine lege.[43]

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evaluation of the circumstances of the case" but are guided - as are the procurator, the investigator or the person conducting the inquiry - by ... "their socialist concept of justice"; p. 456. In the words of a president of one of the People's Tribunals, which were heard by an eyewitness and quoted by Solzhenitsyn in The Gulag Archipelago, p. 243, "we don't go by the laws, but by our revolutionary conscience").

(43) "Before the adoption of the Fundamentals of Criminal Legislation in 1958" say the above mentioned authors (ibid. 405) "there existed in Soviet criminal law the institution of analogy. The gist of it was that in exceptional cases (according to Solzhenitsyn those exceptional cases amounted to many millions of victims), when a socially dangerous act or omission was not specifically defined in criminal law, the court was empowered to apply a penalty for it by analogy with articles dealing with crimes most similar in nature and significance". This, they say, was abolished by section 7 (see n. 42 supra) which holds that "there can be no criminal responsibility where there is no material element of the act, namely, its socially dangerous nature". Thus Soviet criminal law "reveals its genuinely democratic and educational nature", i.e. - "the material concept of crime as a socially dangerous act or omission aimed against the Soviet system of law and order". But this act or omission should, according to section 7, be "prescribed in criminal

35.6 Kelsen demands that the law be free from

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law" (p. 404). As to what constitutes a socially dangerous act, the authors explain that it is a crime that "transgresses against the Soviet social or state system, the socialist system of economy, socialist property, the person, and the political, labour, corporal, and other rights of citizens, and also any other act that transgress against socialist law and order and is defined in criminal law as dangerous to society" (ibid 404-5); namely - to "the legal order established by the Soviet Government" (sections 55, 1, 6 of the Code of 1926, Government, Law & Courts, 936); to the interests of the ruling class (i.e. workers and peasants, as indicated by sec. 1 of the Code of 1926. Menshagin & Vyshinskaya in Criminal Law, General Part, 1948 as quoted ibid. 928). Therefore, the personal guilt is not a solid element in Soviet criminal law, for it is substituted by the concept of social danger (Vyshinsky as quoted, ibid. 930. He consequently advocated that the criminal code should state "only general principles for the imposition of punishment, without giving legal definition of individual crimes"). As criminal law is, according to Soviet text books, a political weapon and should be politically interpreted, and as the smallest departure from this interpretation "results in sliding down to the position of bourgeois objectivity and leads to the heaviest violation of socialist legality" (Piontkovskii & Menshagin in Course in Soviet Criminal Law, Special Part, 1955, as quoted ibid. 937) it is clear that the abolition in 1958 of

any moral or political

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conviction by analogy could be only formal. Thus, it was substituted by general and vague "definitions" of crimes and by a flexible (should we say liberal?) interpretation. Not different, in principle, from the interpretation which had been in use prior to the "reform". The former section 58.1 of the Code of 1926, for example, defines counterrevolutionary crimes as follows: "any act intended to overthrow, to undermine, or to weaken the power of workers' and peasants' soviets, and of the workers' and peasants' governments of the U.S.S.R.... or to undermine or weaken the external safety of the U.S.S.R. or the basic economic, political and national conquests of the proletarian revolution" (even if the crime is directed against any other state of toilers and whether it is incorporated in or out of the U.S.S.R., because of the "international solidarity of the interests of all the toilers. Quoted ibid. 947). The remaining 14 sub-sections define many other particular crimes. The new Law on Criminal Responsibility for Crimes Against the State ("especially dangerous state crimes") specifies, among many others, the following crimes: "high treason, i.e. an act deliberately performed by a citizen of the U.S.S.R. to the detriment of the state independence, territorial integrity or military strength of the U.S.S.R. ... divulging of state or military secrets to a foreign state... aiding a foreign state in hostile activity against the U.S.S.R.; and also plotting to seize power" (art. 1); "sabotage", i.e. "an act or omission designed to undermine industry, transport, agriculture, the monetary system, trade or other branches of the national

judgments.[44] But I have shown, I hope, that the law "refuses" to be freed from either moral or political judgment.[45]

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economy, and also the operation of state agencies or mass organizations, with the object of weakening the Soviet state, etc. (art. 6); "agitation and propaganda directed towards the undermining or weakening of the Soviet authority, or the commission of especially dangerous state crimes, the spread for similar purposes of slanderous fabrications denigrating the Soviet state and social system, and also the circulation, prepration or possession for these purposes of printed matter of a similar nature" (art. 8 - punishment - 6 months to 7 years, or exile for a period of from 2 to 5 years). Soviet prisoners of war were punished in 1941-6 and could be punished today for an act of "detriment of the military strength of the U.S.S.R.". The same is correct with regard to sabotage; any failure to produce that which is expected or ordered by the authorities may be tried and punished for sabotage, and any friendly talk, a private letter and even an intimate personal diary may amount to the crime of propaganda. For details see the cases brought by Solzhenitsyn in chap. 2 of The Gulag Archipelago, especially pp. 61-81.

(44) General Theory, 5.

(45) I very much doubt if the two (morality and politics) can really be separated, for it seems to me rather obvious that many moral values - including justice - are, in fact, the outcome of political convictions. Otherwise no meaning could be attached to the phrases "socialistic

It is true, as Kelsen puts it, that law "designates a specific technique of social organization"[46] but it doesn't follow, of course, that every social organization or technique should be defined as "law". And I do think that Kelsen makes the very mistake against which he preaches in his rhetoric question "perhaps the actual usage is so loose that the phenomena called "law" do not exhibit any common characteristic of real importance".[47]

He tries, in the name of "science", to find such a common characteristic; a common denominator, and thus he "legitimizes" Nazi, Fascist and Communist laws.[48] They are, undoubtedly, political orders; they are social orders. Logically, social disorders may, of course, also be referred to as "orders" if this is what they seem to be or this is how they are imposed. But a social order which lays down, as does the Soviet order, that one is obliged to obey illegal orders; that courts are means of government and one shouldn't confuse them with facts, because they are interested only in political results; that its judges should be bound only by their revolutionary

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justice" and "capitalistic justice" (i.e. - liberalism). That some values are referred to as "natural", "absolute" or "divine" doesn't contradict the assumption.

(46) Ibid.

(47) Ibid. 4

(48) Ibid. 5

or socialistic conscience[49]; that first establishes the accusation and judgment and only later looks for suspects to "fit" them in; that its laws may and sometimes should be ignored by those who enact them or who are entrusted with their enforcement; that its laws may and sometimes should be contradicted by other laws, even "higher" ones; such a social order is an anarchy. Again, anarchy may be defined as a social order if by "social order" we mean a way of life, or rules of behaviour. But, to shape such rules into another imaginary one-clause-constituion, which states that "the law is that which each one may at pleasure decide that it be the law" - doesn't mean that we are dealing with "law". Nor are we dealing with law if the arbitrary enactment is in the hands of one person (monarch, dictator, tyrant) or a group of persons (the leadership of the party, the presidium of the Supreme Soviet).

If law may deliberately contradict the constitution, as it does in many cases in the Soviet Union, then, of course, the constitution may deliberately contradict a prior constitution and the latter - the one that preceded it,

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[49] One may argue that it shouldn't shock us, as "equity" and "justice" which form part of the English (and Israeli) legal system refer to conscience, rather - to political convictions which the liberal concept of justice produces, as much as does the Soviet law. The difference, however, is in that while "socialist conscience" sacrifices the individual to society, class and regime, liberal justice refers to the individual as its main (though not only) target.

until Kelsen's "basic norm" itself is contradicted. Which means, that this "basic norm", this "first constitution" is no longer, and ex post factum has never been, the source of the law and cannot legitimize it.(50)

I suggest that law and anarchy are two opposites, and that the one thing which makes law what it is, namely: a proper "technique of social order", is - as I think also Kelsen would agree - its unity.(51) I further suggest that this unity is dependant on the existence of a "basic norm" to which all the laws of a given social order should conform. Not necessarily Kelsen's "basic norm" but nevertheless - a norm from which all the inferior laws derive their validity.

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(50) In The Concept of Law, 1951, Hart suggests "the rule of recognition" instead of Kelsen's "basic norm" (chap. VI) for the following reasons (note at p. 245-6): a) the validity of a given legal system is an empirical question of fact; b) Kelsen's theory is inapplicable to countries with no written constitution; c) it avoids any commitment to the conflict between law and morals.

(51) In Kelsen's words (General Theory, 162): "there cannot occur any contradiction between two norms from different levels of the legal order. The unity of the legal order can never be endangered by any contradiction between a higher and a lower norm in the hierarchy of law". Philosophizing that "the law is that which one (even when it is the parliament) may at pleasure (i.e. also when it contradicts the "basic norm") decide that it

Moreover, Kelsen justly contends that the purpose or function of law is to put an end to anarchy.[52] Law, according to his definition, is an order (i.e. - a system of rules) of human behaviour.[53] Is the function (purpose) of law a part of its definition? Kelsen doesn't say that it is. I insist that it must be or at least that a definition which refers to purpose and function is perfectly valid. Any human tool - and social order as well as law ("technique of social order") are social tools - may, and should be defined by reference to the "uses to which they are put" in addition, if necessary, to the reference which may be made to the "essential attributes of the species" (e.g. "law"). Therefore, the word "shoe" must be defined so that its definition "includes reference to the use to which those things are put as outer coverings for the foot".[54]

Therefore, a species which looks like a shoe but cannot be put as outer covering for the foot, is not a shoe as much as law which doesn't put an end to anarchy may not be regarded as law. In the first case the individual may seem to be wearing "shoes" while he actually is barefooted. In the second -

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be the law" is a "basic law" which allows contradictions, and therefore doesn't negate the principle of unity is, of course, invalid, for it means that unity equals its opposite.

(52) Ibid. 22, 284-6.

(53) Ibid. 4

(54) Copi, Introduction to Logic, 1967, 123-4. As to the difficulties involved

society is.

If such a "legal order" doesn't fit into Kelsen's definition, i.e. - if its norms (of different levels) contradict each other; if its unity is always in danger, rather - it never exists, and if it doesn't put an end to, nor even reduces anarchy significantly[55], than this "species" is not a legal order. Its "laws" are not, and should not be accepted by positivism as laws, according to its own definition.

In which case, the set of norms concerned belongs to another discipline, other than the "legal science": sociology, political sciences, philosophy, to mention three possibilities. If so, we are permitted, even according to

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in the definition of law, or rather - any rules, see Hart, The Concept of Law, 1961, chaps. 1-2.

[55] A legal order which perpetuates inequality or other social discriminations causes social unrest but, nevertheless, retains "unity" and serves as a "technique of social order" ; does it reduce anarchy or does it do the contrary? The term "anarchy" is not defined by Kelsen and is open to many queries. Unfortunately, it is outside the scope of this work, It may, however, be suggested that if putting an end to, or even reduction of anarchy is an element of the definition of "legal order" than none of the known legal orders may properly be so termed.

Kelsen, to examine such a set of norms from the standpoint of our philosophy of justice, for only positive law (as defined by Kelsen) "must be clearly distinguished from a philosophy of justice".[56] Not, if this "law" is not a part of any legal order, because it doesn't fit into the definition. There is no prohibition in sociology, philosophy or political sciences to look for an answer to the question if a certain phenomenon within the sphere of either of them is just, and to suggest whichever criteria to serve as proper means to supply that answer.

If this question is forbidden, according to Kelsen, because it is a "non-scientific political" one, it must, by way of logic, be allowed in the framework of political thought. Though I can find no explanation what is wrong with interdisciplinary attempts to recognize the existence of a problem in a certain discipline and to suggest possible solutions. I find no justification for isolating "law". Mo reover, no social science is, or should be, isolated nowadays. As a matter of fact - none is.

35.7 Nevertheless, Kelsen vehemently opposes any attempt to moral or other evaluation of legal order. The pure theory of law, he says, is "incompetent to answer the question whether a given law is just or not... because this question cannot be answered scientifically at all."[57]

Why not? Because, he argues, justice is a subjective judgment of value,

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[56] General Theory, 5.

[57] Ibid. 6.

and "there can be no 'just' order, that is, one affording happiness to everyone, as long as one defines the concept of happiness in its original, narrow sense of individual happiness, meaning by a man's happiness what he himself considers it to be. For it is then inevitable that the happiness of one individual will, at some time, be directly in conflict with that of another".

I don't know who ever has so defined "justice" or a "just order". To the best of my knowledge, not even Bentham in his utilitarian doctrine[58], or Hobbes, who based his political philosophy on the view that men are

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[58] "Sometimes", he says, "in order the better to conceal the cheat (from their own eyes, doubtless, as well as from others) they set up a phantom of their own, which they call Justice; whose dictates are to modify (which being explained, means to oppose) the dictates of benevolence. But justice, in the only sense in which it has a meaning, is an imaginary personage, feigned for the convenience of discourse, whose dictates are the dictates of utility applied to certain particular cases" (Bentham, An Introduction to the Principles of Morals and Legislation, 1823, 125-6). And in his Theory of Legislation (Ogden ed. 1931, 96): "all the functions of law may be referred to these four heads: to provide subsistence; to provide abundance; to favour equality; to maintain security". Two hundred and fifty years later the Fascist thinker Del Vecchio would say, as did Fichte, that the eternal seed of justice is inherent in man and that that justice means "equal freedom for all"

essentially selfish.[59]

To say that a social order is a just one, means, according to Kelsen, that "this order regulates the behaviour of men in a way satisfactory to all men, that is to say, so that all men find their happiness in it. The longing for justice is man's eternal longing for happiness. It is happiness that man cannot find as an isolated individual and hence seeks in society. Justice is

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(The Formal Bases of Law, 1921, passim). His state will be the "dialectic synthesis of liberty and authority" based on juristic equality of all citizens (Justice, Droit, Etat - Etudes de Philosophie Juridique - 1938, 365. Also: Justice, infra; Friedmann, Legal Theory, 1953, 107-111 & passim). Thus his "law" is based on ideas and not on necessities alone, and the idea of justice is "the overcoming of individuality, the projection of ego in form of the alter" (Justice, an Historical & Philosophical Essay, 158). However, the term "happiness" is also vague and should be defined. Justice may exist in a society whose members agree to <u>suffer</u> for a mutual cause (e.g. the Soviet society in its early days. A society in war. In those cases justice exists at least in equality). It seems, therefore, that the advocates of the "social contract" ideology were closer than Kelsen to the definition of happiness as a synonym of justice (if it is a synonym).

(59) But, nevertheless, "no law can be unjust" (Leviathan, Ch. XXX) and is for every subject, "those rules which the commonwealth hath

social happiness". (60)

So, we may infer the following equations: a) justice and social happiness; b) social happiness and happiness for all men; c) happiness for all men and the individual happiness summed up; d) individual happiness and individual satisfaction. As (a) = (b); (b) = (c); (c) = (d) then of course, (a) = (d), i.e. - justice equals individual satisfaction. But wasn't it Kelsen himself who taught, as has been just quoted, that a just order means an order which "regulates the behaviour of men in a way satisfactory to all men... so that all men find their happiness in it"?

"establishing" that which purports to be the objective ("pure"?) theory of justice Kelsen moves now to say that it is inapplicable, because "a social order can assure... happiness in the collective sense only, that is, the satisfaction of certain needs recognized by the social authority, the law giver, as needs worthy of being satisfied, such as the need to be fed, clothed and housed." (61)

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commanded him, by word, writing or other sufficient sign of the will, to make use of, for the distinction of right and wrong" (ibid. XXVI).

(60) General Theory, 6.

(61) Ibid. Is it by chance only that the theoretician who accepts as legitimate totalitarian legal orders is also the one who fails to mention among his immediate examples of needs (should we better say - rights) which must be satisfied by the law giver, pursuit of happiness, equality of

The questions "which human needs are worthy of being satisfied and... their proper order of reason... cannot", he argues, "be answered by means of rational cognition. The decision of these questions is a judgment of value, determined by emotional factors and is... relative only". (62)

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opportunities, education or personal liberties? (In his 1776 draft of the American Declaration of Independence Jefferson wrote: "we hold these truths to be self-evident, that all men are created equal; that they are endowed by their Creator with certain unelienable rights; that among these are life, liberty and the pursuit of happiness...").

(62) Pound, also a positivist, is not dismayed, and suggests the following answer to the question what is justice. It means, he says, "administration according to authoritative precepts or norms (patterns) or guides, developed and applied by an authoritative technique, which individuals may ascertain in advance controversy and by which all are reasonably assured of receiving like treatment. It means an impersonal, equal, certain administration of justice so far as these may be secured by means of precepts of general application" (Jurisprudence, II, 374-5). A most interesting and stimulating solution, based on a somewhat pragmatic approach, is offered by Hart (in The Concept of Law, 1951, 189-195). He suggests that a minimum content of natural law is and should be found in every legal system. This new "interpretation" of the traditional natural law is disengaged from any possible divine will or eternal moral truths, but claims that there are a few indispensable "truisms" which ensue from the nature of man, of his environment and

Kelsen has gone even further now. From the previous passage quoted above we could infer that at least "collective" justice can be assured by social

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of the compulsive outcome of these two, namely - his need to live in an organized group. Hart's point of departure is that survival is man's aim, that minimum cooperation is essential (whether voluntary or compulsive), that there is a rational connection between "natural facts" and the content of legal and moral rules, and that young children are and should be fed and nurtured in certain ways within the family, so that only those laws or code of morals can be established that conform to a certain type and hence can function successfully (Hart appeals to psychology and sociology that they might verify this proposition. Indeed, some twenty years earlier psychology did, and carried its findings even further. The famous pedagogue Piaget states in The Moral Judgment of the Child, 1932, 197 ff. that although children of different age groups differ as to what is just or fair, most of the children of the same age group take similar positions as to moral questions. Bienefield similarly suggests in Rediscovery of Justice, 1947, 19-27, that the sense of justice is deeply planted in children and manifests itself in a like manner. They demand equality and protest against arbitrary discriminations among brothers and sisters). The "natural facts" which dictate the "minimum content of natural law" and their outcomes are, according to Hart: a) the need to restrict the use of violence which is due to human vulnerability; b) the necessity for a system of mutual forbearance and compromise, which is due to the approximate equality of men on the one hand and their

order, for it can assure a "collective happiness". But from the latter passage the opposite should be inferred, namely - that not even that justice

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aggressive tendencies on the other; c) the need for some minimal form of the institution of property and the distinctive kind of rule which requires respect for it, which is due to a third "natural fact", i.e. - the limited resources of food, clothes, and shelter (here again, an earlier anthropological research supports Hart's proposition. In The Ideas in Barotse Jurisprudence, 1965; a research which was conducted in the 1940's, says Gluckman about the people of this African tribe, that most of their transactions and obligations ensued from status-relations - in the sense referred to by Maine in his Ancient Law, 163 - i.e., family relations, and that they had only very few contracts. The reason is to be looked for not only in the fact that the Barotse were then still in an early stage of economic development but also, and maybe mainly, in the fact that their economic resources were practically unlimited. People's wealth was dependent on their diligence alone and "money" or political power couldn't improve considerably their living conditions. Thus, wars among the Barotse never broke out for any economic advantage. Whether this strengthens Marx' and Engels' basic formula, that history of mankind is the history of class-struggle, as they put it in the Communist Manifesto, or weakens it, has to be left for a separate discussion). The latter, "natural fact", necessitates d) a dynamic system of rules, to enable men to create obligations and to vary their incidence (with

can be done, as there can be no rational answer to the question which needs are worthy of being satisfied and what is the proper rank of order in which they ought to be satisfied. In other words, Kelsen states simply that, even when a population is "content" (I try to avoid the adjective "happy") with its legal order, it is, nevertheless, by definition, an unjust one, because whichever were the ways and means that have established that order - they may not be rational. Moreover, as there is no way to determine the two questions unemotionally, the solution presented by any legal order must be arbitrary. But with my contention that arbitrariness is - again: by definition - incompatible with justice, very few will not agree, I presume.

The trouble with Kelsen's allegation is once more its foundation, i.e. - his stubborn insistence that law is, or should be, a science, and his view of what science is. The key word in the two passages last quoted is: "proper" (order of rank). Firstly, there are some fundamental truisms

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regard to transfer, exchange or sale of products, division of labour, need for cooperation); hence - another result of the same "natural fact" - e) the need to secure the recognition of promises as a source of obligation. These, together with the additional "natural fact", namely - the limited understanding and strength of will - leads to f) the need for an organization of coercion. As Hart puts it: "a voluntary cooperation in a coercive system" (p. 193).

which, though cannot be rationally or scientifically proved are, nevertheless, truisms of general acceptance.[63] Life, i.e. - physical existence comes before any other need. Food comes before dwelling. Dwelling precedes clothes, etc. Of course, somewhere later a dispute may arise and it may also arise with respect to particulars of the uncontested needs, but if mathematics can be founded on unproved axioms without losing its character as science, why can't the philosophy of justice be founded similarly?[64]

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[63] See, for example, the French Declaration of the Rights of Man and of the Citizen of 26th August 1789; The American Bill of Rights of 15th December 1791; The Universal Declaration of Human Rights of 10th December 1948; Convention for the Protection of Human Rights and Fundamental Freedoms of 4th November 1950. Montesqieu said in The Spirit of the Laws (Nugent trans. 1900, Book I, Chap. i) that "to say that there is nothing just or unjust but what is commanded or forbidden by positive law, is the same as saying that before the describing of a circle all the radii were not equal".

[64] As it was, for example, by all the advocates of the idea of "social contract". And as it is done by Kelsen himself for no rational, scientific ("empirical") proof is offered by him to many of his assumptions (axioms?) e.g. that "a just order is an order that regulates the behaviour of men in a way satisfactory to all"; that "it is <u>obvious</u>" that "there can be no just order, that affords happiness to everyone", that law should be treated as science; that there is, or ever was a "basic norm" or that

Secondly, that generally accepted truism is a rational conclusion, be it founded on emotions (axioms) or not. Furthermore, as positivist Kelsen should be interested only in the general consent, not in the reasons or motives of the "parties" in agreement. There is an order of rank acceptable to the Christian world and the Socialist world (if to refer to Kelsen's own examples), with a philosophy to support it. And since he agrees that to a certain extent the means to fulfil such a philosophy may logically be justified - the philosophy itself can be justified as well (see also infra). Emotion is an integral part of the process of rationalization as much as illogicality is sometimes a part or at least an inevitable consequence of logic.

35.8 As we have seen Kelsen rejects any reference to "justice" as a judicial criterion for deciding whether a certain law or legal order is "just" or not, because this question cannot be answered "by means of rational cognition". It cannot be answered, as was already quoted, "scientifically". It is, he says, a "relative judgment" of value, "determined by emotional factors". (65)

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no rational conclusion may be valid unless it is empirically founded. There is no empirical proof in Kelsen's work to establish this premise, and I know of scientific conclusions (e.g. in Astrophysics) which are based on theoretical assumptions only (see Ben Bova, the New Astronomies, 1974).

(65) Being aware of the fact that positive law sometimes does in fact refer

On the other hand he states that according to positivism "legal norms may have any kind of content". (66)

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to "justice", Kelsen offers for his theory the following excuse: "when the norms, claimed to be "the law of nature" or "justice", have a definite content, they appear as more or less generalized principles of a definite positive law, principles that, without sufficient reason, are put forth as absolutely valid by being declared as natural or just law" (General Theory, 10). The key expressions of this passage are "definite" and "generalized principles" (more or less) which obviously (whether in "norms" Kelsen refers to "social" or "legal" ones) are incompatible (especially when the "definite" content is "more" generalized). The expression "definite" is certainly vague for, either reference is made by a legal norm - and one may rightly contend that it is always made - to specific requirements which are the legislator's practical interpretation of "justice" without necessarily mentioning the term or, it is made to the term ("justice") without any specification, leaving for the judge or the relevant authority to give it a meaning.

(66) General Theory, 113. Hart's partial answer can be found in The Concept of Law, 195, with regard to "sanctions", as an integral part of the positivistic definition of "law". According to Hart sanctions are a "natural necessity" when it exists, but law remains a law even when it doesn't provide for sanctions. At any rate, by force of Kelsen's statement, my proposed one-clause-constitution ("Each and every

I said "on the other hand" because I think it can be shown, as I will try to do hereafter, that these two statements of Kelsen's "pure theory of law" contradict each other, and that, therefore, either the theory of positivism is not valid or it has to be reshaped, enlarged and newly defined. That it has to accept the criterion of "justice" as a value judgment inherent in positive law although its exact meaning may sometimes not be "scientifically" analyzed.

Justice, rather - the feeling that common law was outdated and in many cases unjust, brought about the British institution of "equity" as it was developed since the Statute of Westminster in 1285. The Chancellors "would give or withhold relief, not according to any precedent, but

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enactment must be just, and any unjust enactment shall be declared void by the Constitutional Court"; sec. 35.4 supra) is, undoubtedly, valid. As is any other which may be proposed, e.g. "any enactment, whether duly passed or not, shall be regarded as the law of the land and shall be obeyed" (we'd better leave out the problem what will the force of this "constitution" be if it is unduly passed); or - "... law for the purposes of this constitution means any order titled 'law' which may relate to whichever acts or omissions committed prior to its publication, but publication is not a condition precedent to its validity", etc.

according to the effect produced on their own individual psychology by the merits of the particular case before them, according to their innate ideas, prompted by morality, honesty, conscience, or knowledge of good and evil. From these abstract virtues springs equity; conscience and equity in the mediaeval period present the appearance of Siamese twins who are well content no to be separated."[67]

This was until the 19th century mainly a judges' law, though it was anything but "definite", not in the beginning in any case.[68] Relief was granted by the Chancellor as a matter of grace not of right, and he had complete discretion whether to intervene at the instances of the petitioner or not.[69]

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[67] Hanbury, Modern Equity, 1943, 3-4. Britain was, of course, not the first to solve "the conflicting influences of precedent and conscience". Roman "ius praetorium" preceded British equity for like reasons, and became the viva vox iuris civilis (Eisenstadt, Roman Law, History and Elements, 1953, 62-3). Since equity was based on conscience it acted in personam and he who "could not show an honest cause of conduct on his own part would appeal to the Chancellor in vain".

[68] See n. 65 supra.

[69] Radcliff & Cross, The English Legal System, 1946, 116. According to the Israeli Law of Arbitration 5728 - 1968, an arbitrator, unless otherwise expressly agreed by the parties, may decide the case

Thus, as late as in 1841, Parke explained in Kelly v. Solari: "I think that where money is paid to another under the influence of a mistake, that is, upon the supposition that a specific fact is true, which would entitle the other to the money, but which fact is untrue, an action will lie to recover it back and it is <u>against conscience</u> to retain it..."(70)

It is not by chance that the doctrine is called the doctrine of "<u>unjust</u> enrichment". Lord Mansfield in the famous case of Moses v. Macferlan (1760) said: "If the defendant be under an obligation, from the ties of <u>natural justice</u>, to refund, the law implies a debt, and gives this action, founded in the equity of the plaintiff's case, as it were upon a

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according to what he thinks is right, he is not subject to the relevant substantive law otherwise governing the case. Hence, it is by the force of law a "court of equity" which does not refer to a "definite meaning of justice".

(70) As quoted by Hanbury in Modern Equity, 49. Parke's decision was followed and much enlarged in Jones v. Waring and Gillow (1926) A. C. 670, where it was decided that the plaintiffs were entitled to recover from the defendants an amount of money which the plaintiffs had paid them under false pretences of a third party without the defendants knowing anything about it. It should be remembered, though, that the doctrine of "quasi contract" or "money had and received" may be traced to the common law.

contract". (71)

The maxims of equity are, naturally, a conclusive evidence, I think, of the role of equity, honesty, fairness and conscience, in short - of the concept of justice in English law. The section which grants the High Court the power to appoint a receiver by an interlocutory order in any case in which it seems just or convenient to it to do so (72) is nothing but the implementation of the maxim: "equity will not suffer a

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(71) 97 E.R. 676. Moses v. Macferlan was followed by Israeli courts in quite a number of cases, beginning mainly with Municipality of Tel-Aviv v. Armon Aharonowitz (1954) P.D. 10, 1835 (there was no mistake there either of fact or of law. Payment was made under duress but without a protest on the part of the respondent. Nevertheless the appeal was dismissed). Some of the other cases are: Supergas Ltd. v. Mizrahi (1956) P.D. 12, 394; Baram v. Friedman (1957), P.D. 12, 634 (unjust forfeiture); The Jewish Agency v. Shechter (1956) P.D. 11, 1332; Adlerstein v. Kaplan (1950), P.M. 5, 186. In Brooks' Wharf v. Goodman Bros. (1937) 1 K.B. 534 (545), Lord Wright plainly stated that the action for money had and received is founded on what the Court decides is <u>just and reasonable</u> with regard to the case before it. See also the Commentary of Winfield in 53 L.Q.R. 447 and Friedmann's (at 449). Lord Wright repeated his view in Fibrosa Spolka Akcyjna v. Fairbairn etc. Ltd. (1943) A.C. 32 (61).

(72) See 45, Judicature Act, 1925.

wrong[73] to be without a remedy."

The maxim: "he who seeks equity must do equity" bore among many others the fruit in Re Peruvian Railway Construction Co.[74] where Sargeant J. said that "where a person entitled to participate in a fund is also bound to make a contribution in aid of this fund, he cannot be allowed to participate unless and until he has fulfilled his duty to contribute".

Very little should be added to the maxim "he who comes to equity must come with clean hands". This "prevents a plaintiff from getting something which he has asked the court to give him, and which it would be against conscience that the Court should give him". Thus a plaintiff who had been guilty of deceiving the public[75] was refused

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[73] It seems rather difficult to point at any word other than "wrong" which bears a stronger moral connotation, founded on value-judgment. The same may be implied to the maxim: "he who seeks equity must do equity".

[74] Hanbury, Modern Equity, 65.

[75] Also the doctrine of "public policy" is being applied by the courts according to their (moral) interpretation of the "good of the public". See, for example, Ulpanei Hasrata Be'Israel Ltd. v. Levy Gary & others (1962), P.D. Vol. 17, 2407, where the Supreme Court, following American and its own precedents, reaffirmed that a cinema

relief.[76]

The same is true with regard to "equality is equity", and more so - with regard to "equity looks to the intent, rather than to the form".[77]

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film which might be contrary to accepted morals or good taste or support values which the public regards as blemish, shall be banned. Often courts expressly resort to concepts of justice and injustice, in relation to public policy. Thus in Hurtado v. California (1884), 110 U.S. 516, it was decided that the expression "due process of law (with regard to the right of a person, under the Fifth Amendment of the U.S. Constitution, not to answer for certain crimes without a previous indictment of a grand jury) may be flexibly interpreted, provided that the process fulfils public policy which safeguards the principles of freedom and justice.

[76] Newman v. Pinto (1887) 67, L. T. 31.

[77] This maxim can hardly be compatible with Barrow v. Isaacs (1891) 1 Q.B. 417, where the court granted forfeiture in spite of the fact that the lessee's breach of covenant had been technical (by not having received the lessor's consent for underletting, while the lessor was not supposed to "arbitrarily withhold his consent" in the case of a respectable man, which - the court found - had been the case). In Israel a special section (132) of the Tenants' Protection Law (Consolidated Version), 5732-1972, prevents such injustice by laying down that the

Considerations of justice are an integral part of Israeli law[78] as much as of English law.

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court may refuse an order of eviction if it is convinced that in the circumstances, it will be unjust. By virtue of the same section the court of appeal is entitled to reconsider the justice in the decision of the first instance. The expression "justice" in section 132 should, however, not be interpreted as referring to "mercy and compassion" (Lifshitz v. Rubin (1957) P. D. 16, 57). The interests of both parties must be considered and only when the result is "in collision" with "the sense of justice" eviction will not be ordered (majority opinion in Heizner v. Kalinsky (1955) P. D. 11, 17; See also Lengenberg v. Frank (1960) P. D. 14, 1705; Abukassis v. The Supervisor of Enemy Property, 1964, P. D. 18 (4), 228; Reib v. Levy, 1963, P. D. 17, 1311).

[78] I have counted over forty such enactments, some of which are mentioned hereafter: Nationality Law, 5712-1952, clause 10(e) which empowers the Minister of the Interior to refuse to consent to the renunciation of nationality insofar as it concerns the termination of a minor's Israel nationality, if he considers that there is a special reason justifying the refusal. In this connection it should be noted that when the legislator vests powers in the hands of an authority without expressly specifying the conditions on which such authority is supposed to use them, then the assumption is that, as far as people's rights are involved, the authority must act in accordance with the principles of "natural justice"

As in England also in Israel

(see next note). Other enactments are: Cultivators (Protection) Ordinance, 1933, clause 18; Motor Vehicles Insurance (Third Party Risks) Ordinance (New Version) 5730-1970, clause 2(b), which orders the court to disqualify a driver, guilty of driving without a policy, for twelve months, "unless, under special circumstances... it sees fit to order disqualification for a shorter period"; National Insurance Law, 5714-1953 which, by virtue of clause 94 entitles to grant a benefit claimed after the specified time; Cooperative Houses Law (Consolidated Version) 5721-1961 (repealed and reenacted in the framework of the Land Law 5729-1969) whose clause 17 permits the competent official to deviate from the rules of evidence "if he is satisfied that it is in the interests of truth and justice to do so", and whose clauses 23 and 49 are in the same spirit as is clause 75 of the Land Law; Land Courts Ordinance, 1921 (repealed by the Land Law) which referred in clause 8(1) "to equitable as well as to legal rights to land"; Tribal Courts Rules, 1937, rule 9(2): "... if... a witness offers to give evidence... in form held binding by persons of his tribe and not repugnant to justice and decency... the evidence so given shall be considered proof against the person who offered to be bound..."; Marriage Age Law, 5710-1950; Penal Law (Modes of Punishment) (Consolidated Version), 5730-1970, clause 22; Wage Protection Law, 5718-1958, sec. 18; Declaration of Death Law, 5712-1952, sec. 16; Prescription Law, 5718-1958, sec. 27; Companies

there is a High Court of

Ordinance, 1929, sec. 132, 148(g), regarding the winding up of a company"... on other gounds (if) it is just and equitable" and see also secs. 154(1), 173(5), 187, 204 ("just and beneficial"), 210, 256; Emergency Land Requisition (Regulation) Law, 5710-1949; Charitable Trusts Ordinance, 1924; Treatment of Mentally Sick Persons Law, 5715-1955, secs. 6, 30; Capacity and Guardianship Law, 5722-1962, sec. 10 with regard to a declaration of incapacity which "ought not to have been made" ("was not justified"); Mejele (Ottoman Law) sec. 906; Prevention of Infiltration (Offences and Jurisdition) Law, 5714-1954, sec. 25 (deviation from the rules of evidence); Prevention of Profiteering and Speculation (Jurisdiction) Law, 5711-1951, sec. 7; Evidence Ordinance, 1924, secs. 25, 32; Nazi and Nazi Collaborators (Punishment) Law, 5710-1950, sec. 15; Patents and Designs Ordinance, 1925, sec. 21(3) ("... the patentee may be ordered by the court to grant licences on such terms as the court may think just"); Bankruptcy Ordinance, 1936, secs. 26(3)(á), 93(1) ("... or which the court may deem it expedient or necessary to decide for the purpose of doing complete justice..." with regard to any questions, whether of fact or law, involved in the bankruptcy); Partnership Ordinance, 1930, sec. 41(f) with regard to the dissolution of a partnership if it is "just and equitable", 43 ("just and convenient"), 61(2); Planning and Building Law, 5725-1965, sec. 206; Payment of Compensation from Italy Law, 5715-1965, sec. 4(B) (the court "... may also prescribe such modalities for payment to the

Justice[79] whose duty is "to grant relief in the interests of justice" in matters in which it deems it necessary[80], while most of the doctrines of English equity are embodied in Israeli law.[81]

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claimant as it may think fit in the interests of justice to claimants in general"), 7.

[79] Identical with the Supreme Court of the land.

[80] By ordering, for example, officials: "to do or refrain from doing any act in the lawful exercise of their functions or, if they have been unlawfully elected or appointed, to refrain from acting" (Courts Law, 5717-1957, sec. 7(b)(2). See also the Rules of Procedure in the High Court of Justice, 5723-1963.

[81] By virtue of the Palestine Order in Council, 1922-1941, article 46, which states that the Palestinian court shall exercise its powers "... in conformity with the substance of the common law, and the doctrines of equity in force in England." This article is still in force by virtue of the Law and Administration Ordinance, 5708-1948, which was enacted upon the establishment of Israel. Sec. 11 of this law states, that "the law which existed in Palestine (on May 14th 1948) shall remain in force, insofar as there is nothing there in repugnance to this ordinance or to the other laws which may be enacted by or on behalf of the Provisional Council of State (now - the Knesset, i.e. Israeli Parliament), and subject to such modifications as may result from the establishment of

The Israeli High Court of Justice (just like English courts) perpetually lays down binding rules which are the conclusions of its own decisions in the fulfilment of the legal provisions ordering it to do justice.(82)

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the State and its authorities". In 1972, though, clause 15(c) was added which disconnected Israeli laws from the formal instruction, embodied in laws, to interpret them in accordance with English principles of interpretation. Nevertheless, at least with regard to clause 132 of the Tenants' Protection Law (see n. 78 supra) the Supreme Court decided in Hananowitz v. Levinhartz (1954) P. D. 9, 1903 that "although the accepted principles of English doctrine of equity may guide the Israeli court when considering if in the circumstances of a certain case an order of eviction is justified - it is not bound by these principles and that the expression "justice" is new and original (in this context) and the courts of the land should give it content". Lifshitz v. Rubin (1961) P. D. 16, 57 followed this decision by laying down that the tenant must not lose his application just because he came to court "not with clean hands". But see reservations in Reib v. Levy (1963), P. D. 17, 1311 and Weizman v. House in Plot 106 Ltd. (1968) P. D. 22(1)606.

(82) May I stress this point in anticipation of the counter argument that equity and any other specific reference to justice in the framework of a given positive law does not contradict Kelsen's rejection of justice as criterion, because that which has been cited by me deals with specific cases, and lays no such criterion. Firstly, this counter

Thus, the court decided that it is obliged to enforce rights which are

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argument is not valid insofar as the doctrines of English equity are involved. Secondly, both in Israel and in England provisions ("doctrines") were and are being derived from courts' decisions, and it is hard to understand in what they may be differentiated from similar provisions, had the legislator chosen to give them the form of a law. In other words, these two legal orders reject Kelsen's contention that there is something wrong in not being able to analyze a certain term or expression (e.g. "justice") "scientifically". Kelsen is haunted by the obsession that law is, or at least should be, a "science". But the fact is that it does not wish to be one. There are innumerable examples of non-scientific legal provisions and decisions. In fact much of the judges' work is based on their own concept of justice (Justice Haim Cohn in the case of Ohana v. Appelate Court Martial, 1970, P.D. 24, 771 at p. 783: "the 'justice' mentioned in section 7(a) is different from and should be looked for outside the law; and as to those who argue that it cannot be defined, because its concepts change from one person to the other and from one judge to the other, my answer is that there is no need to define it, as a judge's individual sense of justice is effectuated also here only to the extent that it is effectuated anyway whenever he uses his judicial discretion"), and on other terms not less vague than this. Take but expressions as "public interest", "public policy", "public mischief", "reasonable man", "reasonable time", "due course", "good faith" as

recognized by custom or by "natural justice" although they may not be secured by any legal provision.[83] Personal liberties are respected and

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examples at random. Thus Kelsen's zeal for "scientific approach" leads him also to his "scientific" definition which purports to take the form of a "scientific" rule. But there is no valid explanation why should that rule (definition) consist of the elements suggested by Kelsen, and it is possible to show, as I hope to have succeeded in doing earlier, that these elements can easily be rebutted. Even his insistence on the unity of law loses some of its strength in view of the Soviet legal order. In democratic countries with no constitution, an "unconstitutional" law may be enforced in spite of courts' criticism and the contradiction is left for the legislator to be dealt with (though in Israel in one case the Supreme Court took the liberty to nullify a law of the Knesset without a specific authority to do so and the Knesset honoured its ruling: Bergman v. The Minister of Finance (1969), P.D. 23(1), 693). Any attempt to make a science out of law, as if it were physics or chemistry, must fail. Lastly, I can find no answer in Kelsen's theory why - supposing he is right that value judgment from "within" law is (contrary to my opinion) impossible - it is forbidden either to change the defined limits of his "science" of law or to use an auxiliary "discipline", as some disciplines do.

(83) Cohen v. The Minister of Defence (1962), P.D. 16, 1023. In Gardiner v. Heading (1928) 2 K.B. 284 the court expressly stated that the courts,

enforced by the court though there is no constitution, either in England or in Israel,[84] which either formally recognizes these rights or empowers the court to take any measure with a view to guarding them. Hence the "right (of a person whose personal freedom, whose interests or rights are at stake) to be heard" by the court or tribunal or any other quasi-judicial body whose decision may have effect on this freedom, interests or rights, was recognized and effectuated many times by the High Court of Justice.[85] So did the court with regard to discovery of documents by a public authority

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while following the legislator's order to weigh justice (and its "spiritual father" morality) in deciding a case, are sometimes using an extra-judicial consideration. See also the quotation from Chana v. Appellate Court Martial in the previous note.

(84) The Israeli Proclamation of Independence of 14 May 1948 does not have the power of a law, and it is certainly not a constitution, though in the absence of a law which expressly denies any of the liberties specified by the Proclamation - the courts should be guided by its spirit (Kol Ha'am v. The Minister of the Interior, 1953, P. D. 7. 871; Ziv v. Gubernik, 1948, P. D. (a)1, 85 and other decisions).

(85) For example, in Anon. v. The Minister of Health (1964), P. D. 19(1), 122; Rothman v. Assessing Officer(Internal Revenue) of Hadera, 1966 P. D. 20(4), 492; Appelbaum v. The Israeli Bar, 1966, P. D. 20(4), 459

(when no trial is pending).[86]

In these cases the court founded its decisions on the principles of natural justice.[87] As it does whenever it decides againt discrimination, and prejudices (not only to do justice but also so that "justice is seen to have

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(where it was decided that the authority given to the person involved to present his arguments in writing is equivalent, in the circumstances, to physical appearance. Levy v. The Rabbinical Court (1959), 13 P.D. 1182; Haver v. The Supervisor of Wage Collection (1963), P.D. 17, 1193; Guardian of Absentees' Property v. The Shari Court (1962), P.D. 16, 1942; Eshed v. The Minister of Foreign Affairs, 1958, P.D. 13, 144.

[86] For example, Feitel's Estate v. Assessment Commission, Holon (1966), P.D. 21(1), 69.

[87] Not, of course, in its traditional meaning. See also Valenti v. Canali (1889) 24 Q.B.D. 166 ("when an infant has paid for something and has consumed or used it, it is contrary to natural justice that he should recover money which he has paid"); Maclean v. The Workers' Union (1929) 1 Ch.D. 602 (at 625). Also Pavesich v. New England Life Ins. Co. (Ga. 1905), 50 S.E. 68 where the right to privacy was said to have its origin in the "instinct of nature" and that it becomes a legal right by the concept of "natural justice". As to generally the Israeli High Court of Justice see Zamir, On Justice in the HCJ, Hapraklit 1970,

been done"). (88)

Vol. 26, p. 212 and Osnat, On the Concepts of Justice in HCJ, Hapraklit, 1971, Vol. 27, 243.

(88) E.g. Hassin v. The Competent Authority (1964) P.D. 19(1), 512; Ulamei Gil Ltd. v. Yaari (1960), P.D. 15,673. See also Ward, Applied Sociology, 1906: "Justice consists in the enforcement by society of an artificial equality in social conditions which are naturally unequal"; Hart, Positivism and the Separation of Law and Morals, 71 Harvard Law Review, 1958, 593 (at 624): "it is... true that one essential element of the concept of justice is the principle of treating cases alike." In this spirit the Supreme Court of the U.S. reversed in 1908 the decision in Lochner v. New York (1905, 198 U.S. 45) and declared that limiting the working hours of women was not unconstitutional (Muller v. Oregon, 208 U.S. 412). The same was decided with regard to industrial workers; in Bunting v. Oregon (1917), 243 U.S. 426 and in West Coast Hotel v. Parrish (1937) 300 U.S. 379, minimum wage for women and children was also affirmed. It is hardly necessary to mention Brown v. Board of Education (1954) 347 U.S. 483 and (1955) 349 U.S. 294. See also Oppenheim v. Kridel (1923), 230 N.Y. 140, where the court recognized the right of a wife to initiate criminal proceedings against her husband's mistress on the ground of the equality of sexes.

35.9 It is true, as Kelsen puts it,[89] that the fact that many individuals agree in their judgments of value is no proof that these judgments are correct, though I am not sure that I understand the meaning he attaches to "correct". To my mind even if <u>all</u> the individuals of the universe agree in their judgments of value it will still not prove that their judgment is "correct". To use Kelsen's own (irrelevant) example[90]: the fact that <u>all</u> people believe that the sun turns around the earth is no proof of the truth of this idea.

It is not true, however, that "the criterion of justice... is not dependant on the frequency with which judgments... of value are made", and this last statement cannot be logically inferred from the first one. On the contrary, the fact that the majority of a given society believes at a given period of its existence (frequency is also an irrelevant element) that the criterion of justice is the right one, makes it binding as far as the involved society and

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[89] General Theory, 8.

[90] Ibid. "The fact that most people... used to believe that the sun turns around the earth... was no proof of the truth of this idea". Incidentally, Kelsen here (and also in other passages) confuses "justice" and "truth". While truth may be a natural fact - justice is not. In other words, that something is true or not, is a matter of fact depending on the existence of a fact and not on any value judgment.

time are concerned.[91] The fact that this criterion is not founded on a scientific concept does not render it invalid. Certainly - not impractical or inapplicable.

As has been shown in the previous section, judges do, in fact, lay down criteria of justice. When doing it they act on behalf of society and by virtue of the authority entrusted in their hands by the legislator. Usually, their decisions are founded on public convictions, so that it will not be totally wrong to assert that in this respect the relationship between judges and society is reciprocal, as judges' views of what is justice is derived from that of their environment.

Furthermore, if the legislator decided to adopt the various common denominators of "justice", as may be inferred from courts decisions in the various instances where they are supposed "to do justice", it could enact a "law of justice". Actually, there is no logical impediment that it does it beforehand. And, as I have suggested earlier - the separate common denominators may be put into a "one-clause-constitution". Such constitution is, of course, one of my proposed answers to the allegation that judges do not pass judgments on the question whether a specific law is

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(91) The definitions of society with regard to its circumference will be discussed further. At present I would like only to emphasize that I do not accept Nazi, Fascist or Communist criteria of justice.

just, but only entertain their discretion, indeed - use their power and fulfil their duty to decide in each case separately what is justice upon the facts brought before them with regard to that specific law.

Now, if judges and legislators may do it in the name of society, why can't society itself do it. Why indeed is it forbidden by Kelsen for each and every member of that society? At any rate, why can't each and every one do what judges are ordered to do whenever an enactment is vague or ambiguous. Judges are to interpret the enactment by referring to the legislator's intent. In other words, they are to reject that proposed meaning which, according to their interpretation, does not serve the legislator's purpose and prefer the one that does. Hence, indirectly, they are checking to what extent, if at all, has the legislator succeeded in reaching his goal. With regard to those laws which are specifically enacted with a view to do justice (social aid, for example) the courts will actually be analyzing the meaning of justice, rather - if the law is just, i.e. if it is in accordance with the criteria of justice, which were the footing of the law. At least, when they reject the "unjust" interpretation, they lay down that according to variants of the two possible interpretations - the <u>law</u> is unjust. True, they don't do it "scientifically", though sometimes they do, to a certain extent (e.g. when the question involved is somewhat mathematical like in certain cases of an alleged equal distribution of resources). If they can and must do it, why can't any other "member" of the legal discipline do the same? This, incidentally, is also what constitutional laws do, certainly - the one which operates by virtue of "my" one-clause-constitution. And this is what we do when we criticize, as we undoubtedly are entitled to do even by positivism,

a high court decision which rejects as "unjust" one of two or more proposed interpretations of a certain law, as aforesaid, or when, in similar circumstances, a superior court criticizes a decision of an inferior one (in England a HCJ decision may be subject to an appeal). As was already mentioned, in the Soviet Union, the court judges anti-Soviet and counter-revolutionary activities and others which may be incompatible with the aim of socialism, using its socialist conscience (i.e. justice). Positive international law refused to "honour" Nazi or Japanese positive laws in as much as they contradicted principles of humanism and justice internationally accepted and recognized as fundamental.

Accordingly, Nazi judges were tried and punished as were participants in the legislator's work.[92] Also, Kelsen would accept a law against discrimination (racial, sexual, etc.) which is, practically, a law dealing with one phase of justice, and the decisions according to which are typical value judgments (what is discrimination? The American Supreme Court gave, as was cited, different and contradicting answers to this question).

Kelsen does not really object to my proposition and, indirectly, accepts it. "It is a peculiarity of the human being that he has a deep need to justify his

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[92] See The Nuremberg Trial, The Judgment of The International Military Tribunal, 1961, 192-218; Gilbert, Nuremberg Diary, 1961, passim.

behaviour, the expression of his emotions, his wishes and desires, through the function of his intellect, his thinking and cognition. This is possible, at least in principle, to the extent that the wishes and desires relate to means by which some end or other is to be achieved; for the relationship of means to end is a relationship of cause and effect, and this can be determined on the basis of experience, i.e. rationally."(93)

Only that Kelsen neglects to define, or at least explain, what is an "end" and what is a "means", and how to differentiate between the two. I venture to suggest that no valid differentiation can be made, and that there is no "end" (except perhaps "social happiness") which is not a "means" to another, a further "end". Justice, too, is, of course, not an "end" but a means to a "happy society" (as Kelsen himself admits).

Since Kelsen accepts the Soviet law as a positivistic manifestation of the communist legal order, will he not have to justify judicial murder and hard labour camps as "due" means for fulfilling communism? This he shall have to do by accepting the Soviet scale of values. According to his logic he probably will not regard the question whether the same end may be achieved differently, as relevant. But is it that fantastic to argue that the relationship of means and ends is dependant on the decision, which has to be taken beforehand, what is the relevant scale of values? Is the dilemma

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(93) General Theory, 7.

not whether the means selected is really the one most justified out of the various possibilities?

Choosing the means and deciding if the choice is appropriate for the relevant end, are two value judgments par excellence. As a matter of fact, Kelsen himself indirectly admits that: (a) the answer with regard to means and ends doesn't have to be given from "within" the legal decision; (b) that actually the proper question should be what is the best means to achieve a given end.[94] We may assume that by "best" he doesn't merely mean "most effective". for he speaks of <u>social</u> science which is not yet developed enough to furnish us with the adequate tools needed for the answer.

35.10 In support of his argument that justice is a subjective value judgment which changes with time and may be different in different societies, Kelsen quotes John Adams and argues that in the quoted passage Adams expressed a conviction generally accepted at <u>his</u> time.[95] But Kelsen forgot, that only a few pages earlier he had mentioned the general belief that the sun was moving around the earth. Hence, the legal "science" is not less a science than physics, if the criterion should be the rigid unchangeable laws of the

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(94) "To be sure, even this (justifying means in the light of the ends which they serve) is frequently not possible in view of the present state of social science, for in many cases we have no adequate experience which enables us to determine how certain social aims may be attained" (ibid).

(95) General Theory, 10.

science in question. Many, if not all sciences and theories are based on rules and principles which have later been proved false. Social "sciences" are certainly among them. So is law.

If there is any importance that law be "recognized" as science.

35.11 When elaborating on that positivism is "a radically realistic and empirical theory" (which "declines to evaluate positive law") Kelsen asserts that one statement a theory can make, however, on the basis of experience: only a legal order which does not satisfy the interests of one at the expense of another, but which brings about such a compromise between the opposing interests as to minimize the possible frictions, has expectations of relatively enduring existence. Only such an order will be in a position to secure social peace to its subjects on a relatively permanent basis".[96]

Couldn't we paraphrase the last sentence and say: "only such an order will be... just"?[97] For this is really what it amounts to, and it is hard to conceive how would anyone be able to ascertain that the described order is "in a position to secure social peace etc." unless one applied ideological criteria to the definition of those obscure terms which have been just quoted,

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[96] Ibid. 13-14.

[97] Kelsen foresaw this outcome or else he would not immediately have plainly added (ibid. 14) that "the ideal of justice... is something quite different from the ideal of peace, there is a definite tendency... to

e.g. "satisfy", "interests", "at the expense of another", "opposing interests", "compromise", "frictions", "minimizing" or "social peace". As much as one would have to apply ideological criteria to decide whether a certain legal order has or has not abolished anarchy, thus achieving its positivistic aim.[98]

Disapprovingly Kelsen quotes[99] from Pound's An Introduction to the Philosophy of Law (1922, 33 f.) the following passage: "the conception of natural law as something of which all positive law was but declaratory, as something by which actual rules were to be measured, to which so far as possible they were to be made to conform, by which the new rules were to be framed and by which old rules were to be extended or restricted in their application, was a powerful instrument in the hands of the jurists and enabled them to proceed in their task of legal construction with assured confidence".

And he adds the following sarcastic remark: "a powerful instrument" indeed! But this instrument is a mere ideology, or, to use a term more familiar to

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substitute the ideal of peace for that of justice." However, he offers no explanation or excuse whatsoever what is wrong with this tendency and what is the difference between "peace" and "justice".

[98] See pp. 222-5 supra and n. 55 at p. 225.

[99] Footnote at p. 11 of the General Theory.

jurists, a fiction".

May I be allowed to be sarcastic too and make my own remark: "fiction indeed! But is Kelsen's "basic norm" not a fiction?[100] Is a legal order not acquainted with fictions, rather - does it not use them as its integral and essential elements?

A boy under the age of 9 may not be held criminally responsible for any act or omission which he may have committed.[101] This, of course, is founded on the legal fiction (based on psychological assumptions) that a boy under 9 cannot tell good from evil, whether in fact a specific boy does or does not know the difference. The defence based on an alibi is founded

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[100] Indeed it is! And the proof, if one is needed, may be found in his own words: "the positivistic jurist... assumes that this original historical fact... has the normative significance of a fundamental law. Only by making this assumption can he demonstrate the normative meaning of all other acts which he comprehends as legal acts simply because he ultimately traces them all back to the original constitution. The hypothetical basic norm which established the original legislator expresses this assumption; it conscienciously formulates it; nothing more" (General Theory, 396).

[101] Clause 8, Criminal Code Ordinance, 1936.

on the legal fiction (based on physical assumptions) that physically a person cannot be at a given moment at two different geographical places.

What, then, is wrong with the proposed fiction that for judicial purposes the "objective", "scientific" and "absolute" justice (if there is any need that it be "scientific" etc., which argument I reject) be that which is recognized and accepted as justice by the majority of the relevant society[102] at a given moment? As has already been shown this is exactly what the courts actually do[103] when they interpret the legislator's intention, when they interpret the law "in the spirit of the Proclamation of Independence" (i.e. among others, according to the principles of "freedom, justice and peace as envisaged by the prophets of Israel")[104]; when the High Court of Justice operates. Hence, the HCJ can decide (as did the Israeli HCJ) that a woman cannot succeed in a claim against a man for breach of promise to marry her, if this man was married to another woman when he signed the agreement with the plaintiff, because it is against "public policy" (i.e. - the accepted moral principles of the Israeli Society at the time of the judgment), to grant her the relief, but decides the contrary (with certain reservations) some 10 years later, when society felt differently about it.

This is exactly what the legislator sometimes does when he repeals or changes a law; e.g. the law against homosexualism or against artificial

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[102] See n. 91 supra.

[103] See pp. 241(a)-249, 252-4 supra.

[104] See secs. 11-13 supra.

abortion. Subject to what I have said I may agree with Kelsen that value judgment is "subjective" or that even when many agree as to what is justice it doesn't make it "correct", or that the term cannot be "scientifically" or "rationally" analyzed or proved. But, I find this criticism of Kelsen irrelevant, immaterial and of no meaningful consequence. I may have no objection that he supplies us, if he can, with rules and definitions in order to make a science out of a mere theory, on the condition that he does not twist reality to prove his case. That something be a science can certainly not be an aim, and we should be cautious not to use "scientific" methodology to create something which some of us may feel is desirous or necessary. It is very unscientific to use scientific cliches for the purpose of forcing a discipline into the Procrustean bed of science.

One thing is certain: it is anything but a scientific approach to first declare the result (that legal theory is a science, or should be science) and then supply the justification. This is what Fascism and Communism do and it is unbecoming an open minded thinker. The wish to be able to forecast a future behaviour (this is what a scientific rule does, assuming that conditions are identical to those which existed in the experiments that proved the rule) should not take us off track, because social conditions never repeat themselves. History, sociology, psychology and even economy are believed by many not to be sciences. Very much because they deal with everchanging conditions dependent on human behaviour. They are quite "content" in being "just" theories. To my mind it is even more stimulating and intriguing that they are. And this does not degrade them or make their role in human culture and development less decisive. Let us, therefore, leave law in their good

company, and keep it as it is. For actually law is a social "science", it is a branch of the same tree which grows the others. It became separated not because it is initially different from those others, or because it can breathe its own air and function without their help (it cannot and should not, for there is no scientific or logical law which forbids interdisciplinary cooperation. And there is no harm, therefore, in that one discipline may give an answer asked by another). Historical factors and the skilfulness and specialization that is required, made law a separated mysticism, but it is high time that it be returned to the family of social sciences. After all, the scope of any discipline, certainly of law, is the outcome of arbitrary decisions founded on historical developments and social needs. But it may be "redefined" and enlarged according to changing requirements. Indeed, it is a socio-political dynamic process which should constantly be adjusted to the interim, sometimes provisional, aims of the society, justice included. It is the duty of the legal discipline itself to see to it that it is well equipped to check and recheck the ways and means to fulfil its destiny as a social servant.

In a Composer's World (1949) the author, Paul Hindemith said that "music has to be converted into moral power", for music "has the power either to improve or debase our character... Sounds and forms remain meaningless to us unless we include them in our mental activity and use their fermenting quality to turn our souls towards everything noble, superman and ideal".

The same, only more forcibly, should be said of law[105], keeping in mind that the expressions "noble" and "ideal" are, of course, as obscure as the expression "justice". Law is not only, as Kelsen puts it, a social "technique". It is a tool, a means. And since, even according to him, the relationship of means and aim, as any other relationship of cause and effect, may be rationally analyzed, it must - on the same logical foundation - be allowed to analyze the relationship of legal order (means), not only a specific law, and the relevant social aims.[106]

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[105] Though, of course, a genuine difference of opinions may exist as to what morality is and to what extent, if at all, law should interfere in enforcing morals (see, for example, pp.116-120 and the notes there). Undoubtedly, a decision of the legislator to refrain from interference is a moral one, just the same, and has the same power, if not more than the opposite deicision may have.

[106] This, actually, is an accepted thesis of communism and other totalitarian theories, which refer to law as an integral part of the regime and of its aims. It may be for this reason that liberalism tends to reject this approach. But, if freedom and equality in their liberal sense are defined as social aims then, of course, there is no reason for rejection.

PART II

LAW IN SOCIAL CHANGE

V. SOCIAL PHENOMENON AND SOCIAL CHANGE

36. Even religious thinkers like Kierkegaard,Descartes or St. Thomas Aquinas who, as was pointed out, believed that justice is what it is because God wants it to be so, would probably have agreed that, in fact, its implementation is deposited by Him in man's hands. Non-believers would agree that justice is a social phenomenon. A product of human society. A flexible social value, sociologists would say, which would usually materialize in social norms, and is dependent on social changes. Legalists would expect its main aspects to be implemented and embodied in legal norms. They won't argue with their sociologist friends, that the law too is a social phenomenon.

An inquiry into the interrelations between these two social phenomena: justice and law may, therefore, be illuminated by a general survey of the relations between societies and the laws which they produce.

It may also help to determine the limits, the main object of this research, within which law may operate as servant of justice. But, before doing that, I think answers should first be given to a few preliminary, may be superfluous, questions which arise from the foregoing paragraphs. Such as - what is a social phenomenon. Is law really such a phenomenon. What is social norm and what is social change. When and how can it be identified. And other questions of the like.

A. Social Phenomenon

37. I suggest as a definition that "social phenomenon" with regard to law should be understood as a "manifestation, within the limits of social structure, which is the legislator's interpretation of a society's attitude towards its principles and goals".

One may doubt that it is at all necessary to engage ourselves in definitions. Doesn't everyone know, or at least feel quite clearly, that which is generally accpeted as social phenomenon? Doesn't everyone know that a legal norm is a social manifestation, if not for any other reason, then, at least, because it is a product of the society to which it applies?

Nevertheless, may a law, enacted for a given society by a tyrant, be considered the product of that society? Undoubtedly it was enacted for that society. It lays down norms, by which the society is bound under the threat of legal sanctions. But was it produced by that society?

A general consensus may easily be reached that Pericles', even Solon's laws were products of the Greek society. I doubt if the same may be said of Pesistratus. The same comparison may be made between the Roman aristocratic senate of the early republic and Rome of the tribunes. In modern times, a comparison may likewise be made between laws of representative parliaments in democratic countries and laws laid down by absolute rulers, tyrants, dictators or colonels.

To be honest with ourselves, an answer to the question whether a certain law was created and produced by the society to which it relates may, nearly

always, be negative, if we really bother to investigate to what extent the legislator is really a representative of that society. Some may go further to doubt that a parliament represents the "people's will" even in democratic countries, par excellence. It is clear that at best it represents the majority's will.[1] This was the case even in the direct democracy of classic Greece, when laws were adopted by the majority of the (free) people's general assembly. It doesn't seem at all possible that this may be changed.

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[1] Though one may doubt that a law passed in parliament by a proportionate majority of the members in fact present, really represents the people's will, or even the will of its majority. In Israel, a vote of 35 against 15 in a parliament of 120, is not at all unusual. Furthermore, in countries like Israel, where in general elections voters vote for parties and not for named candidates, it is even more difficult to accept that the majority who support a certain bill actually represents the true will of the people rather than the will (or the deals) of the parties. Lastly, the considerations of each of the voters in parliament in favour of a bill are different. Therefore, not only that the expression "people's will" is meaningless, but also the expression, so often used by courts as a means of interpretation, i.e. - "the legislator's intention". Hence, it is even a greater mistake to count on the government's explanatory note of a bill, in order to decide what was the legislator's intent.

It is possible that an absolute ruler will take the liberty to decide what is the "general good", it is impossible, though, to expect that a consensus may be reached by a whole society as to what is "good" for all the individuals of which it consists.

This is why it was suggested that law is a social phenomenon from the point of view of its siting, i.e. the social structure, and its consequences, i.e. - legal norms which bind those who are subjected to them. But though law is the interpretation of society's attitude towards its principles, concepts and goals, as the legislator understands them, it is by no means a correct interpretation.

38. That which may be obvious today was alien to legal thought for hundreds of years. In fact, until the establishment, in the 19th century, of the historical school by Sir Henry Sumner Maine in England[1] and Karl Friedrich von Savigny in Germany[2], legalists never treated law as social phenomenon. The historical approach "legitimized" the connection between law and the social context, and from that moment on the way was open for investigations as to the interrelations between law and social change. Simply, because a historical description must, by itself be a description of developments, for there is no development without changes. Without them everything stays still.

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[1] Ancient Law, 1861. He examined also social values (e.g. justice) but only as products of their societies.

[2] On the Vocation of our Age for Legislation and Jurisprudence, 1831.

It's true with regard to nature as much as with regard to society, be the change in social structure, social order, political institutes, political beliefs, moral and religious concepts, economy or in any other social field. Sooner or later most social changes express themselves in legal norms.

As an Englishman, Sir Henry Maine didn't really have to deal with the problem of codifications and constitutions. The development of common law was, actually, a prima facie typical process of the kind recommended by Savigny for the German states.(2)

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(2) It may be of some interest to note that without basing it on Savigny's theory that legislation should develop in the footsteps of and represent customary law (ibid. p. 137), but because of the English example on the one hand, and the political struggle with the religious parties on the other, Israel's Parliament (Knesset) passed, in 1950, a decision (not law; known as the Harari Bill) that Israel's constitution would be laid down chapter by chapter with the enactment of 'basic' laws. So far, only 4 have been enacted, but 2 of them may be repealed, changed or amended by a simple majority of the members of the Knesset present at the vote. The other 2 require a "constitutional" majority of 61 and 80 members.

B. Social Change

39. What is the nature and essence of the social changes to which I refer? Sociologists, as is known, refer to changes in social norms, but I couldn't find any suggested definitions in their writings either of "social change" or of "social phenomenon". They do differentiate, however, between "social norms" and "social values", the first being the manifestation of the latter. Value, they say, is part of the cultural structure of society while "norm" is part of its social structure.[1] Value is a general guidance, while norm is a rule of behaviour.[2]

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[1] Max Weber thinks that structural and cultural developments of a society are mutually influenced and interrelated (The Protestant Ethic and the Spirit of Capitalism, 1958, p. 183).

[2] Yonathan Shapiro, Elements of Sociology, 1971, pp. 37-40. Shapiro brings "you shall give honour to the aged" (Leviticus 19, 32) as an example of "value" and the first part of the same sentence ("you shall rise in the presence of grey hair") as an example of "norm". May I add an example of my own, unfortunately - of a more universal nature: Benjamin Franklin, in his "Advice to a Young Tradesman", said in 1748 (Benjamin Franklin's Autobiography and Selections from his Other Writings, 1950 ed., p. 232): "... Time is money. He that can earn ten shillings a day by his labour, and goes abroad, or sits idle, one half of the day, though he spends but sixpence during his diversion of idleness, ought not to reckon that the only expense; he has really spent, or rather thrown away, five shillings besides". This advice became, regretfully, a social value, an integral part of the cultural structure of many western

Lucy Mair puts it a little differently. "Social facts", she quotes Emile Durkheim[3], "were to be studied as 'things', with an existence independent of the consciousness of the individual people who make up society". What are these social facts? They are, says Mair, "rules of behaviour, norms, standards of vallue, expectations that society has of its members, behaviour that corresponds to them, and reactions to deviant behaviour."[4]

The key word in this definition, I think, is "expectations". Because the proof that rules exist is not in statistics, i.e. not in the frequency that they are being kept. People may break them, but nevertheless the rules dictate the behaviour which society expects of them and thinks is appropriate in particular circumstances. "Social behaviour is a response to complex pressures and not the expression of a kind of personality."

There is, therefore, a tension of opposites, between the behaviour demanded by society and people's willingness to "express their individuality, by breaking the rules, either on calculation or on impulse."

There is another constant tension, which Mair doesn't mention in her Introduction to Social Anthropology - the tension between social norms and social values. The value may be "you shall give honour to the aged"

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societies. The norm derived from it is, "industry". For "industry will win the day."

(3) Règles de la Methode Sociologique, 1895.

(4) An Introduction to Social Anthropology, 1972, p. 26.

while many youngsters would not "rise in the presence of grey hair". But as long as they hide behind a paper on the rear seat of a bus, the norm is being proved to be still in existence.

For otherwise there would be no need for self-defence by hiding. It exists, though the value may have disappeared. It may exist and not be widely observed despite the existence of the value. The fact that some, or sometimes even many, don't keep a certain norm is not necessarily a proof that either the norm or the value doesn't exist.

It seems to me not altogether impossible to argue that, though it is generally true that on the one hand - a condition precedent to the creation of a norm is the existence of a value, or a set of values, which produces it (if value is defined widely to include also social goals, needs and aspirations), on the other hand - the disappearance of a value may or may not cause the immediate disappearance of norms which were its offsprings. Social development of the last decade or two shows both phenomena: norms which were being kept in spite of the disappearance of "their" value, and also the intentional breaking of norms and the creation of new ones, especially by certain groups of youth, by way of protest against <u>existing</u> social values.

I beg further to differ from some sociologists, and contend that, although it is true (with quantitative reservations regarding both time and place) that disobedience to social norms is no proof that they don't exist and may even stress that they do exist, nevertheless in those cases where, as has been just shown, the breaking of norms is made in protest or where it is done by many for a long period of time, then - the change in social behaviour

may cause a change in values.

It is, therefore, inaccurate, I think, to assert, as some sociologists do, that since the creation of a social value is always a condition precedent to the creation of a norm, therefore the vice versa must also be true, i.e. that in order that a norm may stop operating - the value which had created it must first disappear. I would argue, if another example may help, that the general avoidance of taxpaying is an ever growing norm though the social value "obedience and respect for law"[5] still exists.

Usually, however, a change in social values does cause a change in social norms, and this is the customary way by which new norms are being born. We can easily see for ourselves how this is permanently happening in our dynamic society, whose values are being incessantly changed.

The forefathers of modern Israel came to settle Palestine as pioneers, being convinced that the social and national redemption of the Jewish people depended on manual labour. Their famous slogan was "labour is our life" and with this went simple, sometimes rough way of life. People dressed simply, lived simply and had rough manners. Frugality was praised while comfort and the chase of good office and good life was condemned. With the establishment of the State of Israel things began to change. People who wore a

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[5] In Horace's words: "Vi bonus est quis? Qui consulta patrum, qui leges jurasque servat" (who is good? He who follows his father's advice and keeps the law).

tie were no longer mocked at, and in a few years success became the new value for evergrowing numbers of people. The manual labourer is much less of an example than he used to be, though members of Kibbutzim are still being looked upon as special and form the elite of Israel's society.

The value of manual labour has, to a great extent, been replaced by the value of success, and the norms are being changed accordingly. Success neither corresponds with honesty, nor with a simple way of life. That Israel is no exception to the rest of the western world is, of course, of very little comfort.

The Jewish attitude towards human life is another example. "He who rescues one soul is deemed to have rescued the entire world" was one of the basic and profound convictions of Judaism since its early times. But it is declining, and in the process, new norms are being created on the highways and on the borders. Again, that four wars, hatred by the neighbours and the world-wide disregard for human life have helped this change, is irrelevant.

Yet another example is the extreme change in attitude towards the family as a social (not necessarily only religious) sanctity. This social value, which used to express itself in norms of puristic behaviour (though broken by many), has changed maybe more than any other. And with it - sexual freedom followed as a new social norm.

Karl Marx and Friedrich Engels thought that changes in production

forces[6], and not in the ideology of the ruling class, is the cause for changes in social norms.[7]

Marx's assumption was that capitalism must lead to an increase of wealth and misery, of wealth - in the numerically declining bourgeoisie, and of misery - in the numerically increasing working class.[8] This would create, among the members of the proletariat, an awareness to their situation and the sense of solidarity, which might bring about its unity, organization and lastly - the revolution.[9] Though he did not ignore the role of prestige and the struggle for political power as elements of considerable influence[10], Marx too spoke, therefore, about a change in social values (class consciousness) as a condition precedent to a change in social behaviour,

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[6]Marx, Poverty of Philosophy, see A Handbook of Marxism, 1935, p. 354; The Communist Manifesto, A Handbook of Marxism, p. 28; Marx's Preface to a Contribution to the Critique of Political Economy (1859), Stone trans., 1904.

[7]Ibid. Marx, Poverty of Philosophy; Marx, A Preface to a Contribution, etc. as quoted in the Handbook of Marxism, pp. 371-2; Engels, a letter to Schmidt of 27 October 1890, Selected Writings II, p. 380.

[8]K. Popper, The Open Society and its Enemies, 1966. Vol. 2, p. 146.

[9]Ibid. 147-48.

[10]The Communist Manifesto, A Handbook of Marxism, 46; Lenin, State

i.e. social norm (disobedience, rebelliousness, revolution). He accepted, however, the notion that sporadic diversions of some - strengthen, even validate and stress the existing social structure and norms. The extraordinary only emphasize the common.(11)

40. What, then, is a social change? Why is it important to define it?

It is easier to answer the second question by saying that the importance is in that a definition may help us to find an answer to one of the queries of this research, i.e. assuming that a change in the concept of justice in a given society is a social change, to what extent may such change be the cause of a change in law and to what extent its outcome. For, if a social change is to include changes only in social norms then, of course, the consequence is unequivocal and there is no need to go on. But, if a social change means both a change in values, (i.e. concept of justice) and a change in norms (or a change in either of them), then there is a reason to carry on. The consequence may carry us even further if we include in "social value", as I suggest, changes in social needs, goals and aspirations, and in "social change" - changes in social structure (or social order) and changes in means of social supervision, whether the last two are or are not the outcome of a change in needs or goals.

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and Revolution, 8-9, 15-16.

(11) Marx, Selected Writings in Sociology and Social Philosophy, pp. 167-8.

See also Stone, Social Dimensions of Law and Justice, 1966, p. 16.

To the first question I suggest the following answer, namely, that a social change consists of both phenomena and - more important - also of either of them: a change in the social norm and a change in the social value. I further suggest that an enforced legal norm becomes usually a social norm, while the opposite is not necessarily correct. Therefore, it is true, as will be shown later in this work, that a change of legal norms (adopted by society as aforesaid) may result in a change of value, including, of course, a change in the concept of justice.

Two clarifications seem needed, first - that a change in social norms may, of course, easily be the result of a change in social order, while social order may easily be the outcome of a social need, the latter being defined as social value. Secondly, that the definition of "social change" must be enlarged, as has been done above, to include also a change in social structure, order and supervision. This is so for the following reason, if not for any other - that if we do not do it, we will be forced to assert that usurpation is not a social change and neither is a political change resulting from a revolution or a coup d'état. For some revolutions (including the Bolshevik's in Russia), and certainly coups d'état had very little, if anything, to do with changes either in social values or social norms, as their cause[1], and it is easy to prove it by looking into Roman history and

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[1] To exclude, perhaps, one value whose existence (not as a result of recent change) sometimes makes such coup d'état possible, namely - the concept, latent or recognized, which legitimatizes it.

many chapters of ancient history, I wonder if it is free of obstacles to show that South American revolutions, or all Syrian revolutions resulted from changes of either values or norms, to differ from the deep conviction that a small group of revolutionists might have had in the need for a change in both.

But, nevertheless, each new revolutionist government starts by repealing or changing the laws of the former ("decadent") regime, by inserting a new constitution and a new set of laws (including new offences, often - with retroactive effect), and court martials, people's tribunals and the like to try the criminal leaders of the former regime and its collaborators. All this is done in the name of the revolution and in order to safeguard its achievements. The new methods of supervision are part of a new social structure which is legitimatized by the new constitution or orders of the "provisional" ("revolutionist", "national", "military" etc.) government.

Now, it is hard to allege that such a (successful) revolution is not a social change. It may, and usually does, manifest itself by new legal and social norms, but without being the result of a similar change, nor even - as has been pointed out - of a change in values, though, if it survives, it creates new ones, or brings to the open latent ones.

This brings me to the concluding remark regarding the present discussion, though it may perhaps unjustifiably sound to some an over-simplification and a game-like logical entertainment. I refer to retroactive offences which may be declared by a revolutionary regime.

If the contention is that it is so done by a successful revolutionary regime, then it must also mean a tacit consent of the public. A consent which, naturally, goes back to the date of commencement of the law. If so, then it seems arguable that although the revolution, i.e. the change in social structure had no "backing" of prior change in social values (as defined in this work), it may now retroactively have it.

C. <u>When Does a Social Change Become a Fact?</u>

41. Before moving on, as has been promised (in clause 36), to a survey of the relations between societies and their laws with a view to better understand the relations between justice and law, yet another problem - the one stated above - should be discussed.

As legislators, who wish to be aware of changes in the spirit of time and social developments - this problem is of considerable importance to us. We would wish to know of a change the moment it occurs, though this does not mean, of course, that an immediate legislation would follow. The information is needed so that we might decide how, if at all, to respond, and whether to adapt the law to the new situation, or maybe overcome the situation by making its followers criminals.

Moreover, if we may wish to legislate a law with the purpose of causing a social change, again we shall have to know when, if at all, the law so enacted will have succeeded in fulfilling the purpose. For, usually, a social change <u>is</u> the outcome of a slow development and does not occur at a defined point of time and place.

History is full of examples of legislators who ignored, sometimes wilfully and maliciously, social changes. Further examples may be brought to show legislators who were simply unaware of social changes which occured right "under their noses". If the "sensitiveness" of Marie Antoinette of 18th century France, on the eve of the revolution, represented - as it certainly did - the amount of the French legislator's sensitiveness, then what better proof may we find in history as to lack of sensitiveness, then the famous phrase which she left for the future generations. As is known, the criminal reaction of that spoilt lady to the demonstrating people who demanded bread at the palace gates was: "if there is no bread, let them eat cake" , a reaction for which she paid later with her beautiful head.

So, how then can we decide that a social change has occured and became a fact? It is easy, of course, to "decide" that there has been a revolution. No criteria are needed for that. But a change in a social value (which, as has been suggested, is a social change even without a change in norms), whether in its narrow or its wide sense (which includes changes in social needs, goals and aspirations) is very hard to trace, as long as it does not express itself overtly. This, according to some sociologists may not happen so long as the change in social value does not take the form of a change in social norm, which the new value may (or may not) have created. Thus, the best thing which we may hope to achieve is to trace the creation of the norm as early as is at all possible. (1)

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(1) I feel that sociologists neglect in this respect a field in sociology which

Even this may not be easy, for the problem, as Julius Stone puts it, quoting Nadel[2], is to decide when "individual behaviour can become social conduct,and individual qualities and propensities can become social norms and values". [3]

He follows Nadel in suggesting[4] that an empirical evidence of three interconnected kinds should be looked for. One - the frequency and regularity of the patterned concurrence of particular attributes of tasks and their performers. The second - explicit converging statements of reliable people, i.e. value-judgments indicating the belief in or desired "normality", and hence the normality codified. Third - the way in which the various parts of the social order are geared to support the

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engages itself in this precise problem, i.e. - public opinion, using an appropriate equipment to decide to what extent changes in values have occured in a certain population.

[2] Social Dimensions of Law and Justice, 1966, p. 15.

[3] Here Stone seems to have overlooked the problematic interrelations of "norm" and "value" on the one hand, and on the other - to have accepted, at least impliedly and maybe "en passant", that a behaviour (not yet even "social", but only a propensity of the individual!) may - as was suggested earlier in this work - manifest itself in a social <u>value</u>.

[4] Ibid. p. 16.

fulfilment of social roles and deter from deviance, in particular how and when its sanctioning machinery works.

It may be presumed that the suggested third test does not necessarily relate to changes that have already been expressed by the legislator, but usually to external manifestation of the social value. Being a test, it is, of course, by definition, referring to both possible results: positive and negative. When an assumed social norm is on test, details thought to be its ingredients are being looked for. A sign in public transportation "seats reserved for invalids" may be an example of such tested detail.

I can hardly find an answer to the sophisticated question why a legislator should feel compelled to test if a change has occurred, as long as there is no awareness that it has occurred or that it is being in process. And again - if no test is done, how would it be known that something is happening or may happen? The answer may be that the sensitive legislator (or sociologist, psychologist and any other relevant professional person) should always be on guard and always listen to under-currents in the social ocean of emotions, thoughts and happenings.

VI. LAWS AS SOCIAL PRODUCTS

42. Some of Karl Llewellyn's assumptions[1] may, I think, be accepted as undisputed, though not necessarily the conclusions he derives from them. It is seemingly correct that law is constantly changing, that it is a means to social ends and that the society in which it operates is also constantly changing, only faster.

We may evade the question what is the purpose of law and assume, temporarily, that when we speak of justice we all have in mind the same vague idea of the general concept; the major principles to which we refer. At least we feel what it is. This feeling, not definable as it is, may not be common, and most likely not universal. But the presumption of this work is that we all do want to live in a "just" society, no matter what its definition may be.

Another presumption is that whatever the purpose of law may be, it either advances "justice" or deters it. How far does or can it operate as a servant of justice, I asked in sec. 35 supra, and suggested that an investigation should be made into the interrelations of social values existing in various societies at given moments (for justice is, of course, a social value) and the laws which these societies produce.

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[1] Jurisprudence, Realism in Theory and Practice, passim.

To what extent do these two social phenomena correspond with each other? What can be deduced from such an investigation with regard to present and future social connections? Can law contribute towards the creation of social norms beside its being their product?

In other words, the justification for the investigation I am about to begin, is in that law is one of the means for the supervision of social order and the fulfilment of its social "destiny" as recognized by its majority. We must try, therefore, to find out what rules govern its operation, if there are any. Does it supply us with appropriate tools to make society more "possible"? Does it give each of us a fair chance to make the most of himself and to be happier? Does the law keep pace with current social changes (and should it) and with the ones which can be envisaged for the near and far future? Are our laws "good" and is there enough coordination between them and the aspirations and needs of our dynamic society?

How can this coordination be measured, and what can be done to strengthen it? How can we prevent law, that organic member of the social body, its flesh and blood which is supposed to march society towards its goals, from advancing in one direction while society is advancing in the other?

If allegory may be used, how can we prevent from ourselves Alice's nightmare in Wonderland, when she became gigantic, her feet almost out of sight. She was dismayed at the consequence that they wouldn't walk the way she wanted to go. That she might lose control over them. Laws are the feet of our society, and it does grow constantly, thus becoming a monstrous giant.

A. Different Societies - Different Laws

43. In sections 37-41 supra, an attempt has been made to prepare the present investigation by putting aside a few "terminological" obstacles. Additional clarifications are needed, though, before we start comparing the laws of "similar" and "different" societies. I refer to the other terms which have just been used, i.e. "similar" and "different" with regard to the comparison of societies, and the term "society".

May I immediately agree that no two societies are ever really "similar". Therefore every two societies are always different. But then, so are every two definable groups in any given society. In England people still speak of lower classes and upper classes[1]. In any other society, whether relatively homogenous like England or not, we will easily find a great number of groups, being sometimes rather closed, which base their identification on convictions, beliefs, religion, social strata, standard of living or of education, sex, race, age and the like. Nevertheless, we speak of English, American, Israeli or Papuan and Indian societies, thus relating to few (sometimes very few) common elements which make the different groups one society. Some sociological researches may be made with regard to groups or even sub-groups, but others - to the whole society

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[1] British physicist and astronomer Fred Hoyle complains in The Face of Science (p. 35, 1974 ed.) that in Britain people are so much prejudiced about class structure, that they always doubt that one has "any right" to speak of the matter on which one happens to speak.

as an entity.

Let me, therefore, explain that when I refer to "similar" societies I mean seemingly similar from the point of view of all, or some of the following elements, i.e. - historical background, language, political organization, major concepts and convictions. But one should be aware of the limitations which are inherent in the term.

As to the term "society", in many cases it may be assumed that a national society, i.e. - a state is referred to. But not always. As has already been hinted above, Papuan and Indian societies, to pick only two examples, will be considered "proper" societies for the purpose of this research.

Nationalism is the product of less than the last two hundred years. It would be, therefore, unwise and unjust to refer only to states, for this will distort both facts and conclusions, if I can reach any.

After all, for some fifteen hundred years general and universal elements were ruling mankind. People believed in a "world-state" and in "res publica christiana". Greek and Latin (and French, lately) were the universal language of international western civilization, while Arabic and Persian were the languages of a like Moslem civilization. And although some early seeds of the national state may be traced back to ancient Egypt, Babylon, Israel or Sumer, the core of their existence was of religious pattern.

In Europe, for centuries before the 18th, when the American and French revolutions stirred national emotions and ideology, loyalty of men was dedicated to that form of political administration to which they were

subjected: city-state, dynasty, feudal lords or religious establishment, and the Renaissance meant Greek or Roman civilization as universal ones.

Nationalism and national society were the product of the formation of large states under absolute monarchs which replaced the feudal units; the weakening of the religious primacy; the rise of economic interdependence of states and the newly declared principles of people's sovereignty and personal liberties.

Hence, the identification of state with nation and these two with national civilization, language and ethnical roots is very young and not necessarily final. The examination of the past and possible developments in the future compel, therefore, the use of the term "society" in its widest meaning.

44. On April 27th 1967, an article signed by Second Lt. Ibrahim Halas was published in "Jeish el-Arab", the Syrian army newspaper. Among other things he wrote that the way to build an Arab society and culture is by creating -

> "... a new Arab socialist who is convinced that God and religions, feudalism, property, richness, colonialism and all other values which used to dominate the previous society are nothing but "stuffed skins" in the museum of history... There is only one value: absolute belief in the new man... who relies only on himself and his own doings... because he knows that he cannot escape death and that there is nothing for him beyond it... neither Paradise nor Hell. We are in no need for bowing down, kneeling people, who beg for mercy and compassion."

Sixteen days later, Second Lt. Halas and the newspaper editor were sentenced by a Syrian court martial to life with hard labour. The formal ground for this shocking sentence was that the two prisoners were guilty of high treason, i.e. of conspiracy to destroy the progressive Syrian regime; the Arab socialism in formation.

But the actual ground was in the need of the "Ba'ath"[1] ruling party to calm down the orthodox Moslem population who was furious about the official publication of heresy in a newspaper representing the authorities position.[2]

The reader who was brought up in the light of freedom of speech and the rest of personal liberties which form an integral part of the concept of western democracy, would probably not be at all surprised to learn that the fate of other editors, neighbours of the Syrian one and advocates of socialist revolution, was entirely different. I refer to a publication in an Israeli newspaper (in Arabic) which represented the extreme leftist opposition. Its editors reacted to unfound news, which was later denied, according to which Israel's ambassador to the U.N. (as he then was) Abba Eban had promised 200,000 Israeli soldiers in support of the U.N. forces in the Korean war. Hereafter is a translation of the said reaction:

"All forms of government's surrender and all its proofs of loyalty will be futilely answered by its American masters. Moreover, its

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[1] Arabic - renaissance.

[2] Bernard Lewis, Islam Exploration, 6, Molad, (1971), p. 357.

internal and external political and economic bankruptcy is now being discovered by the masses, who have started understanding whereto this government deteriorates them: not only to unemployment, poverty and hunger, but also to death in the service of imperialism, which offers them as meat for its war machine. But these masses don't wish this fate and will prove their refusal... The multitudes of the people want bread, labour, independence and peace. They will intensify their struggle for these ends... and won't allow speculation in their sons' blood..."[3]

Two days earlier an article, nearly identical to the one just cited, was published in a Hebrew communist newspaper[4], and the Minister of the Interior ordered that the two newspapers be suspended for ten days, because they had published something which in the Minister's opinion "was likely to endanger the public peace".

While ordering, as he did, the Minister purported to have acted by virtue of powers vested in him by the Press Ordinance, a British Mandatory enactment of 1933. But, the newspapers never thought of giving in and petitioned the High Court of Justice[5] for a mandamus against the Minister, arguing that he had no authority to make the order.[6]

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[3] Communist "Al-Itiahad" ("The Unity") March 20,1953.

[4] Kol-Ha'am ("Peoples Voice") March 18,1953.

[5] In Israel - the supreme instance.

[6] H. C. J. (1953), 7 P. D. 871. Cf. Kol Ha'am's case(1953) P. D. 7, 165; Shapira, Self-Restraint of the Supreme Court etc., TAU L. R. 1973, Vol. C, 2.

The order was made absolute at the end of a long discussion and elaboration on freedom of speech specifically, and on democracy in general, including quotations from great thinkers, from Locke to Ahad Ha'am (Hebrew). It concluded that although "freedom of speech" is not an unlimited and absolute "right" and may be abridged in view of social and political interests which, under certain conditions, should be preferred, nevertheless - when the legislator granted the Minister of the Interior the authority to suspend a newspaper if he thought that something published there "was likely to endanger the public peace"[7], the legislator was referring to a "probable" danger, not just a possible one. Here, said the court, the danger was not "probable". Therefore, in making the order, the Minister acted ultra vires his power, and his order was null and void.

So, we have seen two publications in two neighbouring countries, and two judgments that followed. One judgment deprived the author and editor of the publication of their freedom for life. The other became a lighthouse of freedom of speech and democracy. The communist newspaper's petition was the first and also the last to be put before the High Court of Justice, because there was no need for it. The Minister of the Interior never repeated the order.

In Syria, neither the regime nor the people could take the heresy published by Second Lt. Halas, and had to support a conviction by claiming that the

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[7] Press Ordinance, 1933, clause 19(2)(a).

article in the official newspaper of the Syrian army was planted by the "Americans, British, Jordanians, Saudi-Arabians and Salim Hatum".[8] In Israel, a publication which could easily be interpreted as part of a subversive plan, supported by her Soviet enemies, was declared lawful.

Why is it that Syrian and Israeli laws are so different from each other in this respect? Why does the first totally deny freedom of speech while the other sanctifies it? At first sight the answer seems very simple: Israel is "progressive" while Syria is "unprogressive". Israel is "liberal" while Syria is "clericalistic". Israel is a democracy while the Syrian regime is totalitarian.

One may add historical and political arguments to explain the differences in social structure, moral and religious convictions, national needs and aspirations of each of the two countries. Yet, another may offer sociological and psychological explanations, or economic ones, depending on the distribution of means of production. Savigny[9] would have contended that the laws pro and contra freedom of speech are an inevitable result, each law - of the society to which it relates. Others might disagree and yet assert that the Syrian law is a product specific, maybe even exclusive,

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[8] Salim Hatum was a colonel in the Syrian army who, in 1966, supported the Ba'ath extremists in their successful coup d'état, and was executed by them in June 1967 for an alleged reverse attempt.

[9] Supra, section 38.

to the Syrian society, while the Israeli is specific to Israeli society.

These two contentions are, of course, not the same though they might, at first sight, sound so. Therefore there is room for the question which of the two answers, if any, is the correct one. Or, perhaps, both are correct? Is it true that each law is a product specific to its society and is derived from the specific conditions of that society? Is it true that each law is the inevitable product of its society?

Let us carry these questions further, and add the following: assuming that law is really a specific product and also inevitable - is it exclusive? In other words - is it at all impossible that, though acting in circumstances unique only to it, a society will produce <u>another</u> law? Maybe "inevitable", and yet - different?

At this stage I would like to bring a few examples with only one purpose, i. e. to show the complexity involved.

45. I have already mentioned the pauper whose life was bought by a convicted rich murderer.[1]

Fawn Brodie brings many other similarly shocking stories, like the one about a girl who was suspected of being unfaithful to her husband. She was seventeen and he was thirteen; her uncle killed the suspected lover; her father led her to the front of his house... twisted her long hair in his hands,

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[1] Supra. Section 1.

and held her on tiptoe while her brother hacks off her head. Unwanted infant daughters of the Todas were drowned in milk or trampled to death by water buffaloes. Among the Belochis the girls were killed with opium.[2] A husband on the least quarrel would whip out his knife and "off goes the woman's nose, and she is lucky if her lips and ears don't go also". Thieves invariably had their right hands severed. It was the custom of a certain hill tribe to kill their women and cut off both hands of all the children in the villages they pillaged. Under Moslem law murder was legally punished by the relatives of the victim; often this was settled by the payment of fines that were swallowed up in administrative corruption.[3]

Sir Charles Napier regarded the whole Indian system of government as one which was constructed "for robbery and spoilation... not for good to the multitude, not for justice"[4], and he tried to replace the Hindu and Moslem legal practices with the British police and court system. Eventually it was copied throughout India. And "everything in this place (seemed) to hate (the British)".[5]

At that stage the British didn't realize that the Indian code of behaviour and

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[2] The Devil Drives, 1971, p. 74.

[3] Ibid. p. 66.

[4] Ibid.

[5] Charles Burton, Scinde, or The Unhappy Valley, 1851, Vol. II, pp. 220-21 quoted by Brodie (idem).

laws was the outcome of a specific social reality of an overcrowded hungry counrty, whose attitude towards death and whose belief in the transfiguration of soul was, probably, the only practical solution for the otherwise unsolvable problems of this vast sub-continent.

It will, however, be unfair, to accuse the British of having only cynical political and military purposes. There can be no doubt that they really were shocked from what they had found in India, and took upon themselves the Christian mission to bring justice as they understood it to the multitudes, as well as law and order.

On the other hand, their astonishing success in forcing the English law can be accounted by not only the force which had been used - though for itself it was an interesting phenomenon which will be dealt with later - but also for the social changes that India underwent, partly due to the new legal norms and partly to economic and structural interventions.

46. Is India a proof that law is not necessarily a product of the society to which it applies? It is possible, of course, to claim that in time the Indian society "swallowed the bait" and became "rational", though it does seem somewhat dubious. It does not, however, contradict the assumption that when a society adopts foreign laws willingly - they may prove, post factum, essential (sometimes - unique) to that society, as may be inferred from several examples, such as that of the Roman Empire[1], which enforced

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[1] See The Legacy of Rome (C. Bailey, ed.) 1923, p. 173. Moore, The

its laws on its colonies, thus leaving many of the principles of its legal system as a heritage to the western world.

Does the example of Britain in India, or Rome in its colonies contradict the assumption that the law is a unique product of its society? Do India and the Roman colonies constitute exceptional instances, from which nothing can be deducted? It appears that there are other examples of legal changes which do not ensue from natural social evolution.

Reporting on his research among Papuan tribes in New Guinea, Leopold Pospisil claims that a change in law need not be the product of an internal social development, and that he has proof, that even a single person can cause such a change.[2] And though I share the doubts that many researchers have with regard to the validity of his conclusion, it won't be superfluous to give a brief summary of his findings.

The story began in 1935 in the village of Botukebo, when the village headman fell in love with his third paternal cousin, whom he could not marry, since by the Kapauku laws "to marry one's sibmate was taboo" and punishable by death for both man and woman.

The young lover - intending to get the father's forced consent - hid with his beloved outside the village while the rest of the villagers were called

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Roman Commonwealth, 1942, 50 ff.

(2) Structural Change and Primitive Law, in Law in Culture and Society, 1969, pp. 208-229 (esp. 212-218).

up to hunt him. Indeed, under pressure of the relatives, and the futile pursuit, the father agreed to accept the brideprice, and the law-breaking bride and bridegroom were pardoned. From that time on such marriages became legal and the law was hence amended.

I referred above to my doubts as to whether Professor Pospisil's conclusion is correct. It is wrong to suppose, I think, that the people of Botukebo would have agreed to the change in the law unless they had already been in fact ready to accept it.[3] Pospisil himself states that the village headman knew that in neighbouring "Pona Valley" some individuals who belonged to the same lineage, had similarly broken incest taboos - and had managed to stay alive".

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[3] This, undoubtedly, would have been Savigny's opinion who thought that law is a product of "internal, silently operating forces" (Of the Vocation of Our Age for Legislation and Jurisprudence, Hayward trans. 1831, 130); that it "grows with the growth, and strengthens with the strength of the people, and finally dies away as the nation loses its individuality" (ibid 27). In the earliest times to which authentic history extends the law will be found, he said, "to have already attained a fixed character, peculiar to the people, like their language, manners and constitution. Nay, these phenomena have no separate existence, they are but the particular faculties and tendencies of an individual people, inseparably united in nature, and only wearing the semblance of distinct attributes to our view. That which binds them into one whole is the common conviction of the people, the

It is true however that the village headman succeeded in limiting the old taboo, although he did not alter (nor did he intend to alter) the basic incest prohibition which related to marriage of closer relatives. The village headman himself was of the opinion that the reason which convinced the villagers to accept the change was economic, i.e. - through such a marriage the husband becomes richer, possibly, since in these cases property increases "in the family".

On the other hand, if Pospisil is right ? then the story may serve as an example of a law, which was created to meet the private requirements of an individual, and was subsequently adopted by his society, without it being a natural development arising out of the society's own needs. Even if we agree that this society would not have "submitted" to the village headman unless it had been "subconsciously" ready to absorb the change in the law - still it won't contradict the argument, that it was indeed the act of the village headman which <u>accelerated a process</u>, that but for this act might perhaps have taken many years.

47. Indeed, the acceleration of processes by individuals who are somewhat ahead of their time is not unique to Papuan tribes. Israel too, is familiar with the phenomenon and it is sufficient to mention the private struggle of couples, whose marriage is prohibited by Jewish law[1], and who took

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kindred consciousness of an inward neccesity, excluding all notion of an accidental and arbitrary origin". (ibid. 24).

[1] While the Church of England represents only the Christian faith

their cases up to the Supreme Court as well as the Knesset and the media, with the purpose of having the law amended. [2] Lately this struggle has started bearing fruit, for it seems that the Israeli society is readier now

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(Marshall v. Graham, 1907, 2 K.B. 112, at 126) and has some limited authority over its believers - Israeli residents are identified, in matters of personal status, by the religions to which they were born and, in these matters, are subject to the law and jurisdiction of the relevant religious courts (e.g. The Rabbinical Court Jurisdiction (Marriage and Divorce) Law, 5713-1953. A comprehensive analysis of their history and substance may be found in M. Chigier's article: The Rabbinical Courts in the State of Israel, in 1967 Is.L.R., Vol. II, p. 147). Apart from exceptional (usually - marginal) cases they cannot find resort in the State Civil Courts and cannot get married or divorced in a civil ceremony. The Supreme Court of Israel decided (Rogozinsky v. The State of Israel, 1970, 26 P.D. Vol. I, p. 129) that the law is valid even if it does not correspond with the freedom of conscience which was promised in the Israeli Proclamation of Independence of May 14, 1948 and sec. 83 of the (British) Palestine Order in Council, 1922.

[2] Gurfinkel & Haklai v. The Minister of the Interior (1963, 17 P.D. Vol. III, p. 2048; Segev v. The Rabbinical Court (1966) 21 P.D. Vol. II, 505; Rodnitzky v. The Great Court of Appeals (1969) 24 P.D. Vol. I, 704; Cohen-Maller v. The Regional Rabbinical Court of Tel-Aviv-Jaffa (1971) 26 P.D. Vol. I, 227; Keidar-Cohen v. The Regional Rabbinical Court of Tel-Aviv-Jaffa (1971) 26 P.D. Vol. I, 608.

than ever before to accept a liberal solution of the problem.[3]

Charles Dickens could serve as another example of a catalyst, who accelerated legal changes (in Britain). He certainly was more ahead of his society and time than the village headman of Botukebo. The latter, as noted, saw the example of neighbouring-relatives. Dickens went all out to attack the oppression and exploitation of children by the economic liberalism of the industrial revolution, when it was at its pinnacle.

As a matter of fact, many thinkers who dealt with problems of state and society served, to some extent, as direct or indirect catalysts of legal change either by expressing and crystallizing of social values, or by braking the wheels of imperative change, which life required. From the viewpoint of logic there is, of course, no difference between the one and the other, as both contribute to the process of legal development. Distortion

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[3] A private bill which aimed, on behalf of the "right of marriage" to solve the limited problem of Jewish couples, whom the Rabbinate wouldn't wed, by referring them to a civil ceremony (Jurisdiction in Marital Matters and Their Dissolution Law, 5732-1972) never reached the plenum, but marked growing public bitterness. See the comprehensive article of A. Rubinstein, The Enforcement of Morals in a Secular Society, in 2 Israel Yearbook on Human Rights, 1972, p. 57. As to the right of marriage see also Loving v. Virginia (1967) 383 U.S. 1, where this right was again confirmed, though not with regard to the marriage of two men.

of the Christian ideal by the secular princedoms in Italy of the 15th and 16th centuries gave birth to the teachings of Nicholo Machiavelli who - like his contemporary Dante Alighieri - approved of the separation between Church and State. The very same distortion, that stirred up Girolamo Savonarola against the corruption of the Popes of his day, in an attempt to restore the Church from within, and moved his disciple Tommaso Campanella to preach for an absolute Catholic state. Savonarola's attempt cost him, as we know, his life. Yet when society was ready for it - his ideal materialized, inter alia, in the form of the Inquisition.

John Calvin, who in the 16th century rebelled against the Catholic Church, based the idea of the peoples' sovereignty (its buds: "The Republic - The Peoples' Property" were conceived by the Roman Cicero one thousand and five hundred years earlier) and was, indirectly, one of the contributors to the ideological basis of the Republic of the United States. His permission to give money credit for interest accelerated the growth of American capitalism. From this point of view he may be considered one of the forefathers of the American anti-trust laws, which were enacted some three hundred years later.

It seems, that only a minimal amount of imagination is required to accept the argument that the Dominican monk, Thomas Aquinas, had indirectly supplied, already in the 13th century, the ideological basis for the justification of Marcuse's and the New Left's civil disobedience, as well as the justification of the Bolshevik and Trotzky-Maoist terrorism.

48. I have brought several examples, at random, of thinkers who served as catalysts of legal change. The choice was, of course, arbitrary. I will, therefore, readily agree that I have discriminated against Plato, whose idea that (Platonic) justice should be the nature of his "best" (ideal) state and that democracy should be replaced by oligarchy influences human thought to this day (I have dealt with his ideas in sec. 23 supra); Philo of Alexandria, who backed democracy thus disagreeing with him some five hundred years later[1]; St. Augustine of Hippo who argued that only those who are true to the Church may rule a state since the origin of law is divine and that membership in the state was the prerogative of believers only[2]; Aristotle; More, who in his "Utopia" contributed the idea that it is possible to plan and establish a state in the spirit of human willpower[3]; Spinoza whose

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[1] See Stein, Philo of Alexandria, 1937.

[2] Like Thomas Aquina he too differentiated between lex temporalis (temporal, i.e. - positive law, which reminds us of Thomas' human law, but which should be warranted by the lex aeterna) and lex naturalis, which is the "transcription of eternal law inborn in man's soul, reason and heart". The eternal law is defined as "the reason or will of God which commands us to preserve the natural order and prohibits us to disturb it". According to Augustine "a law which is not just is not law" (De Libero Arbitrio I, 5, 11, 6, 14. De Diversis Quaestionibus 53, 2; Contra Faustum XXII. 27. See Julius Stone's Human Law and Human Justice, 1965, 44).

[3] Thomas More, Utopia, 1970 ed.

idea of human consent as the foundation of political structure[4] preceded Rousseau's "Du Contrat Social"[5], and whose cry for freedom of speech preceded Mill's "On Liberty"[6]. I have discriminated, no doubt, against Hugo Grotius, Martin Luther, Francis Bacon, Thomas Hobbes, John Locke, Montesquieu; in short - all those philosophers, writers and numerous statesmen who, directly or indirectly, contributed to immediate or late changes in social structure or values and law, either on a global or local scale. I confess, with embarrassment, that I must have discriminated against many other important contributors, whose names I have not heard and whose writings I have not read.

49. Yet, was the response (positive or negative) of the legislator to the teachings of some or other "contributor" in all cases obligatory? It may be reasonably deduced with relative accuracy, that indeed it was so, insofar as free society is concerned. But it is not necessarily so with regard to absolute, religious or secular regimes.

As we have already seen[1], English law was imposed on the sub-continent

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[4] Tractus Theologico-politicus. See Wolfson, The Philosophy of Spinoza, 1934.

[5] Jean Jacques Rousseau, Du Contrat Social ou Principes du Droit Politique, 1932.

[6] John Stuart Mill, On Liberty, 1946.

[1] See supra.

of India in the 19th century, in the face of public opposition, at least at the beginning. In his lifetime Savonarola did not succeed in bringing about a change in the Catholic state-church, which was ruled by "monarchist" popes. Though Martin Luther and John Calvin were more successful, they couldn't succeed without a fierce struggle and the support of the public which was both geographically and mentally remote from the centre of power.

It appears that a condition precedent to a change (or for preserving the status quo despite internal pressure for a change) is - training the legislator's will. In a free society -he must first of all adopt those social values, and sometimes - rules of behaviour, which would favour the change, or at least be convinced, that its aims and requirements dictate the change. A law which imposes taxes, would be interpreted by each individual as harmful to his own interests though the population at large might accept it as essential for the implementation of national goals. Similarly, a society may for like reasons, ignore a law thus "deleting" it, figuratively speaking, from the code, if it no longer suits its convictions, ethics or requirements, as understood by the majority of its members. Israeli examples of "deleted" laws are well known, such as the law prohibiting abortions (when no criminal negligence is involved), the law prohibiting homosexual relations (of adults voluntarily), or the law regarding national service of women who have been released from military service due to religious conviction.

50. When an absolute regime is concerned - the ruler must either agree to the required change as desirable, or at least, as necessitated by the force of

circumstances. Of the many examples of such pressure, I shall bring the following three. The first - the Magna Carta Libertatum which was granted in 1215 by King John under pressure (violent, at first) of the English barons and part of the churchmen. As recalled, the Magna Carta promised - inter alia - freedom from arbitrary arrest, freedom of economic activity and special law courts for the nobility.

The second - also from England - the Bill of Rights, which was declared in 1688-9 under pressure of parliament, and which, inter alia, restricted the prerogative of the crown to repeal laws, expanded the freedom of speech and prevented the imposition of taxes without parliament's approval.

The third - from Czarist Russia in the years 1861-1881: the reforms of Czar Alexander II, initiated by the Crimean defeat and the peasant revolts, which granted the emancipation of serfdom; the autonomy of universities; the independence of the judiciary; the abolishment of corporal punishment of "cantonistic" edicts (i.e. - forced long-term military service of Jewish boys with a view to having them converted to Christianity) and of the Jewish pale.

There are, of course, examples of enlightened rulers, who made important changes without waiting for open, violent or other pressures. Who were able to feel the pulse of time and the real social requirements of their nations. Speaking of Czarist Russia, Peter the Great may certainly represent such rulers. It was he who Europised Russia at the beginning of the 18th century, established general taxation, set a uniform coin, released women from their harems and, in particular - separated church and state,

while placing himself at the head of the "Holy Synod", the supreme religious authority.

In Jewish history, one of the most outstanding examples of a ruler who introduced a reform without pressures, seems to be King Josiah. Furthermore, this is an example of reform, that might be regarded, at least post factum, as positive, despite the fact that it was introduced against the people's will as well as against its pattern of behaviour. As will be recalled, Josaiah put an end to idolatry in Judea and re-established the Laws of Moses.

Moses too, is, of course, an example of a legislator "by the grace of God", who imposes laws on a society which, while willingly accepting his leadership and declaring "we will do" even before it says "we will obey", [1] does not hesitate during the forty days of his absence to start a civil disobedience, rather - a revolution (the golden calf) that endangers the entire social and moral structure of the united tribes.

51. When and why do legal changes occur in the various societies? Who and what brings them about and to what extent can they be speeded up? What can be deduced from the various processes of changing an existing situation or of protecting it? What are the points of comparison between the laws of two societies?

I suppose that the problematicality of the subject is now better understood;

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[1] Exodus 24, 7.

why it is difficult to compare either two societies or their respective laws.

It is true, that it is possible to compare one by one specific phenomena in two societies and discover the points of identity, similarity or difference until at last the two societies have thus been compared in their entirety. Such an examination will, however, be seriously lacking, if it is not done against the general background specific to each of the societies. This general background will no doubt include the history of each of the societies under comparison; their respective ethnic political and economic structure; the social classes, their respective needs and aims, accepted moral values and patterns of behaviour. In other words: the examination of any single social phenomenon means first of all - an examination of its roots, while these roots, are very often, social phenomena in themselves. The conclusion is, therefore, that any comparison will, actually, be only a formal one. In fact, we may arrive at two parallel descriptions of two different societies, possibly parallel descriptions of certain aspects only. Possibly - descriptions with different emphasis. For a valid comparison is dependent on an absolute identity of the points of departure while determining them must be subject to the arbitrariness of the researcher, his inclinations, his ability for an overall outlook, his power of analysis and to a great extent - his profession, i.e. - the discipline according to which the research was made: the political sociologist will present different questions than will an anthropologist, and will apply different measures to have them answered. The anthropologist will approach the research in a different manner than the historian and the path of the latter -

has nothing or little in common with those of the economist or the jurist.

Moreover, it is clear that the researcher never succeeds in collecting all the answers and is unable to encompass all the trifles of the dynamic life of the researched phenomena, and these, of course, may give his conclusions powerful distinctions. Even that which may, at first glance, seem a most meticulous comparison - invariably contains an element of supposition, of hope, that we have indeed reached the right answers. There is no certainty in this and there can be none. Therefore, although experiments to compare societies and their laws should not be disqualified, we should be aware of the relatively high rate of possible mistakes.

Furthermore: although we know, practically by intuition, that apparently it is impossible that there be identical roots of "similar" phenomena in two different societies, we have to be on guard against additional risk. One can say - the opposite risk of the one mentioned by me previously. Namely - the risk that we may possibly attach influence to phenomena, which may not be phenomena and thus - are not really differences.

52. For instance, an assumption prevailed among many researchers that a territorial division occurs among certain animals, as a result of the fight of its population for food and females. Namely - that these animals do not, in fact, defend the territory as such but that which is to be found within its boundaries.

Among these animals the rhesus monkeys were particularly well known. It was there in India, where they were investigated, that the researchers

discovered not only territorial division of monkey "societies", but also a social division into leadership and led. The ruler-leader was not only that rhesus monkey with the greatest physical strength, but also the one who by nature, was the most aggressive, or rather, had a desire for power.

But then came an American scientist by the name of Carpenter, who removed the rhesus monkeys from their natural environment in India, and settled them on an island in the West Indies with conditions very similar to the conditions to which they had been accustomed in India, with one difference - he supplied them with unlimited quantities of food and females.

Within a few months a territorial division occurred on the island, together with a formation of a separate monkey society in every teritorry, headed by a "local" aggressive leadership. Each such society protected its own territory fiercely, just as did similar societies in India.[1]

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[1] C.R. Carpenter, Sexual Behavior of Free-Ranging Rhesus Monkeys, 1942, Journal of Comparative Psychology, Vol. 33, p. 113-142. Robert Ardrey in The Territorial Imperative (1972 ed. p. 301) reports of later researches criticizing Carpenter's consequences on the ground that "in rhesus life the conditions were artificial, that territorial defense is abnormal, and that defense was probably inadequate". But, then, in 1967, when the Territorial Imperative was first published, Jane van Lawick-Goodall was still investigating her chimpanzees and baboons near lake Tanganyika in Africa; hence, Ardrey couldn't know of her somewhat

Perhaps this experiment may serve as "commencement de preuve" to the claim of the contemporary British philosopher, Bertrand Russel, that the central and main instinct that motivates human and social activity is the desire for power.[2] Anyhow, the experiment indicates that - at least as far as the rhesus monkeys are concerned - the roles of food and females should be re-evaluated, i.e. - life and sexual instincts as social factors. Recalling the reservations regarding the difficulty in comparing societies - we can now go back to Ibrahim Halas' Syria and Israel of the communist newspaper case and, subject to these reservations, may state that the laws of the two states are so much different, because their societies are radically different from each other, in almost every aspect.

Again, subject to those reservations, we may also presume that the Syrian and Israeli laws are products, not only unique to their societies but also essential. Yet, will laws be different whenever societies are different?

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similar findings (Jane van Lawick-Goodall, In the Shadow of Man, 1973, Chap. 16. The conclusions are mine). At any rate, Ardrey's assumption (p. 302) that Carpenter's findings should be carefully analyzed because "Garibaldi" (the leader) "was a remarkable monkey", becomes rather dubious in view of Goodall's findings regarding leaders and social structure in the chimpanzee society (see, for example, Chap. 10).

(2) See his famous work: Power, A New Social Analysis, 1938. In this context Konrad Lorenz's On Aggression (1968 ed.) should be mentioned for his theory may also find some strengthening in Goodall's work. As may Harold Lasswell's Power and Personality (1969 ed.).

B. Different Societies - Similar Laws

53. The following incident occurred in one of the distant regions of Ethiopia: a pedestrian stood at the roadside and watched an approaching vehicle. Then, when it was very close to him - he suddenly crossed the road, escaping death just by a mere chance.

A stupid action? Not necessarily. Only strange, different from anything customary among us and therefore seemingly unreasonable and crazy. Still, it does not seem crazy to the Ethiopian, who believes (like many other Africans and Chinese) that the devil lurks behind every human being. Therefore he waits to the last second to cross the road in the hope that he might survive while the devil would be run over. Fear of the devil and the wish to get rid of him is so great that the Ethiopian is prepared to risk himself in an act that appears a senseless attempted suicide.[1]

In Israel, a negligent driver may, under similar circumstances, be criminally responsible. Here and in England he may be liable to pay damages to the injured pedestrian. To determine whether there was or

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[1] Information delivered to me by M. Avni, an Israeli traveller, at a private metting, on 7 July 1972.

wasn't negligence on the part of the driver the court will probably apply the test of the "reasonable man", i.e. - (a) should the driver have anticipated the accident and (b) did he take all reasonable measures to prevent it. Indeed, it is not impossible that the court will retroactively impose on the reasonable driver that figment of his own imagination, a standard of behaviour, which in fact has never before existed.

It is not as astounding, as might perhaps seem. For, in laying down these rules "retroactively", the court is being guided by an eternal value: the sanctity of human life and infers a standard of behaviour which the accused should have reached himself. That he did not reach it - implies his disregard for human life.

The court's demand is the compromise of western society between the sanctity of human life on the one hand, and the need for maintaining swift and efficient transportation on the other. It is the factual interpretation of this compromise, its implementation in daily life. From this viewpoint the law, undoubtedly, constitutes a social tool intended to serve a social need. But this tool is not required at least in those regions of Ethiopia in which the economy is as backward as the society and motor traffic is not essential. But even if such a transportation network had developed in Ethiopia, the Ethiopian society would not have been forced to find compromises between its existence and human life, since primitive, primordial and mythical fear of the devil correspond - weird as it may sound - with economic "progress" (i.e. - transportation may run fast).

The standards of behaviour applied by the Ethiopian court may perhaps be different from those of the Israeli or the English. Nevertheless, in both courts - the accused will probably be acquitted. In Ethiopia - although the driver knew in advance of the possible fatalistic behaviour of the victim. In Israel and in England - since the accused could not have anticipated it.

We have discussed two societies which seemingly vary radically from each other, apart perhaps, from their attitude to human life (as a Christian society, Ethiopia ascribes to life - at least formally - a supreme value). All the same, the two societies have created similar laws.

Thus, it is possible that different societies - such as the Syrian and the Israeli - should create different laws. However, the fact that two laws are similar, does not necessarily indicate that they were created by two similar societies. In other words, it is possible that a certain thesis ("two different societies create different laws") will be correct, but it does not follow that the opposite ("similar laws of two societies are the products of two similar societies") should also be true.

In order to clarify more forcefully the claim that similarity between the laws of two societies does not necessarily indicate similarity between them, it would not, perhaps, be superfluous to bring examples additional to the Ethiopian one and less technical. Let us therefore discuss the seventh day of rest.

54. Most countries in North and South America, Europe, Africa and Australia, as well as some Asian countries, are enjoined to observe the Seventh Day

rest. In other words, all countries with a Jewish, Christian or Moslem tradition and several others.[1] Upon the initiative of the International Labour Organisation[2], laws were enacted in numerous countries obliging employers to allow their employees minimal weekly rest. This principle was also indirectly recognized by article 24 of the 1948 Universal Declaration of Human Rights which says: "everyone has the right to rest and leisure, including reasonable limitations of working hours and periodic holidays with pay". Although this declaration has no binding force, it reflects, no

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[1] In his book: Labour in the Law of Nations (1969) Bar-Niv asserts (p. 153) that already the Babylonian legislator Hammurabi passed a law of Sabbath as a day of rest but, I couldn't verify this assertion and there is no such law in the 1923 edition of the Laws of Hammurabi (Tsharna ed.) which was at my disposal. Delitzsch's attempt to find the origin of Jewish Sabbath in Babylonian tradition (not in Hammurabi's laws) does notiseem convincing though it seems reasonable to believe that the Jewish Sabbath has its origin in an early Semitic tradition.

[2] E. g. I. L. O.'s first convention: Hours of Work (Industry) Convention 1919 from which the principle of a weekly rest may be inferred and the Weekly Rest (Industry) Convention 1921. The demand for an immediate application of a weekly rest was included already in the "nine points" of the Versailles Treaty of 1919 (Bar-Niv, Op. Cit. Ibid.). See also Oppenheim's International Law, 1967, 727-29.

doubt,values universally accepted by all civilized countries.

The Seventh Day rest may,of course,be said to be a social achievement aimed at the workers' welfare, but it may be noted that, to a certain extent, it also serves advanced capitalism by preventing unfair competition between businessmen through fixing an agreed day for closing down all business.

Many other individual rights are recognized in the laws of numerous and variegated societies and enjoy general recognition. Of course, an examination of the actual enforcement of every single right by the various laws is necessary and it may reveal differences, not only in the formulation of the law, but also in its actual implementation. Some countries declare in their laws that they are ensuring a certain freedom and yet in practice, this freedom is not enforced at all. This is especially true of totalitarian countries,and it is sufficient to mention the Soviet Constitution which allegedly ensures its citizens freedom of speech and the press, freedom of assembly and public gatherings, and freedom of processions and demonstrations.(3)

And yet, may I repeat, most societies, irrespective of how different they are, recognize the basic freedoms universally upheld, beginning with the freedom against discrimination and ending with the freedom of marriage.(4)

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(3) Article 125, Chap. 10 of the 1936 Constitution.

(4) E. g. The Universal Declaration of Human Rights, 1948, article 16 (1).

Blum thinks that in principle this right is enjoyed by all Israelis (Marriage

Speaking of marriage, here is an additional example of a law similarly found in various societies, primitive or progressive, during different periods of time and in different places in the world. I do not mean the right of marriage proper (which is "ensured" in international treaties and the laws of many countries), but taboo on marriage between relatives commonly shared by most, if not all, societies.

If we ignore the marriage of relatives in the ancient Egyptian Kingdom, ancient Babylonian society and other exceptional cases which may have existed in history - we find that all societies banned marriage of close relatives, beginning with various degrees of kinship. The degree itself was different, but taboo existed and its violation incurred, in many of these societies, a severe punishment and, sometimes, death.

I have already mentioned the Botukebo society and the success of the head of the village in restricting marriage taboo, so as to permit his marriage to his third paternal cousin. This story implies both the existence of previous taboo and its subsequent continuation.

Law in Israel and Human Rights, Hapraklit, 1966, Vol. 22, 214)

but see a dissenting opinion in Rubinstein's The Right to Marriage, in The Tel-Aviv University Law Review, 1973, Vol. 2, 433-458 and n. 1 in p. 433 with regard to limitations of this right also in some of the States in the U.S. and in West-Germany. In this regard, see 52 Am. Jur. 2d, 926 (1970) and Loving v. Virginia (1967) 388 U.S. 1.

New Guinea seems to have about 700 tribal societies, each one with its own language and laws, but marriage taboos appear to exist in all of them.

We also know of marriage taboos in ancient Jewish society and I have already hinted at the taboos existing in the ancient Babylonian society. This is evidenced by Abraham's argument before Abimelech regarding Sarah: "and yet indeed she is my sister; she is the daughter of my father and not the daughter of my mother; and she became my wife". (5)

Hence, at least at that time, four thousand years ago (roughly the period of Babylonian King Hammurabi), marriage between brother and sister was authorized, provided they were not from the same mother. Among the Papuans, marriage was permitted with descendants of one of the parents (only the father) although in a more distant degree of kinship. Oedipus' marriage to his mother seems to have been a taboo as from the start. We find no ban on marriage with a sister in the code of Hammurabi, but we do find taboo on incest, obviously with the same result. Intercourse is interdicted between father and daughter, father and daughter in law, son and mother and son and his father's wife. (6) These, and other taboos exist in Judaism and, as said before, practically in every human society.

A wife's faithfulness to her husband is also an obligation found in many

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(5) Genesis 20, 12.

(6) Laws of Hammurabi 153-58. See some similar Jewish prohibitions in Leviticus 18, 7, 15, 18; 20, 11.

societies unrelated in time or place and frequently, without any common background and character.

We have seen how a seventeen year old Indian girl suspected of having been unfaithful to her thirteen year old husband was treated by her uncle and her father (although this suspicion had never been proved founded). The obligation of faithfulness was imposed by Hammurabi in Babylon and by the Pentateuch in Israel. It exists in African Zambia and in New Guinea - and in all Moslem and Christian societies.

Anthropologist Margaret Mead, who has explored one of the Papuan tribes, avers that the violation of marriage rules in that tribe is tantamount to "sacrilege", because it disrupts complex property settlements related to marriage.[7] Many additional factors, which are not relevant for our purpose, exist in other societies.

The second side of the coin, the tolerant treatment of a husband's infidelity, is also shared, to some extent or other, by most human societies, those which uphold monogamy and, naturally, those which favour polygamy. Usually, permissibility for the husband's "unfaithfulness" emanates from the absence of a specific prohibition. Hindu religion which imposed such a cruel death on the seventeen year old girl on suspicion of adultery, specifies that a husband may violate the 'sanctity' of marriage in no less than ten cases. These include intercourse with a married woman if her husband happens to

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(7) Mead, Op. Cit. 103.

be "your foe's friend" so that his wife could "persuade him to abandon your foe", but woe to her if she herself is caught.(8)

In brief, we have seen that entirely different societies have produced, and are producing, similar and sometimes identical laws. I wished to illustrate with the help of these examples that similarity of laws is not necessarily a proof of similarity between societies that produce them.

C. Similar Societies - Different Laws

55. The question of whether - pending a verdict - the Court should consider the prisoner innocent or guilty, goes deeper than meets the eye. For if a man is presumed innocent, he may usually remain silent and, at any rate, it is up to the prosecution to prove his guilt. While, if he is presumed guilty he would, of course, have to bear the onus of proof and convince the court of his innocence (the question of the quantity of evidence is immaterial at present). Obviously, if he is presumed guilty he could usually not be found innocent, on any count, unless he takes the stand. This may lead to one more consequence: his obligation to reply to questions put by police investigators.

That a man is not presumed innocent in the Soviet Union is not surprising. In his article on criminal procedure, Karcb says that the "accused" (note: not "suspect" but already at this stage - "accused") "has the right to testify

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(8) Vatsyayana/Klaf, Op. Cit. passim

but is not obliged to do so". However, "when there is a sufficient ground to assume that the 'accused' will evade inquiry ", he may be arrested.[1] The investigator "has no right to place the burden of proof on the 'accused' and is prohibited to make the 'accused' give testimony by the use of violence or any other unlawful measures".[2] (It is not clear through which "lawful" measures a testimony can be enforced).

When the accused is brought to trial, the court interrogates the accused... and the prosecutor... participates in the interrogation[3], as does the counsel for the defence, while "the accused has the right to give explanations... concerning the testimony of witnesses" at the trial.[4]

"A verdict of guilty", Kareb goes on to say, "may not be brought in on assumptions and is passed only in cases when the guilt of the accused... has been proved at the trial".[5] This is really odd: why is it necessary at all to stress it,as if it could be any other way? What is the meaning of guilt "proved" at the trial? And why the failure to specify the amount of proof

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[1]Romashkin, Op. Cit. 443-484, at 465

[2]Ibid. 450.

[3]Ibid. 470

[4]Ibid. 471

[5]Ibid. 472

required for a conviction?

The Soviet Union has its reasons for not being strict about the amount of proof; apparently, because no procedural measures to avoid a mistake are needed.

On the contrary, to quote Prof. Kareb "Soviet judges are not bound by any formal requirements in the evaluation of the circumstances of a case. In accordance with article 71... the Court, the procurator, the investigator or the person conducting the investigation (are) guided by the law and by their socialist concept of justice..."(6)

As was said: nobody will be surprised, not only at the fact that the accused is not held innocent in a Soviet Court, but also that, all said and done, a man is convicted or acquitted according to the "Socialist" concept of the judges. Incidentally, two of the latter are laymen representing institutions and each one of them has a vote equal to that of the professional judge who presides the Court.

A criminal court in the Soviet Union - unlike a court in a western society - is not a tool for administering justice, at least legal justice - but one of the state's measures and institutions whose declared purpose is to serve the requirements of the socialist society and the goals of the state.

56. It would seem stranger still that an accused is not held innocent in some

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(6) Ibid. 456

liberal European countries which do not follow the English legal system. This is the situation in France, Italy, Germany, all of which are democratic countries with seemingly similar societies, with a different historical background, a different national characteristic ("the volksgeist" of Hegel and the historical school of Maine and Savigny) and a different civilization and outlook, and yet upholding similar moral values. However, countries which have not yet adopted the principles of the English pattern tend to do so now.

This tendency finds expression in two international documents, of which one is directed at European countries. The first is the Universal Declaration of Human Rights of 1948 which, in article 11, states that "everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence". The second document, the "European Convention" of 1950 states, in article 6(2), that "everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law". The Soviet Union signed the Declaration in 1948, whereas European countries have adopted the Convention as from 1950, but both maintain their laws as described above.

The Israeli "Basic Law: Human & Citizen's Rights" suggests that a man shall be held innocent "so long that his guilt has not been duly proved". Personally I prefer the version suggested by Supreme Court Justice Haim Cohn: "A man is held innocent of any criminal offence, so long that he has not been duly convicted", because only a conviction in Court, and not the proof in itself

(when is a fact considered proved?...) can contradict the presupposed innocence of man.

This is only one example of the fact that different laws may be enacted by "similar" societies. Others can easily be produced, e.g. - with regard to capital punishment. Liberal Britain has only recently abolished the death sentence after a long and bitter struggle. The same Britain,whose 18th century courts used to pass death sentences by hanging for several hundred offences, most of them with regard to property, valued at over one shilling. Only lately, when the American Supreme Court ruled that the death penalty contradicts the eighth amendment of the American Constitution, did the United States abolish the death sentence.[1] Israel abolished the death sentence for murder already in 1954. On the surface, all are societies with similar moral values, but this similarity has been reflected in similar legislation only over the years.

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(1) "Exclusive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted". On the 20th of April 1973, I heard the Governor of the State of Connecticut explain why he thought capital punishment should be restored by his State's legislator, as follows: "It's cheaper to execute people than to keep them for life". The interview had been recorded on the 25th of March of the same year. I know of no public reaction in April 1973, in New York, to the Governor's argument.

One may justly argue that these societies only appear similar, but that although they uphold similar moral values - they differ in their historical background, their cultural level and social structure and especially, that they face different problems. Yet, in spite of the upsurge of violent crime and an increasing disregard for human life, the U.S. through the constitutional interpretations of its Supreme Court, has during recent years granted suspects and accused rights unknown in most other countries.[2] Now, it has proclaimed the abolition of capital punishment owing to its cruelty.[3]

Until recently, the death penalty was abolished, to some degree or other, in several states of the United States and retained in the remaining states. Some of them can certainly be said to be "similar", and yet their laws on the subject vary. Without thorough and meticulous investigation, it is difficult to understand why, for instance, capital punishment was abolished in the northern states of the United States: Maine, Michigan, Wisconsin, Minnesota and North Dakota, but not in: South Dakota or California. Why was it eliminated in Argentina, Brazil, Colombia, Venezuela and other

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[2] E. g. the inadmissibility of electronically gathered evidence if it involved tresspass (Silverman v. United States 1961, 365 U.S. 505; Berger v. New York 1967, 388 U.S. 41); the right to counsel from the time of arrest, and even earlier - from the moment the police has started investigation (Miranda v. Arizona 1966, 384 U.S. 436).

[3] It was actually preceded by "preparatory" decisions of the Supreme Court

countries in South America, but not in Chile, Peru and Paraguay. Why in Italy, but not in France, in New Zealand but not in the majority of the states of Australia.[4]

Actually, any comparison between two societies, as well as between their respective laws is difficult, if feasible at all. Hence, it will probably be of only little value to attempt to examine also the fourth variant: "similar" societies whose laws - as expected if they are really "similar" - are also similar.

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such as Robinson v. California (1962) 370 U.S. 660 and Witherspoon v. Illinois (1968) 391 U.S. 510.

(4) Encyclopaedia Britannica, 1965 ed., Vol. 4, 847-9.

D. Similar Societies - Similar Laws

57. We will presently proceed to a comparison between the various states of America: Michigan with Wisconsin or Wisconsin with Minnesota and assert that they have abolished capital punishment almost entirely, because they are "similar", uphold similar moral values, have a similar population structure, similar aims and requirements, similar historic background and so forth. We would still find it difficult to explain why Michigan has retained capital punishment for treason, while Wisconsin has failed to do so. Why North Dakota has added to treason murder committed by a prisoner serving life sentence. Why Michigan has abolished the death sentence as far back as 1847 and Minnesota only 64 years later, in 1911.

I have already mentioned that "similarity" in the laws of two countries does not necessarily reflect a similarity between the two countries themselves. This assertion may be strengthened by mentioning Nepal, which abrogated the death penalty in 1951 - and yet, a man endowed with the most fertile imagination will find no similarity between that country and Germany, where the death sentence was abolished in 1949. However, Nepal appears 'close' to India, at least as far as the main religion (Hinduism) is concerned, and yet India failed to abrogate capital punishment.

Some similarity may be found between Belgium and Luxemburg, both of which did not abolish the death sentence, although they hardly enforce it in practice. It is hard to understand the difference between Portugal and Spain. Both are Catholic and until recently also dictatorships, but Spain retains the death sentence while Portugal abolished it as far back as 1867.

A more precise analysis reveals that these "similar" societies, where capital punishment exists, differ in the definitions of capital crimes. For instance, a death sentence was imposed in the U.S. for first degree murder, namely premeditated and willful murder. In France, the definition also includes ill-treatment or kidnapping of a child less than 15 years old resulting in death.

I have mentioned elsewhere the Seventh Day Rest observed throughout the world, some of the personal liberties prevailing in many societies (e.g. freedom of speech, demonstrations and assembly), accepted marriage taboos etc., and shall not repeat these examples. They clearly indicate that although similarity should not be concluded between societies which produce similar laws in various fields (and welfare laws, free compulsory education and others may be added in this respect), similarity in laws does not preclude the possibility that they <u>are</u> a product of similar societies, but every single case should be carefully examined on its own merits.

F. Conclusion

58. This, then, should be our own conclusion: that one must refrain from drawing rash conclusions. No common denominator can be found with certainty. Every society produces its laws in accordance with what it believes serves best its own national and social needs, comprising multifarious values and material facts.

No objective and general criterion exists to determine what is a progressive society and what is a progressive law. A law which we may consider progressive (e.g. the presumption of innocence) may reflect a progressive society, but the fact that a society enacts a law which seems "backward" (e.g. the presumption of guilt) does not necessarily point to a "backward" society. The Soviet Union has numerous laws which would be considered extremely "progressive" by many. Its written Constitution is among the most impressive ones as far as the rights it presumes to grant to the individual are concerned. At the same time, many would certainly doubt whether the Soviet society is indeed a "progressive" society, while others would consider it the embodiment of progress. As was put by a prominent judge: I prefer the Soviet Constitution effectuated by an American procedure rather than to have the U.S. Constitution effectuated by a Soviet one.

In conclusion, a comparison between the respective laws of two societies, as well as a comparison between two societies, seems at first sight an arduous but unrewarding work. And yet, rewarding it is. It is the recompense we are being rewarded whenever we try to learn from the experience of others; from comparing processes; from differences and dissimilarity. But, the implied methodical conclusion is that we should deal with our own laws and our own society, while resorting to other laws and other societies as a source for comparison, criticism or inspiration.

VII. THE CONCEPT OF LAW

A. Historical Roots[1]

59. Many jurists concur in the view that law is a social tool. Roscoe Pound said that law is "a social institution... ordering... human conduct through politically organized society... a social control... securing... social interests."[2]

What he had in mind was a formalized legal system of means of coercion. He referred to statute law as distinct from the obligations imposed on individuals by established custom or general consent. I too am dealing, in the main, with statute law, but also with the laws of primitive societies. The latter can sometimes enlighten us about the historic processes in the development of law, including the interrelation between law and the society which creates it, were it only for the reason that a primitive society is less

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[1] See Primitive Law; General View of Ancient Law; Cuneiform Law; Jewish Law in the Encyclopaedia of the Social Sciences, Vol. IX, 202 ff. and Roman Law (ibid. Vol. XIII and passim), Canon Law (Vol. III and passim), Common Law (Vol. IV and passim); Justice (Vol. VIII and passim); Friedmann, Legal Theory 1953, passim; Stone, Social Dimensions of Law and Justice 1966, passim; Maine, Ancient Law 1916.

[2] Pound, Introduction to the Philosophy of Law, 1954, 47.

complex and it is easier to delve from it the factors influencing the creation of a certain law and, in turn, being influenced by it.

What, then, are the historical processes which have brought law up to its present position in a modern contemporary society? Our reflexive conception that law is, and therefore has always been, the outcome of a process of legislation is, of course, mistaken. For, at the beginning, there was a common pattern of conduct. A set of rules of behaviour. An established custom. A primitive justice.[3]

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[3] This is how Carlston, quoting Malinowski's Crime and Custom in Savage Society (1926, 17-20) describes it: "The scene is the Trobriand Archipelago, a group of Coral islands surrounding a wide lagoon. A formless pattern of canoes moving across the face of the lagoon, of groups of individuals upon the land, is seen... To the trained observer... a definite technical system of catching fish and complex economic arrangements emerge. The natives are found to have a close organization in their working teams, and a fixed division of social functions. Small groups function together to achieve common goals. Within the canoe, each man is seen to have a specialised role. One is the leader or 'master'... He finances the building of a new canoe... maintains it in repair, with the help of the rest of the team. He has custody of the canoe. But... he cannot refuse his canoe (Law and Structures of Social Action, 1956, 1).

Very often it was grounded in religion. The attribution of this justice to God's will , as expressed by His representatives on earth, served as a brake against quick modifications. A drastic modification of customary law - at the cradle of human civilization - was tantamount to a rejection of the "divine" authority of religion. In those days, customary justice was sacred and, therefore, immutable.

The necessities of life left their impact[4], in due course, and what could not be achieved through a frontal "offensive" was brought about circuitously and indirectly. Justice was "adjusted"[5], and sometimes distorted, through

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[4] In his Pensées, Pascal said: "... rien, suivant la seule raison, n'est juste de soi; tout branle avec le temps. La coutume fait toute l'équité, par cette seule raison qu'elle est reçue; c'est le fondement mystique de son autorité... Qu'est-ce que nos principes naturels, sinon nos principes accoutumés?" ("Nothing according to reason alone is just in itself. Everything shakes with time. Custom makes the entire equity by this reason alone, that it is recognized. This is the mystical foundation of its authority... What are our natural principles if not our familiarized principles"; Isaiah Leibovits in a lecture at the International Symposium on Medical Experimentations on Human Beings, Tel-Aviv, the 22nd of October 1974).

[5] Sometimes, by a rational justification which actually disconnects and liberates intellectual reasoning from religious belief. As did Maimonides

interpretation, by religious jurists or legislation. We are quite familiar with the interpretation of the Halacha in Jewish history - all said and done, the Talmud is merely a compilation of interpretations, an adjustment of the Halacha to suit the transcient requirements of Jewish society from the third to the fifth centuries B.C.

The code of Hammurabi, the Babylonian king who was a contemporary of the Patriarch Abraham, specifies: "If a man has accused a man... and then has not proved (it against) him, his accuser shall be put to death". (6)

The Jewish legislator who, no doubt, was inspired by the Babylonian legislation, imposed a similar prohibition, but showed greater realism, decency and wisdom, by limiting himself to the injunction, "Thou shall not go up and down as a talebearer upon they people; neither shalt thou stand against the blood of thy neighbour"; "and not suffer sin upon him". (7)

(Op. Cit. part I, chap. 2): "... by his intellect man differentiates between truth and falsehood... Although the obscene and the becoming are of common knowledge, and not cognizable... intellectually man may tell truth from falsehood with regard to anything intelligible... But as far as 'necessity' is concerned,'good' and 'evil' do not exist at all, but only 'truth' and 'falsehood'."

(6) The Laws of Hammurabi, 1.

(7) Leviticus 19, 16-17.

Like the Pentateuch, Hammurabi specifies, "If a man has put out the eye of a (free) man, they shall put out his eye"[8] and the Jewish legislator follows the same measure for measure justice bid (although, contrary to Hammurabi, he makes no distinction between a free man's eye and a slave's eye). This injunction was interpreted in due course and the gouging of the offender's eye was replaced by the payment of compensation. The Roman law followed suit and actually, at a more advanced stage, outlined exact rates for injured limbs.

Legislation, as a function of government, is relatively new and the more the state undertook the task of outlining an economic policy and implementing it, the more intensified the rate of legislation. When the mercantile system struck roots in Europe between the 16th and 18th centuries, the need for a legislative intervention by the state was also felt. This was due to the inability of the mercantile state to attain its goal - step up its economic strength as compared with other countries, when imports exceeded exports, without intervening in production. This intervention gave rise to the need for the promulgation of laws. There followed a necessity for suitable legal tools which customary law, with its slow modifications, was in no position to supply.

The strongest impetus for intensified legislation seems to have followed the ousting of feudalism and the consolidation of absolute monarchies. The

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(8) Op. Cit. 196.

main characteristic of this period may have been the consolidation of the territorial principle and, concurrently, that of the conception of sovereignty. Jean Bodin may have been one of the notable forerunners of modern political science in the 16th century, when he preached for tolerance and freedom of conscience, while stressing the importance of natural factors for moulding the character of the state. He also heralded the doctrine of Locke and Montesquieu, when he determined that the state is the supreme authority unrestricted by law.

From that point, rapid progress followed. The separation of powers, the democratization of political laws expressed in elected parliaments and the resultant consolidation of the "rule of law" as a central and guiding conception under which all, the government itself included, are subjected to the law and are equal before it - all these, coupled with increasing requirements of the centralized state, accelerated legislation, codification and legal reforms.

A notable contribution to the ideologic background of reforms was made by Jeremy Bentham, founder of the utilitarian system. According to him, the test of the utility of any institution lay in its ability to promote the greatest happiness to the greatest number of people. He claimed that this could be gauged, just like the principle of pleasure behind the said test. The conception of enjoyment is found in Bentham's contention that a man is governed and guided by his quest for enjoyment and his desire to avoid pain.

On its emergence, about one hundred years later, the welfare state - as we know it today - had merely to translate Bentham's principles into the

Beveridge system for old age pension, national health insurance and housing - in brief for an expanding legislative system to cover all these aspects. This led to an unprecedented process of legislation, which is still at its peak and which may be the principal factor necessitating our present clarification.

The historical school of Maine and Savigny did not stand the test of time, objecting as it did to the expansion of legislation on the grounds that law should grow organically from the spirit of the people side by side with its historic development. Neither did stand the test of reality, the contemporary sociological school (headed by Ehrlich), which claimed that the promotion of justice does not depend on legislation, but is inherent in society itself.

B. Law Defined

60. For centuries philosophers were engaged in attempts to reconcile between divine and human laws; to settle the dispute between the desired justice and the existent (legal) evil. They have, however, never seriously raised the question of what is law, as law was, in their opinion, given by a potent lawgiver whether God or an earthly ruler, and it was treated as such on the basis of a formal-organizational approach, namely - because it was enacted by a competent authority.

But what made secular law legal? Wherefrom did the earthly lawgiver derive his legislative binding power? For those who resorted to God the answer was simple. But for the others the question became intriguing.

Is the question whether our laws are just and good relevant? In other words must 'justice' be a part of any proposed definition of law? Or maybe the lawgiver, the state, is - as Bentham put it - the supreme authority, unrestricted by law and thus entitled to enact and promulgate whatever it may deem fit? Is there any ideology, any moral concept, above and beyond the law and the legislator from which law should derive its inspiration and from which it should not deviate?

As was already shown, the historical school refused to deal with morality and felt that the moral aspect was irrelevant. It pointed that law is a necessary, almost mystical, result of what Savigny termed in German "Volksgeist", a sort of "spirit of the people", the civilization and tradition handed over from one generation to the other and from which its laws derive.[1]

The analytical school too is not concerned with ethical issues. As was already quoted, Austin presupposed, that positive law and ideal law are two entirely different and separate things. In his opinion, law should not

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[1] Julius Stone rightly remarks that Israel is an evident proof of the failure of the "Volkgeist" theory, its legal order being made up of Mohammedan, Jewish, Catholic, Ottoman and common law elements, although few peoples have a "Volkgeist" more distinctive than the Jewish people (Social Dimensions, Op. Cit., p. 102, n. 65). Savigny and Maine attached in their time, no correct weight to the influence of sociology and psychology, the reciprocal influence of nations and countries,

be defined as applying to any ideal of justice because law derives from a definite sovereign legislator (single or plural) not subjected to any legal restriction and whose binding power emanates merely from the practice of the greater part of the public to obey him.[2]

Under the influence of the developing science, the analytical school was empiric and approached law on the basis of observation. Its starting point was facts rather than any basic preliminary ideas. In a way, it followed David Hume, who developed Locke's empiricism to a degree of scepticism by asserting that all ideas derive from observation only.

Kelsen, while rejecting the empiric approach claims, as was shown, that no theory of justice can be part of the pure theory of law. The ideals of justice are a matter for political science, whereas law is a hierarchy of normative relations. It is not a chain of causes and effects. As to its "definition" - law in his view, is a social tool whose aim is to diminish anarchy. Hence, a functional definition. The origin of law was not his concern. An approach, opposite to that of the advocates of the 'social

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international trade and international law.

[2] I have already mentioned Austin's approach to law by quoting from his Province of Jurisprudence ("every positive law is set by a given sovereign to a person or persons in a state of subjection to its author"). Friedmann (Legal Theory, Op. Cit. 151) quoted from Austin's Lectures on Jurisprudence the following definition of law, the natural outcome of the said approach: "a rule laid down for the guidance of an intelligent being

contract' who were mainly interested in the origin of law without suggesting a definition of its content or form.

Jhering insists that law is a means of control applied to people within the framework of a society and such a means should not be evaluated other than as part of social control in its entirety. But he too, did not suggest a definition.[3]

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by an intelligent being having power over him."

[3] Shaki's introduction to Jhering's Der Kampf um's Recht, Krupnik trans. 1947, 17-25, 29 & passim. I have quoted Jhering's "definition" of law (see n.55, sec. 24.12 : "law is the sum of the conditions of social life in the widest sense of the term as secured by the power of the State through the means of external compulsion". A "definition" similar in its reference to "the sum of conditions" but different by its reference to a principle to which law should be subjected and by not referring to the element of compulsion, is that of Kant (see n. 6 , sec. 30) who says that law is "the totality of the conditions under which the arbitrary will of one can exist with the arbitrary will of another according to a general law of freedom" (Metaphysik der Sitten, 1922, 34-5). Both definitions, however, fail to outline the "conditions", i.e. - law. When Jerome Frank says that "no one knows the law about any case or with respect to any given situation, transaction, or event, until there has been a specific decision (judgment, order or decree) with regard thereto" (Are Judges Human? 80 U. Pa. L. Rev. 1931, 17, 41); he, of course, does not solve

Pound's approach - as was already quoted - is similar: law is a means of social control, though not a perfect one and, unfortunately, it does not fulfill efficiently its purposes. Therefore, while not speaking of a "struggle" (Jhering's "Kampf"), he does call upon the jurist (unlike Jhering - on a pragmatic principle), to materialize as many social interests as possible, through compromises and adjustments which constitute the legal order.

Most of the theories mentioned accept law as a natural immutable phenomenon which should be taken as it is. Even Jhering's to a certain extent.

Other philosophers, over a span of two thousand and five hundred years, did not resign themselves. Throughout that period of time, they looked for an ideal, preferable to positive law and superior to it, from which positive justice derives its strength, and to which it should yield precedence (under some theories) or, at least, strive for its attainment (according to others).[4]

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the problem. For we may still not know the definition of that "law" which has been decided by the judge. To say that law is "universally the very contrary of freedom and equality and indeed naturally must be" (Gumplowicz, The Outlines of Sociology, Moore trans., 1899, 182) may be logically true but can, of course, not serve as a definition, even of what law is not.

(4) Thomas Aquinas defined earthly law as "nothing else but a dictate of political reason emanating from the ruler who governs a perfect community" (The Summa Theologica, Part I, Book II, Question 90, in

They did not treat positive law as an immutable "natural phenomenon", but determined its very legality in the light of this ideal.

True, the examination of a certain law in the light of a superior ideal or principle may undermine the stability of existing political and legal order. This indeed is a risk. And yet, no individual and no society with moral values can avoid it without sacrificing their values.[5] I believe that the risk

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The Political Ideas of St. Thomas Aquinas, Bigongioris ed., 1969, 11). Hence, a "positivistic" definition of positive secular law which must be obeyed so long as it is not incompatible with divine law.

[5] As put by the first president of the Israeli Supreme Court (Justice Zemorah) in one of the court's most celebrated decisions, when he thought that he would do injustice by adhering to a binding precedent: "true and stable? - true is preferable" (according to sec. 33(b) of the Courts Law 5717-1957, the Supreme Court is no longer bound by its own decisions. Nor, of course, is it bound by decisions of English courts; see Moshe Cohavi v. Erich Baker & others, 1955, P.D. 11, 225). Actually, he was not the first in legal history to reject an unjust result by means of interpreting (should we say, as did Jerome Frank - see n. 3 supra - by means of (re)enacting the law in the spirit of contemporary moral concepts. Lord Atkin, for instance, said that "we act in the finest common law when we adapt and alter decisional law to produce common sense justice" (United Australia Ltd. v. Barclay's Bank Ltd., 1941, A.C.

of undermining is greater in a contemporary democratic country when its legal system conflicts with its moral values than when it attempts to live with an evil "stability" which distorts them.

61. What is the nature of natural law? I have mentioned St. Thomas Aquinas and St. Augustine who saw God as the source of natural law.

Aristotle (followed by Kant, Hegel and others) attributed the source of law to reason, man's will coordinated with his inner wisdom which sets him

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1, 29); Judge Desmond posed the following question when he was called to decide if a minor was entitled to damages for injury he had suffered while still "en ventre sa mère": "shall we follow Drolner v. Peters, or shall we bring the common law of this State on this question into accord with justice? I think ... we should make the law conform to right". The following was his answer: "When these ghosts of the past stand in the path of justice clanking their mediaeval chains, the proper course of the judge is to pass through them undeterred" (Woods v. Lancet, 102 W. E. 2d, 691, N. Y. 1951). See also Nahum Yehoshua v. The Appeal Commission Under the Invalids (Pension and Rehabilitation) Law (1949) 1954, P. D. 19, 35; Eric v. Tompkins (1938) 304 U.S. 64 (which practically eliminated "federal common law" by reversing Swift v. Tyson 1842, 16 Pet. 1, 10 I Ed. 865 and Williams v. North Carolina (1942) 317 U.S. 287 (which reversed Haddock v. Haddock, 1906, 201 U.S. 592 thus forcing the State courts to recognize a divorce granted by the State where only one of the parties resides).

apart from all other creatures.

The conditions of the "social contract" on which political existence rests, are actually principles and ideals of a modified "natural law" which the legislator should not contradict, and go back to the platonic philosophy.

In point of fact only few modern western philosophers will disagree that liberty is an ideal which law should observe. Thus, their positivism seems to include, in this respect, some degree of self delusion and - at least in this respect - they themselves are, to a certain extent, natural law jurists.

In England, as well as in Israel, we find many decisions specifically resting on the conceptions of natural justice. Actually, in the absence of a constitution which sets down these conceptions as binding principles, natural justice may serve as a criterion only when it does not clash with a specific act of legislation.[1]

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[1] In the beginning, the Israeli Supreme Court tended to identify injustice with "simple" illegality in either the interpretation or the application of the law, while refusing to consider justice as a criterion outside it (e.g. Gotlieb v. The Minister of Commerce and Industry, 1960, P.D. 14, 2182; Miller v. The Minister of Transport, 1960, P.D. 15, 1989; The Registrar of Companies v. Kardosh 1961, P.D. 16, 1210; Cohen v. The Minister of Defence 1962, P.D. 17, 1023) and insisting that in addition to the illegal act of which the petitioner complains, he must show that injustice was, in fact, done to him (Felman v. The President

Most ideals, though not all of them, accepted by most thinkers as natural justice have been incorporated in the U.S. Constitution. The American

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of the Execution Office 1949, Pssakim E, 2, 11; Merkaz Rehitei Lakol v. The Minister of Commerce and Industry 1952, P. D. 6, 790; Adiri v. The State Comptroller 1964, P. D. 19, 401; Belan v. The Minister of Agriculture 1968, P. D. 22 Vol. 1, 617). But already in Cohen v. The Minister of Defence, the court reaffirmed its readiness to recognize rights even when they may not be traced to a specific law, and in Ohana v. The Appellate Court Martial(P. D. 24, Vol. 1, 771) Justice Haim Cohn was of the opinion that the justice which the Supreme Court is ordered by law to do should be looked for outside the law (see also Justice Landau's article in Mishpatim, Vol.II, 292). The Israeli court never doubted, however, that it should apply the criteria of "natural justice" (in its narrow legalistic sense) such as fairness (The Consumption Council v. The Chairman of Gas Services 1968, P. D. 23, Vol. I, 324); the equal right of a woman to testify in court (The Guardian of Absentees' Property v. The Shari'i (Moslem Religious) Court 1962, P. D. 17, 1942); the right of an accused to be notified of the charges related to him, to be present and heard in court and to furnish evidence (even by a quasi-judicial commission: Arad v. The Minister of Foreign Affairs 1958, P. D. 13, 144) or indiscrimination (for cases see supra, secs. 11-13) etc. The situation in England is similar in many respects (see Halsbury's Laws of England, 3rd ed. (Simonds) Vol. II, 23 et seq.).

Constitution offers therefore some practical solutions of the problem. Obviously it fails to solve the basic issue: after all, the Constitution too is an act of legislation by Congress; had it conflicted with natural law, it would have still remained valid and the quest for those ideals able to disqualify it would have continued.

62. The two previous sections repeated concisely the analysis in part I, as a background for the discussion of the question which was first specifically posed in sec. 60 supra, namely: must "justice" be included in the definition of law? (1) To rephrase this question: is an order emanating from a competent authority always a "law" regardless of its content, or is such an order a law only if it is just. Hence, should every "law" be obeyed or are there laws which may, and perhaps should, be disobeyed as being manifestly unjust? (2) I suggest that a law which is manifestly unjust may

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(1) The question whether an unjust law may or should be enforced, or the fact that it is enforced in spite of its being unjust are both irrelevant; the competent legislator is presumed to have ways and means to enforce it. Nazi Germany had, thus ensuring "legal" stability.

(2) As a person is at liberty, rather - obliged, to refuse an order emanating from an otherwise competent authority if the order is manifestly unlawful (The Military Prosecutor v. Malinki & Oths. (1957) Psakim M., Vol. 17, 90. The decision is founded on the "justification" clause: 19(b) of the Criminal Code Ordinance 1936, which lays down that a person is

be disobeyed at the risk that the objector may be found by the court guilty of an unjustified disobedience. I further suggest that this is what a constitutional court does in some of those countries which have a constitution. My "constitution" lays down that no enactment may be "manifestly unjustified".

I use the term "justified" and not "just" keeping in mind that, unfortunately, sometimes a law which is unjust from a philosophical point of view may be justified by social, economic or political factors. I use it in the negative form together with the adverb "manifestly", so that anarchy may be avoided without preventing anyone who wishes to take the risk from using his rights as a free thinking being.

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criminally responsible if he carries out an order which is "manifestly unlawful", and furthermore - that the question whether the order was "manifestly unlawful" is a <u>question of law</u> (See also the judgment at the Nuremberg Trial) and is at liberty to resist (at his own risk) any unlawful arrest or search--why can a law, such as the one on which that authority rests, not be presumed unlawful? After all, as far as the person receiving the order is concerned, that order <u>is</u> a law. It is not a valid answer to say that, by refusing the order such a person is acting according to the law (or court's decision) which has declared the order unlawful. By including the term "justice" in a proposed definition, law itself will make exactly the same declaration.

May I now take the liberty to propose my own definition of positive law. It will rest on an organizational (formal) approach which refers only to the origin of law, rather than on a functional (material) approach, and reads as follows:

> A directive (institutionally enforceable)[3] deriving from the supreme authority of the State, or of another political entity, directed at anyone who, within or outside the territorial boundaries, is subordinated to that same authority by virtue of its own directives, and which imposes legal norms, not manifestly unjustified".

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[3] For further deliberation on "sanctions" as an element in the definition of law, see infra. At this point I would be ready to accept Hart's argument (The Concept of Law, 1972, 193-5) that sanctions are "a natural necessity", that most people have one reason or another out of several to obey the law rather than the threat of a sanction, and that sanctions are no more than a guarantee. Hence, I would say, sanctions belong to the "procedural" aspect of law and are not, nocessarily, part of its substance. Moreover - social norms too are enforceable and indeed are being enforced by social means (i.e. contempt, reproach, etc.) with impressive results. Thus, the term "enforceable" was mentioned but not actually included, to hint at the institutional means of enforcement, specific only to laws, and to differentiate between them and social norms, namely: the institutionary arrangements formulated by the legislator. Their effectiveness is, however, immaterial, of course.

63. What is the nature of the proposed definition?

To begin with, it should be grounded in the supreme authority of the state or of another political entity. Granted that we know what a state is - what is that "other political entity" to which I refer?

To provide a reply to this question I shall have, I am afraid, to resort to the elements of that same definition, because "another political entity" is, to my mind, that human society with a "supreme authority" which can impose legal norms. We should be concerned with that entity because if law is possible only in a real state, then the Mosaic law, for instance, has never been law. Nevertheless, in their forty years of wandering in the wilderness the Israeli tribal society was headed by a supreme authority which imposed "institutionally enforceable directives", even though the tribal society disobeyed them occasionally.

The same applies to numerous other societies, primitive mostly but nevertheless political entities within the context I have mentioned. The King or another recognized leader of an African tribe, who imposes legal norms on his tribesmen by virtue of his supreme authority, is the legislator of its laws.

64. What is this supreme authority from which a directive should originate?

Take the Proclamation of Independence of the State of Israel as an example.

Was it issued by a supreme authority? Ostensibly yes, because the proclamation was issued by the National Council, the Parliament during the transitory period proceeding the establishment of the state. I say "ostensibly", because the position and right in the National Council of the National Executive of the Jewish Agency may be debatable. That National Executive was a body representing the Zionist movement and elected, inter alia, by persons who acquired the Zionist Shekel (thus becoming members of the Zionist movement) in Palestine, but not all the members of the Jewish community in Palestine were affiliated to the Zionist movement and some even fiercely opposed Zionism. The Executive of the National Committee of Knesset Israel (the formal title of the Jewish Community in Palestine at that time), which was the second component in the National Council, was elected only by members of the recognized Jewish community. The agreement concluded between the parties which formed these two bodies to include in the National Council representatives of the Revisionist-Zionists, "Agudat Israel", the Communists and the Sephardis - could it grant the National Council the constitutional authority as the representative body of the entire Hebrew community? As a supreme authority? The last elections to these institutions had been held many years before the Proclamation of the State of Israel without the participation of about one third of the Jewish community of 1948. Even if we concede that the Jewish community was adequately represented - what about the Arab population which on the day of the Proclamation of the State numbered about 150,000 residents, out of a total of 800,000. About 20%! It is incontestable that this population was not represented at all.

A more pedantic scrutiny raises doubts as to whether the National Council, which was appointed on 4 May 1948 - a mere 10 days before the establishment of Israel - constituted the supreme authority of the still non-existent state, and as regards the date on which the state was actually founded. The drafters of the Proclamation seem to have this fact in mind because the assertion "accordingly... we are hereby declaring the establishment of a Jewish State in Eretz Israel to be known as the State of Israel" appears in the middle of the Proclamation, after a description of the historical background. Only after this declaration, after the inception and establishment of the state, are "binding" declarations on the nature of the new state made. Furthermore, even the National Council itself did not base its authority on its being an elected body empowered by the people, but on "the natural and historic right and on the strength of the resolution of the United Nations General Assembly". This was undoubtedly due, inter alia, to a purely constitutional reason - the source of its authority being unclear, the National Council followed examples from the history of other peoples and resorted to the "natural right" (and the U.N. resolution). The mention of Almighty God at the end of the proclamation is also a hint to this effect.

And yet, the National Council is presumed to have been the supreme authority of the state and, to the best of my knowledge, no Court has even been asked to rule differently and it too presupposes that the proclamation of the establishment of the State was authoritatively issued.

Obviously, supreme authority in a country with an absolute regime lies in

the hands of whoever possesses absolute authority, be it a King, a President or a supreme legislative body. The source of this supreme authority is an issue beyond the scope of the present discussion. One is reduced to referring to the result alone and, with a certain degree of cynical pragmatism and logical confusion, assert that supreme authority is vested in him who has the power to impose directives.

65. I have said that law is "a directive deriving from the supreme authority of the state". My reference to the supreme authority as merely a source is, of course, no coincidence. The legislative body in a modern state is unable to cope with the promulgation of the daily growing volume of laws, a lengthy and cumbersome process.

Delegation of powers for "subsidiary legislation" from the supreme authority to secondary authorities had been in full swing for quite a long time. Powers delegated to the Executive creates a confusion of powers instead of the classical, Montesquieu-styled "separation of powers", towards which exponents of modern democracy have been striving.

These developments are known and preoccupy all persons who uphold separation as a remedy to ensure a democratic regime, but there seem to be no prospects whatever of turning the clock back. This is why the dramatic development of the modern welfare state, its security and social requirements, its increasing intervention in economy, development and education - in fact, in all phases of life - dictate a growing necessity for delegating more and more legislative powers from Parliament to Cabinet Ministers.

Ministers are not considered "legislators" they are regulation drafters, but the different title does not reflect a tangible change in the nature of the document. Laws and regulations alike are binding directives. Usually, in the absence of regulations enacted by a Minister, a law is but a dead letter. It is the Minister's regulation which breathes life in a law. His regulations are implementation orders, in default of which, the law cannot be carried out. Until the Minister concerned sets up criteria for air pollution the "Kanovitz Law"[1], for instance, remains on paper alone.[2]

It happens that a Minister's regulations may have a real effect on rights and duties. Thus, when the Minister of Justice determines that court fees must be paid upon lodging of a suit rather than at the completion of the trial (and in accordance with its results) - he also indirectly determines the extent to which rights would be materialized.

Local Councils may enact by-laws regarding business hours, business licensing and matters affecting the environment, hence - the quality of their

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[1] Prevention of Nuisances Law, 5721-1961.

[2] But the High Court of Justice may compell a Minister to use his powers as "subordinate legislator", as it did with regard to the Kanovitz law. See Oppenheimer v. The Minister of the Interior and Health (1965), P. D. 20, Vol. I, 309; Peranio v. The Minister of the Interior and the Minister of Health (1971), P. D. 26, Vol. I, 809.

inhabitants' life. Similarly, the District Town Planning and Building Committee sets down criteria of its own which affect people's life, economic and social development and the individual's property.

All these subsidiary-legislations have one common denominator - they derive from the supreme authority of the state in Parliament. None of them may impose directives unless authorized by law, and all must remain within its scope.[3] The Court will not hesitate to nullify a subsidiary legislation which is ultra vires the "legislator's" powers. The "fourth" power, i.e. the State Comptroller (or a like agency) is also designed to prevent misuse of powers by a subsidiary legislator.[4]

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[3] In the Soviet Union too "orders and instructions of the individual Ministers... are supposed to be issued within the law, but often are not, which does not affect their mandatory character" (Gsovski & Grzybowski, Op. Cit. Vol. I, 42).

[4] Communism seems to assert that "separation of powers" is a bourgeois device whose sole purpose was, right from the start, to deprive the people of their rights through, inter alia, the transfer of legislative powers to the Executive power. This, together with the centralization of power inherent in the Communist concept of state is the ideologic reason behind the restricted scope of sub-legislation in the Soviet Union. In theory legal norms may not,and must not,collide with the laws of the proletarian revolution, such collissions must be subordinated to the

In brief, power for sub-legislation, be it wide or narrow, always derives from the empowering law, the supreme authority of the state. This applies equally to a democratic and a totalitarian regime.

66. We can now go back to another element in the definition and demand that a directive be binding. This, of course, does not apply to a declaration, a statement or an expression of wish.

Let us return to the Proclamation of Independence.

After having proclaimed and declared the establishment of the state, the Proclamation says, inter alia, that the State of Israel "will be based on the

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formal commands of the party (id. 43-4, 49-54. Gilison, Khrushchev, Brezhnev and Constitutional Reform, in Problems of Communism, Sept.-Oct. 1972, 69; Golan, Russian Traditions in Soviet Socialism, in The University, Dec. 1971, Vol. 17, I, 56). Thus, instead of wide sub-legislation, the Presidium of the Supreme Soviet is empowered to issue directives ("Ukases") which have to be (and always are) approved by the Supreme Soviet, although they assume immediate validity even before their approval. On the other hand, Communism has no reason to fear the mounting strength of the Executive power, as does the West, because there exists no danger of the domination of the Soviet executive power and no fear of its mounting strength, the Supreme Soviet being a representative of the popular sovereignty to which the Soviet Government is ever subordinated.

principles of liberty, justice and peace... will uphold the full social and political equality of all its citizens... will guarantee freedom of religion, conscience, language, education and culture" etc.

The High Court of Justice, as already shown, ruled that the Proclamation is merely a document expressing the vision of the people and its "credo, but constitutes no constitutional law".

The Court was not prepared to consider the content of the Proclamation of Independence as a law, as a binding directive, because although "every authority in the state is bound to be guided" by the principles of the Proclamation, the Proclamation does not grant "the citizen a right enforceable by a legal claim". (1)

It follows that the answer to the question of whether a certain directive is binding, whether it constitutes a law, may be found in the reply to another question: does it grant the right of claim? In other words, a directive is binding if there exists a positive obligation to act under it. How would we know whether such an obligation exists? - through a pragmatic examination: if an obligation for commission or omission exists, it follows that a right exists to demand in Court that it should be carried out. But, nevertheless, the absence of such right does not, necessarily, reflect the absence of an obligation. Although the obligation is devoid of any practical and tangible

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(1) Peretz v. Kefar Shemariahu (1962) P. D. 16, 2101.

significance, just as a right is abstract, unless there is a counter-obligation to respect that right; unless the pretender to the right can enforce the obligation to respect it through the Court. (1)

67. It follows that the next element of the definition, i.e. that the directive must impose (binding) legal norms, is clarifying and amplifying, but at the same time, a vital element which refers, inter alia, to the actual imposition of obligations and prohibitions and to the actual grant of rights and permits. Even if the holder or claimant of a right cannot enforce it, at a certain given moment; not even through institutional measures.

A person is entitled by law to enjoy his property and derive from it all the

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(1) A "ransom" paid to the positivistic approach to "right", in the context of a legal definition, as mine, which defines the positive law. There is a strong argument in favour of the contention that "right" (at least - the right to "right") has a life of its own, independent of any obligation to respect it. An argument somewhat similar to that which supports the independent existence of "justice" even when justice is totally ignored. In this sense one may argue that the two arguments meet in the following third, namely - that man has a (just) right to justice. Further consideration must be given to the question of whether justice may exist when man does not have even that abstract right. Such a discussion exceeds, unfortunately, the scope of the present work.

benefits which that ownership grants him. But a mere declaration of his right to these benefits is obviously meaningless unless he can secure a remedy against anyone who, directly or indirectly, interferes with these benefits. Hence, the possibility to impose obligations and prohibitions signifies the power to prevent any such interference, to restore the owner's right and to make the malefactor compensate him.

68. What closes the circle is, therefore, the ability to enforce the law through, inter alia, the determination of subordinations or procedure of control and supervision. An arrangement which reaches its peak in coercive measures, namely the police and other Government institutions as well as Courts to protect rights and enforce obligations and prohibitions.

But a law, unenforceable at a certain given moment is, nevertheless, a law, although it may temporarily lose its practical significance in spite of the fact that it has been enacted on behalf of the supreme authority.

69. A law, according to my definition, may be directed at anyone who, within or outside the territorial boundaries, is subordinated to that authority (supreme in the state) by virtue of its own directives, because the supreme authority may aim its directives at whomever it deems necessary or desirable. To begin with, individuals. Secondly - legal bodies. And lastly (in democratic countries) - at the Government, including local councils and other competent authorities found in abundance in the country. Even at the supreme authority itself and at the head of state if he is not

identical with it (a representative President, like in Israel).

Those at whom the directive is aimed may be within the territory of the state or the political entity or outside it. This element applies to the recently growing number of laws which term offences certain activities committed outside the boundaries of the state[1] and likely to endanger its existence. Israel has enacted such laws and she is not the only country to have done so.

70. It may be advisable to elaborate on another alleged element of law, which was not included in my definition, although some scholars suggest that it should be.

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[1] A marginal case from the viewpoing of my definition is that of a state which expands its territorial boundaries beyond the accepted practice in international law, thus applying its law to an additional territory at the price of an expected clash with other countries which claim that the expansion interferes with their rights (e.g. fishing or oil) and is inconsistent with international justice. I said "justice", rather than law, in spite of the arrangements, ineffective as they may be, for its enforcement because another element of the definition, the existence of a "supreme authority" is not being fulfilled. International law rests on the voluntary acceptance by sovereign countries which insist that they are "supreme authorities" in themselves, and may withdraw at will.

I am referring, of course, to the twofold meaning of obedience, which determines that the directive includes the duty of obedience and that the public actually obey it.

The first meaning is obviously no innovation. A directive which "imposes" obligations and prohibitions clearly means that the directive "imposes" also the duty of obedience. The emphasis on this element may cause the reader to wonder whether mention of this element hints at a possible situation - were it only hypothetical - in which a binding directive would exist without the attendant duty to obey.

Even moral directives, issued on behalf of a religious authority or a voluntary social organization are expected to be obeyed. So are social norms, which stem from general agreement. This does not signify an act of legislation by Parliament or King.

Furthermore, to stress the obligation of obedience as a separate element is to define law from within its own definition. If, in the course of our analysis of the other elements, we had to explain one element of the definition with the help of another - a faulty action in itself - this time we may really enter the realm of absurdity.

If obedience is made an element, why not take one further step and restrict the whole definition to "law is a directive which should be obeyed"? Thus one would ascertain that a directive is 'law' by ascertaining that the directive includes the obligation of obedience. And it is like saying that "I know that a directive enforcing obedience is 'law', because 'law' demands

obedience to a binding directive."

In fact, the obligation to obey is seldom imposed separately and expressly. Criminal law punishes only for acts and omissions which it specifies, thus only hinting at the prohibition which lies in the background. The assumption that a directive should be obeyed is impliedly included in a criminal legislation by the very nature of the obligation on which it rests.(1)

Nevertheless, the general consent that binding directives should be obeyed, is an essential condition. Not because this is what the law says, but because general consciousness of the obligation to respect the law is the source of the supreme authority's power; a declaration of loyalty by the population subjected to these laws towards its supreme authority.

In other words, the obligation to obey is, actually, but a recognition of a duty which is one of the foundations of the definition of "supreme authority". In Rousseau's words: it derives its power from a "social contract" without which no authority (a totalitarian one included) could exist for long. A

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(1) Clause 5 of the Israeli Criminal Code defines an offence as "an act, attempt or omission punishable by law". Hence, for instance, to unlawfully cause the death of another person is a felony (clause 212). But the law does not expressly and positively say, as does the Decalogue: you shall not commit a murder. May I take this opportunity to mention that only three out of the Ten Commandments are still considered crimes by many modern criminal codes (murder, theft and perjury) all the others

general definite lack of agreement is tantamount to civil disobedience which, when active, may turn into a revolution.

By general agreement I do not mean that every single person must be happy with every single law, or that whomever the law is directed at (e.g. drivers, soldiers, employees, tenants) should agree to it, but simply that the population at large should tacitly accept the entire body of laws; those aimed at specific groups, included.

The non-acceptance of one law or another by part of the population does not detract from the general fundamental power of the supreme authority. It is also possible that non-acceptance of a certain law by the entire population may not, in itself, harm the authority. But "quantity" in this connection may turn into "quality" and a legislator may lose his authority if non-acceptance is shared by a permanent majority of the population with regard to numerous laws or even a few major ones only.[2]

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having become religious or moral prohibitions only.

[2] Of course, a situation may be created, incidentally or not, temporary or permanent, in which the entire population or a certain group in the population at which a certain law is directed,opposes a <u>specific</u> law, as was the case with regard to the National Service Law, 5714-1954 which imposed the duty of alternative service on girls exempted from military service on religious grounds. At the beginning of the 1950's the entire population opposed the austerity regulations prevailing then and turned

This brings us to the second aspect: actual obedience. Is it a condition, does it have to be one of the elements in a definition of law? Here too, the answer will evidently be negative, for if actual obedience is a binding foundation - what is the point in having means of coercion? After all, the mere insistence on the maintenance of means of coercion, clearly points at the basic assumption that, without them, lack of obedience will make law a farce and render its existence dubious. Obedience or disobedience to the law cannot, therefore, in itself, be a condition to the recognition we shall duly grant a certain binding directive.

Jewish ancient sources refer to a lawful but inadvisable decrree. Hence, a decree remains a decree inadvisable as it may be. A wise supreme authority would, however, not issue decrees which the public cannot countenance. Not only to protect the public, but also to protect its own power and prestige.

Again, we have returned to the supreme authority and the conclusion is that the question of obedience, in both its dimensions, is relevant to the definition, the powers and the functioning ability of the supreme authority and not to the definition of law.

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the Minister in charge into a caricature, through no fault of his. This opposition was not tantamount to a general civil disobedience, because the law in dispute was singular, but it could easily have reached this stage had it spread in time and on a number of laws.

71. So much for the definition of law. What - apart from binding directives as defined - does it include and what does it not? One of each. It includes a custom which has become law. It does not include a mere usage, regardless of its acceptance.

Let me explain. A custom established over many years, which has been proved numerous times in court as a habit practiced throughout the territory by all, or by certain groups of the population to which it applies, may be granted, by some legal systems, the force of a binding directive. Such a custom will thus be considered a law, because after having been "duly" recognized, it fulfils all the conditions of the definition.

It derives from the supreme authority of the state[1], without whose recognition it would remain a mere custom. It is applied to anyone subjected to it and it imposes a legal norm (which may be enforced).[2]

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[1] See, for instance, the Interpretation Ordinance (New Version) which, in its definitions clause lays down explicitly that custom is an integral part of the law of the land. See also clauses 36-45 of the Ottoman Civil Code (the Mejele) which determines the same.

[2] As was the case of severance pay. In 1963 the Knesset passed the Severance Pay Law making it compulsory on an employer to compensate any worker who is dismissed by him after having been employed for at least one year, or who resigns in circumstances entitling him to severance payment. By enacting the said law the Knesset merely lent

For the very same reason, custom in primitive societies constitutes a law by virtue of its definition. There too, custom becomes law following a recognition by the supreme authority of the social structure within the boundaries of which the custom operates and the "political" arrangements for its enforcement exist.

This does not apply to a mere social norm whose enforcement is not ensured by the legal sanctions formalized by society. In other words: sanctions on behalf of that supreme authority. Hence, it does not include obligations by virtue of practice or general acceptance, even if persons who violate

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legal validity to a custom which had developed in Palestine and Israel over a span of tens of years through a struggle between organized workers (The General Federation of Labour) and individual as well as organized employers (The Manufacturers' Association), and which had been declared by the courts as valid and binding following separate decisions in which variants of the same custom had been recognized. See for instance, S. Cohen & Co. and Isaac Levy v. Abraham Capun (1940), P.L.R. Vol. 7, 81; Zilbiger & Another v. Dickman (1949), P.D. 10, 254; Wolfson v. Spines Ltd. (1950), P.D. 5, 267. As to other customs which were recognized by the court, see, for instance, Beit Hanania etc. Ltd. v. Friedman and 8 others (1964), P.D. 18, Vol. 3, 23 (membership and voting right of women in a cooperative settlement were approved).

them may be liable to the sanction of excommunication.

Likewise, the definition does not include regulations undertaken freely by members of voluntary bodies. This is why, for instance, it does not refer to the constitution of the General Federation of Labour or the Sick Fund regulations, or the labour code of a given factory. Nor does it apply to the regulations of other, non-voluntary institutions, which supply services in accordance with the conditions set down by them and which anyone requiring their services undertakes to fulfil. Nor to disciplinary regulations of an academic institution, unless that academic institution is authorized by law to determine them.

VIII. CHANGING THE LAW

72. According to Communism[1] law expresses the existing production relations. In the early stages of development, the individual imposes his will despite commonly shared conditions of production and barter. At first it takes the form of custom and later on - of law. At the same time, following the development of society, law becomes an independent element which derives justification for its existence not from economic relations but out of independent inner roots and bases itself on the human will.[2]

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(1) Beer, Allgemeine Geschichte Des Sozialismus und der Sozialen Kaempfe, Ben-Avraham tans., 1953, 334-41; Marx, Kritik des Gothaer Programms, Ben-Asher trans., 1952, 34-7, 42-3, 47-56; Engels, A Letter to Bebel of 18/28 March 1875 (id. 64-5); Lenin, Cn Engels' Letter to Bebel (id. 103-17). Engels, Principles of Communism, in The Communist Manifesto, Dorman Ed., 1950, 93-8; Lenin, On the State, Selected Writings, Goldberg trans., 1951, Vol. II, 109-26; Plechanov, The Historical Materialism and its Opponents (Original Russian title: Cn the Question of the Monistic Outlook of History), Malkin & Raban trans., 1950, 126-246 (esp. 146-78, 185-8, 233-5; Popper, The Open Society and its Enemies, 1966, Vol. II, 81-99; Ben-Amittay, The History of Political Thought, 1972, 275-81; Lancaster, Masters of Political Thought, 1959, Vol. 3, 166-202; Avineri, The Social and Political Thought of Karl Marx, 1967, 24-50; David & Briersley (Op. cit) 145-7.

(2) Cn the Problem of Housing, Engels, Selected Writings, Vol. I, 454.

This is how individuals lend their will, dictated by their mutual relations, an all-embracing expression in the form of a state will. From this moment, however, a situation is created in which law is no longer dependent on the arbitrariness of each individual.

Nevertheless, Marx claims, law must be just. Therefore, a law which punishes man for his thoughts is a law of one party against the other. Hence - unjust as causing inequality. (3)

Law, says Engels(4), should reflect economic reality and at the same time be logical and devoid of internal contradictions. Contradictions, however, can be settled only at the price of undermining the reflection of economic relations in the law - namely, by its being a rigorous expression, without friction and without fraud, of the rule of one class.

Hence the need to create that one class society, to which law would serve a rigorous expression without internal contradictions. And, in default of a better way, Lenin would explain that the removal of internal contradictions in law will be effected through a revolution.

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(3) On the New Instructions of the Prussian Censorship in the Anekdota Zur Neuzten Deutschen Philosophie Und Publicistik, as translated from the Russian edition of Marx' Writings, Vol. 1, 15.

(4) A Letter to Schmidt of 28 Ctc. 1890 (op. cit. 380).

In his early writings, Hegel, whose theory served the Marxist doctrine, was more extreme. He claimed that when an obsolete set of laws is kept valid, despite the fundamental change which has occurred in the entirety of social relations, then the regime contradicts the wishes of society and its requirements, deprives itself from all its power and dignity and becomes an entirely negative phenomenon. It is imperative to destroy this phenomenon, and it cannot be destroyed other than through violence. It must be destroyed because the state, whose task is to perpetuate and maintain the common interest of all its members in a coordinated and rational manner... no longer fulfils its task". At the same time, that violence recommended by Hegel will be justified only if it expresses "a concrete historic force, which has sprung and grown in the reality of an existing order."(5)

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(5) As quoted by Marcuse in Hegel's Method (original title: Reason and Revolution, Hegel and the Rise of Social Theory), Mann trans., 1951, 52-6. An indirect support of Hegel's premise and a latent legitimization of revolution can be found in the preamble of the Universal Declaration of Human Rights of 10 December 1948 which reads as follows: "... Whereas, it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and aggression, that human rights should be protected by the rule of law..." Whether the quelling of such a riot may be "lawful" in the view of Article 2(2)(c) of the Convention for the Protection of Human Rights and Fundamental Freedoms (the "European, or "Rome Declaration" of 4 November 1950)

Hegel does not explain how to tell whether a certain violence expresses a concrete historic force.

Marcuse does not accept Lenin's solution and seeks a compromise between Marx and Hegel.[6] When an objective need for a change is created - even if this need is not felt among social classes traditionally considered underprivileged - the machineries which stifle the need for a change should be eliminated first.

He provides no reply to the question as to who is authorized to determine the "objective need" for a change and on what basis, when underprivileged classes do not feel this need at all. He would probably determine it himself

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which specifically states that "deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force... (c) in action lawfully taken for the purpose of quelling a riot or insurrection" - remains open for discussion. The European convention itself "reaffirms" in its preamble, "the profound belief in those Fundamental Freedoms which are the foundation of justice and peace in the world..."

(6) Marcuse, Das Ende de Utopie, Shlomo trans., 1970, 62-79, 84-7, 93-5. See also his An Essay on Liberation in the One Dimensional Man (the Hebrew title of the book follows the name of the latter essay), 1970, 282 & passim.

and this would be the root of his authority to eliminate the said machineries.

He feels, of course, the faulty logic in his theory and, surprisingly enough, finds refuge in the worthy "natural justice", namely - "the supreme authority with universal validity, superior to the rights of a certain group". When "natural justice" justifies it, the right of resistance is born.

This resistance , however, will not be expressed in a revolution, but in civil disobedience, provided a way is found to avoid a confrontation of force. When will a confrontation of force be justified? When the established coercive power decides of its own accord the scope of legality and restricts it to an intolerable minimum. As to who will decide whether it has reached this minimum - no reply is offered. At any rate, confrontation will take place with a view to overthrowing that establishment. Presumably, the law is "good", and bad is only he who operates it.

Whether he wants a change in law or the destruction of the administration which distorts it through the manner of its application and interpretation - Marcuse cannot, of course, evade in the long run a change of the law itself.

Most authorities of natural justice can serve to justify civil disobedience and even violence. If we agree that the common denominator of all the theories of natural justice is the assumption that there exists a binding supreme source, with which the law should be consistent, then the Marxist and early Hegelian doctrines as well as that of Marcuse are, in fact,

theories of natural justice.

Early Hegelianism, Communism, and the New Left share the realization that - at least at a certain stage - no change of law is possible "from within", by resorting to the tools which law itself places at their disposal, and that the course is that of coercion "from without", either through a violent revolution or civil disobedience which, for lack of alternative, may end in a violent confrontation.

However, we are interested in examining the possibility of changes in law through legitimate activities from within, namely inside the existing machineries, through them, by virtue of the authority granted by law and according to the rules it determines.

73. Hence the question is: could law cause social changes, or is it only their product?

In our scanty review of the historical development of law, I mentioned the sluggish change in customary law and attributed it, inter alia, to its religious source. Thus, the sanctified law could be changed only with difficulty and through judicial fictions derived from learned interpretations of scholars and judges. The very same reasons which slowed down and sometimes prevented changes in law, also decelerated or braked social changes.

It follows that if law is capable of bringing about changes in society, it is only through changes in the law itself (which are social changes in themselves, for law is a social phenomenon). To the same extent, the influence of social

changes on law will prove insignificant unless we refer to an influence leading to changes in law.

Actually, we must deal not with "law in social changes", but with "legal changes in social changes". To clarify this - we should comprehend how, from the technical and organizational aspects, changes in law are created in a modern state.

74. In the Soviet Union (as well as in most countries of the Communist bloc, with slight and immaterial changes) the legislative body is the Supreme Soviet, which is supposed to convene twice a year at least[1] and approves the laws and decrees submitted for its approval and pertaining to the entire Soviet federal organization. Local Supreme Soviets of member "states" follow suit in respect of legislation with local validity.

Incidentally, the decrees (in Russian - "ukazes") are the main means for the introduction of changes in law, between sessions of the Supreme Soviet. These are changes which, in the opinion of the Presidium, are necessitated by changing circumstances.[2] In Hungary, for instance, legislation during the years 1957-66 consisted of 42 laws enacted by the "legislator" and 352 by the Presidum in the form of decrees.[3]

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[1] Article 46 of the Soviet Constitution.

[2] The authority of the Presidium to issue decrees is determined in article 49(b) of the Constitution.

[3] See Boim, commentary on Binhari's Socialist Representative Institutions,

A decree may repeal a law, create a new law and, of course, amend a law.[4] There are only few laws which the Presidium cannot enact in the form of decrees, such as the Budget Laws and the Economic Plan Laws.[5]

The ideologic source of the decree is found in Lenin's doctrine which gave birth to the decree as a temporary measure, for a transitory period, while the legislative powers would be permanently vested in the Supreme Soviet, the Parliament supposedly expressing the will of the people.[6] This part of Lenin's theory on the temporary character of this arrangement has not been applied and this oversight is especially felt when we bear in mind the direct influence of the Communist party on the "legislation" of the Supreme Soviet through such people as the party Secretary General and members of the Presidium.

I have said that the decree is the main means for changes in the Soviet law. It is not the only one though, because the Presidium of the Supreme Soviet is also authorized by the Constitution to "interpret" laws.[7] Obviously, when a disagreement arises between the prosecution and the counsel for the defence on the correct interpretation of any law and the Court is unable to

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Is. L. R. 1972, Vol. 1, 167-173.

(4) Ibid. See also 162 in David & Brierley's Major Legal System in the World of Today, 1968, 172-3,

(5) Ibid.

(6) Boim, ibid.

(7) Article 49(c) of the Constitution.

interpret it - the interpretation of the Presidium may radically change the content and significance of a law.

No theoretical difference, however, exists in this respect between the Soviet Union and a western country. In both, interpretation may result in a change of law although, in practice, the difference is substantial: interpretation in the West is made by the Court[8] while in Russia, this is achieved by a

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[8] See, for instance, United Australia v. Barclay's Bank Ltd. (1941), A.C. 1, 29 (which refers to common law rather than to statute law); Oppenheim v. Kridel (1923) 236 N.Y. 156, 140 N.E. 227; Brown et al. v. Board of Education (1954) 347 U.S. 483 (where the U.S. Supreme Court interpreted state's laws by virtue of the powers vested in it by the Constitution. Brown's case is, of course, only one example in a long row of decisions which declared provisions in a State law unconstitutional. Of some special interest may be the decision in Adler v. Board of Education (1952) 342 U.S. 485, which confirmed the Feinberg law with regard to the removal from office of teachers who support the illegal overthrow of the U.S. Government and the other decision, which determined the exact opposite: Keyishian v. Board of Agents (1967) 385 U.S. 589). I have already cited some of the many Israeli decisions which interpret the term "justice" in the Tenants' Protection Law and the other cases which changed, through interpretation, an accepted meaning and application of laws.

supposedly "legislative" body, directly influenced by the executive power and the party backing it. Even if it is claimed that the interpretation by a court - especially the Supreme Federal Court of the U.S. - is not devoid of political pressures through the nomination, sometimes political, of the judges, one can still argue that this is a question of degree and principle.

Of degree - because it is the extent of politization of the Court which matters. Actually, criticism is voiced in the U.S. and in other countries against the system of nomination of judges to the Supreme Federal Court (by the President with the approval of the Congress). This criticism is not only justified, it also determines the degree, i.e. the extent of political influence, and also - the possibility to change the method.

Of principle - because the controversy around political structure and social order is condensed in this subject. A western democracy holds sacred Montesquieu's principle of division of powers - legislative, executive and judiciary (controlling power may be added to the latter). Despite the confusion of these powers, this principle still guides, western political science.

Communism claims that the separation of powers is a bourgeoois idea whose whole purpose is to deprive the people and the voters from their powers, [9] This being so, no judicial control of laws and decrees is needed in the Soviet Union, because the Supreme Soviet represents the sovereign will of the

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[9] David & Briersley (op. cit) 157; Boim (op. cit).

people. Hence no institution may control its actions because the possibility that the Parliament would enact anything anti-constitutional is, supposedly, completely ruled out.[10]

In such a dictatorship[11], where in fact, the Government is not responsible

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[10] Also in Israel the theoretical assumption is that the Knesset may pass any law it may deem necessary or desirable however anti-democratic it may be. But this argument must be weighed against the existence of general elections, the Declaration of Independence, the case of Bergmann v. The Minister of Finance (1969) P.D. 23 Vol. 1, 693 which was already cited . The English constitutional law (the common law part) which to some extent still prevails in Israel. The Basic Law bill referring to quasi constitutional powers of the Supreme Court, which is now under preparation in the Ministry of Justice and mainly, the Jewish democratic "volksgeist" which may serve as the most efficient brake against "totalitarian democracy".

[11] As Rosa Luxemburg described it already in 1918: "In place of the representative bodies created by general elections, popular elections, Lenin and Trosky have laid down the Soviets as the only true representation of the laboring masses,but with the repressing of political life in the land as a whole, life in the Soviets must also become more and more crippled. Without general elections, without unrestricted freedom of press and assembly, without a free struggle of opinion, life dies out in every public institution, becomes a mere semblance of life, in which only

to the people, but the other way round[12] it is small wonder that the validity of changes in the Soviet law, i.e. decrees of the Presidium of the Supreme Soviet is not always conditional on publication.[13]

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the bureaucracy remains as the active element. Public life gradually falls asleep, a few dozen party leaders of inexhaustible energy and boundless experience direct and rule. Among them, in reality, only a dozen outstanding heads to the leading and an elite of the working class is invited from time to time to meetings where they are to applaud the speeches of the leaders, and to approve proposed resolutions unanimously - at bottom, then, a clique affair - a dictatorship, to be sure, not the dictatorship of the proletariat, however, but only the dictatorship of a handful of politicians... such conditions must inevitably cause a brutalization of public life; attempted assassinations, shooting of hostages etc." (quoted by Boim, op. cit).

[12] Golan, Russian Traditions in Soviet Socialism, Ha'Universita (1971) Vol. 17, 1, 55 (at 58).

[13] Until 1958 there was no obligation to publish decrees of an administrative and economic nature, the publication of which is "superfluous and unimportant". Afterwords, permission not to publish is limited to orders which have "no general significance, or normative character" (Gsovski & Grzybowski, op. cit. Vol. 1, 44; Vol. 2, 1905).

75. In democratic countries, the publication of changes in law is usually compulsory, when they are directly made by either the legislator or by a sub-legislator. However, these are not the only methods of change. No less important than the former two are changes indirectly made through the application or implementation of the law.

A change by the State Prosecution administration is a change through application and should not necessarily be published. This is not the case with a change through implementation, namely through the interpretation given by Courts. Their interpretation is published in the form of judgments and is imperative, not because of the principle that no " law" or "amendment" of a law is possible without publication, but because the judgments of the Supreme Court cannot be made known and thus cannot be binding on, or even guide, lower courts without being published. (1)

Many judges, out of undue zeal for the protection of the principle of the separation of powers, are shocked to hear that they too are supposedly "legislators", through the interpretation they lend the law in their judgments. (2)

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(1) In Israel, most courts, excluding the Supreme Court (and a few others, e.g. Labour Courts) are bound by the rulings of the Supreme Courts and guided, but not bound, by other instances higher than themselves (Courts Law, 5717-1957, sec. 33).

(2) See, sec. 49 n. 8.

But, it will be difficult, I think, to dispute that when the Supreme Court ruled in the famous Bergman's case (supra) that it is empowered to invalidate a Knesset law because it affects "the very soul of democracy", its decision went beyond mere interpretation.[3]

I have already mentioned the abolition of capital punishment by the Supreme Court of the U.S. The interpretation which this court lent the Eigth Amendment of the Constitution - one would argue - constituted no change of law, but merely its interpretation in the light of criteria brought about by changing circumstances regarding the extent of cruelty of the law. I doubt whether this understanding is shared by a man sentenced to death who for years awaits his own execution.

Anyhow, it is unconvincing, I think, to argue that the Supreme Court of the U.S. merely made use of its powers to interpret the Constitution, and that therefore it does not amount to a change of law. After all, whatever the court does, interpretation incl uded, is based on the powers vested in it by the law, irrespective of whether this law is a constitution with greater authority or an ordinary law.[4]

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[3] Bergman argued that the law is invalid under which state financing is given prior to the electoral campaign only to factions which were represented at the Sixth Knesset and to others - only when and to the extent to which they win the elections to the Seventh Knesset.

[4] A stronger argument may be the following, namely - that the example of

I find it difficult to see a tangible difference, apart from the formal one, between a total abrogation of an anti-constitutional law by the court and the actual abrogation or change of its provisions through interpretation. Once the Court rules as it does - either by virtue of a constitutional or another power, or without it - the "former" law is no longer a law.

The situation is different when it applies to a change of law through its application by the executive power. When the Attorney General directs that no indictment be submitted for an abortion, which has been performed with the woman's consent unless death or severe harm resulted owing to gross negligence; or when he directs that no indictment be submitted for homosexuality between two consenting adults carried out in private - he neutralizes the law.

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the U.S. does not relate to changing of law through interpretation because of the specific powers of the Supreme Court to invalidate unconstitutional laws, and therefore if the Court really changed the law it did not do so by way of interpretation as such. But the counter argument is that these specific powers were assumed by the American Supreme Court through interpretation. The Israeli Ministry of Justice has recently proposed to empower the Supreme Court to invalidate "a law which changes a Basic Law or contradicts the provisions of a Basic Law which has not been approved by the required majority". This appears to be a constitutional power which rather than grant the Supreme Court powers is designed to restrict it and prevent judgments similar to the one given by it in the Bergman's case mentioned above.

In these cases, though the law is in the book - it is not practiced, but, since it is in the book - the Attorney General may, of course, change his mind and order to implement it. The earlier change must therefore be regarded as conditional change. The condition being that circumstances would not change, or that he would not receive a different order by the executive power to whom he is subordinated. Until then, the change is tantamount to a change of law.

76. With regard to the changing of law through subsidiary legislation, I have already mentioned, that a sub-legislator actually breathes life into law through his regulations, and sometimes determines also rights and obligations. I have mentioned the Minister of Justice who affects rights of litigants through court fees, by fixing their rate, by imposing them on the claimant (rather than on the loser) and making the hearing conditional on their payment.

The Transport Law merely determines a general framework which the Minister fills with many hundreds of regulations specifying obligations and prohibitions and imposing penalties on those who violate them. Many a time, he repeals and amends the regulations, thus becoming a real legislator.

The powers of the Minister of Transport and other, very comprehensive, powers which the Knesset grants sub-legislators, give rise to concern among legislators lest they lose control, although they clearly realize that there exists no practical way to prevent the delegation of legislative powers on a

wholesale scale.[1]

Indeed, the Knesset is the main and most important source for changes in law. A change of law, when effected by the Knesset, takes, of course, always the form of a law - which determines that a former law is being repealed or changed as specified in the new law. The proposal for a change of a law may come at the initiative of the Government - as it is in most cases - or at the

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[1] Apparently, the only way to prevent a complete confusion of powers and misuse of these powers is through control. In fact, in 1972 the Ministry of Justice submitted a proposal (not yet a bill) which, if passed as law, will provide that only the following would be empowered to enact regulations: the Minister empowered by a specific law; the Minister to whom the Government may delegate powers of subsidiary legislation (e.g. with regard to emergency regulations); the Minister whose emergency regulations are extended by law. As to control, the proposal goes on, in addition to the power of the Supreme Court with regard to ultra vires sub-legislation, the Knesset too will, by simple resolution be usually entitled to invalidate regulations excluding those which may originally be enacted with the approval or the consent of one of the Knesset committees, or in consultation with it (e.g. customs tariff), emergency regulations, regulations for the control of which the law may specify another manner of control by the Knesset, and by-laws.

initiative of a Knesset member who may submit a private bill. (2)

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(2) In the Soviet Union (Berman, Basic Laws on the Structure of The Soviet State, 1969, 119-31) the power of a member of the Supreme Court to propose private bills apparently does not exist. At least it is dubious, and not practiced. The 1967 Statute on Permanent Commissions etc. of the Supreme Soviet provides that the Legislative Proposals Commissions of the Soviet Union and of the Soviet of the Nationalities shall be charged with "working out drafts of laws of the U.S.S.R. (and) edicts and decrees of the presidium of the Supreme Soviet of the U.S.S.R. on questions connected with the strengthening of socialist legality and the administration of justice and on other questions of a general nature". Seeing that they are also charged with "considering in a preliminary way drafts of laws... which have been referred to them", it is possible that, under the definition of their function mentioned before, they may draw drafts to offset the drafts already prepared and submitted to them in their second capacity. It seems that, if at all, a member of the Supreme Soviet may propose that the Commission prepare a certain bill and if it does, the proposal may be tabled before the Supreme Soviet. Hence, formally, the procedure in the Supreme Soviet is similar to that of a democratic parliament.

IX. LAW AND SOCIAL CHANGE - CAUSE AND EFFECT

A. A Tool for Changes in Patterns of Behaviour

77. Two preliminary secondary questions arise when we discuss the question posed at the head of this section: is law merely an echo of social changes which have already occurred or is it also able to cause these changes? In dealing with the first question I shall ignore the second. In dealing with the second question, I shall assume that it does serve as a tool for changes.

Examples are not lacking that law may serve as a tool for changes in patterns of behaviour. When the legislator determined in the (free) Compulsory Education Law that parents should send to school their children in the relevant age brackets, he imposed, on parents and children alike, patterns of behaviour which had not been accepted among many of them before. From now on, these children must attend school (unfortunately, the legislator cannot force them to study too), must stop vagrancy during school hours and even helping to earn their family's livelihood. Their parents became liable to punishment if they do not enable their children to study.

If the scope of this change in pattern of behaviour does not seem unduly dramatic or convincing among Jews, it will, I believe, be easy to convince sceptics when we see what has happened among the non-Jewish population

in the State of Israel.[1]

During the 1969-70 school year, a total of about 100,000 pupils from the minorities (out of 360,000 inhabitants, excluding East Jerusalem) attended close to 400 schools taught by approximately 2,500 teachers. There were 35 post-primary schools (before the law was expanded to apply to the ninth grade) as compared to one single institution which existed when the State was established in 1948-49. The most pronounced change may be seen in the percentage of girls from among the minorities who attend schools. In 1948-49, girls' school attendance was only 18.6% from the total pupil body. Exactly twenty years later, in 1968-69, the percentage of girls going to school rose up to 43.1, despite the difficulties incurred in the implementation of the law in rural localities where over 83% of the Moslem population is centralized.

The law which bans the employment of children and restricts that of youths, has led to two results. The first - it has helped implement the previous law on compulsory education. The second - it has changed the nature of the labour force in Israel, through the removal of children from it and by limiting the participation of youths in it. The same applies to the amendment to the Settlement of Labour Disputes Law which prohibits - except in extraordinary cases - strikes in "public services" as defined in the law.

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(1) Israel - Minorities, in Levine & Shimoni, Political Dictionary of the Middle East in the 20th century, 1972.

Quite possibly, the relative failure of this latter law, at least during the first period of implementation, is due to the meagre means of coercion adopted. I have said "part of the failure", because failure was due to many causes which go beyond the framework of the present discussion.

The Restrictive Trade Practices Law 5719-1959 could serve as an example of changes in patterns of behaviour determined by the legislator in another, economic, field. This law purports to restrict cartels and monopolies[2] for two reasons: the first - to protect free competition within the planned economy of Israel's "capitalistic" structure. The second (which is usually not the intention of similar laws in other countries, e.g. American anti-trust laws. See supra) - to protect the country as well as the individual customer against such organizations. This is a law which has substantially affected the scope and methods of economic activity.

The ban on bigamy may round out the list of examples by an instance from the criminal field. This ban was imposed by the Mandatory legislator on, inter alia, a Moslem population whose patterns of behaviour and religion permitted

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(2) According to article 2 of the law, cartel is an agreement containing any preventive or limiting provision as to any of the matters specified in the article, e.g. price, quantity, etc. of a commodity. Article 30 defines monopoly: "the supply or acquisition of a commodity or service by one person to an extent exceeding the extent designated by the Minister of

marriage to more than one woman, and it is superfluous to elaborate on the changes brought about by this law. Especially since the Israeli courts began to be strict about its implementation.

All these are patterns of behaviour imposed, as put by the definition of law, through a binding directive on whomever is directed to behave according to the relevant legal norms.[3]

I said "legal norms". I said "patterns of behaviour". I did not say (yet) - and for a good reason - that law is a tool for a change of social norms.

Trade and Industry".

[3] In Japan there is no tension of opposites between legal norms and the social world. Law is only a symbol of prestige. The concept of personal right versus the government does not exist. Hence, there is no confrontation between the two, but identification of the individual with the authorities through his self-denial. Consequently - governmental self-restraint in forcing the law (Takeyoshi, The Status of the Individual in the Notion of Law, Right and Social Order in Japan, 267-8). No tension existed in ancient China either, whose legal system dealt mainly with obligations and not with rights. Between 206 B.C. and 220 C.E. anything "immoral" was considered also a criminal offence (Wu, op. cit. 219). In India injustice is inherent in class division, and unchangeable (Zimmer, Philosophies of India, 1960; Bühler (editor), op. cit. I must thank here Mrs. Even of the Tel-Aviv University for letting me read her unpublished

Because a social norm, as we have defined it, is that very same norm of behaviour which develops from "within", which emanates from a consolidated social value and represents it. That "value" whose meaning has been expanded to include also changes in the requirements, structure, aims and aspirations of a given society.

When it does not stem from a change in a social norm already consolidated but merely from the legislator's will - law does not automatically create a social norm, but merely an obligation; a legal norm, according to which the population should behave.

But, is the legislator's will really detached from social changes, or else does it represent them? Could it be that the legislator's will is not a result which reflects a change in the social "value", even though at this stage that value lacks practical expression? Doesn't the fact that a law is enacted by a democratic legislator mean that a change has already occurred in a value which has produced the need for legislation? Formally, it may be so, the assumption being that the will of the people, its requirements and aims are expressed by its parliament. If this is always the case in practice, is a question bearing reflection.

It is seemingly obvious that sometimes this is not the case in practice.

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thesis on Indian tradition and law). Hence, one may speak of Indian "Natural Injustice".

"Seemingly", that is, if we bear in mind all the laws which are not enforced in everyday life, because the public is unable (or unwilling) to accept them. This applies to the laws banning strikes in public services, prohibiting the employment of women at night or outlawing abortion and homosexual relations.

I said "seemingly", because I feel that just as it is correct that a social norm remains a norm even when not generally practiced, the public realization that it should be maintained being sufficient, it is equally correct with regard to a social value. Opposition to the law resulting from the value (according to the legislator's conviction), or even leaving it as a "dead letter" does not necessarily mean that there does not exist a general recognition of the justification for, and existence of, that value.

Each case should be examined on its own merits, difficult as it may be. In important cases, a referendum could provide an answer to the question. Public polls too could be helpful. This is how it appears that, despite the repeated strikes in public services, the amendment which bans them does represent a new social value limiting the former one, which has permitted the right to strike as a sanctified right of the workers.

78. We have seen that statute law in itself can serve as a tool which causes changes in patterns of behaviour. But until it shapes itself into a final form, it does not, it cannot and it should not, function isolated from closely related and remote disciplines.

After all, it is inconceivable that a legislator should be able or allowed to deal, say, with a prohibition of the use and trade of drugs without consulting

disciplines as sociology, psychology, medicine, economy or statistics, which have so much to contribute to the subject.

The use of drugs, to pick one example at random, gives rise to a considerable number of cardinal problems and I suggest that the great menace of the use of drugs to our society lies in the encouragement it lends to the alienation of the individual from his environment, an alienation which is both its outcome and one of its factors.

I refer to a new dimension of an old value: the individual - his welfare, happiness, sensations. Man is no longer gauged - as has been the case in Israeli society until recently - by his contribution to the society in which he lives. Recognition by society no longer constitutes a compensation for this contribution. This is due to numerous factors - beginning with the crystalization of the individual's soul by Freudian psychiatry and the incessant dealing with his problems, through the western liberal outlook of capitalistic democracy of which the individual is the vision and purpose (hence, also, the worship of Buddhism and Zen-Buddhism of these last two decades), down to youth's disappointment with the old world, the adult's world of yesterday.

Stefan Zweig wrote about the "world of yesterday" and committed suicide because it was lost and he was unable to accept the world of his time. This world in which Stefan Zweig found no peace and from which he departed is our yesterday's world.

It is quite possible that, contrary to Zweig, present day youth long for the world which Zweig left protesting so violently. They commit social suicide,

not being able to cope with their present world which has succeeded it. They would, it is true, raise hell about the Biafra children, the Vietnam war and even poverty in their own country, but the majority will do nothing to bring any change. They find refuge in drugs, so as to live through mystic, out of this world, experiences. They will, of course, be unable to escape from the social framework they despise, were it not for the existence of a social framework from which one could flee and of which their rebelliousness is an integral part. But, they no longer consider it a "value" to fight for a change from within, except in words.

The motto "make love, not war" reflects the absurdity of this conception. "Make love" and not "love thy neighbour", make love for your own sake. "And not war": not the Vietnam war or even any other war to change the face of society. Of course, that youth has an answer to explain its impotence: to begin with, nothing can be done anyhow, when this whole world is rotten to the bone. Secondly, as it is rotten, it will collapse and disintegrate by itself. And in the meantime?

Drug addicts are unable to change the face of society or even to protect its safety and - I repeat - this is where the greatest threat of drugs lies. This is a sociologic, moral, philosophical, political problem and law cannot afford to disregard it. The legislator cannot afford to ignore it, and must act in collaboration with all these disciplines.

He should collaborate with medicine, which should determine the extent of danger of every single drug. With economy, which will speculate on the influence of drugs on the will to work, on the labour force of the population,

on productivity. I have already mentioned psychology and statistics, in the absence of which no science is possible in our times.

B. Law as a Cause of Social Changes

79. Now to the main question: is law capable of being a cause of social changes or does it merely serve as a rubber-stamp for changes which have already occured.

I proposed earlier that law cannot cause a change in social norms. In other words, that it cannot create social norms,[1] because a social norm, under its definition, results from a rather slow process, beginning with the

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[1] For a norm can be said to have changed when one or more of its existing components is changed, abolished or replaced by a new component, or when a new component is added to the existing ones. But, in either of these cases a creation of a new norm has actually been accomplished because, logically, the old norm, namely - the sum of the old components in their specific set up which has formed earlier the old norm in its entirety does not exist any more, and another norm is being practiced now. That it may, to a greater or smaller extent, remind us of the old norm - is immaterial. Hence, logically, there is no difference between the total disappearance of a norm and its "replacement" by a totally new one or a "mere" change as aforesaid. As to norms in general, see Homans, The Human Group, 1950. There (p./54) the writer suggests that norms and orders are both verbal sayings which indicate what the behaviour of a certain group must be and not what it actually is, and that obedience to orders is identical to the social supervision of norms.

emergence of a social value; a process "from within", creating norms of behaviour which society consolidates to protect that value. I would like to correct the said proposition. It is true that a social norm results from a natural process which happens inside society, in its midst. But it is also true, as I have mentioned earlier, that a change in law is in itself a social phenomenon.

Accordingly, law itself, as one of the many other social phenomena, participates in the process of creating social changes, to no lesser extent than it is - like many other social phenomena - their outcome. It is the weight of every internal factor, accelerating or even producing the social change, which characterizes it as a factor in that creation. When law is such a central factor, it may be said to create the social change, or at least to be among its main producers and to have achieved this from "within", because law itself is "from within".

Is law capable of being such a central factor? We have seen that it is capable of imposing patterns of behaviour and we were careful not to term them "social norms". And yet, the answer seems positive.

A superficial examination of acts of legislation among various peoples and in Israel reveals that most of these patterns of behaviour are usually being adopted by the population out of conviction in their importance and necessity and, in due course, become social norms. Not necessarily and not only because they are enforced by law. Furthermore, in heterogeneous Israel, with her specific problems, to a far larger extent than in other countries, law fulfils a task - I would almost say an "educational" task - of consciously

creating new social norms.

More than once, the Israeli court was conscious of this fact. In the case of the Attorney General v. Segal[2] the question confronting the Supreme Court was whether or not Segal was guilty of murder.[3] In other words, whether the victim's behaviour, which immediately preceded the killing, amounted to a provocation justifying a conviction of manslaughter instead.[4]

The Court was satisfied that his former fiancée had provoked Segal's outburst which had caused her death and that he was "unable to realize

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[2] 1954. P. D. 9, 393.

[3] Section 212 of the Israeli Criminal Code Ordinance of 1936 reads as follows: "Subject to the provisions of section 214 of this Code, any person who by an unlawful act or omission causes the death of another person is guilty of a felony. Such felony is termed manslaughter". Sec. 214 reads as follows: "Any person who: ...(b) with premeditation causes the death of any person... is guilty of a felony. Such felony is termed murder".

[4] For the purpose of section 214, a person is deemed to have killed another person with premeditation when ... "(b) he has killed such person in cold blood without immediate provocation in circumstances in which he was able to think and realize the result of his action..." (Sec. 216).

the result of his action". However, the Court wondered whether the test of provocation should be objective or subjective. Whether it was not the court's duty to ask an additional question after having found that Segal was actually provoked, namely: would a "reasonable" man have been provoked in these circumstances.

The District Court in Jerusalem decided that the test was subjective, convicted him accordingly of manslaughter and sentenced him to fifteen years of imprisonment. On appeal, the Supreme Court decided that the test was objective and convicted Segal of murder sentencing him to life imprisonment.

Explaining its preference for the objective test, the Supreme Court said, inter alia, that in heterogeneous Israel, which includes inhabitants whose social norms allow, and even compel, them to kill a sister, a daughter or a wife who has been a "disgrace to the family"- it was impossible to apply the subjective test. The social order of a progressive and moral Israel necessitated an objective test to prevent the encouragement of similar acts which may ensue from the subjective one.

80. This was an example from the sphere of courts' decisions. As for law - the Compulsory Education Law 5709-1949 may, I think, serve as an adequate one.

The legislator enforced - by resorting to the threat of penalty - a certain behaviour. At first, the number of offenders was considerable, but in due course - and despite the relatively few convictions and the light sentences

passed - this obligation to send children to school has become a social norm.

The question implied by the title of this sub-chapter remains still unsolved. For, even if we argue that law is capable, at least occasionally, to change a social norm - it is no proof that it is also capable of causing a social change, if a social change is to include a change of norm as well as a change of the value which produces it.

If so, where is the change in value? At least - is it possible to identify a social value, which the social norm (the by-product of a legal norm) represents?

I believe that this too can be identified with relative ease, as evidenced by the example of compulsory education. After all, the norm of sending children to school represents the value of education, of culture. I would even go further to say that whenever a legal norm becomes a social norm, it is because the population is convinced (as was the legislature when it passed the law) that the behaviour required represents a social value worth protecting.

I shall go still farther: even if a proof is furnished of a legal norm which has become a social norm in spite of the population's opposition and its rejection of the corresponding value - it would still be correct to contend that the very fact that it has become a social norm is a proof that one value, at least, the population wishes to preserve with the help of that norm, namely - the respect for law.

There exists one country in particular, which was famous for its respect for law as a value in itself and where, in most cases, legal norms became social norms which the population maintained out of conviction and a sense of duty. I am referring to Germany, of course.

But not only Germany. Also, in other countries observance of law is maintained by the majority out of conviction of the duty (value) to respect the law. Had it not been the case - no democratic social order could have lasted.

To whoever disputes that respect for law is an independent and separate value to which , in the absence of a specific value, one can resort to prove that law is capable of causing a real social change, the answer will have to be that if so, then law can generally be only the outcome of a social change. I said "generally", because even our sceptic disputer will have to agree that there are exceptional cases, such as the Compulsory Education Law (at least in respect of the Arab population) or the law prohibiting a holdover of a worker's wages, which support the premise that law can cause a social change.[1]

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[1] The disputer will, I think, have considerable difficulties in trying to hold on to his objection, when the Soviet law is brought to prove that not only a specific enactment,but the entirety of a legal system,may intentionally (and ideologically) be used to cause a revolutionary change in the nation's set up of social norms. The Soviet example is, of course, only one of

Except for such cases we shall be compelled to say that a social change may merely combine a specific social value (other then the respect for law) and the social norm resulting from it, hence - that law can only be a result of a social change.

Legislation calculated to achieve a social aim or requirement (namely - value) follows, of course, rather than anticipates them. Hence, if the claim is that a new objective or a new need when generally accepted, constitute in themselves, a social change - then, evidently, in a democratic state, law cannot appear "out of the blue", and can seldom cause that change, except in the kind of cases I have mentioned when the legislature anticipates its own people.

81. These few cases are enough, however, to justify the conclusion that law is capable of causing social changes, even in the eyes of a person who insists that a specific change in a social norm should always be attributed to a specific social value.

For my part, I am positive that a law which imposes a legal norm without becoming a social norm, or without purporting to serve a social need recognized by the population - has slight prospects to become a social factor if it is dependent on the "respect for law" alone. It is doomed to remain a dead letter.

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numerous examples of other, communist and fascist, regimes which did the same.

On the other hand, a sensitive legislature may, through wise legislation, succeed in causing a social change, namely - a change which includes a change of social values through "external" intervention,[1] like starting a vehicle by pushing it instead of using the starter. The public may digest the new social value through an enforced behaviour.

If the legislature does not believe that it can be done, it may find itself moving in a vicious circle, because sometimes legislation is aimed at uprooting a consolidating, even established norm, which may, in the legislature's view, endanger the very safety of society. In cases like these (e.g. wildcat strikes, drug consumption) it must intervene to prevent the destruction of the foundations of social order.

Until the intervention of the legislature in 1973,the right to strike was practically unrestricted. When the social value inherent in "public service" was replaced by "personal well-being" - the legislature determined a new legal norm or order to restrict strikes in public services.

But if one argues that law is merely capable of adopting social norms already consolidated, then the legislature should permit the strike. However, it cannot permit what has never been prohibited because in a democratic country whatever is not specifically prohibited is permissible. Hence, it

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(1) As to why Parliament does not, necessarily, reflect the views shared by the majority - see supra.

(2) Art. 37a of the Labour Disputes Settlement Law, 5717-1957.

should sit and do nothing, it should not enact laws. This means - a failure to fulfil the task and duty imposed on it. However, if it fails to fulfil its duty, the new social norm might spread to other fields and radically wreck society and state. It should, therefore, restrict it, or even prohibit it.

This is why I said that the legislature may find itself moving in a vicious circle. A vicious circle, however, has both an advantage and a disadvantage. The disadvantage lies in its being vicious and the advantage - in its being a circle. Therefore, wherever broken off, the circle, namely this order-disorder of cause and effect, will be liquidated. The aim will be achieved regardless of whether severence liquidates the cause or the effect. When to break off the circle and exactly where is the delicate task, the expertise of the legislature which knows its task.

C. Law as a Result of Social Changes

82. Here we stand on more solid ground, because it is easy to prove that frequently law validates consolidated social changes, namely, social norms produced for the protection of those social values (including social structure, needs, aims and aspirations) which have engendered them.

The best and most illuminating example is possibly that of the "reputed wife"[1] (rather - "spouse"[2]) whose rights are restricted mainly with regard to succession if the lawful wife of the deceased lives and with regard

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[1] Usually, "a woman living with the (man) and commonly reputed wife" (e.g. the Invalids (Pension and Rehabilitation) Law, 5709-1949. The number of Israeli laws granting a special "status" to these "common law" wives, is great. For details see Elon, Religious Legislation, 1967-8, 120). Hence - where marriage has never been performed, whether regular or irregular. As to irregular Scots marriage, especially "per verba de praesenti", where the decisive factor is the intention to marry, see Steuart v. Robertson (1875) L.R. 2, lack of intention may result in a compulsory divorce also according to Jewish law (Appeal 120/3729 P.D.R. 8, 3).

[2] A "reputed husband" is entitled, for example, to a share in his deceased "wife's" estate, and to occupy the apartment in which she had rights of a protected tenant (see sec. 55 of The Succession Law, 5725-1965 and

to officially bearing her reputed husband's surname.[3] Nor is she entitled to alimony upon separation.[4]

This is apparently a rearguard action. The "classical" family is currently undergoing an "institutionalized" change in most western countries, and Israel does not lag behind. On the contrary, from a certain aspect the problem is possibly even more acute in Israel, if not quantitatively then at least emotionally, I am referring of course to all those cases which are not "adultery" in the western sense of the word, but to those when Jews are not allowed to marry owing to legal bans on marriage.

On the other hand, the fact that by law some of the private marriages (when performed) are retrospectively recognized by a Jewish court[5] might have

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The Tenants' Protection Law).

[3] The High Court of Justice ruled by a majority decision (Justice Cohn dissenting) that if such a change was permitted,the sanctity of family, still cherished by the greater part of the public, might be ruined (Aizik v. The Minister of the Interior, 1970, P. D. 25, Vol. 1, 544; 1971, P. D. 26, Vol. 2, 33).

[4] Yeger (Palevitz) v. Palevitz (1965), P. D. 20, Vol. 3, 244. The court will, however, enforce a contract entered by the parties with a view to securing her maintenance.

[5] See, for instance, Appeal 42/5728, P. D. R. 7, 175; id. 125; 3564, 2772, 2987, 373/5727, id. 281.

indirectly, and ironically enough, given some impetus to the consolidation of the reputed wife's position also in respect of couples who could not even contract private marriages.(6)

No doubt, the need to grant rights to the "common-law wife" results mainly from an outlook shared by most legislators who are not prepared to ignore the problem - economic-social in the main, but also moral - which is becoming increasingly acute, simultaneously with the undermining of the family institution and the growing number of couples cohabiting in practice.

Remnants, such as protection of the public against the "fraud" of an unmarried woman who assumes the name of her husband, or the refusal to enforce certain contracts entered into by a married man and an unmarried woman or vice versa - are constantly being attacked by the facts of life.

As mentioned before, the Supreme Court dismissed only by a majority of votes a reputed wife's petition concerning the assuming of her "husband's" name, and a promise of marriage by a married person has recently been recognized as legal and binding provided that it was signed when his (or her) marriage was shaky anyway.

In conclusion, the legislature no doubt follows in the steps of consolidated

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(6) See, for example, Gurfinkel and Haklai v. The Minister of the Interior (1963), P. D. 17, Vol. 3, 204; Rodnitzki v. The Great Court of Appeal (1969) P. D. 24, Vol. 1, 704; Cohen-Meller v. The Regional Rabbinical Court in Tel-Aviv (1971) P. D. 26, Vol. 1, 227.

social norms by adjusting the provisions of the law to fit them, and the case of the "common-law wife" is but one example out of many.

To remove any doubts, I do not claim that every law should be the result of a social change or its cause. Many laws do not aim at more than what is expressed in them: an intention to impose, without any prior change in social values or in social norms, legal norms which in the legislature's opinion are necessitated by the needs of society and the state or by national aims which will be maintained so long that there exists a general consent that they should be maintained, and which do not constitute a decreee which the public cannot endure.

Such, for instance, are many of the laws imposing taxes, or changing their rates, laws which determine licensing procedure and others. I merely wished to show that sometimes a law is the result of a social change and,in rarer instances - its cause.

In this context law, obviously, may also meet social values - aims and aspirations - by lending validity to changes of structure which in the opinion of the legislature are necessitated by them. The same applies to changes in social control which may lead to amendments in the Constitution or in institutions as the State Comptroller or the Ombudsman.

These changes in law may, or may not, be the result or cause of social changes, as defined. Such is the amendment to the American Constitution which limits the election of a President to two consecutive terms only, or the creation of the Ombudsman's office. The latter is designated to meet a

need (value) of control and, undoubtedly, also changes the social norms of the public and its servants.

I wished to show that it is usually difficult to distinguish between law and the social developments within which it operates, just as it is difficult to separate between law and the national culture of which it is an integral part.[1]

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[1] In Ventures in Policy Sciences, 1971, Chapters 16-17 (pp. 169-85), Dror says that one cannot understand the laws of matrimony of a given society without referring to the entire legal system. Being also part of the family institution, they cannot be understood without an understanding of this institution too.

D. Law as a Delaying Factor

84. Logically, no difference may exist between a factor accelerating social changes and a factor which delays them. From the point of view of the social phenomenon they both are factors with regard to a possible change in it. Nevertheless, when we deal with law, it is advisable - in view of its importance and tremendous impact on our daily life - also to stress its delaying influence. One might term it negative influence while the other would possibly refer to its checking influence.

Sociologic surveys show that every organization aims at retaining its existence in spite of the fact that its original goals have been attained. They further show that this "life instinct" is equally shared by conservatives and radicals.

Of course, law is not the "organization" to which these surveys refer. It is different in many respects from, say, "the anti-Tuberculosis League" - to pick an example of an institution existing by an "inertial force" - and yet some sort of organization may be found among jurists, a sort of guild, which zealously guards against any change which it considers a menace to what has been consolidated within its boundaries.

Most jurists are conservative by nature and justify their insistence on the existing law by the need to minimize the shock ensuing from rapid radical and frequent changes. This argument should not be belittled. They aver that law is a stabilizing factor; that it protects social, economic and commercial safety; that it supervises and controls the division of powers in society and

their restriction; that it safeguards the balance between groups of social-economic interests in society.

There is undoubtedly much truth in these arguments. A frequent change of social structure may undermine it. If the legislature revokes the obligation resulting from the signing of a promisory note - the economic and commercial safety will collapse; if it is not strict about the division of powers and their restriction to the authorities empowered to use them - chaos will reign; if it abandons the tenants, the workers, or released soldiers - the balance between groups of clashing economic interests will be upset.

At the same time, added to these correct arguments, there seems to exist a mystic or metaphysical approach to law. This may be due to its formal and rigid character which awes laymen and many legislators too. Owing to the arguments I have mentioned - the mystic-metaphysical approach and formalism of a legislature may stubbornly refuse to adjust the law to the pressing demands of social changes.

Its rigidity sometimes causes considerable distress (remember child labour during the English Industrial Revolution) and its conservatism gives rise to injustice. No doubt, a state's progressiveness and a legislature's sensitiveness and wisdom are measured by their ability to adjust their tools promptly to social changes and social needs. In point of fact, law has been approaching for years steadily, even though slowly, quite an acceleration of anti-formalism. A somewhat dangerous anti-thesis ensues in some cases. But on the whole this new tendency is apparently welcome, although some of the most important jurists - including Julius Stone - warn against it and,

particularly, against the abandonment of formalism.[1]

85. Nevertheless, during the second half of the 20th century, we can no longer tolerate results of the kind expressed, for instance, in the Diplock case.[2]

The case dealt with the will of one Caleb Diplock who, by will made in 1939, had bequeathed his property to "charitable or benevolent purposes" at the discretion of the trustees. The bequest was invalidated, because the deceased had failed to write "charitable and benevolent" and the court ordered that the charities must pay the money to the deceased's cousin although it had already been spent on building new hospital wards.[3]

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[1] Stone, Social Dimensions etc. (op. cit.) 9-15.

[2] Re Diplock (1941) 1 Ch. 267; (1944) A.C. 341.

[3] The Israeli Succession Law 5725-1965, with a view to prevent similar results, explicitly determines (a sort of an extention of the cy-près doctrine) that a will should be interpreted so that the presumed intention of the testator is given effect as closely as possible. But in Israel too we, sometimes, are not free from far reaching and odd results. Thus in Jones v. Jones (1971), P.D. 25, Vol. 1, 619, the Supreme Court refused a wife's petition for an order prohibiting her husband to leave the country pending an order dissolving their marriage, although such an order was likely to be made in her favour. The grounds for the refusal were , that the interim injunction petitioned for was, according to the

This was, of course, a shocking legal consequence of the introduction of formalistic rigidity.(4)

The general trend, however, is towards added flexibility in procedure. This trend seems to come in waves. At the time, common law had become increasingly rigid until equity came to its rescue. It served justice by by-passing the provisions of common law, and yet before long it became as rigid as its predecessor, but not before having managed to introduce some important reforms (e.g. equitable "money had and received", injunctions).

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rules of procedure a means to secure the execution of a judgment, whereas at that stage the Deputy President was only petitioned to decide which court should be competent to deal with the wife's principal claim. Hence, at that stage no court could grant the required remedy, and the fact that, fortunately, no harm was done to Mrs. Jones because Mr. Jones had agreed to cooperate, is irrelevant. Jones v. Jones is a binding precedent as much as Re Horrocks (1939) was binding with regard to the Diplock case.

(4) Some of the other cases which may show how rigid English equity has become are: Minister of Health v. Simpson (1951) A.C. 251; Armstrong v. Strain (1952)1 K.B. 232. For further clarification of these two and others see Denning (op. cit.) 76-8.

Julius Stone proposes to differentiate between the descriptive and qualitative angles of the interrelations of law and society. The first describes the influence of existing ideals in a given society. The second refers to the mutual influence with reference to the desired future.

In concluding this sub-chapter may I remind that it is in this second angle that we are here interested.

E. Law as a Direct and Indirect Tool

86. One may, of course, disagree that either of the following two, namely, a change in a social value and a change in a social norm may, each of them alone, constitute a social change in itself. One will, however, be bound, I think, to admit that a social norm can never spring out of nothing and hence cannot occur unless preceded by a change in a social value which has produced it and which it wishes to protect.

On the other hand, as long as a change in value has not found external expression in the form of a new social norm, it must remain mere wishful thinking, a hothouse for such future change.

But wouldn't a legislative expression of that new value constitute a social change in itself? Isn't the mere enactment of a law to meet such rising need, that external expression, required to translate the potential idea into practice; to turn the "cocoon", the value, into a butterfly hovering and propagating a social norm?

As was earlier suggested: propagation - yes. But being a social change in itself - no. Not in the meaning attached to this expression here. For otherwise we may find ourselves involved in a logical absurdity.

When we wondered whether law is capable of causing social changes, the point of the question was whether it is capable of causing a phenomenon outside itself and not, whether it is capable of causing a phenomenon of which it is an integral part through its existence in this very phenomenon.

This distinction is not, as some may argue, hair splitting, a fallacious reasoning, or just mental acrobatics. Unless we accept the distinction I have proposed, we shall be compelled to say simply that law is always and ever capable of causing a social change. Furthermore, seeing that the enactment of any law is designed to meet one social need or another, the mere enactment will close the circle of creation of a social change. This will be an over simplified answer which might shorten this treatise and reduce it to a few pages, but will not promote in the least understanding of the subject matter.

When I said that law happens sometimes to be a "direct" tool for causing a social change (as hinted by the title of this sub-chapter) I did not imply causing through the direct participation of law in a process of which it is an integral part. This being so, we can go one step further and say that, generally law does not constitute a direct tool. "Generally", because of the several cases in which it does serve as a direct tool: free compulsory education, ban on bigamy (in respect of Moslems), ban on restricted trade practices, standard contracts, protection of minimum wages and so on. In other words, all those cases in which the legislature considered it necessary to ensure a social value through legislation, although this value has not yet consolidated any social norm. Those cases, when the legal norm - so does the legislature hope - becomes a social norm.

Other cases, when law is sometimes capable of being a direct tool, at least to a certain extent, are cases in which law serves as a political-social instrument, either in the hands of the authoritative representatives of society,

or of a group in it which tries to impose on society its will, its political program and the social structure and order it deems desirable. This is a revolutionary group, regardless of whether it resorts to means of violence or not.

This is how, for instance, Turkey and Japan replaced - after World War I and World War II respectively - most of their laws by relatively progressive western laws.

The Soviet Union is another example of a total replacement of laws. It did so not only because the former seemed bad, not only because it preferred the new to the old, but also because it was under an ideologic obligation to do so. It did not assume a foreign legal system to replace its own, but created an entirely new system based on socialist principles.

As from the start, there existed a Socialist conviction that one day, in the remote future, when people are conditioned to it, society would function without legal norms. But - to put it in Marx' words, as quoted by Lenin - "it is inconceivable that people who will destroy capitalism will immediately learn to work for society without any legal norms, and the abolishment of capitalism does not provide at once the preliminary conditions for such a change". As is known, the first (Communist) stage of the revolution is epitomized in the slogan "to each according to his work". Only at the final stage of the successful revolution, in a pure Socialist society, will it be "to each according to his needs".

"At the first stage", Lenin says, "bourgeois law is repealed (but) not

completely, only a small part of it", namely, "only to the extent already achieved by the economic revolution as regards means of production" which, contrary to bourgeois law, will become the property of the community. Still, at the first stage, "he who does not work will not eat", and that part of bourgeois law which settles the division of needs and work between members of society will continue to exist.(1)

It is on this background that one should understand the Soviet system of laws which lent binding validity directly to social values pertaining to a very small group of the population.

87. The legislature may be a factor, also through omission, by either failing to change the law following social changes or by specifically revealing the wish that a certain set of laws remain valid in toto and thus, "re-enacting" it at its own initiative.

This undoubtedly is a desirable way to protect existing social structure and order against a shock, which may result from mass opposition, namely - when they conflict with elementary concepts of the rule of law to such an extent that they cannot be retained, without perpetuating injustice and denial of freedom to an intolerable degree.

This is why, shortly after Britain had assumed the mandate for Palestine in

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(1) Lenin, The State and the Revolution, in Selected Writings, 1951, Vol. 2, 81-91.

1920[1] it stated specifically, inter alia, that "the jurisdiction of the Civil Courts shall be exercised in conformity with the Ottoman Law in force in Palestine on 1st November, 1914".[2]

On the establishment of the State of Israel, the Provisional State Council followed suit and determined that "the law which existed in Palestine on 5th Iyar 5708 (the 14th May 1948) will remain in force".[3]

The same was applied by Israel with regard to the areas occupied by it in the Six Day War of 1967.[4]

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[1] At the San Remo Conference. It was ratified by the League of Nations in 1922.

[2] Article 46 of the Palestine Order in Council, 1922.

[3] Sec. 11 of the Law and Administration Ordinance, No. 1, 5708-1948. The law was to remain in force inasmuch as it did not contradict that same Ordinance or other laws which the Council might enact, and subject to the changes deriving from the establishment of the State and its authorities. In another section (13) the 1939 White Paper laws which restricted Jewish immigration to Palestine and the acquisition of land in it were revoked, lending retroactive validity to all Jewish illegal immigrants. The Law of Return 5710-1950 granted, with some reservation, permission of entry and automatic citizenship to all Jews who would emigrate to Israel.

[4] This was also based on the Fourth Geneva Convention of 12 August 1949

88. A small and violent group may impose a constitution on the population it controls and, with more or less success, bring about social changes which the population may produce and accept of its own will. As far as the revolutionary group is concerned, the purpose of the constitution is, first and foremost, to create a new political structure which will ensure its own rule. The extent to which its safety coincides with the general interest is usually revealed retrospectively in the light of the results. Therefore, every single case should be examined on its own merits.

It is clear, however, that when a population rejects a formed social order as contradicting the elementary concepts of the rule of law - it frequently marks the dramatic move from one structure to another through a new constitution. Such constitution will, directly or indirectly, cause extreme social changes.

Whether the social changes will be direct or indirect depends firstly - on the attitude of the constitution towards the legislator, namely to what extent, if at all, it subordinates him to its directives. Secondly and mainly - on the measures specified in that constitution to prevent the legislator, from violating or changing it too swiftly and easily. In other words - whether any

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Relative to the Protection of Civilian Persons in Time of War, the principles of which Israel chose to adopt (without admitting that they were legally binding on her). Hence in each of the administered areas the law which had existed before the war remained valid "subject to changes emanating from the establishment of the Israeli Defence Army's Government".

institution (Supreme Court, Constitutional Court, State Council) exists whose task is to efficiently supervise the legislature and check its tendency to enact, at will, in accordance with what it may occasionally consider social interests necessitating protection.

In Israel, which has no constitution, the Knesset is alleged to be "sovereign" and authorized to enact at will. I have mentioned the decision of the High Court of Justice which invalidated a law because it clashed with "the very soul of democracy".[5] I have also mentioned the legislation initiated by the Government (not yet a bill) according to which the Supreme Court will be granted the status, it did not have hitherto, of a Constitutional Court.[6]

Obvioulsy, a Constitution is not all inclusive. One may still ask what happens if the Constitution itself clashes with "natural law", with the elementary concepts of justice and society, the minimal principles of relative equality and freedom. In another chapter, I touched briefly on the answers provided by several thinkers.

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[5] Bergman v. The Minister of Finance (1969), P.D. 23, Vol. 1, 693

[6] Sec. 15(a), Basic Law: The Courts (a memorandum) 1971, Hapraklit Vol. 27, 136 determines that the Supreme Court sitting as a "Constitutional Court" will have the power to consider an allegation that "a law which changes a basic law or contradicts a provision in a basic law was not passed by the required majority". Thus the former government wished to determine explicitly what the Court may, and especially what it may not do, namely - invalidation of Knesset laws because of their content.

The drafters of the American Constitution did not attribute the source of law to a divine will or to any other natural law. As far as they were concerned, their source was in the people itself, "We, the people of the United States" - the Constitution begins, "... do ordain and establish this Constitution for the United States of American" and they enumerate the reasons for its promulgation. The Supreme Court is empowered(by its own interpretation, see supra) to censure State and Federal Laws and to invalidate them if they conflict with the Constitution. The Constitution, however, provides no answer to the question regarding the fate of a directive in the Constitution itself which contradicts "natural justice".

Out of fear that uncontrolled strength might accumulate in the hands of one factor, the drafters of the Constitution insist on a maximum separation of powers and, to this end, created a most complex political structure of "checks and balances".

It is interesting that the primitive Barotse tribes in African Zambia[7] feared the same thing. They legend the origin of their state to a "social contract" concluded with their chosen King (as was Biblical King Saul) who was both the grandson and the son of God (Nyamba), from his wife who was also the daughter of that same God. In consideration of the King's consent to rule, they gave him part of their produce as tribute.

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[7]Gluckman, op. cit. passim.

Hence, the source of political power among the Barotse was simultaneously divine and grounded in a contract entered into freely. It follows that the Barotse law permitted to kill a cruel King and to rebel against him. Still, as the source of his power was also divine, the rebellion was not against the system, but against the man himself, against the King who abused his powers.(8)

To prevent the centralization of power in the hands of any group of interest, there exists a very complex Barotse system of bodies among which powers are divided and which control each other: a council representing the people; a council representing the interests of the King and a council representing the interests of members of the royal family. The King himself "does nothing" (everything is done by others), because if an action of his harms one of his subjects, the latter could receive no remedy in court against him. The King cannot sue or be prosecuted, because "no man can be judged in his own

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(8) In Europe and in England of the 12th and 13th centuries, it was permissible to rebel against a feudal lord - be he even a King - if he turned his back to justice, hence, acting illegally. The Magna Carta allowed a vassal to fight his Lord in order to protect himself against injustice emanating from a violation of the feudal agreement between them. It also allowed barons - through 25 of their representatives - to seize the King's castles in order to force him to safeguard the peace and freedom he had granted them.

court". (9)

Even the prerogative to pardon offenders is divided between various powers: the King, the head of the People's Council and others. Certain important legislative matters are divided equally among the three councils and all three have an equal status. There are also chambers which convene in the evening and others which meet during the day and they control each other. Two women, a princess and a commoner, hold the official task of eavesdropping on the deliberations of the "evening chamber" to warn the King against strong men likely to incite the people.

We see that a constitution, regardless of whether it derives from the ruling group in the population, from an agreement or from divine authority, is able - by determining the political structure itself - to cause indirectly, and sometimes directly, social changes, if the legislature considers itself subordinated to it and if control and supervision measures for its enforcement are determined. Law can also be an indirect tool, by the establishment of institutions (such as National Insurance) through which the change is effected.

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(9) The same principle applied in England during the Middle ages and for that very reason, a King accused of treason was judged by the nobility.

F. Law as a Social Expression

89. The need for a change in law may be determined "from without" or "from within". From "without" - when a social value necessitates it. From "within" - when new social norms cause a friction between them and legal norms. In either case, law is too serious a matter to be left to the legislature, just as war is too serious a thing to be left to generals.

Changes in law should not be left at the discretion of the legislature alone or of law enforcers. Questions such as what necessitates a legislative step and, particularly, whether society is mature for that step and the exact contents of the latter, are not the concern of jurists alone. Neither are they merely political issues for members of the legislature.

In default of a better system, legislators may determine the need for the enactment of a certain law, but from that point the question becomes purely inter-disciplinary, not just an issue on which groups of interest may reach a compromise.

The reply to the question should be provided by all disciplines likely to be involved in the answer: political science, economy, sociology, biology, demography, psychology, ecology, statistics and so on. Of course - not always all of them; very seldom probably - none of them; usually - some of them.

The positivists, and some legal sociologists, deal with law as it is and want us to accept it as it is. They do not recognize, like Julius Stone, the

existence of a qualitative approach, but stress the importance of stability. With all due respect for stability - law is given to be lived with and when a binding social change or social need necessitates it,the population could and should cause its change through pressure from "within", from "way down" - through a public and political struggle with all suitable means to express a view in an open minded regime which ensures freedom of speech, beginning with the press and leaflets and ending with demonstrations.

PART III

CONCLUSIONS

X. THE CONTINUOUS STRUGGLE

A. Just but Bad, Unjust but Good

90. I suggested earlier that upholders of all variants of Natural Law have, actually, legitimized the right of disobedience to a law clashing with the principles supported by them. Therefore, by logical inference - also to a law clashing with different principles supported by others.

If we attempt to find a common denominator for all, we could say that when they spoke of "Natural Law", they referred to moral criteria which each one of them considered to be the real source of law, in the light of which its legality should be examined and under which one should determine whether a law is just, and accordingly, whether it is good.

We might undoubtedly differ about the nature of such criteria, but we could concede, for the sake of the present discussion, that there exist several such accepted criteria, at least as a motto, even though we disagree about details of their substantial content.

Accordingly, we can agree that freedom and equality are two of these criteria. In a democracy, this gives immediately rise to the question whether a majority is entitled to enact laws contrary to these criteria.

Indeed, there clearly exist generally accepted laws which are "bad" laws, such as laws discriminating on grounds of faith, religion, race, sex, language and so forth. Concurrently, there are laws enjoying general support, which are "good", although they deviate from these moral criteria.

We accept inequality determined by law as "good", or at least justified (not necessarily just). We do not oppose indirect taxation, even though laws which impose a uniform tax on commodities (and not on income) increase the price of commodities equally for the rich and the poor, thus creating inequality in the opportunity to acquire them. Many do not dispute the law which exempts a woman from military service for reasons of religious conviction and, instead, imposes on her an alternative service, thus favourably discriminating her as compared to non-religious women, who must serve in the Army.

Nor do we dispute other transgressions of the principle of equality when we feel that this supposed equality incurs discrimination. In other words - when equalization is between different persons so that in itself it creates a situation inconsistent with our basic moral concepts.

This is why we accept as "good" a law which "discriminates" against women by protecting their health during pregnancy, childbirth and with regard to night work. We accept as "good" a law designed to protect against the exploitation of children, tenants or workers. We also accept as "good" a law which discriminates against certain workers when it forbids them to strike in "public service".

The same applies to the principle of freedom. We restrict freedom of occupation to prevent harm to the public by unskilled "professionals". Accordingly, we prohibit unlicensed persons dealing in medicine or law (to mention two examples at random).

We restrict freedom of speech when we term slander a criminal offence and

civil wrong.

We restrict freedom of movement, when we feel that permitting it might endanger public safety and, accordingly, determine restricted zones in which unwarranted access or exit are barred.

We restrict freedom from arbitrary arrest when we feel that a certain person constitutes a security risk, and maintain preventive detention through an order of an administrative rather than judicial authority.

We supposedly transgress the principle of public debate and hold Court sessions in camera when we feel that an open hearing might injur a minor victim.

In brief, a law may be "good", even though it supposedly fails to fulfil the abstract criteria which we consider "just". Social and political interests dictate a deviation from principles and every law should apparently be examined separately, in accordance with the aims it purports to serve as against the necessity incurred to contradict principles acceptable on it.

This is why we find in many Constitutions: on the one hand a proclamation ensuring personal liberties and on the other - authorization of the legislator to abridge them, when warranted by circumstances. The usual formula is: a proclamation on the existence of the obligation with the addition "... subject to the provisions prescribed by law". (1)

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(1) As, for instance, in sec. 1 of the Basic Law: Human and Civil Rights

To put it briefly, democratic law is a social phenomenon and a tool of society to help the attainment of its goals and the organization of its social structure. It is subject to social criticism, which should be done in the light of moral principles accepted by society and consistent with the principles of natural law. Namely, those basic moral principles which are above and beyond the authority of society to negate them, unless this is manifestly justified - and only to the extent to which it is justified by its vital needs. (2)

Bill which determines that "man is free. No restrictions or obligations shall be imposed on him other than by virtue of law" (Hatza'ot Hok - Legislature Bills - 1973, No. 1085, 448). Even the American Constitution, which is so extreme in the protection of personal liberties, specifies in the First Amendment that "Congress shall make no law... abridging freedom of speech or of the press, or the right of people peaceably to assemble and to petition the Government for a redress of grievances". Therefore, the police may disperse any assembly, other than peaceable, as illegal.

(2) See infra.

B. The Defective Justice

91. "Why", asks Ralph Newman[1] "has equity appeared in so many parts of the world as a concept separate from law, although a part of it?", and he replies that it appears to be due to the duel objectives of law.

The first objective of law, he says, is to create a basis for an effective social order and a human adjustment of individual relations. At first, the supreme consideration is peace and social safety. Only when society feels sufficiently safe can it afford also to take into account moral considerations necessitating application to private cases and drawing away from general determinations.

Newman found the first distinction between "right" and "wrong" in the Egyptian maxims of "Ani", whose estimated date is 4266 B.C., or about 8200 years ago. There - apparently for the first time - intentional infliction of harm, rudimentary types of fraud and rights of property are discerned. Moral conscience, based on brotherly love is found for the first time in Judaism, which also managed a reconciliation between law and equity through the operation of moral ideals within the law itself.

With Aristotle, justice remains outside law and separate from it, as a factor through which the injustices of strict law could be corrected. But during the Middle Ages, Fathers of the Church went back to the Jewish

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[1] The Nature of Pure Equity, in of Law and Man, Shoham ed. 1971, 177-189.

concept of justice based on brotherhood.[2]

92. Del Vecchio was, therefore, of the opinion that "every system, even

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[2]This brotherly love may, perhaps, be represented by the following quotation (from Devils, Drugs and Doctors, by Howard W. Haggard, 1929): "In the late Middle Ages and in the Renaissance an occasional dissection called "Making an Anatomy" was allowed by ecclesiastical authorities. The subjects for dissection were executed criminals, but the actual dissection was a subordinate part of what was in reality an elaborate social function. The subject for the dissection was selected from among the prisoners, special rites were performed over him and spiritual indulgence were allowed for the indignities which were to be done to his body. When thus prepared spiritually the prisoner was strangled by the executioner and the body was turned over to the university" (p. 143). In Stendhal's Chroniques Italiennes (1971 ed.) Francesco Cinci repeatedly raped his fourteen year old daughter in the presence of her mother, until at last the father was cruelly killed by two hired murderers. When the daughter, after intolerable torture, confessed the Pope ordered that all those responsible for the murder be tied to the tail of untamed horses and be executed in this manner. Seeing that the murder was committed in self defence Cardinals and Princes begged that the criminals be allowed to defend themselves. But they were all beheaded at the completion of a procession of hymns.

apparently closed, has in reality its safety - valves and its natural means of renewal, of transformation and increase. Justice may proclaim itself as valid and effective even against a legal system actually in force, when the rules of the system in force are in irreconciliable conflict with the elementary requirements of justice, which are the primary reason for its validity."[1]

Roscoe Pound claims that law is "experience tested by reason, and reason tested by experience"[2] and Newman explains it in the following manner: "in the beginning of law, it is reason which determines impersonally the shape of the legal norms. As law becomes humanized in the course of the moral growth of mankind - justice requires that the law be not only reasonable but also humane. The rules of law open to receive principles of equity, and reason and justice together shape the legal norms".

For Denning, justice is "what the right-minded members of the community - those who have the right spirit within them - believe to be fair".[3] This "definition" - if this is the right term - seems to contradict what Denning says a few lines before, namely: that "justice is not temporal but eternal". If it is eternal, how could it, each time anew, be determined by a moral spiritual elite?

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[1] Justice (1952 ed.) 152.

[2] Toward a New Jus Gentium, in Ideological Differences and World Legal Order (1949) 1, 4.

[3] The Road to Justice, 1955, 4.

It is different from law and mercy, as can be inferred from the oath of the Queen at her coronation, who answers in the affirmative to the question posed to her by the Archbishop: "Will you to your power cause Law and Justice in Mercy, to be executed in all your judgments" (although as Denning argues[4], law and justice are "treated inseparably").

Perhaps Roman jurists did not confuse law and justice, as Allen claims, but other Romans did, when they referred to law as a tool for the implementation of justice.

This is how Jupiter of Virgil's Aeneid replies to Venus' complaint on the injustice caused to the Trojans who were punished excessively for their sins, while raising doubts as to whether they have sinned at all:

"Daughter, dismiss thy fears: to thy desire,
The fates of thines are fixed, and stand entire,
Thou shalt behold thy wished Lavinian walls;
And, ripe for heaven, when fate Aeneas calls,
Then shalt thou bear him up, sublime to me:
No counsels have reversed my firm decree.
And, lest new fears disturb thy happy state,
Know, I have searched the mystic rolls of fate".

And after describing victory and how, in the long run, a son of Troy (Julius

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[4] Id. 5.

Caesar) would rule Rome, Jupiter-Virgil concludes his words of consolidation by saying:-

"Then dire debate, and impious war, shall cease
And the stern age be softened into peace;
Then banished Faith shall once again return,
And Vestal fires in hallowed temples burn;
And Remus with Quirinus shall sustain
The righteous laws, and fraud and force restrain.
Janus himself before his fane shall wait,
And keep the dreadful issues off his gate
With bolts and iron bars; within remains
Imprisoned Fury bound in brazen chains:
High on a trophy raised, of useless arms,
He sits and threats the world with vain alarm."(5)

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(5) Translation John Dryden (The Works of John Dryden, 1903, 10-11).

C. The "Good" Law

93.1 Felix Cohen[1] rejects the instinct of both justice (e.g. Denning's approach) and injustice (e.g. Kahn's approach) as a criterion, saying that there is no reason to assume that human sentiment may attain a just result. Moreover, in itself, the instinct of justice results from moral principles which must be defined.

As for justice itself, he disqualifies it as a criterion because it lacks clarity. It cannot be used to estimate law, if justice is taken in its narrow sense, namely - the realization of positive law; the entirety of rights and obligations ensured by it.

Although perhaps more appropriate - justice cannot be used in its wide sense either, the one identified with human "goodness", because it does not provide a fundamental reply to the question of what is preferable.[2]

He is not prepared to identify justice with mercy or with utilitarianism. He does not accept, either, any formulae of equality, neither "mere" equality nor distribution of goods based on a moral level (of the recipient) nor a distribution according to the degree of need, "to each his due". For what is

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(1) Ethical Systems and Legal Ideals (1959), passim.

(2) I understand this to mean that, a decision on the question of what is good, is a decision in a scale of priorities, a decision between alternatives, and to reach this decision - we must be equipped with criteria which we do not possess.

"due" to a man? - Is it that which "should" be given, or that which law and custom determine is "due" to him? He raises similar questions with regard to the formula: "to each according to his merit". And another: "why should any proportion be applied at all to the "relationship" between "worth" and "benefit"? After all, these two cannot be measured quantitatively, and there should be at least one common denominator between the two.[3]

93.2 Law, Cohen says, should bring with it as much 'good' as possible. Consequently, judgments should not be examined under criteria of "right" or "wrong", but under criteria of "good" and "bad". The "good" which law should bring about is, according to Cohen, the "good life"; the reply to the question inherent in justice: what should be in the future.

Having rejected the contention that justice can, by itself, serve as a criterion for this purpose, he proceeds to examine whether other criteria are applicable, and rejects them one after the other.

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[3] May I add that no common denominator may exist between "worth" and "benefit" any more than between "pain and suffering" and the amount of damages. And although money, benefits and social appreciation should not, in the absence of better ones, be disqualified as close, or possible, criteria - "to each according to his merit" is defective because people are made in the image of God and cannot have "different worth", even if one can be distinguished from the other.

He rejects the aesthetic test, namely the test of harmony and symetry. Of uniformity, of what is technically termed "elegantia juris". This harmony serves an important social objective: the elucidation of law and the promotion of social order and safety. It goes without saying that if, for instance, law forbids whatever is permitted, or permits whatever is prohibited, it will clash with harmony. From this viewpoing, Cohen says, it will also be related to morality, because morality is inherent in the body and spirit of law.[1]

At the same time, aesthetics should not be confused with ethics, and the aesthetic test cannot be applied to draw conclusions on the nature of law. Just as it is impossible to learn anything from the mere contents of law.

Cohen rejects the test of content too, because it attempts to settle an irreconciliable controversy between two questions. The first - is it desirable for human beings to act in a certain manner, and the second - is it desirable that the state compel such activity.

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[1] The moral question incurred in the examination of a law which "forbids whatever is permitted or permits whatever is prohibited" is not, in my humble opinion, a question of "elegantia juris", but rather of content. The question is <u>what</u> is forbidden and <u>what</u> is permitted, sometimes - in respect of whom, and particularly - <u>why</u>. Only in this context can the problem be one of morality.

Not every law, Cohen says, which permits good things is "good" and not every law which permits "bad" things is "bad". Wisdom, love or heroism cannot be forced down, even though they are "good" things. On the other hand, an attempt to force them down will be a crying injustice and mere coercion will deprive them of their meaning.

Similarly, consumption of alcohol can be good (from an individual's point of view) but prohibition of driving in a state of intoxication is necessary. In other words, an estimation of content cannot refer to what is good for every one, because - by its very nature - law is meant to lend preference to the good of the public and this preference may incur prohibition of something which is "good" from the individual's point of view.

The good of the public is related to the aim of law, but aim too is not a test, because it cannot be assumed that every law has an absolute and uniform aim, or that the legislator can adapt a suitable technique for the attainment of this aim (even if it exists).

In any case, the special aim of establishing peace is not, according to Cohen, a valid criterion, not only because of what has already been said, but also because peace is merely a means for the attainment of the real aim of law, namely - good life. Moreover, Cohen adds, to sacrifice successively the foundations of life which make peace "good", in order to attain... peace is like burning the house in order to light it.

93.3 Could freedom serve as a criterion, Felix Cohen asks and replies with a

question: what is freedom? In its wide sense - it is simply freedom from external human intervention. In this sense it is obviously too superficial, because it includes both the freedom to suffer and the freedom to cause injustice. Furthermore - freedom is meaningless when a man lacks the power to realize his opportunities, either because of the presence of human restrictions or despite their absence.

In its narrow sense, says Cohen quoting Kant, the meaning of freedom is epitomized in the freedom of every man as long as it conforms with the identical freedom of others. However, the expression "identical" is devoid of meaning, because two freedoms, are never the same. There is no similarity between the worker's freedom and the employer's freedom to enter into a mutual labour contract. Besides - if I killed a man, I violated through this very action his "identical" freedom to kill me. And the fact that I killed him because he was "bad" is immaterial and irrelevant.

A judge who speaks of identity of freedoms, will do so on the basis of a mistaken assumption that the aspect to which he refers is - for some reason - the right aspect. The rejection of this assumption caused Anatole France to describe ironically equality of freedoms by saying that "law with its royal equality, forbids the rich, as much as he forbids the poor, to sleep under the bridges, to collect alms in the streets and to steal bread".

This theory of equal freedom, Felix Cohen says, is known to us from the courts in the U.S. and in England (and in Israel) and serve as a mask for personal priorities to cover their nakedness.

If we cannot use freedom as a test, neither in its wide sense nor in its narrow sense, maybe we shall find refuge, Cohen says, in political freedom? But he rejects this too. He admits that a balance between tyranny and anarchy is a condition for a man, to live a good life. The price for such a balance, however, is the priority lent to certain groups in the population.

93.4 Cohen now proceeds to the test of social interests and, without saying so specifically, attacks both Jhering and Pound. He quotes John Stuart Mill who said that the only justification for intervention in the freedom of the individual is self defence, and that one should not force down on a man, who is the sole sovereign of his body and mind, something for his own good or because somebody thinks that in this manner (through coercion) he will be happier.

Cohen finds numerous faults with this thesis. It is clear, he says, that the state may intervene in the freedom of the individual to take drugs. It is also possible, and sometimes essential, to restrict freedom of speech. The same applies to statuary prohibitions imposed by the state on a person, to sell himself into slavery, work for starvation pay, or to destroy and ruin himself.

The role of law in the field of social interests is, according to Cohen, to bring about a coordination of conflicting social interests, but not necessarily "only" to settle conflicts. Its role is to ensure a "just" settlement of conflicts and a "just" delimitation of interests. Obviously, this justice is dependent on factors beyond the immediate conflict, because the problems arising in a specific case are - always - part of an entirety beyond the

scope of the said conflict. Through the discussion of the conflict , law breathes new life into those social values, which are beyond the conflict.

Law should, therefore, be estimated according to its influence over the foundations of life, even if they do not perforce give birth to conflicts, while the individual's life should be examined as part of the life encircling him.

93.5 Indeed, Cohen adds, criticism is sometimes voiced that a doctrine, like the one he proposes - which encompasses the life of the individual in the framework of the norm of state activity - promotes autocracy, paternalism and an unjustified intervention in the life of the individual. This criticism claims that life would become intolerable, when the state could intervene in every case it "expects" to do a tiny bit of "good", and every moral theory which allows such intervention by the state - is bound to be mistaken and wicked.

His reply is that we are not dealing with an intervention through which the state "expects" to do "good", but with an intervention which, in practice, did "good", and the question - he adds - of who would judge what is "good" is irrelevant.

The proposition, Cohen explains, that it is advisable that the state do "good" is not identical with the proposition that it is advisable that the state do what I am likely to consider good.

There is a big difference, he says, between the determination that of two

angles in a triangle the bigger one is opposite the longer side, and the determination that of the two angles in a triangle the bigger one is opposite the side which Mr. Jones thinks is bigger. Moreover, of these two determinations, the first - is absolutely right, whereas the second - is most probably wrong.

In other words, the state should do "good" anywhere and in all circumstances, even if nobody knows what this "good" is. As for the difficulty to find somebody able to determine whether the state does "good", this difficulty - Cohen explains - also exists in respect of any other criterion in the light of which we proceed to examine our laws.

This is why, Cohen concludes, either law can cause "good" or it cannot. If it can - it is bound to do so and the demand that it refrain from intervening in the life of the individual becomes an absurdity expressed in the saying "it is not good that law does good". On the other hand, if law is unable to do good then, Cohen admits, his demand does not hold water and will, in itself, contradict his theory, because it is impossible to say that law should do good, even when it is unable to do so.

At the same time, he agrees that in practice, by intervening in order to bring about "good", law sometimes causes damage. Because badness is inherent in law, at least as regards the burden which it imposes on a man's mind; as regards the social price of legal machinery, and the suppression of attempts to solve social difficulties, through independent association.

93.6 Cohen ends by rejecting "natural law" too. Natural law, he says, rests on one of two foundations: the first - expressed in the question of "what should be" and the second - the universal foundation.

Universalism is considered a proof of what law should protect. And yet, many evils are accepted universally. Therefore, Cohen says, "value" should not be inferred from its universal existence. What is universal may be good, but it may be bad too.

The alternative conclusion that ideal law is law accepted throughout the world does not stand the test, according to Cohen, because a comparison of law in its various places reveals immediately that, even though it deals with the same matter - it differs from one place to another, because of different conditions.

If so, what is the test of "good" law, according to Felix Cohen? He quotes, with agreement, the following passage from Norman Wilde:

"The modern doctrine of natural rights is realistic and historic. It knows nothing of humanity as such and its abstract rights, but finds only a varying body of traditions as to what are the essential conditions of social welfare... In every growing society there is as much need for the revision and reinterpretation of its rights as there is in the growing child for the alteration of its clothes" (pp. 109-10).

D. The Perfect Justice and the Justified Law

94. In his fascinating book "The Crock of Gold", James Stephens says that "Nature grants to all her creatures an unrestricted liberty, quickened by competitive appetite, to succeed or to fail, save only to Reason, her Demon of Order, which can do neither, and whose wings she has clipped for some reason with which I am not yet acquainted."

These lines came back to me when I read Felix Cohen's conclusion, because unlike him I am not prepared to negate neither the human factor in the doctrine of natural rights, nor the changing concepts of justice in a given society.

Can "traditions as to what are the essential conditions of social welfare" not include also moral convictions, among them - the concept of justice? If the expression "social welfare" refers, as it does, to the welfare of society in its entirety - what are these "essential conditions"? Who determines them? If they cannot, as Cohen claims, be found in "the rights of humanity as such" they can certainly be found in human rights "as such", or else the "reinterpretation" of the rights of society, to which Cohen refers, is meaningless. That reinterpretation is dictated by "the need for the revision of rights", but "right" is directly connected with "what is due", and what is due cannot be answered without reference to the concept of justice.

The revision dictated by the "varying body of traditions" relating to social welfare, as well as the revision and "reinterpretation of rights" are not possible and are unfounded other than in conjunction with humanism. The

need for revision is not a realistic and historic development disconnected from the revised material. It is an inevitable conclusion which reason derives from the social concept of justice.

Not abstract justice. Certainly not absolute or universal justice. But "perfect justice".

By "perfect justice" I mean a perfect equilibrium of the totality of good and bad in the social reality.

95. This is why, elsewhere in this work, I suggested, as a definition, that law is -

> "An institutively enforceable directive deriving from the supreme authority of the state, or of another political entity, directed at anyone who, within or outside the territorial boundaries, is subordinated to that same authority by virtue of its own directives, and which imposes legal norms, <u>not manifestly unjustified</u>."

In the footsteps of Zen-Buddhism I would say that injustice is inherent in justice. Furthermore - that justice is meaningless without injustice, and that, therefore, not only that injustice should be endured but it is also required. The problem is that of proportions.

Thus, when a law is "manifestly unjustified" then it is no law, and each individual, at the risk of being punished, is entitled, maybe even obliged, to disobey it.

What I am saying, in other words, is that a law should be justified by the encircling circumstances of both its cause and its purpose. This does not necessarily mean that its provisions absolutely adhere to all elements of any given concept of abstract justice. But, I argue, that anything which can be justified is also, socially, just. There cannot exist an unjustified social welfare.

As to the encircling circumstances, in the light of which justification should be examined - they vary with the "circles" concerned. Namely, just as a man lives in three circles: as an individual; within his family and close society; in his state or people, so is society. It also lives as a separate organism; within an interrelated group of societies (i.e. influential area); and the universe.

Therefore, the justification should be tested in the light of the aspirations, needs and aims of the relevant circle, and may be established when they are reached through the ultimate minimum of damage, injustice and unhappiness. Hence, also a whole society (nation) is entitled, as is an individual, to disobey a law which other societies (nations) wish to force down, if that law is manifestly unjustified.

Leibnitz defined justice as the love of a wise man. And Piper, justly, develops this idea by saying that love is impossible without justice inasmuch as justice is impossible without love, because the essence of justice is "the effective kinship with Being, that affinity of myself with Being itself."

As this world seems to have forsaken love - no wonder justice has become only a thesis for philosophical researches. Nevertheless, law can and must continue its struggle to achieve it.

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GLOSSARY

Divrei Ha'Knesset	-	Records of the Knesset (Israeli Parliament) proceedings.
Hatza'ot Hok	-	Legislature Bills (Blue Print).
Mishpatim	-	Hebrew University Law Review

LIST OF ABBREVIATIONS

A.C.M.	-	Appelate Court Martial
Harv. L. Rev.	-	Harvard Law Review
Isr. L.R.	-	Israel Law Review
L.Q.R.	-	Law Quarterly Review
P.C.	-	People's Council
P.D.	-	Piskei Din (law reports of the Supreme Court of Israel published by the Ministry of Justice).
P.D.R.	-	Pisskei Din Rabbani'im (Rabbinical Decisions).
P.L.R.	-	Palestine Law Reports
Pssakim E.	-	Pssakim Elion (law reports of the Supreme Court of Israel, published by the Israel Bar Association 1948-61)
Pssakim M.	-	Pssakim Mehozi'im (law reports of the District Courts of Israel, published by the Israel Bar)
Tel-Aviv Univ. L.R.	-	Tel-Aviv University Law Review