

MAJOR LEGAL SYSTEMS IN THE WORLD TODAY

Rene David & John E.C. Brierley

There would appear to be three at least which occupy uncontested place of prominence: the Romano-Germanic family, the Common law family and the family of Socialist law. These three groups whatever their value and extension throughout the world do not however take into account all contemporary legal phenomena. There are other systems, situated outside these three traditions or sharing only part of their conception of things, which prevail in a large number of contemporary societies and in their regard too, a number of observations will be furnished.

Romano-Germanic family

A first family may be called the Romano-Germanic family. This group includes those countries in which legal science has developed on the basis of Roman *jus civile*. Here the rules of law are conceived as rules of conduct intimately linked to ideas of justice and morality. To ascertain and formulate these rules falls principally to legal scholars who, absorbed by this task of enunciating the doctrine on an aspect of the law, are somewhat less interested in its actual administration and practical application. These matters are the responsibility of the administration and legal practitioners. Another feature of this family is that the law has evolved, primarily for historical reasons, as an essentially private law, as a means of regulating the private relationships between individual citizens; other branches of law were developed later, but less perfectly, according to the principles of the civil law which today still remains the main branch of legal science. Since the nineteenth century, a distinctive feature of the family has been the fact that its various member countries have attached special importance to enacted legislation in the form of codes.

The Romano-Germanic family of laws originated in Europe. It was found by the scholarly efforts of the European universities which, from the twelfth century and on the basis of the compilations of the Emperor Justinian (A.D. 483-565), evolved and developed a juridical science common to all and adapted to the conditions of the modern world. The term Romano-Germanic is selected to acknowledge the joint effort of the universities of both Latin and Germanic countries.

Through colonization by European nations, the Romano-Germanic family has conquered vast territories where the legal systems either belong or are related to this family. The phenomenon of voluntary reception has produced the same result in other countries which were not colonized, but where the need for modernization, or the desire to westernize, has led to the penetration of European ideas.

Outside Europe, its place of origin, these laws although retaining membership in the Romano-Germanic family nonetheless have their own characteristics which, from a sociological point of view, make it necessary to place them in distinct groups. In many of these countries it has been possible to receive European laws, even though they possessed their own civilization, had their own ways of thinking and acting and their own indigenous institutions, all of which ante-date such reception. Sometimes reception has left some of these original institutions in place; this is particularly clear in the case of Muslim countries where

the reception of European law and the adhesion to the Romano-Germanic family have been only partial, leaving some legal relations subject to the principles of the traditional, local law. The old ways of thinking and acting peculiar to these countries may also mean that the application of the new has been quite different from what it is in Europe. This question is particularly important in the case of the countries of the Far East, where an ancient and rich civilization existed long before the reception of western law.

Finally, with respect to the countries of Africa and America, it will also be necessary to ask whether their geographical conditions and populations distribution, creating conditions entirely different from those in Europe, have not led to the development of laws substantially different from their European models.

Common law family

A second family is that of the Common law, including the law of England and those laws modelled on English law. The Common Law, altogether different in its characteristics from the Romano-Germanic family, was formed primarily by judges who had to resolve specific disputes. Today it still bears striking traces of its origins. The Common law legal rule is one which seeks to provide the solution to a trial rather than to formulate a general rule of conduct for the future. It is then much less abstract than the characteristic legal rule of the Romano-Germanic family. Matters relating to the administration of justice, procedure, evidence and execution of judgments have, for Common law lawyers, an importance equal, or even superior, to substantive legal rules because, historically, their immediate pre-occupation has been to re-establish peace rather than articulate a moral basis for the social order. Finally, the origins of the Common law are linked to royal power. It was developed as a system in those cases where the peace of the English kingdom was threatened, or when some other important consideration required, or justified, the intervention of royal power. It seems, essentially, to be a public law, for contestations between private individuals did not fall within the purview of the Common law courts save to the extent that they involved the interest of the crown or kingdom. In the formation and development of the Common law- a public law issuing from procedure-the learning of the Romanists founded on the *jus civile* played only a very minor role. The divisions of the Common law, its concepts and vocabulary, and the methods of the Common law lawyer, are entirely different from those of the Romano-Germanic family.

And as with the Romano-Germanic family, so too the Common law has experienced a considerable expansion throughout the world-and for the same reasons: colonization or reception. The observations made with respect to the Romano-Germanic family apply with equal value. But here again a distinction between the Common law in Europe (England and Ireland) and that outside Europe must be made. In certain extra-European countries, the Common law may have been only partially received as in the case, for example, of certain of Muslim countries or India and where it was received, attention must be given to its transformation or adoption by reason of its co-existence with the tradition of previous civilizations. A different environment has, in any event, created difference between the Common law of the countries where it originated and that of those into which it was imported. This observation is particularly true with respect of the Common law family because it groups some countries such as the United States and Canada where a civilization

different in many respects from that of England has developed. The laws of these countries enjoy a largely autonomous place within the family.

Relations between these two families

Over the centuries there have been numerous contacts between countries of the Romano-Germanic family and those of the Common law, and the two families have tended, particularly in recent years, to draw closer together. In both, the law has undergone the influence of Christian morality and, since the Renaissance, philosophical teachings have given prominence to individualism, liberalism and personal rights. Henceforth, at least for certain purposes, this reconciliation enables us to speak of one great family of western law. The Common law retains, to be sure, its own particular structure, very different from that of the Romano-Germanic system, but the methods employed in each are not wholly dissimilar. Above all, the formulation of the legal rule tends more and more to be conceived in Common law countries as it is in the countries of the Romano-Germanic family. As to the substance of the law, a shared vision of justice has often produced very similar answers to common problems in both sets of countries.

The inclination to speak of a family of western law is all the stronger when one considers that the laws of some states can not be annexed to either family, because they embody both Romano-Germanic and Common law elements. The laws of Scotland, Israel, the Union of South Africa, the Province of Quebec and the societies in which the place and function of law are very different from what they are in the West. A true picture of law in contemporary world society would be incomplete without taking these considerations into account.

In non-western societies the governing social principles to which reference is made are of two types. On the one hand law is fully recognized as being of great value but the law itself is framed in a different concept than it is in the West; on the other, the very notion of law is rejected, and social relations are governed by other extra-legal means. The first view is that of Muslim and Hindu societies, while the latter is that adopted in countries of the Far East and large parts of Africa and Malagasy.

Family of Socialist Laws

The Socialist legal system makes up a third family, distinct from the first two. To date the members of the socialist camp are those countries which formerly belonged to the Romano-Germanic family, and they have preserved some of the characteristics of Romano-Germanic law. Thus, the legal rule is still conceived in the form of a general rule of conduct; and the divisions of law and legal terminology have also remained, to a very large extent, the product of the legal science constructed on the basis of the Roman law by European universities.

But apart from points of similarity, there do exist such differences that it seems proper to consider the socialist laws as detached from the Romano-Germanic family - the socialist jurist most decidedly do and as constituting a distinct legal family, at least at the present time. The originality of Socialist law is particularly evident because of its revolutionary nature; in opposition to the somewhat static character of Romano-Germanic laws, the proclaimed ambition of socialist jurists is to overturn society and create the conditions of a new social

order in which the very concepts of state and law will disappear. The sole source of Socialist rules of law resides therefore within the revolutionary work of the legislature, which expresses popular will, narrowly guided by the Communist Party. However, legal science as such is not principally counted upon to create the new order: law according to Marxism-Leninism- a scientific truth-is strictly subordinate to the task of creating a new economic structure. In execution of this teaching, all means of production have been collectivised. As a result the field of possible private law relationships between citizens is extraordinarily limited compared to the pre-Marxist period; private law has lost its pre-eminence ó all law has now become public law. This new concept removes from the very realm of law a whole series of rules which jurists of bourgeois countries would consider legal rules.

The family of Socialist laws originated in the Union of Soviet Socialist Republics where these ideas prevailed and a new law has developed since the 1917 Revolution. However, the laws of the socialist or people's republics of Europe and Asia must be classed as groups distinct from Soviet law. These laws belong to the Socialist family. But in those of the first group a greater persistence of characteristics properly Romano-Germanic is detected, while in those of the second it is useful to enquire how these new concepts are reconciled in practice with the principles of Far Eastern civilization which governed such societies before the Socialist era.

Other Systems

The three families just described, each of which as numerous variants, are undoubtedly the three principal families of law existing in the contemporary world. Strictly speaking there is no law in the world today which has not drawn certain of its elements from one or other of these families. Some even hold the view that all other systems, no more than survivors from the past, will ultimately disappear with the passing of time and the progress of civilization.

This attitude however proceeds from a rather native sense of superiority and is really no more than an hypothesis, it does not acknowledge an observable reality in the modern world. All contemporary states have, it is true, taken over a number of western ideas either because it was necessary to preserve their independence or because it was useful in their internal development. It does not follow that the older ways of thinking which, not so very long ago, were widely accepted in these different societies have been totally abandoned. Everyone will recognise the superiority of western technology; opinions differ however on the superiority of western civilization taken as a whole. The Muslim world, India, the Far East and Africa are far from having adhered to it without reservation. These countries remain very largely faithful to philo society, must act legally, courts must ensure that law is respected. Law, a mirror of justice, is in this conception superior even to equity itself; outside the law, there can only be anarchy, or arbitrariness, chaos or, the rule of force. Law is therefore venerated, the courts are temples of justice, the judges its oracles.

Far Eastern countries reject this view. For the Chinese, law is an instrument of arbitrary action rather than the symbol of Justice; it is a factor contributing to social disorder rather than to social order. The good citizen must not concern himself with law; he should live in a way which excludes any revindication of his rights or any recourse to the justice of courts. The conduct of individuals must, unfailingly, be animated by the search for harmony and peace through methods other than the law. Man's first concern should not be to respect the

law. Reconciliation is greater value than justice; mediation must be used to remove conflicts rather than invoking law to resolve them. Laws may exist to serve as a method of intimidation or as a model; but law is not made with a view to being really applied, as in the West. Scorn is reserved for those who aspire to regulate matters according to law or whose preoccupation is its study or application, and who thereby defy convention and accepted proprieties.

Countries of the Far East have, traditionally, held the view that law is only for barbarians. The Chinese communist regime and the westernization of Japan have not fundamentally changed this conception rooted as it in their ancient civilizations. In China the communist regime rejected the legal codes drawn up after the fall of imperial rule along western lines and, and, after some brief hesitation, then repudiated the Soviet method of building communism. The techniques finally adopted for doing so have given up to the present time a very narrow place to law. Codes on the European model have been instituted in Japan but, generally speaking, the populations makes little use of them; people abstain from using the courts and the courts themselves encourage litigants to resort to reconciliation; and new techniques have been developed for applying or removing the need of applying the law.

Muslim, Hindu, and Jewish Laws

The attitude of the Muslim, Hindu and Jewish communities about the law is easily understood by a western jurist, even though the definition of law itself in western jurisprudence has always given rise to difficulties and no single definition has so far elicited any general acceptance. One of the fundamental reasons for this lack of agreement is the debate between the proponents and adversaries of the notion of "natural law". But it is because the idea of "natural law" exists that we are able to understand the starting premise of these other systems.

In this debate, law is held by some to be no more than the body of rules that are really observed. The application of which is entrusted to the courts. This is the view today to our western universities in which our national laws are taught. But law may also be seen as a model of ideal behavior, one not to be confused with the actual rules by which individuals act which courts apply. European universities, in their pre-nineteenth-century tradition, paid very little attention to national or customary laws of the time and taught, almost exclusively, an ideal law constructed on the basis of Roman law. In Muslim countries, in the same way, more attention is given to the model law linked to the Islamic religion than to local custom (treated as a phenomenon of fact) or the laws and decrees of the sovereign (treated as merely administrative measures) and neither of these is thought to possess the full dignity of law. The same can be said of Jewish law and, in a very different context, Hindu law.

Law, then, whether linked to a religion or corresponding to a particularly way of thinking about the social order, is not in either case always necessarily observed by private persons or applied by courts. It may nonetheless exert considerable influence on both "righteous" men may endeavor to rule their own lives according to what they consider to be truly the law. A student of western societies may well in a positivist perspective concentrate attention upon the rules enacted by legislatures and applied by court or, alternatively, in a sociological perspective, classify as law only those rules which are really observed as a matter of practice. This difference in approach is not a source of any real inconvenience because in western

societies there is a large degree of equivalence between justice, positive law and social manners. The same cannot however be said of non-western societies where rules of law (in the western sense) remain unorganized, fragmentary and unstable, and where there is generally feeling that true law is to be found elsewhere than in legislation, custom or judicial decisions. Without taking sides in the debate between positivists and advocates of natural law, Muslim and Hindu law, therefore, must be included within the major contemporary legal systems. Jewish law, despite its historical and philosophical interest, must be omitted because its sphere of influence is incomparably less than that the other two.

Far East

The situation in the Far East, especially China is completely different. Here there is no question of studying an ideal law distant from rules laid down by legislators or simply followed in practice: here the very value of law itself has traditionally been put into question.

In the West, and in Islamic and Hindu communities, law is held to be a necessary part of, indeed a basis for, society. Good social order implies the primacy of law: men must live according to law and, where necessary, be prepared to fight for the supremacy of law; administrative authorities, no less than any other part of Philippines would fall into this group. And lastly, but from another point of view, the Romano-Germanic and Common law families are included in the same deliberately ignominious term of "capitalist" or "bourgeois laws" by jurists of the socialist camp, made up of the Soviet Union and those countries that have used its law as a model or which, like the U.S.S.R. profess an adherence to Marxist-Leninist teachings.

Black Africa and Malagasy Republic

The preceding observations regarding the Far East apply as well to the black African countries and the Malagasy Republic (Madagascar). There too, in milieu in which the community cohesion prevails over any developed sense of individualism; the principal objective is the maintenance or restoration of harmony rather than respect for law. The Western laws adopted in Africa are often hardly more than a veneer, the vast majority of the population still lives according to traditional ways which do not comprise what we in the West call law and without heed to what is very often nothing more than an artificially implanted body of rules.

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THE INDIAN LEGAL SYSTEM

Joseph Minattur

INTRODUCTION

To delve among the laws of India is like bathing in the holy waters of Triveni. It leaves one refreshed and delighted; refreshed from the pleasant contact with almost all the legal systems of the contemporary world, and delighted at the hopeful realisation that here in the Indian legal system lie the seeds of a unified, eclectic legal order which may soon grow into maturity and spread its branches, like a banyan tree, all over south and southeast Asia.

Three main streams join together to form the Indian legal system. That of the common law is perhaps the most dominant among them. Then there is the stream of laws springing from religion. The third is that of the civil ('romanist') law which energizes the system with unruffled ethical verve and accords comeliness to its contours. Trickle of customary laws cherished by tribal societies and other ethnic communities also flow into the main stream. Like the Sarasvati near Prayag, the element of the civil law is not easily perceptible, though it permeates the entire structure. So a word of explanation is perhaps warranted.

The very idea to a code appears to have been derived from the codes of continental Europe. When in 1788 a codification of Hindu law on contracts and succession was proposed by Sir William Jones to Lord Cornwallis, it was conceived to be on the model of the *inestimable* Pandects of Justinian. On 18 May 1783 a Regulation for forming into a Regular Code, all Regulations that may be enacted for the Internal Government of the British territories in Bengal was passed by the Governor-General and Council, some eight years earlier, in 1775 Warren Hastings had *A Code of Gentoo Laws or Ordinations of the* pundits prepared and translated by Halhed a Judge of the Supreme Court at Calcutta. The same year Bentham offered to act as a sort of Indian Solon and thought of constructing an Indian Constitutional code. James Mill, one of his disciples at India House thought that his Draught of a New Plan for the France was applicable to India. Speaking on the Charter Bill of 1833 Macaulay said:

I believe that no country ever stood so much in need of a code of laws as India, and I believe also that never was a country in which the want might so easily be supplied.

Section 53 of the Charter Act, 1833 declared that it was expedient:

that such laws as may be applicable in common to all classes of the inhabitants... due regard being had to the rights, feelings and peculiar usages of the people, should be enacted: and that all laws and customs having the force of law should be ascertained and consolidated and, as occasion may require, amended.

The first Law Commission immediately after its appointment in 1833 with Macaulay as its President took up the task of codification. Under Macaulay's personal direction it prepared its first draft of the Indian Penal Code and submitted it to the Governor-General in Council on 14 October 1837. When there were complaints that the progress of the Commission's work was unsatisfactory, Macaulay compared its progress with that of the authors of the French codes. He pointed out that though the French Criminal Code was begun in March 1801, the

Code of Criminal Procedure was not completed till 1810. It is also interesting to find half of the last century were on the same branches of law as were the French codes enacted earlier. Neither in India nor in France was enacted a code on the law of civil wrongs. It is true that there was no comprehensive enactment on torts in England, but then there were no comprehensive enactments in England on any of the subjects covered by the Indian codes.

It is not only in cherishing the idea of codification that the British Indian authorities-executive as well as legislative bodies-appear to have been indebted to continental codes.

As early as 1686 in a letter sent to Bombay the directors of the East India Company had expressed the view that:

you are to govern our people there, being subject to us under His Majesty by the law martial and the civil law, which is only proper to India.

The first Law Commission which drafted the Indian penal Code acknowledged its indebtedness to the French Penal code. In a letter of 2 May 1837 addressed to the Governor-General the Commission stated that it derived much valuable assistance from the French code and from the decisions of the French courts of justice on questions touching the construction of that Code.

It derived assistance still more valuable from the code of Louisiana prepared by the late Mr. Livingston.

The second Law Commission which sat in London from 1853 to 1856 expressed its view that:

what India wants is a body of substantive civil law, in preparing which the law of England should be used as a basis.

It, however, emphasised that such a body of law ought to be prepared with a constant regard to the conditions and institutions of India, and the character, religious and usages of the population. It also stated that in the social condition existing in India it was necessary to allow certain general classes of persons to have special laws, recognised and enforced by our courts of justice, with respect to certain kinds of transaction among themselves.

The Commission gave final shape to Macaulay's Penal Code; it also prepared drafts of the Code of Civil Procedure and the Code of Criminal Procedure incorporating into them materials left by the first Law Commission. The Legislative Council adopted the Code of Civil Procedure in 1859, the Penal Code in 1860 and the Code of Criminal Procedure in 1861.

The third law Commission, appointed in 1861, was enjoined to prepare for India a body of substantive law, in preparing which the law of England should be used as a basis. The fourth law Commission expressed a similar view when it recommended in 1879 that English law should be made the basis in a great measure of our future Codes, but its materials should be recast rather than adopted without modification. It, however, added that in recasting those materials due regard should be had to Native habits and modes of thought.

The influence of Scots and their law on the framing and adoption of the early British India codes and other enactments deserves to be mentioned. For a number of Scots in the 19th century their prospects were not only along the highway to London, but from there across the

high seas to Indian ports. Macaulay himself was of Scottish descent. Even when Scots were members of the English Bar, they were imbued with concepts derived from the civil law system. In the same way as they would prefer to preserve Scots law unsullied by English notions of Legal rule, they were inclined to keep Indian law unsullied by intrusions and erosions to English rules of law and tended to give due regard to native habits and modes of thought.

We shall refer to few instances where the influence of the civil law is clearly discernible. Section 11 of the Indian Evidence Act adopted in 1872 could not have been enacted in a fit of absent-mindedness.

The section which lays down guidelines to determine relevance in the admissibility of evidence is a clear, and presumably a deliberate, departure from the English rule and brings the Indian law in this respect very relevant and fair. Another provision which is of interest in this regard is section 165 of the Act. Commenting on it, Stephen has said:

Section 165 is intended to arm the judge with the most extensive power possible for the purpose of getting at the truth. The effect of this section is that in order to get to the bottom of the matter before it the court will be able to look at and enquire into every fact whatever.

The Indian judge appears to be invested with ample powers under the Act to get at the truth and form his own conviction at time.

It is not unfamiliar learning that the framers of the Indian Contract Act adopted several provisions of the Draft New York Civil Code. The Contract Act which does not purport to be a complete code only defines and amends certain parts of the law of contract, so that a rule of the Hindu law of contract like *Damdapat* is not abrogated. The rule stipulates that interest exceeding the amount of principal cannot be recovered at any time. It is still in force in some parts of India. The reason for not interfering with a rule like this must have been the sense of fairness cherished by the framers of the Act, though no such rule existed in English law.

In the law of contract, consideration plays a significant role in India as in England. But the words of section 25 of the Indian Contract Act which accords validity to a registered agreement, even though without consideration, appear to reflect the concept of cause in French law.

In this brief introduction it is not intended to indicate all departures from English law in the Indian statutes. It may, however, be emphasised that when such departures were made, the legislators were generally induced to do so on consideration of what they thought suited Indian conditions or on considerations of equity.

It is generally assumed that India is a common law country. This assumption may have been justified to a certain extent if applied to British India. It is true that many of the concepts and most of the judicial techniques are of common law origin. But there is more than a sprinkling of other concepts and techniques, which cannot be overlooked. Indian codes or judicial procedure owe a great deal to procedure in England. But with the introduction of nyaya panchayats (village tribunals) which are indigenous in origin the English procedure has been virtually replaced at the grass root level. The functioning of nyaya panchayats may not be as widespread as is desired: the fact however remains that at present there is a less formal

procedure than the one followed until recent years. There is also general dissatisfaction, if not hostility to the complex, protracted procedure derived from the common law system. With the reign of dharma which may be equated with equity while it comprises the concept of law unopposed to justice, there was no need in India to think of a separate branch of law known as equity detached from common law.

We have already adverted to certain departures from English law even when rules of English law were believed to have been codified for the benefit of the Indian people. Neither the expression "justice and right" in the Charter of 1726 nor the phrase "equity and good conscience" or "justice, equity and good conscience" in several regulations and Acts could have meant principles of English law. The Judicial Committee of the Privy Council was careful in its use of words when it pointed out that equity and good conscience had been "generally interpreted to mean rules of English law if found applicable to Indian society and circumstances". It has been observed that from 1880 or there about to the present day "the formula has meant consultation of various systems of law according to the context". At present the Supreme Court of India is inclined to think that the phrase has given a connotation consonant with Indian conditions.

In the early nineteen sixties a number of territories where the civil law prevailed became parts of the Indian Union. In the Union territory of Goa, Daman and Diu, Portuguese civil law was in force, even after the extension of several Indian enactments to the territory, it is generally the provisions of the Portuguese Civil Code which apply to the people of this territory in matters of personal law. In the former French settlements of Pondicherry, Karaikal, Mahe and Yanam which, when ceded, were formed into the Union territory now known as Pondicherry, there are Indian citizens who are governed in matters of personal law by the provisions of the French civil code as they existed at the time of the cession. There are also other *renoncants* who are French citizens living in Pondicherry to whom provisions of the French Civil Code relative to personal law will apply with all subsequent amendments. In these circumstances, the element of the civil law in the fabric of Indian law cannot be brushed aside as negligible. And this element affects domestic relations which are on negligible part of a citizen's life. The customary laws of various tribal communities and other ethnic groups also form part of the law administered in India. To cite one instance: matriliney among the Mappila Muslims of Kerala, though not favoured by the tenets of Islam, is permitted to play a decisive role in the rules of succession applicable to them.

In the light of the presence and prevalence of French and Portuguese laws, customary law of various ethnic groups and laws based on religion of the several communities, the introduction of indigenous judicial procedures in village tribunals and several other factors, one cannot possibly close one's eyes and regard the Indian legal system as belonging to the common law family. It would be more justified to regard it as a mixed system. If Indonesian law with its admixture of customary laws based on religion could be regarded as a mixed system there is no reason why Indian law should not be so regarded. Though the provisions of the French and the Portuguese civil codes relative to domestic relations are in operation in certain regions only, laws grounded in religion or custom are followed all over the country. The mosaic of Indian law may have a large number of common law pieces; but marble

quarried from France and Portugal, gold leaves brought from Arabia and clusters of Precious stones gleaned from Indian fields do deserve to be discarded.

When India adopts a civil code, under the directive in the Constitution it is likely to be eclectic in character, it may have in it a harmonious admixture of various laws based on religion and customary laws, as well as provisions derived from western codes and the English common law. Owing to its eclectic character and especially because it would attempt to harmonise provisions of personal laws derived from religion prevalent in the region, the civil code may be found worthy of emulation in south and southeast Asia. It may thus pave the way for unification of laws, though perhaps limited geographically in extent. If in ancient days, Indian culture was permitted, without any hitch or demur, to permeate social and political institutions and life in general in this region, there is no reason why Indian legal culture cannot play a similar role in the near future as well. The Indian Prime Minister recently expressed his hope that during the next nine years, India would achieve significant progress in every field and would provide guidance and inspiration to other countries. He also stressed that India's influence had been increasing in Southeast Asia and West Asia. Even when one is not sure whether the mention of nine years has any special significance, one can hopefully assume that if an Indian civil code is adopted soon, it may tend to guide and inspire legislators in the neighbouring states. What the Napoleonic code has done for continental Europe, the Americas, and parts of Asia and Africa, a well-framed Indian civil code may easily do for south and Southeast Asia.

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MODERN JUDICIAL SYSTEM

K. D. Singh

HIERARCHY OF COURTS & JURISDICTION

SUPREME COURT OF INDIA



Appellate Jurisdiction

Appeals under the Constitution
Appeal by Special Leave
Statutory Appeals

Original Jurisdiction

Writ
Original Suits
Transfer of Cases
Election disputes

Advisory Jurisdiction

Articles 143(1) & 317

References

Sec. 257 of the Income Tax Act.
Section 7(2) of MRTP Act

Reviews

Article 137
Curative Petition

*HIGH COURTS



Appellate

Original

Writ
Original Suits (more than 20 lacs)

Supervisory

Revisional

***DISTRICT COURTS**

D. INSURANCE REGULATORY & DEVELOPMENT AUTHORITY (IRDA)
(established under the IRDA Act, 1999)

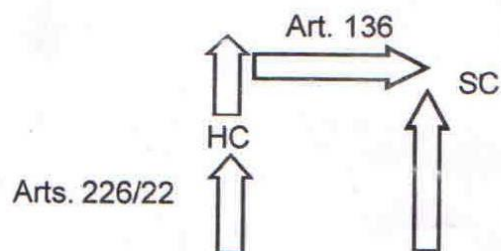
E. PENSION FUND REGULATORY & DEVELOPMENT AUTHORITY
(established under the resolution of GoI)

F. PETROLEUM & NATURAL GAS REGULATORY BOARD (PNGRB)
(established under the PNGRB Act, 2006)

G. SECURITIES & EXCHANGE BOARD OF INDIA (SEBI)
(established under the SEBI Act, 1992)

Appeal

Securities Appellate Tribunal (SAT)

TRIBUNALS / COMMISSIONS**A. SERVICE MATTERS**

CENTRAL ADMN. TRIBUNAL
[The Administrative Tribunals Act]

B. CONSUMER COURTS

SC



National Commission.

Original (more than 1 Cr.)
Appellate
Revisional

State Commission



Original (20 lac-1 Cr.)

District Forum

Original (upto 20 lacs)

[The Consumer Protection Act]

C. LABOUR COURTS

SC



Art. 136

HC



Art. 226/227

Labour Courts / Industrial Tribunals

[The Industrial Disputes Act]

D. MOTOR ACCIDENT TRIBUNAL

SC

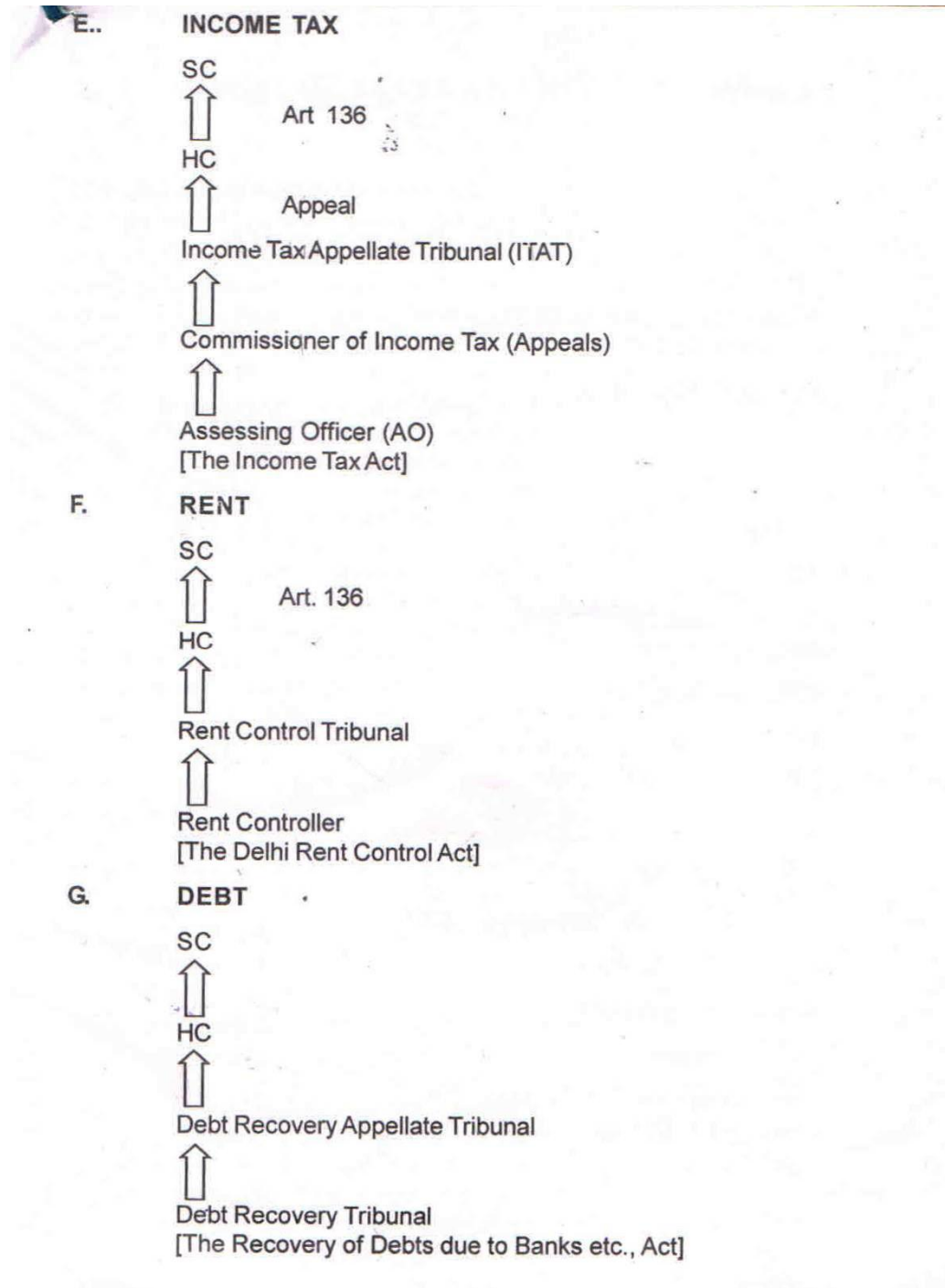


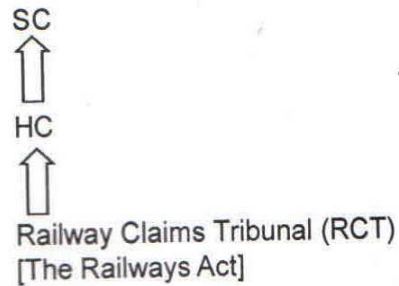
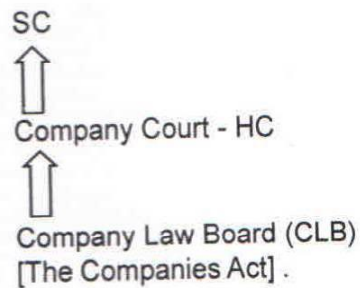
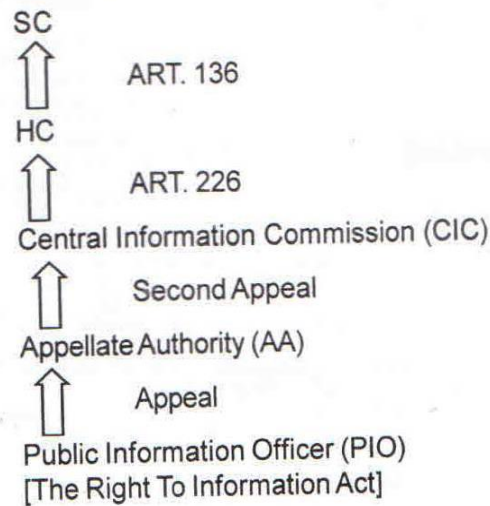
HC



Motor Accidental Claims Tribunal

[The Motor Vehicles Act]



H. RAILWAYS**I. COMPANY MATTERS****J. INFORMATION**

LEGAL SERVICE/AID AND LOK ADALAT

R. Swaroop

Need for introduction of an adequate and comprehensive legal aid/service programme had been felt for many years and it was increasingly being realized that there could not be any real equality in criminal cases unless the accused got a fair trial of defending himself against the charges laid and unless he had competent professional assistance. In ***Hussainara Khatoon v. State of Bihar*** [AIR 1979 SC 1369, 1375], the Supreme Court observed that it was not possible to reach the benefits of the legal process to the poor, to protect them against injustice and to secure to them their constitutional and statutory rights unless there was a nationwide legal service programme to provide free legal services to them. Impressing upon the Government of India as also the State Governments, the urgent necessity of introducing a dynamic and comprehensive legal service programme with a view to reaching justice to the common man, the Supreme Court in ***Hussainara Khatoon*** case observed:

“Today, unfortunately, in our country the poor are priced out of the judicial system with the result that they are losing faith in the capacity of our legal system to bring about changes in their life conditions and to deliver justice to them. The poor in their contact with the legal system have always been on the wrong side of the line. They have always come across ‘Law for the poor’ rather than ‘Law of the poor’. The law is regarded by them as something mysterious and forbidding, always taking something away from them and not as a positive and constructive social device for changing the social economic order and improving their life conditions by conferring rights and benefits on them. The result is that the legal system has lost its credibility for the weaker sections of the community. It is, therefore, necessary that we should inject equal justice into legality and that can be done only by dynamic and activism scheme of legal services.

We would strongly recommend to the Government of India and the State Governments that it is high time that a comprehensive legal service programme is introduced in the country. That is not only a mandate of equal justice implicit in Article 14 and right to life and liberty conferred by Article 21, but also the compulsion of the Constitutional Directive embodied in Article 39-A.

The State cannot, therefore, avoid its constitutional obligation to provide free legal aid to the accused by pleading financial or administrative inability. The State is under a Constitutional mandate of equal justice implicit in Article 14 and right to life and liberty conferred by Article 21, but also the compulsion of the Constitutional Directive embodied in Article 39 A, to ensure fair trial and whatever is necessary for this purpose has to be done by the State. It is also the constitutional obligation of the Court, as the guardian of the fundamental rights of the people, as a sentinel on the *qui vive*, to enforce the fundamental right of the accused to fair trial and his right to free legal aid or to secure assistance of a counsel, where he cannot afford to engage one, on account of indigence or poverty.

There are several reasons why, the right to legal aid or to avail legal services in a country like India, which is under-developing, democratic republic, wherein, the ‘Welfare State’

doctrine has been adopted, assumes wider significance. There are several reasons, aspects and facets prevalent in this country, which would prompt to have a very effective, useful and efficient infrastructure for providing free and competent legal aid in a country like India, where less than 33 percent of the people know how to write and read sufficiently and usefully. Majority of the people are poor or indigent and most of them live below the poverty line, even though poverty line is drawn liberally, and not upon an International Standard. It is imperative to reach the goal of 'equal access to justice,' which is a constitutional commandment and statutory imperative. Legal-aid is not a charity or a chance, but as stated, it is constitutional mandate to the State and right of public, which is not now an opinion, but a constitutional obligation and compulsion. As such it is not a pledge or a plan of a Government, but has assumed, the status of people's movement. Somebody has rightly said, "What is the use of the system, which does not help lowly and lost, poor and downtrodden and which creates distance between law and justice." It is in this context, the provisions for legal services have been made in the Constitution as well as in the Legal Services Authorities Act, 1987, over and above the provisions made in Section 304 of the Criminal Procedure Code, 1973.

2. *Constitutional Mandate*

"The State is under a constitutional mandate to provide free legal aid to an accused person who is unable to secure legal services on account of indigence and whatever is necessary for this purpose has to be done by the State. The State may have its financial constraints and its priorities in expenditure but, as pointed out by the Court in *Rhem v. Malcolm* [377 F. Supp. 995]: "the law does not permit any Government to deprive its citizens of constitutional rights on a plan of poverty" and to quote the words of Justice Blackmun in *Jackson v. Bishop* [404 F Supp 2d, 571]: "human considerations and constitutional requirements are not in this day to be measured by dollar considerations" (*Khatri v. State of Bihar*, AIR 1981 SC 928, 930).

The Founding Fathers of the Constitution of India have right from the Preamble, taken a positive approach of doctrine of philosophy of Equal Justice which becomes apparent on the plain perusal of the preamble of the Constitution. The preamble promise is further strengthened by the constitutional provisions in Articles 14, 19, 21, 22(1), 32, 39-A, 51-A and 226 of the Constitution of India. Article 22(1) of the Constitution, expressly provides that, "No person, who is arrested, shall be detained in custody, without being informed, as soon as may be, of the grounds for such arrest, nor shall he be denied of the right to consult and to be defended by a legal practitioner of his choice."

Long before the Constitution, even in the Old Criminal Procedure Code, under Section 340(1), it had been provided that:

"Any person, accused of an offence before the Criminal Court or against whom proceedings are instituted, under this Code, or any such Code, may of right, be defended by a pleader."

Free legal services an essential element of fair procedure: When under Article 21 of the Constitution of India, no person can be deprived of his life or personal liberty except according to the procedure established by law, it is not enough that there should be some

semblance of procedure provided by law but the procedure under which a person may be deprived of his life or liberty should be reasonable, fair and just [*Maneka Gandhi v. Union of India*, AIR 1978 SC 597]. Now, a procedure which does not make legal services available to an accused person who is too poor to afford a lawyer and who would, therefore, have to go through the trial without legal assistance, cannot possibly be regarded as reasonable, fair and just. It is an essential ingredient of reasonable, fair and just procedure to a prisoner who is to seek his liberation through the court's process that he should have legal services available to him.

Insertion of Article 39A providing for equal justice and free legal aid -As a principle of policy to be followed by the State: The Constitution (Forty-second Amendment) Act, 1976 has inserted Article 39-A as a Directive Principle of State Policy. This Article stipulates that

“39-A. **Equal justice and free legal aid** – The State shall secure that the operation of the legal system promotes justice, on the basis of equal opportunity and shall, in particular, provide free legal aid, by suitable legislation or schemes or in any other way, to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities” [Enforced w.e.f. 3.1.1977].

This article (Article 39-A) also emphasises that free legal service is an inalienable element of reasonable, fair and just procedure for without it a person suffering from economic or other disabilities would be deprived of the opportunity for securing justice. The right to free legal service is, therefore, clearly an essential ingredient of reasonable, fair and just procedure for a person accused of an offence and it must be held implicit in the guarantee of Article 21. This is a constitutional right of every accused person who is unable to engage a lawyer and secure legal services on account of reasons such as poverty, indigence or incommunicado situation and the State is under a mandate to provide a lawyer to an accused person if the circumstances of the case and the needs of Justice so require, provided of course the accused person does not object to the provision of such lawyer.

“It is [legal assistance to poor or indigent accused] necessary *sine qua non* of justice and where it is not provided, injustice is likely to result and undeniably every act of injustice corrodes the foundations of democracy and rules of law, because nothing rankles more in the human heart than a feeling of injustice and those who suffer and cannot get justice because they are priced out of the legal system, lose faith in the legal process and a feeling begins to overtake them that democracy and rule of law are merely slogans or myths intended to perpetuate the domination of the rich and the powerful and to protect the establishment and the vested interests...”

In *Khatris v. State of Bihar* [AIR 1981 SC 928] the Court went a step further and held that the constitutional obligation of the State to provide free legal service to an indigent accused extends not only at the stage of trial but also at the stage when he is first produced before the Magistrate. However, in *Suk Das v. Union Territory of Arunachal Pradesh* [AIR 1986 SC 991, 993] the Supreme Court, further observed that, “of course, it must be recognized that there may be cases involving offences, such as, economic offences or offences against law prohibiting prostitution or child abuse and the like, where social Justice may require that legal service may not be provided by the State.

Exercise of this fundamental right whether conditional upon the accused applying for free legal assistance: *In Sukh Das v. Union Territory of Arunachal Pradesh*, the Supreme Court while interpreting legal aid as a fundamental right which the state is constitutionally obliged to provide to every indigent accused in criminal proceedings, dealt with the question whether this fundamental right could lawfully be denied to the accused if they did not apply for free legal aid. The Court has observed:

“But the question is whether this fundamental right could lawfully be denied to the appellants if they did not apply for legal aid. Is the exercise of this fundamental right conditional upon the accused applying for free legal assistance so that if he does not make an application for free legal assistance the trial may lawfully proceed without adequate legal representation being afforded to him? Now, it is common knowledge that about 70% of the people living in rural areas are illiterate and even more than that percentage of the people are not aware of the rights conferred upon them by law. Even literate people do not know what are their rights and entitlements under the law. It is this absence of legal awareness which is responsible for the deception, exploitation and deprivation of rights and benefits from which the poor suffer in this land. Their legal needs always stand to become crisis oriented because their ignorance prevents them from anticipating legal troubles and approaching a lawyer for consultation and advice in time and their poverty magnifies the impact of the legal troubles and difficulties when they come. Moreover, because of their ignorance and illiteracy, they cannot become self-reliant; they cannot even help themselves. The law ceases to be their protector because they do not know that they are entitled to the protection of law and they can avail of the legal service programme for putting an end to their exploitation and winning their rights. The result is that poverty becomes with them a condition of total helplessness. This miserable condition in which the poor find themselves can be alleviated to some extent by creating legal awareness amongst the poor. That is why it has always been recognized as one of the principal items of the programme of the legal aid movement in the country to promote legal literacy. It would in these circumstances make a mockery of legal aid if it were to be left to a poor, ignorant and illiterate accused to ask for free legal service. Legal aid would become merely a paper promise and it would fail its purpose. This is the reason why in *Khatris v. State of Bihar* [AIR 1981 SC 928] we ruled that the Magistrate or the Sessions Judge before whom an accused appears must be held to be under an obligation to inform the accused that if he is unable to engage the services of a lawyer on account of poverty or indigence, he is entitled to obtain free legal services at the cost of the State...” [Refer also to *State of Kerala v. Kuttan*, 1988 Cri LJ 453].

In *Khatris v. State of Bihar*, the Supreme Court has held thus:-

“But even this right to free legal services would be illusory for an indigent accused unless the magistrate or the Sessions Judge before whom he is produced informs him of such right. It is the common knowledge that about 70 per cent of the people in the rural areas are illiterate and even more than that percentage of people are not aware of the rights conferred upon them by law. There is so much lack of

legal awareness that it has always been recognized as one of the principal items of the programme of the legal aid movement in this country to promote legal literacy. It would make a mockery of legal aid if it were to be left to a poor ignorant and illiterate accused to ask for free legal services. Legal aid would become merely a paper promise and it would fail in its purpose. The Magistrate or the Sessions Judge before whom the accused appears must be held to be under an obligation to inform the accused that if he is unable to engage the services of a lawyer on account of poverty or indigence, he is entitled to obtain free legal services at the cost of the State. Unfortunately the judicial Magistrate failed to discharge this obligation in the case of the blinded prisoners and they merely stated that no legal representation was asked for by the blinded prisoners and hence none was provided.ö

The Supreme Court in that case directed the magistrates and Sessions judges in the country-

öWe would, therefore, direct the magistrates and Sessions judges in the country to inform every accused who appears before them and who is not represented by a lawyer on account of his poverty or indigence that he is entitled to free legal services at the cost of the State. Unless he is not willing to take advantage of the free legal services provided by the State, he must be provided legal representation at the cost of the State.ö

The Supreme Court also directed the State of Bihar and required every other State in the country-

ö[T]o make provision for grant of free legal services to an accused who is unable to engage a lawyer on account of reasons such as poverty, indigence or incommunicado situation. The only qualification would be that the offence charged against the accused is such that, on conviction, it would result in a sentence of imprisonment and is of such a nature that the circumstances of the case and the needs of social justice require that he should be given free legal representation. There may be cases involving offences such as economic offences or offences against law prohibiting prostitution or child abuse and the like, where social Justice may require that free legal services need not be provided by the State.ö

Reports of Law Commission of India

Though even in the old Criminal Procedure Code, under Section 340 (1), it had been provided that: öAny person accused of an offence before the Criminal Court or against whom proceedings are instituted, under this Code, or under any such Code, may of right, be defended by a pleader.ö [Section 303 of the new Code corresponds to the said section, with the addition of the words -of his choiceø at the end]. The emphasis being on öany person accused of an offence in a criminal case is entitled to be defended, as of right, by an Advocateö, this right under the said section did not make it obligatory on the part of the Court in a Sessions case, to assign a pleader for the defence of the accused at the expenses of the State. However, many High Courts issued circulars and orders, and incorporated rules in the Criminal Rules of Practice providing for assignment of an advocate for the defence of an

accused in Session trials and other cases of serious nature in consonance with the Constitutional mandate and fundamental human rights.

Right to be provided with a lawyer by the State: For the first time it was in the year 1958, the Law Commission of India in its Fourteenth Report Volume I on the subject 'Reform of Judicial Administration' made certain recommendations for State legal aid and emphasized for right to assignment of counsel at government expense. It observed, - 'Unless some provision is made for assisting the poor man for the payment of court-fees and lawyer's fees and other incidental costs of litigation, he/she is denied equality in the opportunity to seek justice.' (p.487). Again in 1969 the 41st Law Commission Report, the Law Commission strongly recommended that representation by a lawyer should be made available at Government expenses to accused persons in all cases tried by a Court of Sessions (Vol.1, paras 24, 34-38). The Law Commission in its Forty Eighth Report also suggested for making provision for free legal assistance by the State for all accused who were undefended by a lawyer for want of means.

Recommendation codified in Section 30: This recommendation has now been codified in sub-section (1) of Section 304 of the Code of Criminal Procedure, with this change made by the Joint Committee, that the State aid will be available only where the accused 'has not sufficient means to engage a pleader'. Section 304 reads,-

"304. Legal aid to accused at State expenses in certain cases -

(1) Where, in a trial before the Court of Session, the accused is not represented by a pleader, and where it appears to the Court that the accused has not sufficient means to engage a pleader, the Court shall assign a pleader for his defence at the expense of the State.

(2) The High Court may, with the previous approval of the State Government, make rules providing for-

(a) the mode of selecting pleaders for defence under sub-section (1);

(b) the facilities to be allowed to such pleaders by the courts;

(c) the fees payable to such pleaders by the government, and generally, for carrying out the purposes of sub-section (1).

(3) The State Government may, by notification, direct that, as from such date as may be specified in the notification, the provisions of sub-section (1) and (2) shall apply in relation to any class of trials before other Courts in the State as they apply in relation to trials before Courts of Sessions.

The section provides that when in the trial and more so in trials before the Court of Sessions, the accused is not represented by a pleader or an Advocate and when it appears to the Court that the accused has not sufficient means to engage an Advocate, the Court shall assign a pleader or an Advocate for his defence at the expense of the State. Under Section 304(3), the State Government, may, by notification, direct that the provisions of sub-section (1) will apply to any class of trials before other Courts in the State.

A bare reading of the provisions under Section 304 of the Criminal Procedure Code make it crystal clear that in a criminal trial, the Magistrate or the Sessions Court before whom the accused appears must be held to be under an obligation to inform the accused that if he is unable to engage the services of a lawyer on account of poverty or indigence or any other disability, he is entitled to free legal services, at the cost of the State. It is, therefore, imperative for a Presiding Officer, in charge of a trial to inform every accused, who appears before him and who is not represented by a private lawyer on account of the poverty, ignorance or by any disability that he is entitled to free legal services, at the cost of the State.

While, it is settled position of law that to provide legal aid to accused persons without means in all cases tried by a Court of Session, is a mandatory constitutional necessity, it is further necessary that such lawyer should be of competence. Such counsel appointed for the accused must be given the complete brief of the case and time to prepare the case. Failure to this is a denial of proper representation of the accused and vitiates the trial. [*Raj Kishore v. State*, 1969 Cri LJ 860 (Cal): AIR 1969 Cal 321]. Also, no counsel can be thrust upon the accused without ascertaining the wishes of the accused and without giving him any choice in selecting his lawyer as Article 22(1) of the Constitution guarantees that choice to be accused.

Committee for Implementing Legal Aid Scheme (CILAS)

Concerned with the programme of legal aid as it is the implementation of a constitutional mandate, in September, 1980, the Government of India, with the object of providing free legal aid, by a resolution dated 26th September, 1980, appointed a Committee for Implementing Legal Aid Schemes (CILAS) with P.N. Bhagwati J (as he then was) as the Chairman to monitor and implement legal aid programs on a uniform basis in all the States and union territories. The Committee evolved a model scheme for legal aid programme, [which includes organization of legal aid camps] and set up several legal aid and advice boards throughout the country.

But on a review of the working of the CILAS, certain deficiencies had come to the fore. It was, therefore, felt that it would be desirable to constitute statutory legal service authorities at the national, State and District levels so as to provide for the effective monitoring of legal aid programmes. Therefore, the Legal Services Authorities act, 1987 (Act No.39 of 1987) was enacted with a view to constitute Legal Services Authorities at National, State and District Levels. However, the Act not having been brought into force (The Act was brought into force with effect from 9-11-1995, almost eight years after its enactment) the term of Committee was extended again for a period of one year on and from the 14th May, 1990 or till the National Legal Service Authority was constituted under the Legal Services Authorities Act, whichever was earlier.

Constitution of Legal Aid Boards and Committees:

Many states evolved their own programmes and even enacted State Legislation or promulgated certain schemes or Rules to provide Legal Aid to under privileged and disadvantaged sections of the society. For effective implementation and to achieve the desired objective of providing Free Legal Aid and Advice to the poor, State Boards, District Legal Aid Committees and Taluka Committees were constituted. But it was felt that enactment of a Central Legislation to co-ordinate and promote the activities of the various States in providing

Legal Aid and Advice to the poor was desirable to monitor and implement legal aid programmes on a uniform basis in all the States and union territories.

Need for Strategic Legal Aid Programme

It is now acknowledged throughout the country that the legal aid programme which is needed for the purpose of reaching social justice, to the people cannot afford to remain confined to the traditional or litigation oriented legal aid programme but it must, taking into account the socio-economic conditions prevailing in the country, adopt a more dynamic posture and take within its sweep what we may call strategic legal aid programme consisting of promotion of legal literacy, organization of legal aid camps, encouragement of public interest litigation and holding of *lok adalats* or *niti melas* for bringing about settlements of disputes whether pending in Courts or outside. [*Center of Legal Research v. State of Kerala*, AIR 1986 SC 2195]. As observed by Justice Bhagwati "...what is necessary is to supplement the traditional legal service programme with strategic legal service programme. The strategic legal service programme aims at prevention and elimination of various kinds of injustices which the poor as a class suffer because of poverty and endeavours to launch a frontal attack on the poverty itself with the ultimate goal of its eradication from the society. It does not involve merely quantitative extension of traditional legal services to the poor but instead requires a qualitative and radical change in the whole emphasis, aims and functioning of the legal service programme. It involves novel, radical, more dynamic and multi-dimensional uses of law and the legal process and seeks to provide representation to groups of social and economic protest. It does not regard litigation as playing an important or even significant role in the life of the poor and hence refuses to consider the court as a centre of all legal activity and is concerned with the problems of the poor as a class rather than with the individual problems of the poor which may be projected in litigation in court. The strategic legal service programme is thus directed towards group-oriented approach to the problem of poverty rather than individual-oriented treatment and basically it is calculated to make the poor as class-conscious and powerful, self-reliant and capable of using law as a potent weapon for various purposes....."

A common man has started feeling that justice itself is on trial. It is, therefore, imperative to evolve effective and efficient strategies both preventive and protective:

- (1) To manage: Unmanageable; (2) To break: Unbreakable; (3) To beat: Unbeatable; (4) To hit: Unhitable; (5) To defend: Indefensible.

Looking to the present situation in the country, we are obliged to create and constitute a Neo-Jurisprudence, a public-oriented participation performing, progressive, professional and pervasive programmes. Unfortunately, in the present system, the litigant, who is the heart of judicial anatomy, is the most neglected segment. He is the consumer of justice and he should be respected. The litigant-consumer of justice and heart of our system must receive equal, effective, inexpensive and speedy trial and justice.

In our country, amount spent or expenditure for administration of law and justice is reported 0.2 percent of the Gross Domestic Product (G.D.P.) which is grossly inadequate and insufficient in a democratic set up. It is, therefore, necessary to constitute a regular mechanism, whereby, we can take and evaluate Judicial Cardiogram for necessary urgent and

useful, effective and ebullient reforms to translate Constitutional mandate and obligation propounded right from Preamble Promise in their fighting faith by its Founding Fathers, a reality.

Legal literacy: Legal literacy is a pre-condition to maintain the rule of law. As observed by Justice *Bhagwati*, the strategic legal service consists of creating legal awareness or what may be described as promoting legal literacy, for knowledge of their rights and entitlement would give to the poor strength and confidence to fight and help them to avoid needless difficulties which arise from ignorance. Legal aid camps can also be arranged as part of the strategic legal service programme for carrying legal services to the doorsteps of the rural poor. (*Quoted in Equal Justice and Forensic Process: Truth and Myth* by V.R. Krishna Iyer, at p.47). The model scheme for Legal Aid evolved by the Committee for Implementing Legal Aid Scheme (CILAS) also included programme for promotion of legal literacy and spread of legal awareness among the weaker sections of the community by way of organizing legal Aid camps, especially in rural areas, slums or labour colonies. Voluntary organizations, social action groups, journalists and even advocates have been rendering significant service to educate the people about the laws, their rights and benefits flowing out of the various schemes and measures. The assistance of voluntary agencies and social action groups must therefore be taken by the State for the purpose of operating the legal aid programme in its widest and most comprehensive sense, and this is an obligation which flows directly from Article 39 A of the Constitution.

Public Interest Litigation

Public Interest Litigation has been devised as a tool to secure benefit to a class or group of persons, either victims of exploitation, or oppression or who are denied the constitutional rights but cannot come to court personally for relief by reason of ignorance, poverty, destitution, helplessness, disability or social or economic disadvantage. It is a form of litigation where jurisdiction of the Court is invoked on behalf of such persons or group of persons by a third person or a social action group or a social organization regardless of its personal injury. Cases of this kind involve the rights of thousands of people at a time, unlike traditional litigation, which are basically of adversary character and concerns disputes between individuals. Whenever such litigations have come to Court, the Courts in the country have done everything to help the poor and to break every procedural barrier to deliver justice to the poor. To quote Krishna Iyer, "Moulding the remedies to suit the needs of the situation so that efficacious and comprehensive remedies may be granted, regardless of pickled precedents in remedial methodology, is part of judicial dynamics."

Public interest litigation which is a strategic arm of the legal aid movement and which is intended to bring justice within the reach of the poor masses, who constitute the low visibility area of humanity, is a totally different kind of litigation from the ordinary traditional litigation which is essentially of an adversary character where there is a dispute between two litigating parties, one making claim or resisting such relief. Public interest litigation is brought before the court not for the purpose of enforcing the right of one individual against another as happens in the case of ordinary litigation, but it is intended to promote and vindicate public

interest which demands that violation of constitutional or legal rights of large number of people who are poor, ignorant or in a socially or economically disadvantaged position should not go unnoticed and unredressed. That would be destructive of the Rule of Law, which forms one of the essential elements of public interest in any democratic form of government. The Rule of Law does not mean that the protection of the law must be available only to a fortunate few or that the law should be allowed to be prostituted by the vested interests for protecting and upholding the *status quo* under the guise of enforcement of their civil and political rights. The poor too have civil and political rights and the Rule of Law meant for them also, though today it exists only on paper and not in reality. [***People's Union for Democratic Rights v. Union of India***, AIR 1982 SC 1473].

Public interest litigation is essentially a co-operative or collaborative effort on the part of the petitioner, the State or public authority and the court to secure observance of the constitutional or legal rights, benefits and privileges conferred upon the vulnerable sections of the community and to reach social justice to them.

So far the courts have been used only for the purpose of vindicating the rights of the wealthy and the affluent. It is only these privileged classes which have been able to approach the courts for protecting their vested interests. It is only the moneyed who have so far had the golden key to unlock the doors of justice. But, now for the first time the portals of the court are being thrown open to the poor and the downtrodden, the ignorant and the illiterate and their cases are coming before the Courts through public interest litigation which has been made possible by the recent judgment delivered by the Supreme Court in ***S.P. Gupta v. President of India***, AIR 1982 SC 149 [*Judges Appointment and Transfer case*].

The Legal Aid movement and public interest litigation seek to bring justice to these forgotten specimens of humanity who constitute the bulk of the citizens of India and who are really and truly the people of India who gave to themselves this magnificent Constitution. It is true that there are large arrears pending in the Courts but that cannot be any reason for denying access to justice to the poor and weaker sections of the community. No State has a right to tell its citizens that because a large number of cases of the rich and the well to do are pending in our Courts, we will not help the poor to come to the Courts for seeking justice until the staggering load of cases of people who can afford, is disposed of. The time has now come when the Courts must become the courts for the poor and struggling masses of the country. They must shed their character as upholders of established order and the *status quo*. They must be sensitized to the need of doing justice to the large masses of people to whom justice has been denied by a cruel and heartless society for generations. The realization must come to them that social justice is the signature tune of our Constitution, and it is their solemn duty under the Constitution to enforce the basic human rights of the poor and vulnerable sections of the community and actively help in the realization of the constitutional goals. This new change has to come if the judicial system is to become an effective instrument of social justice, for without it, it cannot survive for long. Fortunately, this change is gradually taking place and public interest litigation is playing a large part in bringing about this change. It is through public interest litigation that the problems of the poor are now coming to the forefront and the entire theatre of the law is changing. It holds our great possibilities for the future. In ***M.C. Mehta v. Union of India*** [AIR 1987 SC 1086], a constitutional Bench of the Apex

Court while considering the scope of public interest litigation to grant compensation to the victims of hazardous or dangerous activities when deaths or injuries were caused to them on account of the accident during the operation of such activities, has held that the law should keep pace with changing socio-economic norms; where a law of the past does not fit in the present context, the Court should evolve new law in a public interest litigation. The Court has incidental and ancillary powers in exercise of which it can devise new methods and strategy in securing enforcement of fundamental rights particularly in public interest litigation or social action cases.

In *Bandhua Mukti Morcha v. Union of India* [AIR 1984 SC 802, 815], the Supreme Court held that when the poor come before the Court, particularly for enforcement of their fundamental rights, it is necessary to depart from the adversarial procedure and to evolve a new procedure which will make it possible for the poor and the weak to bring the necessary material before the Court for the purpose of securing enforcement of their fundamental rights. The Supreme Court further observed:

“It must be remembered that the problems of the poor which are now coming before the Court are qualitatively different from those which have hitherto occupied the attention of the Court and they need a different kind of lawyering skill and different kind of judicial approach. If we blindly follow the adversarial procedure in their case, they would never be able to enforce their fundamental rights and the result would be nothing but a mockery of the Constitution. We therefore to abandon the *laissez faire* [Let things be] approach in the judicial process particularly where it involves a question of enforcement of fundamental rights and forge new tools, devise new methods and adopt new strategies for the purpose of making fundamental rights meaningful for the large masses of the people. And this is clearly made permissible by the language of clause (2) of Article 32 because the Constitution-makers while enacting that clause have deliberately and advisedly not used any words restricting the power of the Court to adopt any procedure which it considers appropriate in the circumstances of a given case for enforcing the fundamental right. It is true that the adoption of this non-traditional approach is not likely to find easy acceptance from the generality of lawyers because their minds are conditioned by constant association with the existing system of administration of justice which has become ingrained in them as a result of long years of familiarity and experience and become part of their mental make-up and habit and they would therefore always have an unconscious predilection for the prevailing system of administration of justice. But if we want the fundamental rights to become a living reality and the Supreme Court to become a real sentinel on the *qui vive*, we must free ourselves from the shackles of outdated and outmoded assumptions and bring to bear on the subject fresh outlook and original unconventional thinking.”

The traditional rule of locus standi considerably relaxed by the Supreme Court

The traditional rule in regard to ‘*locus standi*’ that judicial redress is available only to a person who has suffered a legal injury by reason of violation of his legal rights- by some agency or individual has now been considerably relaxed by the Supreme Court. In ***S.P. Gupta***

v. President of India [AIR 1982 SC 149, 188], the Supreme Court speaking through Bhagwati, J. has held:

It may, therefore, now be taken as well established that where a legal wrong or legal injury is caused to a person or to a determinate class of persons by reason of violation of any constitutional or legal right or any burden is imposed in contravention of any constitutional or legal provision or without authority of law or any such legal wrong or legal injury or illegal burden is threatened and such person or determinate class of persons is by reason of poverty, helplessness, or disability or socially or economically disadvantaged position, unable to approach the Court for relief, any member of the public can maintain an application for an appropriate direction, order or writ in the High Court under Article 226 and in case of breach of any fundamental rights of such person or persons, in this Court [Supreme Court] under Article 32 seeking judicial redress for the legal wrong or injury caused to such person or determinate class of persons....ö

THE INSTITUTION OF LOK ADALAT

Lok Adalats or Niti Melas

Lok Adalat has emerged lately as a new system of dispensation of justice and received tremendous response and wide support from different sections of the society. The system visualized as an alternative dispute settlement mechanism, evolved as a part of the CILAS programme with the object of taking justice to the doorsteps of the poor and to give speedy and cheap justice to those who cannot afford to fight the costly legal battle. Lok Adalat has come to be seen as an institution or an agency, for handling disputes by conciliation and counseling, a species of peace making. Lok Adalats do not treat the issues before it as disputes under contest and decide cases, but treat them as differences and resolve them by conciliatory and persuasive efforts. The process involves discussing with the parties the pros and cons of their case and explaining to them advantages and disadvantage of resolving their dispute by conciliation and compromise, or in the alternative, of resorting to the traditional dilatory procedure of adversarial litigation in regular Courts. The process of participatory justice is a unique feature of this institution. Dispute in the Lok Adalats is resolved by discussion in an informal atmosphere, in which parties and panel members of the Lok Adalat participate, and settlement is reached with the mutual and free consent of the parties. Unlike in litigations concluded in our regular Courts, being in the nature of compromises, there is no winner and no loser in a mediated resolution of dispute by Lok Adalats. The intention being to help warring parties to work things out, shake hands, and become friends (or not enemies again), resolution of disputes in Lok Adalat, is more likely to bring or keep people together and, therefore, more conducive to harmonies. There has been in the last few years a growing interest in the institution and it has emerged as a forum for alternative dispute resolution, to supplement the existing justice delivery system. These forums based on the concept of dispute settlement mechanism by way of counseling persuasion and conciliation, function as peacemaker, and are intended to work informally with simplified procedure.

As part of CILAS programme, *lok adalats* (Peoples Court) were constituted and *niti melas* were organized at various places in the country, under the supervision of State Legal

Aid and Advice Boards, for the disposal, in a summary way and through the process of arbitration and settlement between the parties, of a large number of cases expeditiously and with lessor costs. The organizers of the Lok Adalats, fixed the date and place of the holding of Lok Adalats about a month in advance. Information about the holding of Lok Adalat was widely publicized through press and other means of publicity. Presiding Officers of various Courts were requested to look into the cases pending in their respective Courts and to see whether there was possibility of conciliation in these cases. Such of those cases where there was reasonable possibility of conciliation were identified and listed. Cases were analyzed, classified under various heads according to the nature of dispute and substance recorded. Then, pre-Lok Adalat conferences were held and parties to the dispute were approached and motivated by the legal aid teams, which included, law students, social workers and volunteers to resolve their disputes through Lok Adalats. Before the case was taken up by the Lok Adalat, the mediation process or justice process through Lok Adalat was initiated by way of thorough discussion with the parties as to the details of the case and desirability of conciliation and compromise and the scope of a settlement mutually acceptable to the parties was assessed. The team involved in the mediation or Lok Adalat justice process, consisted of the members of local Legal Aid Committee, advocates, spirited public men or elders of the locality or social activists and called conciliators. This process was continued and resumed at the campsite of the Lok Adalat. Once parties had made a compromise or arrived at a settlement, it was reduced into writing by members of the panel of the Lok Adalat, signatures of the parties were obtained and countersigned by the members of the panel and passed on to the Court concerned for final decree or order. Multiple panels, according to the need of the Lok Adalat, were set up. These panels or members of Lok Adalat consisted of two or three persons, one of them could be a retired judge or a senior retired civil servant or an advocate, a law teacher, and others, social workers and eminent persons of the locality, carefully chosen by the Local Aid Committees on the basis of their record of public services, honesty and respectability among local population, supposed to be good conciliators, concerned with the cause of social justice and sympathetic to people's problem. When the compromise so arrived at was presented before the Court concerned, the Court was expected to look into the question whether all the parties to the suit were entering into settlement or compromise, examine the fairness and legality of the settlement or compromise, and satisfy itself that compromise had been arrived at by free and mutual consent of the parties. After this process of due verification of the compromise made or settlement arrived at by the parties, decree or orders were passed in terms of the settlement or compromise.

Importance of the institution of Lok Adalat in the present context: The revolutionary evolution of resolution of dispute by one or other means, Alternate Dispute Redressal (A.D.R.) mechanism, has been, successfully, translated in various countries. While, in India, roughly, 91 percent of cases instituted in the Courts go for trial and only 9 percent of cases are settled without judicial agitation, in U.S. A., more than 90 percent of cases involving legal disputes are settled before they go for trial.

The institution of Lok Adalat has been acknowledged as an effective Alternate Dispute Redressal agency and gaining wide acceptability. More and more people are choosing this forum to help settlement of dispute through negotiation, counseling, conciliation, settlement

and compromise than to go for a verdict through court. It provides a quicker remedy, it is less expensive, less time consuming, does not permit dilatory tactics of parties to prolong litigation. It saves parties from intricacies of procedure and is concerned more with narrowing the differences and finding settlement in accordance with natural justice, rules of equity and other legal principles than with expatiating upon procedural complexities and their strict application. It is based on jurisprudence of peace and provides a rendezvous for social amity and affinity and social justice. It aims at promoting larger interest, harmony, comity and policy and jurisprudential cohesion and environment. Looking to the present situation in the country the role of Lok Adalat assumes higher degree of importance.

It is reported that 34 percent of the total world's poor populace is in India. More than majority persons live below poverty line. Most of the rural people in India who reside in more than 5,18,000 villages are either, illiterate, indigent or ignorant of their rights. Even in case of urban populace most of them are ignorant about their legal rights, who are otherwise, literate. The urbanized populace lack awareness about their legal rights. Our present traditional system of justice is suffering from maladies like huge and heavy expenses; unexpected and unpredictable delay in disposal and, cumbersome and complex process of Court. In view of the failure to provide easy, cheap and expeditious accessibility, mental barrier is developed amongst many persons to suffer injustice. As a result of which, a common man has started looking at it, as foe rather than a friend. The life span of a civil case or a lawsuit in civil side is ranging average, between 8 to 12 years. Who knows even after a successful decision or order in favour of a party, whether he would be able to see light at the end of tunnel after having passed through the long legal and procedural conduit pipes? Even after a decree awarded or order passed on judicial side in favour of a party, after number of years, successful party has to again undergo the second round of litigation at the stage of execution. It is not a *Pity v. Duty*? Pending workload of cases in Indian Courts has rapidly crossed the 30 millions as per latest survey, and many more are under inquiry or investigation stage, etc. The ratio of Judges per million in India is almost 9, whereas, it is more than 115 in U.S.A. In case of ratio of Advocate available in India, is far less than developed countries. There are about only 4,50,000 and odd number of Advocates in India, which has populace of 1 billion. In view of these circumstances, the institution of Lok Adalat is being looked upon as an effective Alternate Dispute Redressal Forum, which has proved to be dialectical and speedy. By bringing justice at their doorstep, it gets the poor litigants justice without having to meet huge costs and help them to settle their disputes amicable. It creates not only peace but also a culture of compromise. It provides a rendezvous for social amity and affinity and social justice. [Cf. *Dineshbhai Dhemnrai v. State of Gujarat*, 2001 (1) GLR 603].

Legal status for Lok Adalat: The Lok Adalat, a specie of conciliatory agency, proved to be very popular in providing for a speedier system of administration of justice at lessor costs. The success of these Lok Adalats in taking justice to the doorsteps of poor and the needy and making justice quicker and less expensive raised a new ray of hope for those who could not otherwise afford to fight the protracted costly legal battle for assertion and protection of their rights under the law. The institution received wide support from concerned citizens and spread to disputes of diverse and varied nature and resolved cases pertaining to compoundable criminal complaints, civil and revenue disputes, MACT cases, and even institutional cases

(cases where one of the parties is an institution, such as, municipality or a corporation). The number of cases resolved by these Lok Adalats also began to reflect on the workload of our regular Courts. The institution of Lok Adalats was, however, functioning as a voluntary agency without any statutory backing for its decisions. In view of its growing popularity, there was demand for providing a statutory backing to this institution and the awards given by Lok Adalats. It was being felt that such a statutory support would not only reduce the burden of arrears of work in regular courts, but would also provide social justice and serve to achieve the constitutional mandate under Article 39 A. The Government was convinced that this admirable alternate dispute settlement mechanism shall now only reduce the burden of arrears of work in regular courts, but would also take justice to the doorsteps of the poor and the needy and make justice quicker and less expensive and felt that if the Lok Adalats were given statutory status they could function more effectively. Therefore, the Government in exercise of its duty under Article 39 A, drafted the Legal Services Authorities Bill 1987 and the same was enacted by the Parliament as Act No. 39 of 1987, acknowledging the institution of Lok Adalat and giving statutory status to Lok Adalats. However, the Act was brought into force with effect from 9-11-1995, almost eight years after its enactment.

Public Participation in Legal Aid Programme

Role of Voluntary Organizations and Social Action Groups: In *Centre of Legal Research v. State of Kerala*, AIR 1986 SC 2195, the Supreme Court held that there could be no doubt that if the legal aid programme was to succeed it must involve public participation. The Court observed:-

“The State Government undoubtedly has an obligation under Article 39A of the Constitution which embodies a directive principle of State Policy, to set up a comprehensive and effective legal aid programme in order to ensure that the operation of the legal system promotes justice on the basis of equality. But we have no doubt that despite the sense of social commitment which animates many of our officers in the Administration. It is absolutely essential that people should be involved in the legal aid programme because the legal aid programme is not charity or bounty but it is a social entitlement of the people and those in need of legal assistance cannot be looked upon as mere beneficiaries of the legal aid programme but they should be regarded as participants in it.”

Emphasizing the importance of role that could be played by voluntary organizations and social action groups in securing people's participation and involvement in the legal aid programme, the Supreme Court went on to observe :-

“If we want to secure people's participation and involvement in the legal aid programme, we think the best way of securing it is to operate through voluntary organizations and social action groups. These organizations are working amongst the deprived and vulnerable sections of the community at the grass-root level and they know what are the problems and difficulties encountered by these neglected sections of the Indian humanity. They have their finger on the pulse of the people and they know from their own experience as to what are the unmet legal needs of the people, what are the sources of exploitation and injustice to the underprivileged segments of

society and what measures are necessary to be taken for the purpose of ending such exploitation and injustice and reaching social or distributive justice to them. We are therefore definitely of the view that voluntary organizations and social action groups must be encouraged and supported by the State in operating the legal aid programme. It is now acknowledged throughout the country that the legal aid programme which is needed for the purpose of reaching social justice to the people cannot afford to remain confined to the traditional or litigation oriented legal aid programme but it must, taking into account the socio-economic conditions prevailing in the country, adopt a more dynamic posture and take within its sweep what we may call strategic legal aid programme consisting of promotion of legal literacy, organization of legal aid camps, encouragement of public interest litigation and holding of Lok Adalats or *niti melas* for bringing about settlements of disputes whether pending in Courts or outside. The assistance of voluntary agencies and social action groups must therefore be taken by the State for the purpose of operating the legal aid programme in its widest and most comprehensive sense, and this is an obligation which flows directly from Article 39A of the Constitution.ö

Role of the Bench and the Bar: In various countries, particularly, in United States and other Western countries, the contribution of the Bar in rendering free and competent legal-aid is praiseworthy and it must be emulated. Legal Aid fraternity must respond with juristic sensitivity to the voice from the silence zone (a class of litigants) and mass voice of weak, meek, poor, suppressed and exploited women and destitute children so as to create evolving *ebullient echo* for the silent sector. The Bar must evolve scheme to ensure that unprotected is not priced out of Market. The Bar is, really, a backbone of the legal services to compliment and complete the Constitutional obligation and obtain statutory rights of millions of indigent, needy, handicapped and deserving people.

To save the Nation, a catalytic role has to be played by Legal Aid in the larger interest of weaker sections. N.A.L.S.A. has undertaken various important and effective and appreciable Legal-Aid programmes and, therefore, members of Bench and Bar, N.G.Os. and Government Agencies must render voluntary helping hand in such noble and novel projects. [See *Dineshbhai Dhemendrai v. State of Gujarat*, 2001 (1) GLR 603].

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WELFARE STATE AND RULE OF LAW

W. Friedmann

The scientific significance of the vast volume of discussion of and otherwise of about the meaning of the rule of law is of modest proportions.

In a purely formal sense, the rule of law means no more than organized public power. In that sense, any system of norms based on a hierarchy of orders, even the organized mass murders of the Nazi regime, qualify as law. As the science of law is understood by positivists theories of the rule of law means the rule of organization. Such a concept is as unassailable as it is empty.

It is on the rule of law in its ideological sense, as implying the yardstick by which to measure good against bad law that the discussion has centred. The difficulty however is that to give to the rule of law concept a universally acceptable ideological content is as difficult as to achieve the same for natural law. In fact, the two concepts converge. Just as natural law philosophy covers whole spectrum from revolutionary to ultra-conservative ideologies, so the rule of law means to one the absolute integrity of private property, to another the maintenance of private enterprise, free from state control and official regulation, and to another the preservation of the right to work against the power of unions to determine conditions of labour. To some, the rule of law means a minimum of administrative power, even if it entails the sacrifice of good government, whereas to others it means, on the contrary, assurance by the state to all of minimum standards of living and security.

Is it possible to extract, from the welter of extravagant and conflicting claims, any minimum content that is generally acceptable? Such an attempt must, of course, base itself on values and standards acceptable to contemporary society, not on conditions of the past. For this reason, we already noted in an earlier chapter (see p.378), Dicey's formulation of the rule of law is no longer acceptable, since it equates the rule of law with the absence not only of arbitrary, but even of wide discretionary power.

The weaknesses of Dicey's conception are magnified in the modern reformulation of the rule of law by Hayek, which (a) identifies the rule of law with the economic and political philosophy of *laissez-faire*, and (b) is predicated on the fixity of legal rules, and the corresponding absence of judicial discretion.

Other than in the purely formal sense, we cannot formulate any content for the rule of law which would be equally applicable to Democratic, Fascist, Socialist and Catholic states. The problem is narrowed down if we seek to establish a meaning for the rule of law in modern democratic society, but even here we shall have to differentiate between various types of democracies. Thus, the Common-law tradition emphasizes the need for a unitary system of judicial control as an essential safeguard of individual liberties against administrative arbitrariness, while the Continental systems regard the full-fledged hierarchy of administrative courts as a more secure safeguard against abuse of public power.

But the differences within the common-law family are no less important, especially as between the British and the American models of a 'government under law'. Any attempt to

formulate a concept of the rule of law acceptable to modern democratic ideas must seek to find a common denominator.

A democratic ideal of justice must rest on the three foundations of equality, liberty and ultimate control of government by the people. It is, however, far from easy to give these concepts a specific content. Democracy is certainly based on the ideal of equality, but no democratic state has seriously attempted to translate this ideal into the absolute equality of all. There are numerous inevitable inequalities of function and status, between adults and infants, between sane persons and insane, between civilians and military, between private citizens and officials. We can still not formulate the principle of equality in more specific terms than Aristotle who said that justice meant the equal treatment of those who are equal before the law. We can give to this apparent tautology a more concrete meaning by saying that a democratic ideal of justice demands that inequalities shall be inequalities of function and service but shall not be derived from distinctions based on race, religion, or other personal attributes. In a society governed by international law we should add that inequalities must not be based on nationality. But in a society still dominated by national sovereignty this is no more than a pious aspiration.

The meaning of 'liberty' is hardly more easy to define. In terms of a democratic ideal of justice, liberty means certain rights of personal freedom which must be secure from interference by government. They include legal protection from arbitrary arrest, freedom of opinion and association, of contract, labour and many others. Briefly, they may be subsumed under the two broad categories of the freedom of the person and the freedom of the mind. But there is perhaps only one legal and constitutional maxim of general validity which can be deduced from this principle, that in so far as an individual is granted specific rights they should be secure from arbitrary interference.

This means that a judiciary as independent from interference by the executive as possible, given the interlocking of state functions and the human factor in the judicial function, is an essential of the democratic ideal of justice. But it is impossible to lay down a generally accepted rule either as to the substance of those rights or as to the manner of their protection. The Declaration of Rights, adopted in 1948 by the United Nations, is vastly different from the Bill of Rights embodied in the American Constitution. The Australian Constitution contains no individual rights other than the guarantee of religious freedom and perhaps- though this is still very much open to doubt-a protection of the individual from the restriction of free inter-state trade by state regulation (Section 92), British law knows of no guarantees of individual rights other than the limited guarantees of personal freedom in the Bill of Rights of 1688 and the Habeas Corpus Acts. Some additional protection for individual is provided by the procedures established under the European Convention on the Human Rights and Fundamental Freedoms. In one type or democracy, a written constitution, which it is normally very difficult to alter, formulates and at the same time petrifies the meaning of the rule of law in a manner binding upon Legislative and executive alike. Under these systems, a law court acquires the decisive function or an authoritative interpreter of the meaning of the rule of law, within the framework of the Constitution. This conception or 'Government under law', classically represented by the United States legal system, commends itself especially to federal democracies (though not to all of them) and the post-war Constitution of West

Germany and India have placed a Court in a comparable position of ultimate arbiter, both of individual rights guaranteed in the constitution, and of the respective rights and powers of federation and states. Although the Canadian Bill of Rights (1960) is, in form, an ordinary statute, the Supreme Court of Canada, in the *Drybone* case treated it as 'higher law', which invalidates any legislative provision incompatible with it (such as discrimination against Indians). The only difference between this type of constitutional guarantee and that of the aforementioned federal constitutions is that the Canadian Bill of Rights can, in theory, be amended or abrogated by ordinary statute. It is difficult to exaggerate the difference between this system of ultimate judicial control, which gives way to political control only in the rare cases of constitutional amendment, and the purely political control of constitutional power which prevails in countries such as Great Britain. There the rule of law leaves Parliament as the supreme law-giver, and the Judge has the much more limited function of interpreting statutes, in so far as they come before him. If his interpretation differs too much from that of prevailing public opinion, a simple statute will alter the law. The difference between these two types of democratic systems is far more fundamental than that between English and Continental ideals of justice which Dicey exaggerated so much,

Lastly, the principle of control by the people means that law must ultimately be the responsibility of the elected representatives of the people. This is, indeed, a vital principle but it can say little about the technique by which the modern legislator can discharge this function.

A more serious and universal danger to the principles of representative democracy arises from the decline of active civic participation- a product of the explosive increase of numbers, of urbanization and of the dulling impact of modern mass media of communication. Some democracies - e.g. Australia - seek to solve the problem of apathy by statutory compulsion to vote. But even such a system-which may other democracies reject & as basically undemocratic - cannot create an active sense of participation, beyond the occasional process of voting. On the national level, only a few small democracies, notably, Switzerland has been able to preserve something of a direct participation of the average citizen in national processes. The large democracies of today must seek to maintain or revive the average citizen's sense of responsibility and participation by a variety of devices: education in public and international affairs, which of course, is meaningful only where freedom of press and other media of opinion is vigorously maintained ; the decentralization of functions in the body political which enables the citizen to participate actively in the affairs of his local community (covering such vital fields as educational health, town planning and the like), of his church, his trade union or the various social services. None of these devices can counter the basic facts of our society, which tend to separate the elected representatives of the people more and more from the electors, because of numbers, distances and the complexities of the modern machinery of government. It is all the more important that the law should be rigorous and vigilant in its watch over abuses, e.g. in assuring freedom from pressure in elections, in the standards of integrity imposed upon members of legislative bodies no less than those of the executive and the judiciary. By such preventive and curative devices, the law can help to maintain or restore the principles of control by the people - and the means by which it attempts to do so much vary from country to country and from one situation to another. The

basic safeguard or this aspect of the 'rule of law' lies, however, in extra-legal elements only a society whose members are imbued with their personal sense of responsibility can profit from legal safeguards.

No contemporary analysis of the rule of law can ignore the vast expansion of government functions which has occurred as a result both of the growing complexity of modern life, and of the minimum postulates of social justice which are now of the established public philosophy in all civilized countries.

Five different state functions call for analysis. They result from the activities of the state: first, as Protector; secondly, as Provider; thirdly, as Entrepreneur; fourthly, as Economic Controller; fifthly, as Arbitrator.

The state acts first as a protector. This is its traditional function, and classical liberal thought regards it as the only legitimate function of the state. Older British and American decisions reflect this conception in describing defence, foreign affairs, police and the administration of justice as the legitimate functions of the state. To this may be added a limited taxing power confined to the efficient discharge of these functions. These are the traditional spheres of state sovereignty, and consequently, it is in this field that the inequalities which detract from the rule of law in Dicey's sense are most evident, though Dicey consistently attempted to belittle them for the sake of his principle. The immunities and privileges of the Crown, in regard to litigation, taxing, submission to statutes and other fields, are survivals of feudal sovereignty; the special law and jurisdiction for military forces are an aspect of the defence power. The important prerogatives of the executive lie in the fields of foreign affairs and defence. The emergency defence powers of the executive in time of danger, the so-called acts of state, and other prerogatives which are above judicial scrutiny are all detractions from the principle of equality. They are bearable only as long as state functions are limited. As the activities of the state extend in the direction of industrial and commercial enterprise and of social services, the whole field of these privileges and immunities requires redefinition and limitation; otherwise it would gradually engulf a growing portion of the whole field of law.

But for further and increasingly important functions of the modern state now look for adequate legal analysis. The first of these is the function of the state as provider. Legally it expresses itself in two different ways. Many important social services are discharged through the imposition of compulsory duties and conditions on private relationships. A multitude of statutory duties affects both public and private law; their infringement leads to fines, as well as to remedies at the suit of persons protected by the statute. There is a parallel expansion of common-law duties of employers towards employees through the assimilation of new principles of public policy by the law courts. At the same time, social minimum standards are enforced through compulsory conditions in contract. Service contracts are subject to many such compulsory terms. The Truck Acts invalidate provisions for payment in kind to defined categories of servants. Repatriation Acts compel the reinstatement of ex-servicemen. Agriculture Acts lay down compulsory terms of agricultural tendencies in the interests of agricultural efficiency. Employment contracts are subject to compulsory insurance terms.

The discharge of social-service functions also requires a multitude of active administrative and managerial functions by government departments or independent public authorities. Public and Private law are intermingled. Catchment boards, regional hospital boards, repatriation Commissions, forest commissions, discharge administrative functions of a social-service character. In doing so, they must make contracts, buy and sell large quantities of equipment and other goods, engage and dismiss staff, and undertake altogether a multitude of activities regulated by the law of property, tort and contract. The main legal problem here is the adjustment of discretion and private law obligations. The discussion of this problem has shown the need to bring the legal duties of public authorities into line with the general law, except where this would impair the fulfillment of overriding public duties.

Next the modern state acts as entrepreneur. It increasingly engages in the conduct of industrial and commercial activities. It does so either directly, through the state ownership of ships or railways or increasingly through independent corporate authorities, such as coal boards, transport commissions, atomic energy authorities or state trading and development corporations. Sometimes, the state simply acquires a controlling interest in a company. The legal form of the enterprise, which is, from a sociological and economic point of view, a matter of accident, should not determine legal rights and liabilities. While the Crown must be made fully liable in tort and in contract, commercial and industrial activities should as a rule be carried on by incorporated public authorities. The Crown will always enjoy certain privileges, for example, freedom from certain taxes; but the incorporated public authority should be subject to the same rights and liabilities as any other legal person. It should be liable for taxes, rates and other charges and be bound by general statutes. This is the legal position of the nationalized industries in Britain.

Subjection to ordinary legal liabilities need not, prevent the fulfillment of economic, social and other planning functions. Both government departments and separate public authorities operate in the service of public interests or national plans, to which the legal principle of security of transactions must be adjusted. As we have seen, the break clauses in government contracts safeguards the power of the government to terminate contracts which have lost their purpose, such as war supplies, subject to fair compensation and indemnification. This is no worse, and in some cases compares favorably with the standard terms contractually imposed by private industries on the other party. But the government should not be judge in its own case. Disputes arising from such contracts should be justiciable, whether before the ordinary courts, an arbitration court, or an administrative tribunal.

In a mixed economy public enterprise operates side by side with private enterprise. In Australia, for example, a decision of the High Courts has confirmed the constitutional power of the Commonwealth to establish a government operated inter state airline, but has denied it the power to operate an inter-state airlines monopoly. As a result, a government controlled airline operates side by side with private airlines.

In many cases, public and private enterprises co-exist in the same field, as a result of partial or ad hoc nationalisations. Thus, in France, the largest motor-car manufacturer, Renault, is a state enterprise, nationalized after the Second World War. The other motor-car manufacturers remain in private hands, In India, the new steel mills constructed by British, German and Soviet contractors are, in accordance with the Indian Constitution, state-owned.

But a sizable sector of the steel industry remains in the hands of the giant private concern, TATA.

There are also indirect forms of competition between private and public enterprise; where alternative products of services compete for the same market. This, in Britain coal, electricity, gas and atomic energy are operated by government-owned corporations, while the production and refining of oil remains in private hands.

Does the rule of law demand that the Government should dispense its favours equally among its own instrumentality and the private operators? Is there anything objectionable, for example, in the government giving all air-mail contracts to the government, enterprise or ordering civil servants to use no other air transport? It seems that to hold so would; be an impossible legal fetter on policy decisions in a democratic community. The establishment of public enterprises is the result of a parliamentary decision and subject to parliamentary control. It is a perfectly legitimate objective for the government of the day to encourage a form of enterprise which it regards as preferable to private enterprise, within the limits set by a Constitution or other positive legal restrictions. It would be absurd to expect a Labour Government to allocate contracts equally among its own enterprise and private competitors if this is contrary to its avowed policy, and in the play of political forces it will be for any alternative government to reverse this policy if it wishes. For the sake of continuity, a wise government will act with moderation either way; but this is a matter of policy, not of law,

The dual role of the state which both enters into the field of government and industrial commercial management and, at the same time, acts as the general controller over the allocation of economic resources for the nation, leads however to a further and more subtle problem. The state as economic controller allocates scarce resources among different industries and for different purposes. Economic necessity may reinforce social policy. In a social democracy like modern Britain after the war or India at the present time, essential industries are favoured as against luxury industries, exports at the expense of home consumption. This means not only the allocation of essential materials and foreign exchange according to a priorities plan, but also sometimes the direction of labour. In this capacity, the state can exercise a two fold vital influence which is not immediately apparent in individual legal transactions, but which regulates them by remote control. A state can thwart certain industries and encourage others. But it can so exercise a vital influence on the scope of individual liberties. Steel or coal are purely economic commodities; paper is not only an economic commodity which costs money, but also the material basis without which intellectual freedom is bound to wither. Again, the direction of labour threatens one of the most vital aspects of person restricted by existing social and economic conditions, by newspaper or broadcasting monopolies, economic compulsion, and other factors. But the threat is no less great if it comes from the state itself. The problem does not exist in a totalitarian planned economy, where any protection of individual freedoms is at best conditional and where such rights of private property and enterprise as remain are clearly subject to overriding state necessities. But it is acute in a planned economy of the democratic type which regards certain individual freedoms as essential and recognizes the existence of a private economic sector along with public enterprise.

The power of the government of the day to throttle criticism by its policy in allocating paper or broadcasting licences, or to curtail freedom of personal movement by direction of labour, certainly raises one of the gravest problems in modern planned democracy. Under the American Constitution, such action might result in complex legal controversies, about the interpretation of the Bill of Rights of the Constitution, in particular the First, fifth and Fourteenth Amendments. In Great Britain, this is a matter of purely political decision, for Parliament and public opinion. The vigilance of Parliament and public opinion may, in special cases, justify the setting up of representative commissions to investigate problems of urgent concern. But, ultimately, it is the alertness and strength of a conviction of a community on which the prevention of destruction of liberties by such eroding processes depends.

Finally, the state functions as arbiter between different groups in society. The term 'collectivist' state is often used loosely. A social-service state need not be collectivist. It can be a parental or dictatorial state, dispensing social welfare amongst citizens while forbidding them to engage in any autonomous collectivist association, like Nazi Germany or Fascist Italy or France's Spain. On the other hand, the state may take complete responsibility for all group activities going on within its borders, while regarding their quasi- autonomous organization as convenient and necessary from an administrative and managerial point of view. This is the position in Soviet Russia where the managements of state- operated industries face trade unions.

But the trade unions are not genuinely autonomous collective organizations. They represent group interests, within a well defined national plan, and subject to overriding state policy ensured by the one-party system, political pressure and the many other sanctions at the disposal of the totalitarian state. In the modern democratic society, group associations are still permitted to develop freely in principle and to adjust their relations by 'mutual agreement' which is in the sphere of private law. This purely passive functions of the state is proving increasingly insufficient. As the moral and legal authority of employers' associations and trade unions increases, their agreements become more and more a matter of national concern. The vast majority of states are now in a condition of more or less permanent economic crisis. They cannot afford a prolonged standstill of production, or a rise of prices, profits and wages which paralyses the economic capacity of the nation. Hence the state must intervene, by wage boards, conciliation commissioners, compulsory awards, as arbitration courts and other means designed to ensure industrial peace as well as a certain amount of public influence on the formation of prices and wages. It is almost impossible to reconcile a compulsory national wage policy with the recognition of full freedom of organized groups and the consequent right of unimpeded collective bargaining. The most desirable solution is voluntary agreement and persuasion, but this leaves the legal dilemma unsolved. Freedom of association must include the freedom not to associate. It is true that, increasingly, agreements made between the major employers' and employees' associations are applied to the whole industry so that even non-members join in the benefits of such agreements. Graver, however, than this situation would be the recognition of a general principle of compulsory union membership as a condition of employment. This would transform democratic industrial society into that of the corporate state. The practical difference is small, for the trend is towards powerful unions which hardly

need coercion. The freedom of the occasional dissenter makes a difference of principle out of proportion to its economic significance.

In short, the state as arbiter in a democratic country has three tasks. The maintenance of a rough balance between contending organized groups and the usually unorganized consumer; the protection of the individual freedom of association; and the safeguarding of overriding state interests.

Our individual ideals of the rule of law may correspond to the enlightened rationalism of the eighteenth-century aristocracy, to nineteenth-century Manchester middle-class liberalism, to the value system of Catholic Church, or to the centrally directed economy of a Socialist state. But a meaningful definition of rule of law must be based on the realities of contemporary society, and this means that we must recognize the irreducible minimum functions of modern government, as well as the ubiquitous strength of group power. This still leaves plenty of choice between different ideas. A meaningful formulation of the rule of law for a contemporary democracy can only set the sights. It cannot be spelt out in terms of nineteenth-century ideals, of the philosophy of the Founding Fathers, of a Bentham or a Dicey. The basic value remains of the conditions that enable the individual to develop into a morally and intellectually responsible person. But the means by which this goal is to be attained cannot be deeply influenced by the social conditions in which we live. The ideal of social welfare, i.e. of the responsibility of the community for minimum standards of living and protection against the major vicissitudes that would leave the individual-except the fortunate few- destitute and degraded, provided only with the theoretical freedoms of contract, property and trade, is now almost universally accepted. But welfare and work, without responsibility, can lead to the completely regimented and conditioned society. The rule of law in democracy must, therefore, safeguard the elementary rights of participation in the process of government. It must devise adequate protection against the abuse of both public and private power. Now the balance is to be struck must, to a large extent, depend on the changing conditions of society. Today the elementary standards of living are, more than at any previous period, protected by social-security laws and the recognition of collective bargaining as the predominant instrument of regulation of labour conditions. Emphasis is therefore, shifting to safeguards against administrative arbitrariness, the legal immunities of public authority, the excessive concentration of corporate power and abuses of union power over the individual. No less important are efforts designed to preserve effective, as distinct from nominal, freedom of opinion, and measures to preserve or restore the minimum possibilities of civic participation in public affairs without which democracy must wither. In all these fields the law has a vital part to play.

That the content of the rule of law cannot be determined for all time and all circumstances is a matter not for lament but for rejoicing. It would be tragic if the law were so petrified to be unable to respond to the unending challenge of revolutionary changes in society. To the lawyer, this challenge means that he cannot be content to be craftsman. His technical knowledge will supply the tools but it is his sense of responsibility for the society in which he lives that must inspire him to be Jurist as well as lawyer.

* * * * *

DOCTRINE OF SEPARATION OF POWERS

Though the doctrine is traceable to Aristotle¹, but the writings of Locke² and Montesquieu³ gave it a base on which modern attempt to distinguish between legislative, executive and judicial power is grounded. Locke distinguished between what he called

- (1) Discontinuous legislative power
- (2) continuous executive power, and
- (3) Federative power

He included within 'discontinuous legislative power', the general rule-making power called into action from time to time and not continuously. 'Continuous executive power' included all those power which we now call executive and judicial. By 'federative power' he meant the power of conducting foreign affairs. Montesquieu's division of power including a general legislative power and two kinds of executive powers; an executive power in the nature of Locke's 'federative power', and a 'Civil law' executive power including executive and judicial power.

Locke and Montesquieu derived the contents of this doctrine from the developments in the British constitutional history of the early 18th century. In England after a long war between Parliament and the King, they saw the triumph of Parliament in 1688 which gave Parliament legislative supremacy culminating in the passage of the Bill of Rights. This led ultimately to a recognition by the King of legislative and tax power of Parliament and the judicial power of the courts. At that time, the King exercised executive powers, Parliament exercised legislative power and the courts exercised judicial power, though later on England did not stick to this structured classification of functions and changed to the parliamentary form of government.

Writing in 1748, Montesquieu said;

When the legislative and executive powers are united in the same person, or in the same body of Magistrates, there can be no liberty; because apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, the execute them in a tyrannical manner. Again, there is no liberty if the judiciary power be not separated from the legislative and executive. Were it joined to the executive power, the judge might behave with violence and oppression.

There would be an end of everything, were the same man, or the same body, whether of the nobles or of the people, to exercise those three powers, that of exacting laws, that of executing the public resolutions, and of trying the causes of individuals.⁴

¹ Aristotle, Politics, Vol. IV, 14.

² The Second Treaties of Civil Government, Chaps. 12 and 13.

³ L'Esprit des lois (1748) Chap. 12.

⁴ Nugent (Tr.), The Spirit of the Laws, 151-52 quoted in C.K. Thakker, Administrative Law (Eastern Book Company 1992) 31.

The doctrine of separation of powers is an animation of the rule of law and its roots also lie in the concept of natural law because both aim at progressive diminution of the exercise of arbitrary power necessary for protecting the life, liberty and dignity of the individual. It is an organic flexible doctrine which can be moulded to suit the requirements of governance, but its inherent fundamentals and rationality must not be compromised, i.e. 'accumulation of power' is a definition of tyranny.

Brandeis J scientifically explained the purpose of this doctrine when he said that the purpose of the separation of powers doctrine is not to promote efficiency in the administration but to preclude the exercise of arbitrary power. He further emphasises that its purpose is not to avoid friction amongst various organs of the State by keeping them separate but to protect people from autocracy by means of inevitable friction due of distribution of powers. 'Is to divide governance against itself by creating distinct centres of power so that they could prevent each other from threatening tyranny.'

The practical import is that no significant deprivation of life, liberty and dignity of any person can take place unless all the organs of the government combine together. If a person is to be put in jail, then a legislature has to pass a law making his action illegal, executive has to execute the law and judiciary must find him guilty. However, if a person is to be set free then any branch can do it. In Westminster type of democracy where legislature and executive are not separate, judiciary must be separated from the rest. Executive always demands power, at times by threatening insecurity among the people and legislature would always oblige because it is controlled by the executive. In such situation, judiciary, if separate, would apply brakes and save people from tyranny. It is for this that judiciary has now been separated from Parliament in the U.K.

The doctrine of separation of powers is based on four different principles:

(1) Exclusivity principle which suggests structural division in all the three organs of state, as it is in the US.

(2) Functional principle which prohibits amalgamation and usurpation but no interaction of all the organs of state.

(3) Check and balance principle, meaning, thereby, that each organ of state may check the other to keep it within constitutional bounds.

(4) Mutuality principle which aims at creating concord not discord, cooperation not confrontation, engagement not estrangement amongst different organs of state to create a society of constitutional image, which is a free, equalitarian, inclusive and rule-of-law society.

This doctrine can be further used in two senses: 1) negative sense, in which this doctrine puts limits on the exercise of power by each organ of state; and 2) positive sense, in which it not only demarcates limits but also defines the minimum contents of power within those limits which a court can enforce to achieve constitutional values.⁵

⁵ See, *State of U.P. v. Jeet S. Bishit*, (2007) 6 SCC 586.

Though the doctrine of separation of powers in its classical structural form is not followed in any country, not even in the US, yet logic behind it is still valid ó logic of polarity because ðthreat to liberty arises not from blended powers but unchecked powersö. Interaction of power facilitates liberty and freedom.

The theory of separation of power signifies three formulations of structural classification of governmental powers:

(1) The same person should not form part of more than one of the three organs of the government. For example, Ministers should not sit in Parliament.

(2) One organ of the government should not interfere which any other organ of the government.

(3) One organ of the government should not exercise the functions assigned to any other organ.

It may be pointed out that in none of these senses does a separation of power exist in England. The King, though an executive head, is also an integral part of the legislature and all his Ministers are also Members of one or the other House of Parliament. Therefore, in England the concept of ðParliamentary executiveö is a clear negation of the first formulate three organs of the government. As regards the second formulation, it is clear that the House of Commons ultimately controls the executive. The judiciary is independent, but the judges of the superior courts can be removed on an address from both Houses of Parliament. As to the exercise by the one organ of the functions of the other organs, no separation exists in England. Though with the establishment of the UK Supreme Court, judiciary has now been separated from Parliament, yet legislative and adjudicatory powers are being increasingly delegated to the executive. This also distracts from any effective separation of powers.

The doctrine of the separation of powers was gospel to the settlers who were obsessed with the violation of their life, liberty and dignity by the monarchs in England, who combined all the powers. Consequently, drafters of the US Constitution made this doctrine the basic brick of the constitution. Madison said , ðAccumulation of power. Legislative, executive and judicial, in the same hand, whether one, a few or many, whether hereditary, self-appointed or elected may be justly pronounced as the definition of tyranny.ö Jefferson also emphasised, ðConcentration of legislative, executive and judicial powers in the same hand is precisely the definition of despotic government. It would be no alleviation that these powers will be exercised by plurality of hands and not by a single person. 173 despots would surely be as oppressive as one.ö

Thus, this doctrine forms the foundation on which the whole structure of the US Constitution is based. Article I, section I vests all legislative powers in the Congress. Article II, Section I vests all executive powers in the President of the US. Article III, Section I vests all judicial power in the Supreme Court. It is on the basis of this theory of separation of powers that the US Supreme Court has not been given power to decide political questions, so that the court may not interfere with the exercise of power of the executive branch of the government. The US Constitution has also not given overriding power of judicial review to the US Supreme Court. It is a queer fact of American constitutional history that the power of

judicial review has been usurped by the court. However, American constitutional developments have shown that in the face of the complexity of modern government, strictly structural classification of the powers of the government is not possible. The President of the US interferes with the exercise of powers by the Congress through the exercise of his veto power. He also exercises the law-making power in exercise of his treaty-making power. This President also interferes with the functioning of the Supreme Court through the exercise of his power to appoint judges. In fact, President Roosevelt did interfere with the functions of the court when he threatened to pack the court in order to get the court's support for his New Deal legislation. The same manner, Congress interferes with the powers of the President through vote on budget, approval of appointments by the Senate and the rectification of treaty. Congress also interferes with the exercise of powers by the courts by passing procedural laws, creating special courts, and approving the appointment of judges. In its turn, the judiciary interferes with the powers of the Congress and the President through the exercise of its power of judicial review. It is correct to say that the US Supreme Court has made more amendments to the US Constitution than the Congress itself.

Though no separation of powers in the strict sense of the term exists in England and the US, yet the curious fact is that this doctrine has attracted the markers of most modern constitutions, especially during the 19th century. Thus in France, the doctrine has produced a situation in which the ordinary courts are precluded from reviewing the validity not only of legislative enactments but even of the actions of the administration. The void has been filled by the establishment of special administrative courts.

In India, the doctrine of separation of powers has not been accorded a Constitutional status. Apart from the directive principle laid down in Article 32 which enjoins separation of judiciary from the executive, the constitutional scheme does not embody any formalistic and dogmatic division of powers.⁶ The Supreme Court in *Ram Jawaya Kapur v. State of Punjab*⁷ held:

Indian Constitution has not indeed recognised the doctrine of separation of powers in its absolute rigidity but the functions of the different parts or branches of the government have been sufficiently differentiated and consequently it can very well be said that our Constitution does not contemplate assumption, by one organ or part of the State, of functions that essentially belong to another.

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⁶ Upendra Baxi, 'Development in Indian Administrative Law' in A.G. Noorani (Ed.) *Public Law in India* (1982) 136

⁷ AIR 1955 SC 549.

THE INTERPRETATION OF STATUTES

Glanville Williams

THE CONTEXT RULE

In ordinary life, if someone says something that you do not understand, you ask him to explain himself more fully. This is impossible with the interpretation of statutes, because when Parliament has passed an Act the words of the Act are authoritative as words. It is only these words that have passed through the legal machinery of law-making, and individual Members of Parliament cannot be put into the witness-box to supplement or interpret what has been formally enacted. Hence the words of an Act carry a sort of disembodied or dehumanised meaning; not necessarily the meaning intended by any actual person in particular, but the meaning that is conventionally attached to such words. The point must not be pressed too far, since the statute obviously has a broad purpose (or, to speak more precisely, those who collaborated in framing and passing the statute had a broad purpose) which is expressed in the words.

The most important rules for the interpretation (otherwise called construction) of statutes are those suggested by common sense. The judge may look up the meaning of a word in a dictionary or technical work; but this ordinary meaning may be controlled by the particular context. As everyone knows who has translated from a foreign language, it is no excuse for a bad translation that the meaning chosen was found in the dictionary; for the document may be its own dictionary, showing an intention to use words in some special shade of meaning. This rule, requiring regard to be had to the context, is sometimes expressed in the Latin maxim *Noscitur a sociis*, which Henry Fielding translated; a word may be known by the company it keeps. One may look not only at the rest of the section in which the word appears but at the statute as a whole, and even at earlier legislation dealing with same subject matter for it is assumed that when Parliament passed an Act, it probably had the earlier legislation in mind, and probably intended to use words with the same meaning as before.⁸ Somewhat anomalously, reference may even be made to later statutes, to see the meaning that Parliament puts on the same words in a similar meaning that Parliament puts on the same words in a similar context. However, words need not always have a consistent meaning attributed to them; the context may show that the same word bears two different senses even when it is repeated in the same section.⁹

Formerly, the rule permitting recourse to earlier statutes was taken to allow the court to compare the wording of a consolidation act with the Acts that it superseded, and to conclude that variation of wording indicated a change of meaning. But this tended to defeat the object of consolidation, which was to supersede a jumble of Acts of various dates by a single statute. Consolidation would be little help if one still had to look at the old repealed acts in order to

⁸ Maxwell, *Interpretation of Statutes*, 12th ed., 64 et seq.

⁹ *R. v. Allen* (1872) 1 C.C.R. at 374; *West Midlands Joint Electricity Authority v. Pitt* [1932] 2 K.B. at 46.

interpret the new one. Consequently, the rule now laid down by the House of Lords is that where in construing a consolidation act.

“the actual words are clear and unambiguous it is not permissible to have recourse to the corresponding provisions in the earlier statute repealed by the consolidation Act and to treat any difference in their wording as capable of casting doubt upon what is clear and unambiguous language in the consolidation Act itself.”¹⁰

In reading a statute, always look for a definition section assigning special meanings to some of the words in the statute. Parliamentary counsel have the inconsiderate habit of not telling you (for example, in a footnote or marginal note) that a particular word in the section is defined somewhere else in the statute; you have to ferret out the information for yourself.

INTERPRETATION IN THE LIGHT OF POLICY: “FRINGE MEANING”

When interpreting statutes the court often announce that they are trying to discover “the intention of the legislature.” In actual fact, if a court finds it hard to know whether a particular situation comes within the words of a statute or not, the probability is the situation was not foreseen by the legislature, so that the Lords and Members of Parliament would be just as puzzled by it as the judges are. Here, the “intention of the legislature” is a fiction. Because of this difficulty, some deny that the courts are really concerned with the intention of Parliament.

“In the construction of written documents including statutes, what the court is concerned to ascertain is, not that the promulgators of the instruments meant to say. But the meaning of what they have said.”¹¹

Others, however, think it proper to speak of the intention of Parliament, in the sense of “the meaning which Parliament must have intended the words to convey.”¹² in case of doubt the court has to guess what meaning Parliament would have picked on if it had thought of the point. The intention is not actual but hypothetical.¹³ there is, of course, a limit to what a court can do by way of filling out a statute, but to some extent this is possible.

All illustration is the familiar legal problem of “fringe meaning.” The words we use, though they have a central core of meaning that is relatively fixed, have a fringe of uncertainty when applied to the infinitely variable facts of experience. For example, the general notion of a “building” is clear, but a judge may not find it easy to decide whether a temporary wooden hut, or a telephone kiosk, or a wall, or a tent, is a “building.” In problems like this, the process of interpretation is indistinguishable from legislation; the judge is, whether he likes it or not, a legislator. For, if he decides that the wooden hut is a building, he is in effect adding an

¹⁰ Per Lord Diplock in *Curran* (1976) 1 W.L.R. at 90H-91A, [1976] 1 All E.R. at 165b, reaffirmed by a majority of the lords in *Farrell v. Alexander* [1977] A.C. 59. See the reservations by Lord Simon at p. 84.

¹¹ Per Lord Simon in *Farrell v. Alexander* [1977] A.C. at 81G.

¹² Per Lord Edmund-Davies, *ibid.* at 95B.

¹³ Even this formulation of the judge’s task has an element of unreality, as professor Dworkin has pointed out (64 *Proc. Brit. Ac.* 259). Even if the legislature had thought of the point, it might have preferred to leave it unresolved – for example, because to resolve it would arouse the opposition of some group or other and imperil the whole measure, or because it would encumber the Act with too much detail.

interpretation clause to the statute which gives "building" an extended application; whereas if he decides that the hut is not a building, he adds a clause to the statute which gives it a narrower meaning. The words of the statute, as they stand, do not give an answer to the question before the judge; and the question is therefore legislative rather than interpretative. This simple truth is rarely perceived or admitted: almost always the judge pretends to get his solution out of the words of the Act, though he may confess in so doing to be guided by its general policy. The rational approach would be to be guided by its general policy. The rational approach would be to say candidly that the question, being legislative, must be settled with the help of the policy implicit in the Act, or by reference to convenience or social requirements or generally accepted principles of fairness.

This kind of "interpretation" may be legally and socially sound although it reaches results that would surprise the lexicographer. Thus it has actually been held that murder can be an "accident."¹⁴ The word "accident" was being interpreted in the context of the Workmen's Compensation Act, and the result of the decision was that the widow of the deceased workman was entitled to compensation from the employer,¹⁵ because the murder in question arose out of and in the course of the employment.

THE "MISCHIEF" RULE

The task of interpreting statutes gives judges the chance of expressing their own opinions as to social policy; and, inevitably, their opinions do not always command universal assent. However, the judges are on fairly safe ground if they apply the "mischief" rule, otherwise known as the rule in *Heydon's case*.¹⁶ This bids them to look at the legal position before the Act, and the mischief that the statute was intended to remedy; the Act is then to be constructed in such a way as to suppress the mischief and advance the remedy.

The practical utility of the rule depends to some extent upon the means that the courts are entitled to employ in order to ascertain what mischief the Act was intended to remedy. A true historical investigation would take account of press agitation, party conferences, Government pronouncements, and debates in Parliament; but all these are ignored as the result of a rule exclusively evidence of the political history of a statute. The rule is justified by the burden that would be placed upon legal advisers and the uncertainty that would be introduced into the law if such historical materials had to be consulted.¹⁷ In practice, therefore, the judge

¹⁴ *Nisbet v. Rayne & Burn* [1910] 2 K B. 689.

¹⁵ Now turned into industrial injuries benefit as part of the national insurance scheme (Social Security Acts 1975 to 1977).

¹⁶ (1584) 2 Co. Rep. at 7b, 76 E.R. at 638

¹⁷ Although the reason is convincing, the rule sometimes has unhappy consequences. On one occasion, when a section was included in an Act for the avowed purpose of getting rid of a certain decision, a Divisional Court, not realizing this, followed the decision, whittling down the section by applying rules of interpretation, and saying that Parliament could not have intended to change the law. See *Cretney* in 119 N.L.J. 301.

Exceptionally, where a statute is passed to give effect to an international treaty (convention), the courts will apply the Continental rule that the discussions leading to the treaty may be looked at: *Fothergill v. Monarch Airlines Ltd.* [1981] A.C. 251. But Lord Scarman said that such travaux

generally divines the object of a statute merely from perusal of its language, in the light of knowledge of the previous law and general knowledge of social conditions.¹⁸

Many statutes are the result of recommendations made by the Royal Commissions and departmental committees. Can the reports of these commission and committees be looked at as an aid to construction? The rule as now settled is that they are inadmissible in order to show what the committee through its proposals meant, but admissible under the rule in *Heydon's case* to the extent that they show the mischief against which the Act was directed. It may be expected that the practice of referring to these reports will extend itself in the future, because they often supply the best commentary upon the wording of an Act.¹⁹

THE LITERAL RULE

Granted that words have a certain elasticity of meaning, the general rule remains that the judges regard themselves as bound by the words of a statute when these words of a statute clearly govern the situation before the court. The words must be applied with nothing added and nothing taken away. More precisely, the general principle is that the court can neither extend the statute to a case not within its terms though perhaps within its purpose (the *casus omissus*) nor curtail it by leaving out a case that the statute literally includes, though it should not have. (There is no accepted name for the latter, but it may be called the *casus male inclusus*). Lord Diplock expressed the point as follows:

“At a time when more and more cases involve the application of legislation which gives effect to policies that are the subject of bitter public and parliamentary controversy, it cannot be too strongly emphasised that the British constitution, though largely unwritten, is firmly based upon the separation of powers; Parliament makes the laws, the judiciary interpret them. When Parliament legislates to remedy what the majority of its members at the time perceive to be a defect or a lacuna in the existing law (whether it be the written law enacted by existing statutes or the unwritten common law as it has been expounded by the judges in decided cases), the role of the judiciary is confined to ascertaining from the words that Parliament has approved as expressing its intention what that intention was, and to giving effect to it. Where the meaning of the statutory words is plain and unambiguous it is not for the judges to invent fancied ambiguities as an excuse for failing to give effect to its plain meaning because they themselves consider that the consequences of doing so would be inexpedient, or even unjust or immoral. In controversial matters such as are involved in industrial relations there is room for differences of opinion as to what is expedient, what is just and what is morally justifiable. Under our constitution it is Parliament's opinion on these matters that is paramount.”²⁰

preparatoires should be used only where the text is ambiguous or where a literal construction appears to conflict with the purpose of the treaty.

¹⁸ See e.g. *Davis v. Johnson* [1979] A.C. at 338F.

¹⁹ See the close vote on this subject in *Black-Clawson International Ltd. v. Papierwerke Waldhof-Aschaffenburg A.G.* [1975] A.C. 591, discussed by Sir Rupert Cross, *Statutory Interpretation* (1976), 136 et seq.

²⁰ *Duport Steels Ltd. v. Sirs* [1980] 1 W.L.R. at 157, 1 All E.R. 529. For Earlier pronouncements to the same effect see *Magor and St. Mellons v. Newport Corp'n* [1952] A.C. 189; *Stock v. Frank Jones (Tipton) Ltd.* [1978] 1 W.L.R. 231, 1 All E.R. 948.

The rule has often been criticised by writers. What is a real ambiguity, and what is a fancied ambiguity? Consider the following case decided by the House of Lords on the construction of the Factories Act.²¹ This Act requires dangerous parts of machines to be constantly fenced while they are in motion. A workman adjusting a machine removed the fence and turned the machine by hand in order to do the job. Unfortunately he crushed his finger. Whether the employers were in breach of the statute depended on whether the employers were in breach of the statute depended on whether the machine was 'in motion.' In the primary or literal sense of the words it was, but since the machine was not working under power and was only in temporary motion for necessary adjustment, the House of Lords chose to give the words the secondary meaning of 'mechanical propulsion.'²² Since the machine was not being mechanically propelled it was not in motion.

The literal rule is a rule against using intelligence in understanding language. Anyone who in ordinary life interpreted words literally, being indifferent to what the speaker or writer meant, would be regarded as a pedant, a mischief-maker or an idiot.

One practical reason for the literal rule is that judges are now deeply afraid of being accused of making political judgments at variance with the purpose of Parliament when it passed Act. This fear is sometimes understandable, but not all statutes divide Parliament on party lines.

Other reasons advanced for the literal rule may be briefly answered.²³ 'Many statutes are passed by political bargaining and snap judgments of expediency, the courts can rarely be sure that Parliament would have altered the wording if it had foreseen the situation.' This may be true, but is it any reason why the courts should not do justice as best they can, leaving it to Parliament to intervene again if the decision does not meet with Parliament to intervene again if the decision does not meet with Parliament's approval? 'If courts habitually rewrote statutes in order to effect supposed improvements, this might cause statutes to become more complex in order to exclude judicial rewriting in a way that was politically unacceptable.' This supposes that the court misjudges what Parliament would wish it to do, whereas in fact the decision may win general approval. A court that tries to decide as Parliament would have wished is more likely to be right than a court that follows the words believing it was not what Parliament intended. 'People are entitled to follow statutes as they are; they should not have to speculate as to Parliament's intention.' This is a strong reason against the extensive construction of prohibitory legislation, but not in other cases. 'If the courts undertook to rewrite statutes this would tend to foment litigation, because it would encourage people who objected to the legislation to try their luck with the courts.' To suggest that the courts will ever completely rewrite a statute is a great exaggeration; and even judges who accept the literal rule in words will depart from it when the circumstances press them hard enough.

²¹ Currently the Factories Act 1961.

²² *Richard Thomas & Baldwins Ltd. v. Cummings* [1955] A.C. 321. For a fuller discussion see Cross, *op. cit.* 29-31, 74-84.

²³ Some of these reasons are given by Lord Simon in *Stock v. Frank Jones (Tipton) Ltd.* [1978] 1 W.L.R. at 236-237, 1 All E.R. at 953-954, but the above paragraph does not represent direct quotation.

Lord Diplock says that there may be differences of opinion as to what is expedient, just and moral, and that Parliament's opinion on these questions is paramount. This is obviously true, once Parliament's opinion is established. It is also true that Parliament's opinion is ascertained primarily from the words it has used. Nevertheless, the facts of the case may be such as to raise serious doubts whether Parliament intended its words to apply. The decision by a court that a particular situation was not intended to come within the ambit of a statute, though within its words in what may be their most obvious meaning, does not deny the supremacy of Parliament, for if Parliament disagrees with the decision it can pass another Act dealing specifically with the type of case. However, the hard truth is that Parliament generally pays little attention to the working of the law. It is not merely that Parliament fails to keep old law under continuous revision; it loses interest in its new creations as soon as they are on the statute book.

INTERPRETATIONS TO AVOID ABSURDITY: THE "GOLDEN RULE"

As the Factories Act case illustrates, the courts sometimes allow themselves to construe a statute in such a way as to produce a reasonable result, even though this involves departing from the *prima facie* meaning of the words. The rule that a statute may be constructed to avoid absurdity is conveniently called the "golden rule."²⁴ It is by no means unlimited, and seems to apply only in three types of case.

In its first application, the golden rule allows the court to prefer a sensible meaning to an absurd meaning, where both are linguistically possible. It does not matter that the absurd meaning is the more natural and obvious meaning of the words. Lord Reid:

"Where a statutory provision on one interpretation brings about a startling and inequitable result, this may lead the court to seek another possible interpretation which will do better justice."²⁵

On another occasion Lord Reid put the point more strongly.

"It is only where the words are absolutely incapable of a construction which will accord with the apparent intention of the provision and will avoid a wholly unreasonable result that the words of the enactment must prevail."²⁶

This application of the golden rule does not contradict the literal rule, provided that the absurdity of the particular proposed application of the statute is conceded to be a reason for finding an ambiguity in it. If one accepts the golden rule, this involves rejecting Lord Diplock's opinion that the inexpediency, injustice or immorality or the proposed application of the statute cannot in itself be a reason for finding an ambiguity in the statute. According to the golden rule it can be a powerful motivating force leading the court to detect such an ambiguity.

²⁴ *Mattison v. Hart* (1854) 14 C.B. at 385, 139 E.R. at 159. The general statement of the golden rule is that (1) the literal (primary) meaning must be adopted unless (2) this results in absurdity. It is convenient to take the golden rule as meaning (2) alone, since this is what it adds to the literal rule; but some judges use the phrase to refer to meaning (1) alone.

²⁵ *Coutts & Co. v. I.R.C.* [1953] A.C. at 281.

²⁶ *Luke v. I.R.C.* [1963] A.C. at 577.

It is frequently said that the question of absurdity cannot influence a decision in any type of case except the one just stated. Nevertheless, the courts sometimes act on a second principle, stated by Cross as follows.

“The judge may read in words which he considers to be necessarily implied by words which are already in the statute, and he has a limited power to add to, alter or ignore statutory words in order to prevent a provision from being unintelligible or absurd or totally unreasonable, unworkable or totally irreconcilable with the rest of the statute.”²⁷

Acting on this principle judges have occasionally corrected a statute that foolishly and “and” when it meant “or,” or that foolishly said “or” when it meant “and.” However, the argument must be very strong to induce the court to meddle with a statute in a way that they themselves acknowledge creates outrageous injustice.

²⁷ Cross, *op. cit.* 84-98.

CUSTOM AS A SOURCE OF LAW IN INDIA

M.P. Jain

In any scheme of teaching Jurisprudence custom has an important place as a source of law. Indian teachers generally introduce this topic to their students through English and sometimes Continental materials. Even the Indian authors on Jurisprudence refer mainly to foreign materials and not to Indian materials. There is, however, a rich material in Indian social and legal history which can more appropriately be made use of in explaining the place of custom in society. A growing use of this material will help to focus attention on some of the main problems of new India. This paper is a brief attempt at noticing some of this Indian material.

I

Western Jurists

In the evolution of the human society, it appears to be beyond doubt that custom arose first, law came later. Law denotes a more definitive organisation of human society with some kind of power structure established. Customs arise whenever a few human beings come together, as no association of human beings can exist permanently without adopting consciously or unconsciously, some definite rules governing reciprocal rights and obligations. [Vinogradoff, *Collected Papers* 420. As Paton observes, "Indeed custom is coeval with the very birth of the community itself." *Jurisprudence* 143 (2nd ed. 1951). Even a primitive tribe may have a legal order long before it has developed a state (1941) 55 *Harv. L.R.* 66-7]. It also looks to be axiomatic that, to start with, law was built upon custom. One example which immediately comes to mind is that of the English common law which in its origin was built upon custom and which later absorbed into itself the customs of the mercantile community to give to the common law world the modern Mercantile Law. [Paton, *Jurisprudence* 148 (2nd ed. 1961). "Mercantile Law, perhaps, provides one of the most interesting examples of custom". Keeton, *The Elementary Principles of Jurisprudence* 77, 81 (2nd ed. 1949)]. The Twelve Tables of Rome were based upon customs of the people [Maine, *Ancient Law* 18(1946)].

Custom is regarded as a source of law by the Western jurists, though they assign importance to it to a varying degree depending upon their approach and outlook. Austin having defined 'law' as the command of a political superior or definite human authority addressed to political inferiors and enforced by a penalty or sanction, held that custom becomes a law only when it receives judicial or legislative recognition. [According to Austin, nothing is entitled to the name 'Law' which does not possess all the attributes of state-created and state-enforced law and so, on this approach, logically, one shall have to say that customary law is not law at all, or that it is 'imperfect' or 'inchoate' law]. This excludes from the pale of law those customs which exist with all the force of law but have not come before the courts unlike those which through accident have come before the courts and have been recognised there. The rigours of the Austin's theory have been mitigated by other Analytical Jurists following Austin. Holland, though practically adopting Austin's definition of law, nevertheless, holds that courts do not *proprio motu* for the time make custom a law, that they

merely decide as a fact that there exists a legal custom about which there might have been some question up to that time, just as there might be about the meaning and interpretation of an Act of Parliament, and the observance of a custom is not the cause of law; but is evidence of its existence [Holland, *The Elements of Jurisprudence* 53, 55, (8th ed. 1896)]. Courts give operation to customs not prospectively from the date of such recognition, but also retrospectively; so far implying that custom was law before it received the stamp of judicial authentication. Allen also disagrees with Austin's thesis. He regards custom as "self-contained, self-sufficient, and self-justified law" and says that the function of the court is "declaratory rather than constitutive" [Allen, *Law in the Making* 67, 125-151 (5th ed. 1951)]. When a custom is proved in a court by satisfactory evidence, the function of the court is merely to declare the custom operative law. Thus custom does not derive its inherent validity from the authority of the Court. The difficulty in the way of accepting this view is the veto which a court wields to declare a custom invalid on the ground of unreasonableness.

The Historical Jurists attached a much greater importance to custom. They held that all early law was customary, and that the function of legislation is limited to supplementing and redefining custom. According to Savigny, the real bases of all positive law is to be found in the general consciousness of people (*Volksgeist*). The source of law is not the command of the sovereign, not even the habits of a community, but the instinctive sense of right possessed by every race. Since this consciousness is invisible, it is to be discovered by the external acts which manifest itself in usages, manners and customs. Custom is thus evidence of law whose real source lies deeper in the minds of men. As a necessary consequence it follows that custom, as the external evidence of law in the abstract, possesses the force of law before it is received by the courts, and not as a result of this process. According to Savigny, the acts required for the establishment of customary law ought to be plural, uniform and constant. They may be judicial decisions, but these are not indispensable for its establishment, although some have thought otherwise; the authors of the acts must have performed them with the consciousness that they spring from a legal necessity. [Kantorowicz, "Savigny and the Historical School of Law", (1937) 53 *LQR* 326. Thibaut seems to concede to each class of persons a power of establishing the law by their own will, but he mentions certain restrictions to narrow down the power materially. "Custom is, for the people that has established it, a mirror in which that people may recognise itself", says Puchta. To Puchta, custom was only self-sufficient and independent of legislative authority but was a condition precedent, of all sound legislation]. Of course, the flaw in this theory is that there are customs which are not based on an instinctive sense of right in the community as a whole, but on the interests of a strong minority, for example, slavery. Though it is also true that not all customs are consciously created, growth of much customary law is not the result of conscious thought, but of tentative practice.

The fact, however, remains that for those on whom a custom operates, it is finding by itself whether or not the stage ever comes when it is debated or discussed in a court. In the consciousness of the followers of the custom, it has a obligatory force. Take the examples of India; here for long before the advent of the British, customs were observed by the people, and were enforced not by the courts but by the village or community *panchayats*; the Government did not interfere with the prevalent norms. When the British system of Justice

came, these very customs came to be pleaded before the courts which enforced them. In such a situation, custom did not become effective for the first time after judicial recognition. It was there already in full force, the difference was that instead of the *panchayats* it came to be enforced by the courts. Thus the Analytical Theory does not very much fit the Indian condition.

II

Hindu View of Custom

Custom has always been given a very important place as a source of law by the Hindu Jurists. Two views have prevailed regarding the relative value of custom *vis-a-vis* the *sruti* and *smriti*. The *Dharmashastra* writers subordinated customs to *sruti* and *smriti* which were given a higher authority. Thus, according to Gautam, *dharmas* (customs) of countries, castes and families, which are not opposed to *Vedic* scriptures, are authoritative and binding. Manu and Yajnavalkya declare that sources of *Dharma* are *sruti*, *smriti* and *sadachara* in that order. Apararka held the view that a custom repugnant to any 'clear' text of ' *Vedas*' is to be rejected. Mitakshara, Dayabhaga, Mayukha also place custom as subordinate to *sruti* and *smriti*. This, however, was not the unanimity of opinion. There were dissenting voices against the view of subordinating custom. Visvarupa, Medhatithi favour the view that prescriptions of *smritis* (and even of *sruti*) need not be observed when they are vehemently condemned by the people (e.g. *niyoga*, though sanctioned by the texts, are, nevertheless, abhorred by custom) [Vrihaspati, Narada, Asahaya were in favour of unqualified acceptance of custom even when they were in conflict with the written laws. Some of the *smritis* underlined the significance of customs by saying that suppression of customs would give rise to resentment and rebellion]. In one text of the *Manusmriti* itself, there is a hint to regard custom as superior to everything. According to it, *smritis* themselves embody practices of the people current in their days: *Achara* is transcendental law, and so are the practices declared in the *Veda* and *smriti*; therefore, a twice born person desirous of his own welfare should always make efforts to follow it [Kane, *Hindu Customs and Modern Law* 33 (1950)]. The *Arthashastra* writers, e.g., Kautilya, held that usages and customs were of equal authority as evidence of law; and in case of conflict between them, the former must be taken to be of greater force as being actually observed in practice.

Whatever theory the *Dharmashastra* writers propounded of the validity of custom, the fact remains that customs have played a very important role as a material source of ancient Hindu law. The process of integrating custom with the law has always been going on; the Hindu Jurists were liberal in their attitude towards recognising and accepting them, e. g.. the eight forms of marriage were recognised by *Dharmashastra* writers even though some of the forms were highly objectionable. To start with, the *dharmasutra* tried to bring the text of the *sruti* in conformity with the customs prevailing in the contemporary society at the time they were composed. Then the *smritis* drew heavily on the customs of the people for whom they were designed. That largely explains why so many various *Dharmashastras* came into being, and why they differed from each other. When the *smritis* failed to satisfy the growing needs and changing conditions of the people, the commentaries adapted the *smriti*-law, by the process of interpretation, to bring in it the customs which had taken roots in the contemporary

society. What the commentaries did was to take up an old text of the *Dharmashastra* and interpret it in such a manner that it came in harmony with social mores and customs of the people. As the Privy Council has stated, "The Digest subordinates in more than one place the language of texts to custom and approved usage" [*Bhyah Ram Singh v. Bhyah Ugur Singh* (1870) 13 MIA 373, 390]. It is how, starting with the same texts as the base, two major schools of Hindu law developed in India, and that one of them came to have four sub-schools. [As observed in *Mulhukaruppa v. Sellathammal* (1916) ILR 39 Mad. 298, 301, "The commentaries indicate an attempt to reconcile the text law with the actual usages of the people". In *Rutheputty v. Rajunder* (1839) 2 MIA 132, the Privy Council has stated that different schools of law chiefly arose from the difference of local custom; the propounders of law interpreted the ancient texts in such a way as to make them harmonize with local usages, in other words, they had to harmonize the written with the unwritten. In *Balwant Rao v. Baji Rao* (1921) ILR 48 Cal. 30, 41, the Privy Council said that "the commentators do not enact, they explain and are evidence of the congeries of customs which form the law". In *Jogdamba v. S. S.* (1889) ILR 16 Cal. 3C7, at 375 the Calcutta High Court remarked, "The truth is that commentaries and digests ...owe their binding force not to their promulgation by any sovereign authority, but to the respect due to their authors and still more to the fact of their being in accordance with prevailing popular sentiment and practice. Their doctrines may often have moulded usage, but still more frequently they have themselves been moulded according to prevailing usage of which they are only the recorded expression". It may also be pointed out that the process was not entirely one-sided; while customs were recognised, it would also be correct to say that customs also, to some extent, were modified and supplemented by the opinions of the Hindu Jurists.

In Sanskrit, the word for custom is *sadachar*. The exact import of *sadachar* has been shifting from age to age and among commentators. In the earliest days, *achara* to be followed was that observed or declared by *brahmans* who were learned in the *Vedas*, and were highly moral and selfless (*sistas*). This standard gave a kind of choice or freedom to a particular jurist to be selective in accepting or recognising custom. If there was any custom which he thought was immoral or anti-social, he could discourage it by calling it as being not consonant to good conduct. Gradually, this harsh standard came to be relaxed so much so that every usage, having no visible secular purpose, came to be looked upon as binding and, lastly, the usages even of the *sudras* came to be enforced by the king.

From Gautama, Manu, Brahaspati etc., it follows that the customs and usages of which account is to be taken are those of districts (*desa* or *janpada*), towns and villages, castes, families, guilds, corporations or groups (*gana*, *sreni*, *sangh*, *naigam*, *varga*),

III

Muslim View of Custom

The two principal sources of the Islamic law are the *Koran*, as containing the word of God, and the *hadis* or traditions, being the inspired utterances of the Prophet and precedents derived from his acts. Next important sources are : *ijma*, the consensus of opinion amongst the learned; *urf* or custom; and *qiyas*, the analogical deductions from the first three.

There is no doubt that, during his life time, the Prophet himself recognised the force of customary law. He either gave his express sanction to certain pre-Islamic usages prevalent amongst the Arabs, or suffered such usages to continue without expressing disapprobation. His companions, after his death, recognised many customs which were not inconsistent with the teaching of the Islamic faith. The *hadis* contained, to a large extent, the customary law of pre-Islamic Arabia. In *Koran*, there is not much of law. Hence the rule that it must be read in conjunction with the customs then in vogue. It is thus clear that in its formative stages the Muslim law drew a good deal from the customs prevailing in Arabia. When, however, the principles of the law became settled, custom was relegated to an inferior position. Though the Muslim Jurists continued to recognise custom as a source of law on the principle "treat whatever the people generally consider to be good for themselves is good in the eye of God", nevertheless, it is now relegated to an inferior position, coming after *ijma*, i. e., it is considered inferior to the *Koran*, the *hadis* and *ijma*, but superior to *qiyas*. Hence, according to the strict rule of Muslim law, a custom opposed to the principles derived from the former sources is illegal. The conditions laid down for the validity of custom, under the Muslim law are : first, it must be generally prevalent in the country; second, it must not be merely a local usage in a village or a town, though it need not be ancient or immemorial; third, it must be an established course of conduct, not merely a practice on a few occasions; and, fourth, custom being essentially territorial, it cannot affect the law in other lands, and as it is confined to a particular period it cannot affect the custom in another age [Abdur Rahim, *Muhammadan Jurisprudence* 55, 136, 137 (1958); Tyabji, *Principles of Muhammadan Law* 415 (3rd ed. 1940)].

IV

Custom in the Modern Indian Legal System

What place was given to custom in the scheme of administration of justice in India during the British period. The Englishmen were very particular in leaving the personal laws of the people undisturbed as much as possible and this attitude characterised the whole of the British period. In 1781, the Act of the settlement passed to remove defects from the Regulating Act, 1773, directed the Supreme Court at Calcutta to decide 'matters arising out of inheritance and succession to land and goods', and matters of 'contract and dealing between party and party', 'by the laws and usages of Muhammadans', in the case of Muhammadans and 'by the laws and usages of the Gentoos' in case of the Gentoos. Provisions on the same lines were made for other Presidency towns and were repeated from time to time with slight verbal variations.

As to the *mofussil* area, i.e., the territories beyond the Presidency towns, the starting point is 1772, when for the first time, Warren Hastings created an *adalat* system in Bengal, Bihar and Orissa. The *adalats* were directed to decide all cases of inheritance, marriage, caste and other religious usages and institutions according to the laws of the *Koran* with respect to the Muhammadans and the laws of the *Shaster* with respect to the Hindus. In 1781, this provision was supplemented by a provision to the effect that in all cases for which no specific directions were given, the *adalats* were to act according to justice, equity and good conscience. Practically the same was repeated in S. 37 of the Bengal, Agra and Assam Civil

Courts Act of 1887 where Muhammadan law and Hindu law were substituted for 'the law of the *Koran* and the law of the *Shaster*' respectively. No mention was made in this provision of custom. Warren Hastings had supposed that the Hindus and Muslims were governed by their religious or sacredotal texts; he failed to appreciate that more than these texts, the local and personal usages had come to play an important role in the lives of the people. In course of time, better knowledge came to prevail amongst the British administrators regarding the Indian conditions, and then custom came to be given its due importance. Thus in 1827, when Monstuart Elphinstone legislated for the territories annexed to the Bombay Presidency, Regulation IV of 1827, in S. 26, deviated from the Bengal model by giving precedence to custom; it laid down that "the law to be observed in the trial of suits shall be Acts of Parliament and regulations of Government applicable to the case; in the absence of such Acts and regulations, the usage of the country in which the suit arose; if none such appears, the law of the defendant, and, in the absence of specific law and usage, justice, equity and good conscience alone". In S. 16 of the Madras Civil Courts Act, 1873, it was laid down that to decide any question regarding succession, inheritance, marriage or caste, or religious institution, "the Muhammadan law...and the Hindu law..., any custom (if such there be) having the force of law and governing the parties or property concerned, shall form the rule of decision...."

The above provisions did not follow a uniform pattern insofar as the question of the relative position of custom *vis-a-vis* the personal law (as contained in the religious books) was concerned. Except the Bombay Regulation, all other provisions left the question vague. Only the Bombay Regulation clearly assigned precedence to custom over the personal law. The Madras provision did mention 'custom' but did not explicitly give any precedence to it over rules of personal law. The Bengal provision did not mention custom at all. Courts were thus confronted with the question: in case of conflict between the custom and the written text of law, what was to be followed? Insofar as the Hindus were concerned, the courts, taking note of the great importance given to custom in the ancient India, ruled early that "under the Hindoo system of law, clear proof of usage will outweigh the written text of the law", which came to mean that if a custom is proved to be established on a point of Hindu law, then the courts are bound to follow it even though it may be inconsistent with some express text in the *Dharmashastras* or the commentaries [*Collector of Madura v. Mootoo Ramalinga* (1868) 12 MIA 397, 436; *Bhyah Ram Singh v. Bhyah Ugur Singh* (1870) 13 MIA 373, 390]. The point was made still more specific in *Neelkisto Deb v. Beerchunder* [(1869) 12 MIA 523] where it was said that where custom was proved to exist it would oust the general law, which, however, will regulate all outside the custom. The courts in laying down that immemorial usage is transcendental law have depended on the text of Manu which has been quoted above. This judicial approach to custom in the area of Hindu law, even though not in conformity with the orthodox approach, was yet in conformity with the genius of the law which always gave a high regard to custom.

The position of custom in the area of Muslim law remained doubtful for quite sometime. The difficulty arose because, traditionally, the Muslim Jurists placed custom at a low level of priority. Early in the day, the Bombay Supreme Court was called upon to decide, [*Hirbae v. Sonabae*, 4 Ind. Dec. 100, 112] with reference to the Bombay Presidency town, whether

Khojas and Cutchi Memons, who were Muslim by religion, but who followed the Hindu customs of inheritance and succession, should be governed by their customs or by the orthodox Muslim law. Referring to the expression 'laws and usages' of the Muslims in the clause referring to the Presidency towns, Perry, C. J., refused to read it as meaning the application of the *Koran* only to the Muslims without regard to their usages. He pointed that the clause in question was framed on political grounds solely, and without reference to orthodoxy, or the purity of any religious belief. The underlying purpose of the clause was to give the benefit of their laws to the people of India. The effect of the clause was not to adopt the text of the *Koran* as law any further than it has been adopted in the laws and usages of the Muhammadans; and if any class of Muhammadans are found to be in possession of any usage which was otherwise valid as a legal custom, and which did not conflict with any express law of the English Government, they were just as much entitled to the protection of this clause as the most orthodox *sunni*.

It has been already mentioned that the rule of decision (S. 37 of the Act of 1887) for Bengal, Bihar and Orissa, did not mention 'custom' as a source of law. It, therefore, remained a matter of doubt whether in case of Muslims, custom could prevail in derogation to the Muslim law in this territory. [As late as 1866, the Privy Council in *Jowala Buksh v. Dharum Singh* (1860) 10 MIA 511, 538 stated: 'Whether it is competent for a family converted from the Hindoo to the Mahomedan faith to retain for several generations Hindoo usages and customs, and by virtue of that retention to set up for itself a special and customary law of inheritance, is a question which, so far as their Lordships are aware, has never been decided. It is not absolutely necessary for the determination of this appeal to decide that question in the negative, and their Lordships abstain from doing so']. As late as 1904, the Allahabad High Court held in *Jammya v. Diwan* [(1901) ILR 23 All. 20. The High Court said that the terms of the provision in question were very positive and emphatic in terms that Muhammadan law was to be applied to the Muhammadans]. that a family custom among Muslims excluding daughter from inheritance could not be proved as the provision did not provide an opening to custom as against the Muslim law. This view had been held by the courts since long for, as early as 1866, in *Surmust Khan v. Kadir Dad Khan* [1 F.B. Rulings, N.W.P. (1866); also *Jowala Buksh v. Dharum Singh* (1866) 10 MIA 511, 538] the same view was propounded. It may be mentioned that this attitude of the court was due to the low place allotted to custom traditionally by the Muslim Jurists. So far as the Hindus were concerned, the same provision was interpreted differently and custom was given a high place in the scheme of law because of the high place traditionally allotted to custom by the Hindu Jurists. It was only when the Allahabad ruling came before the Privy Council for review in *Mohd. Ismail v. Lala Sheomukh* [17 CWN 97] that custom got the precedence over the Muslim law and was made legally enforceable even in derogation to the orthodox Muslim law [*Ali Asghar v. Collector of Bulandshahar* (1917) ILR 39 All. 574; *Mt. Jaffro v. Chatta*, 163 IC 650; *Roshan Ali Khan v. Chaudhri Asghar Ali* (1929) 57 IA 29. In *Md. Ibrahim v. Shaik Ibrahim*, AIR 1922 PC 59, it was stated that in India 'custom plays a large part in modifying the ordinary law, and it is now established that there may be a custom at variance even with the rules of Mahomedan Law, governing the succession in a particular community of Mahomedans'].

A special reference need be made to Punjab which is pre-eminently a land of customary law. Neither the sacred books of the Hindus nor those of the Muslims have made much of an impact on the rural life of the Punjab and people are mostly governed by their customary law. In the pre-British times, these customs were enforced by the village or tribal *panchayats or jirgas*. On the annexation of Punjab by the British in 1849, the Governor-General, while constituting the Board of Administration, gave assurance to the people; that the native institutions and practices shall be upheld as far as they are consistent with the distribution of justice to all classes. Soon after, directions were issued that the *lex loci* or local customs which had been obeyed by any tribe or sect will be enforced [Sir George Campbell, Lt. Governor of Bengal, who had served in Punjab earlier, observed in the Legislative Council that not one out of a hundred persons in the Punjab was governed by the strict provisions of the Hindu and Muhammadan law]. Section 5 of the Punjab Laws Act, 1872 [The section runs as follows : 'In questions regarding succession, special property of females, betrothal, marriage, dower, adoption, guardianship, minority, bastardy, family relations, wills, legacies, gifts, partition, or any religious usage or institution, the rule of decision shall be - (a) any custom applicable to the parties concerned which is not contrary to justice, equity and good conscience, and has not been declared to be void by any competent authority, (b) the Mohammedan law, in cases where the parties are Hindus except insofar as such law has been altered or abolished by legislative enactment, or is opposed to the provisions of this Act, or is modified by any such custom as is referred to in the preceding clause of this section] expressly directed the courts to observe any custom applicable to the parties concerned which is not contrary to justice, equity and good conscience, and has not been altered or abolished by law, or declared by competent authority to be void, in deciding questions regarding succession, marriage, special property of women, betrothal, divorce, dower, adoption, guardianship, minority, bastardy, family relations, wills, legacies, gifts, partitions of any religious usage or institution. Custom was thus made the first rule of decision. It was at one time held by the courts in Punjab that the effect of this provision was to make custom the primary law of the Punjab in relation to the matters specified in that section and to cast upon anyone alleging that he was governed by personal law the burden of so proving. Bringing out the implications of the above provision, the Privy Council has stated in **Abdul Hussein v. Sona Dero** [(1917) 45 IA 10] that the section raises no presumption that the parties are to be governed by custom rather than by personal law which must be applied unless the custom is proved. The clause puts the custom in the forefront as the rule of decision: the legislature has recognised the fact that in Punjab, customs largely govern the people. But, before a custom may be enforced, it must be established by the ordinary processes of evidence [Also, **Vaishno Ditti v. Rameshri** (1928) 55 IA 407, 421, **Salig Ram v. Munshi Ram**, AIR 1961 SC 1374]. A person asserting the custom has to prove it before the courts can apply it.

There is no such thing in Punjab as a 'general custom'. Custom there is mainly tribal, and even with the same tribe, it may vary from locality to locality. Each tribe has its own customs and in the Punjab there are many tribes. Origins of the tribes differ; even with the tribes of the same origin, local and social conditions have greatly differed resulting in varying customs. There is thus no single body of customary or tribal law common to the whole of Punjab [**Ujagar v. Mst. Jeo**, AIR 1959 SC 1041]. While the custom in Punjab is mainly agricultural,

even the urban people are not completely free from it [*Ramkishore v. Jainarayan* (1921) 48 IA 405].

Customs prevail in Oudh, mainly in the matter of succession and they have figured before the courts from time to time both among Hindus and Muslims [*Roshan Ali Khan v. Chaudhri Asghar Ali* (1929) 57 IA 29, 33]. In Oudh Laws Acts, 1876, S. 3, a provision similar to the Punjab provision has been enacted. Similarly, S. 27 of the N. W. F. P. Reg. VII of 1901 made an equivalent provision giving custom precedence over the personal laws. The Central Provinces Laws Act, 1875, did the same thing. On the Malabar Coast, Maramakatayam law of inheritance in which descent is traced in the female line, a person's heirs being the children of his sister, came to be judicially recognised on the basis of custom [*Krishnan v. Sridevi* (1889) ILR 12 Mad. 512].

The Kumaon Hills constitute another tract of land where customs preponderate. Among others, the hills are inhabited by people known as Khasis who have stuck to their customs on various points which are at variance with the Mitakshara. On the coast of Malabar, people known as Mopalas, who are Muslims by religion, follow not the orthodox system of Muslim law but the Hindu law known as Marumukthayam or matriarchal system and their customs have been applied by the courts.

It may however be mentioned that the clauses giving precedence to custom, did not have much of any special significance, for even without them, custom would have been preferred over the personal law as was held by the Privy Council in the *Moottu Ramalinga* case. To some extent, these clauses did away with the doubt, in the area of Muslim law, regarding the relative position of custom *vis-a-vis* the personal law, but even here the Privy Council's verdict had gone in favour of the custom.

V

Kinds of Customs Enforced

From the above it is clear that during the British Period, the customs came to be given a pre-eminent place as a rule of decision. This happened as a result of statutory provisions, or where these were deficient, by the judicial interpretation. The courts accepted and applied customs of all types, *e.g.*, tribal, communal, sectarian, local, family etc.

Most of the customs brought before the courts are tribal, communal or sectarian, *i.e.*, those which apply to a particular caste, community, or group residing in a particular territorial area [*Parandhamayya v. Navaratna Sikhamani*, AIR 1949 Mad. 825; *Venkata Subba Rao v. Bhujangayya*, AIR 1960 AP 412]. A few examples may be noted here ; Customs in Punjab, Malabar coast, Kumaon hills are all of this category. Apart from these, courts have recognised several miscellaneous customs of various groups. The Kamma community in Andhra has a custom of affiliating a son-in-law and giving him a share in the property; this adoption known as *illatom* adoption has been recognised by the Court. The Jain community, irrespective of its various sects in which it is divided, has a custom that a widow can make an adoption without the consent of her husband (except in Madras and Punjab) [(1947) 74 IA 254 : AIR 1948 PC 177; *Sheo Singh Rai v. Mussumut Dakho* (1878) 5 IA 87; *Chotay Lal* case (1878) 6 IA 15]. Recently, the Supreme Court in *Munnalal v. Raj Kumar* [AIR 1962 SC 1493] reviewed the large number of cases having a bearing on this point and sustained the

custom as one prevailing in the Jain community as such irrespective of the locality where they may reside or the sect in which they are divided. Another custom of Jains recognised by the courts is that a widow has full power to alienate the self-acquired property of her deceased husband [*Sheo Singh Rai v. Mussumut Dakho* (1876-1878) ILR 1 All. 688; *Shimbhu Nath v. Gayan Chand* (1894) ILR 16 All. 379; *Chotay Lall v. Chunnoo Lall* (1879) ILR 4 Cal. 744, 752]. A custom prevails among the Chetti inhabitants of a few villages in Madura District whereby when a husband during the life of his wife marries another wife, he sets aside a portion of his property for the first wife's maintenance (called *moopu*) and the rest of the property is divided in two parts, each part going to the sons of each wife [*Palanjappa Chettiar v. Alayan Chetti* (1921) 48 IA 539]. Nairs in South Malabar have peculiar usages. Some of them have been judicially established. Amongst them, polyandry was legally recognised, and descent of property was through females. Adoption of females with the family when necessary to preserve it was also recognised [*Thiruthipalli Raman Menon v. Variangattil Palisseri Raman Menon* (1900) 27 IA 231].

A family custom is one which applies to a particular family only. At an early stage in the evolution of the Indian legal system, doubt had been entertained by the courts on the question whether a family custom, different from a local custom, could be regarded as legally enforceable. In *Tarachand v. Reeb Ram* [3 Mad. HCR 50] the Judges of the Madras High Court referred to the jurisprudential theories and said that they all referred to customary law, antagonistic to the general law, to be established by evidence of the acts of a single family confessedly subject to the general law. In *Basvantrav v. Mantappa* [1 Bom. HCR, app. XLII], the Bombay High Court refused to give effect to a family custom saying that "it would be a dangerous doctrine that any petty family is at liberty to make a law for itself, and thus to set aside the general law of the country". But this view could not remain in force very long. From the very beginning, the trend of the Privy Council was different. To the same effect were the observations of the Privy Council in *Serumah v. Palathan*, 15 Cal. W. Rep. P.C. 4], a family was held to have retained the mithila law even though it migrated from there, and had been residing in Bengal, for generations. In *Abraham v. Abraham* [(1863) 9 MIA 199. In this case the parties were left free to adopt the law. It was also seen that Thibaut supports the view that a family is capable of making an applicable custom], the Privy Council had definitely accepted the possibility of a Christian family, converted from Hindu or Muslim religion, to have its law. These cases made the Bombay and Madras views regarding the efficacy of a family custom completely untenable and so the courts changed their opinions. [*Shidhojiray v. Naikojiray*, 10 Bom. HCR 228; *Bhau Nanaji Utpat v. Sundrabal*, 11 Bom. HCR 249. The Court held that the words usage of the country in Reg. IV of 1827 are sufficiently general to allow either of a very large or restricted application].

In a number of cases, too many to recount here, family customs have been applied by the courts. A family of *jats* migrated from Delhi to U.P. in 1858. It was held that according to customs applied to *jats* in Delhi, adoption of an orphan was valid and that the family must be presumed to have carried this custom with it to U.P. and so it must be applied to it. Impartibility of estates is a creature of custom and it has been enforced in a large number of cases as a family custom. In certain cases where impartibility of zamindari has been sustained because of a family custom, a right to maintenance in certain members of the family has also

been recognised because of the family custom. An interesting institution created by custom, prevalent among certain families in certain parts of the country, is that of a 'composite family', i.e., two or more families agree to live and work together, pool their resources, throw their gains and labour into the joint-stock, shoulder the common risks, utilise the resources of the units indiscriminately for the purposes of the whole family. A Jain family became Vashnabs, but even then the Jain custom was applied to it and it was held that change in religion did not affect the laws and customs by which the personal rights and status of the members of the family were governed. A family custom governing succession of a Muslim family in Oudh has been upheld by the Privy Council.

Commenting upon the legal enforceability of a family custom of succession, the Privy Council stated in *Shiba Prasad Singh v. Prayag Kumari* [(1932) 59 IA 331] that "a Hindu family, no doubt, cannot by agreement between its members make a custom for itself of succession to family property at variance with the ordinary law. But where a family is found to have been governed as to its property by a customary rule of succession different from that of the ordinary law, that custom is itself law. The rule of succession in such a case is recognised by the state as part of the law of the family, though it is no more than the result of a course of conduct of individual subjects of the state constituting the familyö. It has been held judicially that a family custom is capable of being destroyed by disuse.

A local custom is one which is binding on all persons in the local area where it prevails. A few examples of such customs can be found in the Indian case-law, though it will be seen that they are few as compared to the tribal or family customs which have been noticed above. Another point to note is that while customs in India in the area of family relations and succession to property are either tribal or communal or family, the local customs are more of a secular nature and do not affect family relations or succession; they create other rights. One of the most widely spread customs in several parts of India is the right of pre-emption. Pre-emption is essentially a Muslim concept and the Muhammadan law deals with it in details. But in certain areas of India, the right of pre-emption came to be recognised as prevailing amongst the non-Muslims also as a matter of custom. It has also been held that the rules of Muhammadan law of pre-emption would apply to non-Muslims also except insofar as such rules are modified.

Section 18 of the Indian Easements Act stipulates that an easement may be acquired by custom. It has thus been held that a right of privacy may be established as a customary easement in a locality. Rights not amounting to easements have been recognised by the courts as customary rights. Thus the right of pasturage in the land of another, right to bury dead on another's, right to worship, right to hold festivals, right to remove earth from a portion of a field, right to a village pathway, have all been judicially conceded. In a number of cases, the Calcutta High Court has held that a fluctuating body of persons cannot acquire a customary right in the nature of a profit-a-prendre. Patna High Court disagrees with this view. But Bombay High Court has held that members of a village are not a fluctuating body.

VI

Requisites of a Valid Custom

A custom is a rule which in a particular family or in a particular district, has, from long usage, obtained the force of law. It is not that each and every custom can be legally enforced. A custom to be legally recognisable and enforceable must fulfil several requisites, viz., it must be ancient, certain and reasonable, and, being in derogation of the general rules of law, must be construed strictly. A neat formulation of a valid custom is contained in the Hindu Marriage Act and the Hindu Succession Act wherein it is said that the expression 'custom' and 'usage' signify any rule which, having been continuously and uniformly observed for a long time obtained the force of law among Hindus in any local area, tribe, community, group or family : Provided that the rule is certain and not unreasonable or opposed to public policy.

One of the attributes of an enforceable custom is that it should be certain and not vague; that the course of conduct upon which the custom rests must not be left in doubt but be proved with certainty. The reason behind this rule is simple to understand. If one is left in doubt as to what the custom is, he cannot apply it. If a custom is vague, the courts cannot be definite about its content and so cannot give effect to it.

A custom to be valid must be ancient. The Royal Court in England laid down the rule that country custom was only valid if immemorial. It could not be transferred from one country to another, nor could it be changed. At first, immemoriality must have referred to the actual memory of any person living, since, in the first centuries after the Conquest, law was preserved by oral tradition. Later, it was necessary to prove that there was no record of any different rule. The problem can be illustrated by an important case in 1346 (Y.B. 20, Ewd. III). The Prince of Wales held a court at Macclesfield which tried a plea of covenant on simple contract. The defendant demanded judgment saying that, by the common law used in the country of Cheshire and elsewhere throughout the whole realm of England no one need answer any claim of covenant without a special deed testifying to that covenant. The plaintiff claimed a contrary custom at the Eyres of Macclesfield. The King's Bench held that there was no such custom, since the Eyres had first been held in the time of Edward I, after the time of memory. As records were maintained in writing, the Central courts appear gradually to have limited customs to those recognised when the earliest records started, or not contradicted since that time. They fixed on the year 1189 (Throne of Richard I, from which date the earliest rolls of the King's Bench are available) as the beginning of legal memory, an appropriate date as most royal court rolls start about that time [Lord Blackburn in *Dalton v. Angus* (1880-81) 6 AC 740, 811; *Wolstanton Ltd. v. Newcastle Under-Lyme Corporation* (1940) AC 860. The courts, however, have decided that in the case of an alleged custom it is sufficient to prove facts from which it may be presumed that the custom existed at that remote date and this presumption should in general be raised by evidence showing continuous user as of right going as far back as living testimony can go. This presumption is rebuttable (1940) AC 860, 876].

But the expression 'immemorial origin' in India does not have the same sense as in England. Though in the beginning, the Privy Council appeared to be of the view that a custom should be ancient, the judicial attitude somewhat softened later. The Allahabad High Court frankly stated, "We cannot in these provisions apply the principles of the English Common Law, that a custom is not proved if it is shown not to be immemorial. To apply such a principle...would be to destroy many customary rights of modern growth in villages and

other places. It would be inexpedient...to attempt to prescribe any such period. In one case, the Calcutta High Court held that a right of pasturage being enjoyed for 40 years was not immemorial and hence not customary. In fact, the general view taken by the Calcutta High Court is that either 1773 A.D. or 1793 A.D. is the date for treating a custom which has been in existence as immemorial. The Bombay High Court has taken the view that if within the last 20 years, there have occurred a number of instances in which the alleged custom has been recognised, the presumption arises of immemorial usage. In *Mt. Subhani v. Nawab* [(1940) 68 IA 1, 31, AIR 1941 PC 21], the Privy Council held that in India it is not of the essence of the rule that the custom to be binding must be ancient and its antiquity must be carried back to a period beyond the memory of man - still less, that it is ancient in the English technical sense. It depends upon the circumstances of each case what antiquity must be established before the custom can be accepted. What is necessary to be proved is that the usage has been acted upon in practice for such a long time as to show that it has, by common consent, been submitted to as the established governing rule of the particular locality. In the instant case, a custom proved to be in existence over a period of nearly 30 years was held legally enforceable. The Privy Council has held that customary law, if found to exist in 1880, must be taken to have the ordinary attribute of a custom that it is ancient.

The Supreme Court of India has stated that a custom derives its force from the fact that by long usage it has obtained the force of law, but the English rule that a custom to be legal and binding must have been used so long that the memory of man runneth not to the contrary should not be strictly applied to Indian conditions. All that is necessary to prove is that the usage has been acted upon in practice for such a long period and with such invariability as to show that it has, by common consent, been submitted to as the established governing rule of a particular locality.

The Andhra High Court has held that a custom being in existence for 40 years, is an enforceable custom. The Calcutta High Court has held recently that the rule of legal memory does not apply to custom in India, even though it is proved or assumed that the law was otherwise previously; proof of existence of a custom for 50 years is enough to give it validity of law, even though it is proved that previous to that period a different state of things existed. In *Bari v. Tukaram* [AIR 1959 Bom. 54], the Court held legally enforceable as a customary right, a right to remove earth from a portion of a field which right had been enjoyed for the last 30 years. In *Bhiku v. Sheoram* [AIR 1928 Nag. 87], a right enjoyed for 20 years by kumhars to take earth from a portion of a field was held valid as a customary right.

From the above, it is clear that there is no uniform rule regarding the time factor for which a custom must have been in operation before it is legally recognised. The minimum period for this purpose appears to be 20 years. But the High Courts differ in their approach on this point. Now, the definition of custom adopted by the Hindu legislation says 'for a long period' instead of 'immemorial', which denotes that the English rule has not been adopted, but as 'long period' has not been defined, uncertainty as to what that is continues in the views of the various High Courts.

A custom should not be unreasonable. It should not be against reason, but the reason referred to here "is not to be understood as meaning every unlearned man's reason but

artificial and legal reason warranted by authority of law", and, further, "it is sufficient if no good legal reason can be assigned against it".

Examples of customs held unreasonable by the courts are not many [In *Wolstanton Ltd. v. Newcastle Under-Lyme Corporation* (1940) AC 860, the House of Lords held that a custom for the lord to get minerals beneath the surface of copyholds or customary freehold lands without making compensation for subsidence and damage to buildings, was not a reasonable custom]. One or two examples of unreasonable customs may be considered here. A custom of total remission of rent on the ground that a certain portion of the land was subject to inundation resulting in the destruction of crops, the extent of such destruction not being specific, has been held to be unenforceable in law both because it is unreasonable and uncertain [*Shibnarain Mookerjee v. Bhutnath Guchait* (1918) ILR 45 Cal. 475].

A right of pasturage over the land of another may be regarded as unreasonable if it completely deprives the owner of his right to the lands. It is not possible to deprive the owner of his land completely. In the instant case, right of pasturage was being enjoyed on swampy land. Later the land became fit for cultivation. The Court held that a part of the land may be given on rent so long as sufficient land was left for pasturage for those who are entitled to it and that no such right can be claimed over the whole of the land. It has been held that it is the usage which makes the law, and not the reason of the thing for it cannot be said that a custom is founded on reason, though an unreasonable custom is void; for no reason, even the highest whatsoever, would make a custom or law. The circumstance that the reason for the custom has subsequently been found to be wrong cannot affect its validity. It is no requirement of a valid custom that it should be deducible from any accepted principle of law. A right having been established 50 years ago and which has not been shown to have since been denied or disputed in any decided case cannot be overthrown on the strength of recently expounded theories regarding its basis.

A custom should not be immoral or opposed to public policy or against justice, equity and good sense. There is, however, no fixed test to judge the morality or otherwise of a custom. In *Gopi v. Jaggo* [(1936) 63 IA 295], the Privy Council allowed a custom which recognised and sanctioned remarriage of a woman who had been abandoned and deserted by her husband. According to the custom, desertion by the husband dissolved the marriage tie leaving the woman free to re-marry. In *Nanee Tara Naikin v. Allarakia Soomar*, the Bombay High Court had recognised the custom of adoption of girls by the dancing girls. But the judicial view changed. In *Mathura Naikin v. Esu Naikin* [(1880) ILR 4 Bom, 545], the Court held the custom to be immoral, for the profession of dancing girls was immoral, and adoption by them of girls was designed to perpetuate this profession. But in matters of succession, *dasis* (dancing girls) have been held to be governed by their customs and a custom excluding married *dasis* from inheritance to another *dasis* has been judicially accepted.

Following customs regarding divorce have been held to be immoral; a custom permitting a woman to desert her husband at her pleasure and marry again without his consent, a custom by which the marriage tie could be dissolved by either husband or wife against the wish of the divorced party on payment of a sum of money.

There was nothing immoral in a custom permitting divorce by mutual agreement. In certain cases it has been held that unless both the parties had specifically agreed, a divorce granted by a caste *panchayat* would be against public policy and could not be enforced by the courts. The Madras High Court has recently held the proposition to be too wide.

A custom abhorrent to decency or morality however long practised and recognised by a community cannot be enforced by the courts. Thus a custom permitting marriage with daughter's daughter was held immoral.

It is under this heading, that the courts exercise a kind of 'censorial' power on the customs.

VII

Proof of a Custom

Before the advent of the British period, the customs of the people were mostly unwritten and unrecorded and were enshrined in the 'unexpressed consciousness of the people' and were enforced by the village *panchayat*. With the coming in of the British methods and forms of administration of justice, it became necessary and imperative to establish customs in the courts before they could be enforced. It thus became necessary to ascertain the customs and record them in writing. No longer could the custom remain in the consciousness of the people.

The first important principle laid down by the courts in a large number of cases is that a party alleging that he is governed by a custom must specifically allege the same and prove its existence; there is no presumption that a particular person or class of persons is governed by a custom and the onus to prove it rests on him who alleges it. This principle is followed strictly so much so that even in those areas, like Punjab and Oudh, where the statutes give preference to customs over the personal law of the party concerned, there is no presumption that a custom exists; it must be alleged and proved. The Privy Council has stated that what is required before an alleged custom can receive the recognition of the courts, and so acquire legal force, is satisfactory proof of usage so long and invariably acted upon in practice as to show that it has, by common consent, been submitted to as the established governing rule of the particular family, class or district of the country.

The custom must be established by clear and unambiguous proof, by cogent and satisfactory evidence. In the absence of such an evidence the court cannot come to a conclusion whether any custom is really operative or what is its content and scope. But, at the same time, the Privy Council has made it clear that rigorous and technical rules of proof, such as are insisted upon in England, are not required in India.

A custom cannot be enlarged or extended by parity of reasoning, analogy or logical process. One custom cannot be deduced from another. As the Supreme Court has stated: "Theory and custom are antithesis; custom cannot be a matter of mere theory but must always be a matter of fact. Thus a community living in one part of the country may have evolved a particular custom but from that it does not follow that the community living in another district is necessarily following the same custom". In the Kamma Community in the Andhra Pradesh, there is a custom that if estrangement between wife and husband occurs, dowry and all

presents given to the bridegroom by the bride's people at the time of the marriage must be handed back to the bride. The Andhra High Court refused to extend it by the analogy to a situation when the bride died on the ground that there could be no greater estrangement than 'death'. But on evidence tendered the custom was held proved. Thus a custom has to be established by evidence and not by *a priori* methods.

What the courts want is clear and unambiguous evidence with instances of the enforcement of the custom, though it has also been laid down that proving of specific instances was not absolutely necessary at all times. A family custom can be proved by establishing to the same group, i.e., families having a common origin, and settled in the same part of the country. A custom maybe proved by general evidence as to its existence by members of the tribe or family who would naturally be cognizant of its existence, and its exercise without controversy. This may be said to be the effect of Ss. 48 and 49 of the Evidence Act [Section 48 runs as follows : "When the court has to form an opinion as to the existence of any general custom or right, the opinions, as to the existence of such custom or right of persons who would be likely to know of its existence if it existed, are relevant". Section 49 runs as : "When the court has to form an opinion as to the usages and tenets of any body of man or family, ...the opinions of persons having special means of knowledge therein, are relevant facts"]. Decisions of courts regarding a custom are relevant under S. 42 of the Indian Evidence Act, though under that section they are not conclusive. It has been held again and again that where a custom is repeatedly brought to the notice of the courts, the courts may hold that custom was introduced into the law and that no further proof was necessary of the custom in each case. This is the effect of S. 56 of the Evidence Act according to which nothing need be proved of which courts can take judicial notice. Therefore, a custom by repeated recognition by courts becomes entitled to judicial notice.

Very great reliance has often been placed by the courts on *wajib-ul-arz* or *riwaz-i-am* for proof of customs. Those are village administration papers which were directed to be prepared by Regulation VII of 1822. These papers have been received in evidence under S. 35 of the Indian Evidence Act which says that An entry in any public or other official book, register, or record stating a fact in issue or relevant fact, and made by a public servant in the discharge of his official duties, or by any other person in performance of a duty specially enjoined by law of the country in which such book, register or record is kept, is itself a relevant fact. The *riwaz-i-am* is a public document or record and is admissible in evidence to prove the facts entered thereon subject to rebuttal. The statements therein may be accepted even if unsupported by instances, as the Supreme Court has emphasized that 'the fact that the entries therein are the result of careful research of persons who might also be considered to have become experts in these matters after an open public inquiry, has given them a value which should not be lightly underestimated. Thus an entry in the *wajib-ul-arz* or *riwaz-i-am* may be given in evidence as a relevant fact because being made by a public officer; it contains an entry of a fact which is relevant.

These documents contain a record of customs prevalent in the villages in respect of whom they are prepared. The manner to prepare these papers with respect to custom appears to be that the officer recorded the statements of persons who were connected with the villages.

Some of the persons whose evidence is taken may be the proprietors of villages who made statements declaring the existence of the custom in question.

Entries in these documents constitute a *prima facie* evidence of the customs, but it is not conclusive and it may be rebutted by other reliable evidence. Also, the weight to be attached to the documents depends upon their intrinsic quality. As the Privy Council has stated, its weight may be very slight or may be considerable according to circumstances. A *wajib-ul-arz*, as stated by the Privy Council in **Balgobind v. Badri Prasad** [(1923) 50 IA 196], when properly used, affords most valuable evidence of custom and is much more reliable than oral evidence given after the event. On the other hand, as observed by the Privy Council in **Uman Parshad v. Gandharp Singh** (1887) 14 IA 127], they at times contain statements which would appear to have been concocted by the persons making them in their own interest and are therefore to be disregarded, being worse than useless. With this precaution taken, the courts have depended on the records and decided a large number of cases on the bases of the entries therein of the customs without calling for any additional supporting evidence. And they regard the record as more valuable and reliable than subsequent oral evidence given by the parties after a dispute as to custom has arisen. The evidentiary value of these documents can be shaken by showing that the officer preparing them neglected his duties or was misled in recording a custom. In **Uman Parshad v. Gandharp Singh** [(1887) 14 IA 134], the Privy Council refused to treat *wajib-ul-arz* as authoritative because it found that it was a concoction and was made at the instance of one of the parties to the dispute and that her views were entered in the record not as her views but as the official record of a custom. This, however, is an extreme case of its kind. Invariably, the courts follow these documents as evidencing custom and rarely has the basis or the authenticity of these documents been ever challenged. It may however be noted that courts have held that presumption in favour of customs as recorded in these documents would be weak where women are adversely affected as they have no opportunity to appear before revenue officers and only a few instances would suffice to rebut it.

Further manuals of customary law in accordance with *riwaz-i-am* have been issued by authority for each district which stand on much the same footing as the *riwaz-i-am* itself as evidence of custom. Even if there be no evidence of instances, still the custom mentioned in the manual of the customary law of the district, there is sufficient *prima facie* evidence of the existence of the custom, subject, of course, to rebuttal, and that it ought not to be held insufficient merely for want of instance.

The inhabitants of the Kumaon Hills, known as Khasis, are governed by customs which are at variance with the Mitakshara on many points. As usual when any case came from this territory for decision, the court demanded strict proof of the custom and at times ignorant and simple people could not always muster sufficient proof to prove their customs. With the result, the people suffered injustice because many of their customs failed to get recognition at the hands of the courts. The U.P. Government felt that it was inequitable and imposing an impossible task to require the people of Kumaon, unsophisticated and uneducated as they were, to make them adduce proof to establish their customs and, therefore, it undertook to investigate and ascertain the customs of these people. In 1919, the Government appointed Shri Panna Lal, I. C. S., to make a collection of local customs of Kumaon and the result was

the *Hindu Customary Law in Kumaon* published in 1920 by the authority of the Government. This book has been held to be admissible in evidence in the courts under S. 35 of the Indian Evidence Act as it was compiled by making a local inquiry into the actual existing customs of the people.

Besides the above-mentioned official attempts at ascertaining the customs of the people, some private attempts have been made in that direction. Based on the *riwaz-i-ams* and the judicial decisions, some treatises came to be prepared by scholars. One such book was brought out by Mr. William Rattigan in 1880 containing customs of the Punjab; it has run into several editions since its publication, and has assumed a great authority in matters of Punjab Customary Law, so much so that it has been noticed even by the Privy Council in *Mt. Subhani v. Nawab* [AIR 1941 PC 21], as a book "of unquestioned authority in Punjab". This Digest of Customary Law has invariably been cited in judicial decisions. The Supreme Court has recently stated that the authoritative value of Rattigan's Compilation of Customary Law is now beyond controversy, having been recognised by the Punjab courts and even by the Privy Council. But where there is a conflict between *riwaz-i-am* and Rattigan's Digest, the entries in the former ordinarily prevail. In Jammu and Kashmir, the High Court has referred to Sant Ram Dogra's *Code of Tribal Custom*.

There is some difference of opinion in the judgments of the Privy Council itself over the question whether questions of the existence of an ancient custom are generally questions of law or are mixed questions of law and fact or simply of fact. In *Palaniappa Chetty v. Deivasikamony Pandara* [(1917) 44 IA 147], the Privy Council held it as a mixed question of law and fact. In several other cases, it held it to be a question of fact only.

VIII

Abrogation of Custom

While it was the settled policy of the British administration to preserve customs of the people in the administration of justice, there were certain forces which were working for their abrogation. One such effort, on a very big scale, was made through the Muslim Shariat Act, 1937, which abrogated custom applicable to Muhammadans and restored to them their personal law. Except agricultural land, all questions regarding intestate succession, special property of females, including personal property inherited or obtained under contract or gift or any other provision of personal law, marriage, dissolution of marriage, including *talaq*, *ila*, *zihar*, *lian*, *khula* and *mubarrat*, maintenance, dower, guardianship, gifts, trust and trust property, and *wakfs* (other than charities and charitable institutions and charitable and religious endowments) the rule of decision in case where the parties are Muslims should be the Muslim Personal Law (Shariat) [To a limited extent, custom was abolished by the Cutchi Memons' Act, 1920. These people were governed by the Hindu law of inheritance and succession. This Act gave them an option to place themselves under the Muslim personal law by means of a declaration and thus abrogate custom]. Option was given to the Muslims to adopt the personal law in preference to their customary law in matters pertaining to adoption [Muslim law does not recognise adoption, but custom permits adoption in Punjab. *Nur v. Bhawan*, 162 IC 854], wills and legacies. The provisions of S. 2 are coercive, while those of S. 3 are persuasive. The reasons which were given to abrogate custom were uncertainty and

the expense of ascertaining custom and inadequate rights granted to women under the customary law as compared to the Muslim law. It was pleaded that customary law was uncertain and indefinite whereas the Muslim personal law existed in the form of a veritable code and was too well-known to admit of any doubt or to entail any great labour in the shape of research, and so abolition of customs would ensure certainty and definiteness to the mutual rights and obligations of the public. This argument, of course, may not stand the test of scrutiny. But a much more sound reason to abrogate custom was that under it the position of women in matters of inheritance was inferior to that under the Muslim law. The general rule of intestate succession under custom was agnatic succession which excluded all females except a widow and daughter who were allowed a life interest or maintenance. The Muslim personal law accords a better position to women. The abrogation of customary law was a result of the agitation carried on by such bodies as the *Jamiat-ul-Ulema-i-Hind*, an organisation of Muslim religious men. Support was lent by many Muslim Women Organisations which condemned the customary law as adversely affecting their rights.

With a view to introducing uniformity in, and to liberalize, the law applicable to the Hindus, certain portions of it have been codified recently. By far and large, the effect of this legislation has been to reduce the importance of custom though it is not correct to say that custom has been completely abrogated. Some force is still given to customary law. Thus while S. 4 (a) of the Hindu Marriage Act, 1955, gives overriding effect to the Act and abrogates a custom with respect to any matter for which the Act makes a provision, customs in respect of following matters have been left intact, *viz.*, recognition of marriage between parties within degrees of prohibited relationship, and *sapindaship* rites and ceremonies regarding celebration of marriage, divorces and thus a customary right to obtain dissolution of a Hindu marriage is not abrogated.

Section 4 of the Hindu Succession Act, 1956, provides for the overriding effect of the Act in respect of matters dealt with by it. Any custom inconsistent with it is abrogated. The Act does not recognise impartibility except that created by *sanad* or government grant. Impartibility by custom has now been abrogated and succession to such property would now be regulated by the rules which apply to other property. Custom regarding power of disposal is not abrogated; whether a person has power to dispose his property by will is a matter outside the Succession Act; it is to be decided by reference to custom.

Similarly, S. 4 of the Hindu Adoptions and Maintenance Act, 1956, gives overriding effect to the Act. On two matters, however, customs have been saved : Adoption of a married person or of a person over 15 years of age, only if custom permits.

Concluding Remarks

The foregoing survey would show that, after the advent of the British in India, custom came to be given a place of honour in the administration of justice. A large volume of case-law arose in India having a bearing on custom. Custom came to play a very important part as a source of law; it took a place second only to the statutory law; custom was given preference over the religious laws of the parties. This was a reasonable and just approach for, in practice, the law of the *shastra* and the *shara* was not observed by the people in all its pristine purity and that all kinds of customs had ingrained themselves in the scheme of things. It was only

just and equitable that the customs which people had been observing in practice be enforced rather than the theoretical law contained in the books; it would have been harsh with the people to force them to forego their customs in favour of the orthodox system of law.

All kinds of customs - family, local, tribal - came to be applied. Formally, the tests applied to adjudge the legal enforceability of a custom were the same as those laid down in England, but in their practical application, they were not rigidly enforced, and the courts showed a great amount of flexibility of approach and toleration towards customs. Thus about the qualification that a custom to be applicable should be antiquated, we have already seen the liberality of approach which the courts adopted towards this maxim in India, and, in a large number of cases, customs were enforced when there was evidence of their operation over a period of twenty years or so. This is not so in England where a custom must be in existence since 1189 A.D. Similarly, the courts, earlier in the day, declared that they would not insist upon technical methods of proof, and many customs were held proved even though the quantity and quality of evidence in support of them left something to desire [While generally that was the attitude, there are a few cases on record where the courts showed some intolerance towards some customs without any rational reason. One such case is *Gopalayyan v. Raghupatiayyan*, 7 Mad. HC 250. The Civil Judge found that among the *Brahmins* of the locality there prevailed a custom, 'uniform and uninterrupted', 'for the last 134 years', of adoption of sister's son. Nevertheless, the Madras High Court refused to accept the custom saying, 'In the case of *Brahmins* it is impossible in any case to believe in the existence of a customary law of which no trace appears in any written authority of the place to which they belong'. Further, in England, there is nothing like a family or a tribal custom; there the custom is 'local' having the force of law in a particular locality. But in India, it is not so; here family customs came to be fully recognised and enforced. Similarly, the communal or tribal customs were enforced, whereas such would not be the case in England. It may be noted that a large mass of custom here is tribal or sectarian.

In England, the term 'usage' is used for a general line of conduct adopted by persons in a particular department of business life. In India, the term 'usage' has been used in a completely different sense. Usages accepted by the courts have had nothing to do with trade or commerce but covered all aspects of family relations. By and large, the term 'usage' has been used synonymously and interchangeably with custom. Bombay Regulation IV of 1827 speaks of the 'usage of the country'; the Punjab Act, 1872, of the 'customs of the parties'. In the recent Hindu legislation, customs and usage have been defined in the same way. In some earlier cases, it was said that a custom is a usage of long standing [In *Edward v. Sheikh Gozaffar Hussein* [3 CWN 21], the Court stated: 'A long time must elapse before a custom can grow up; but this is not necessarily the case with respect to usage. There is a great difference between a custom and a usage and that clearly the latter may be established in a much less period of time than a custom. We are not prepared to say how long a period must elapse before such a usage can grow up, but it can grow even in 12 years' but, in effect, it makes no difference, for in India the rule of immemorial antiquity does not operate, and a usage of twenty years standing even if it may not be characterised as custom, is followed nevertheless.

Another doctrine adopted in India, for which no parallel can be found in England, is that a family can renounce customs applicable to it and adopt other customs. Another English rule was held not applicable to India which is that if a custom was alleged as applicable to a particular district, and the evidence tendered in its support proved that the rights claimed had been enjoyed by the people outside the district, the custom would fail.

The looseness with which the English tests of a valid custom were applied in India had a good result in the formative stages of the judicial system, for, that way most of the customary law of the people was preserved. Even in matters of proof, the courts were not very technical or scrutinising. [In two cases, *Rup Chand v. Jambu Parshad* (1909) 37 IA 93 (adoption of a married person amongst Jains) and *Chiman Lal v. Hari Chand* (1913) 40 IA 156 (adoption completed merely by unequivocal declaration to that effect and treatment of the adoptee as adopted son) though the Privy Council was not satisfied with the evidence, as it was 'somewhat limited' in character and so cautioned against treating these cases as precedents for the future, did, nevertheless, apply custom to the instant situations at hand]. Had those tests been rigidly applied, most of the customary law would have disappeared resulting in great injustice to the unsophisticated people; it would have created a great void in the judicial system because in the early British days the legislature was not active, did not enact laws in the area of private law, and judges had to decide cases, in the absence of law, by justice, equity and good conscience. In part, the judicial attitude of tolerance and indulgence to custom may be explained by the fact that legislature being inactive, and there being no *lex loci* in the country, if customs were rejected on technical grounds, there would be no law to apply and the courts would be forced to invent principles to decide cases. Rather than resort to principles borrowed from a foreign Jurisprudence and unknown to people, it was better to enforce such customs as were available even though they might not fulfil all the rigours of English law. The judicial attitude was thus to some extent born out of necessity of the situation. This attitude towards custom did introduce an element of uncertainty and confusion as to the rights of individuals but that was for long the bane of the Indian legal system, and this uncertainty was not so dangerous as would have arisen had the customs been abrogated and principles foreign to the people introduced.

Not only were customs recognised and legally enforced, a great effort was made to ascertain them and to reduce them in writing. It was done administratively, like compilation of *riwaz-i-am*, in addition to what happened judicially when a custom was held proved. Thus the customs which so long had been unwritten, and lived in the consciousness of the people, became certain and written. This made the system more definite, but it did, on the other hand, stereotype the customs; the element of flexibility and growth disappeared; customary law became rigid and lost its capacity of organic growth. Thereafter, the system could grow and be developed by legislation, and it was not the policy of the British administration to interfere with the personal laws of the people except when there was public opinion for it. To take an example, in the area of Muslim law, the Shariat Act was passed as a result of the demand of the Muslim people. This Act abrogated, to a large extent, custom modifying the Muslim law. In the area of Hindu law reformatory legislation was undertaken from time to time as a result of public opinion, which abrogated custom as well as regarded Hindu law as backward. One difference of approach between Hindus and Muslims may however be underlined. Whereas custom was abrogated to restore orthodox Muslim personal law, there is no example where a custom was abrogated to

restore a principle of *Dharmashastra*. Whatever changes were made were to reform Hindu law and to that extent, custom or text, whatever came in the way was abrogated. So much so, that through recent Hindu legislation, Hindu law has been codified and reformed and made uniform throughout the country, certain customs have been still preserved even at the cost of uniformity.

It appears that customs have had their heyday and they have practically exhausted their efficacy as law-creating agency. They have now ceased to act as a fruitful agency of law reform. New customs are difficult to get recognition from the courts. Their ascertainment has also led to their fixity. The future legal growth in India will be mostly due to legislation, and to some extent, judicial interpretation and precedent, though comparatively, the latter would be less important than the former. And, usually, when a new legislation is passed custom to that extent is abrogated as is depicted by the recent Hindu legislation. This trend, however, is in line with the developments which have taken place in every complex society, where the custom becomes less effective. The test of custom is continued observance and customs *ex hypothesi* cannot be suddenly created to meet a new problem. Custom is useful for situations which have already occurred, but cannot create a rule to deal with a future difficulty.

The predominance of custom makes the system less uniform; it varies from family to family, from region to region and from community to community. It places a double burden on the judiciary which has to decide not only questions of fact, but also to take evidence to decide existence and content of the custom alleged to be applicable to the facts. Judicial proceedings thus become dilatory and time-consuming. It becomes expensive for the parties for they have to produce witnesses not only to testify to the facts of the case but also to custom. Till a custom is judicially accepted, position remains vague and indefinite for no one can feel sure whether the custom would be accepted as valid or not. All these considerations point to one inevitable result - abrogation of custom and enactment of legislation instead. This has already been achieved to some extent. As time passes on, custom is bound to lose its pre-eminent position which it has enjoyed so long in India. It was inevitable till the legal system itself was in its formative stages. But when the legal system has achieved maturity, people have also become sophisticated and literate and, therefore, time is ripe for uniform legislation and abolition of custom. In every mature and developed system, custom plays a very minor role. Take the example of England. There is one other very important reason as to why custom should now be abrogated. Most of the customs are tribal and communal or sectarian, and so long as custom survives, these class distinctions are also bound to survive. It would lead to a better integration of the people, if the sense of separation of each community arising out of its distinctive customs were removed. As it happens, in every progressive society, custom ceases to play an important role after a stage of social evolution is reached which appears to have been reached in India. It may be that customs of certain tribes may have to be preserved for a little longer time; the Constitution seeks to do that with respect to certain very backward areas like NEFA and Nagaland. These people are in a backward state of evolution, and their modes should not be changed suddenly till they have reached a stage of evolution where they can assimilate new ideas and principles and give up their habitual and traditional patterns without much violence to their feelings and susceptibilities. But, as regards the rest of the people, these considerations do not prevail; and with them, no justification to keep their disparate customs appears to be imperative any longer.

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JUSTICE IN DECIDING DISPUTES: PRECEDENT

R.W.M. Dias

The forth major task of justice, and one which lies especially within the province of lawyers, is giving just decision in disputes. In Aristotelian terms this would fall under *corrective justice*.

Deciding disputes involves three kinds of knowledge knowing the facts, knowing the law applicable to those facts, and knowing the just way of applying the law to them. Knowing the law involves knowing how to find it in judicial precedents, statutes and immemorial customs and will be dealt with in that order in this and the following two chapters; knowing the just way of applying the law will be dealt with in Chapter 10.

As mentioned before, the doctrine of precedent in Britain has assumed a have binding force and enjoy law-quality per se; Bindingness depends on the hierarchy of courts; higher courts bind lower courts, never vice versa law to the principle behind a decision, its *ratio decidendi*, as stated by Jessel MR: "The only thing in a Judge's decision binding as an authority upon a subsequent Judge is the principle upon which the case was decided."²⁸ The two aspects are independent. A decision of the High Court, for example, is *law* although it is not binding on any court superior to itself. Two conditions had to be satisfied before *stare decisis* could become established. (1) There had to be a settled judicial hierarchy before there could be any clear-cut doctrine of binding authority, for until then it could not be known whose decisions bound whom. (2) There had also to be reliable reports of cases; if cases are to be authoritative as *law*, there should be precise records of what they lay down. Only about the middle of the last century were these conditions fulfilled, and it is from about then that the modern doctrine emerges.

Stare decisis should also be distinguished from another doctrine known as *res judicata*, which means that the final judgment of a competent court may not be disputed by the parties or their successors or any third parties in any subsequent legal proceeding. The main differences between the two doctrines are:

(1) *Res judicata* applies to the decision in the dispute, while *stare decisis* operates as to the ruling of the law involved.

(2) *Res judicata* normally binds only the parties and their successors. *Stare decisis*, relating as it does to the ruling of law, binds everyone, including those who come before the courts in other cases.

(3) *Res judicata* applies to all courts. *Stare decisis* is brought into operation only by decisions of the High Court and higher courts.

(4) *Res Judicata* Takes effect after the time for appealing against a decision is past. *Stare decisis* operates at once.

²⁸ *Osborne v Rowlett* (1880) 13 ChD 774 at 785.

LAW-QUALITY PRECEDENTS

Before any kind of doctrine of precedent can operate, there have to be reliable records of the decisions in previous cases and this is especially necessary for the doctrine of *stare decisis*.

Law reports

It has been pointed out by many writers that the history of *stare decisis* is the history of law reporting. Although the strict doctrine could not come into existence until reporting had attained an efficient standard, it is equally true that it was the habit of reply on precedents that gradually improved law reporting. The absence of reports, though inconvenient, did not preclude recourse to previous decisions. Memory was often relied on; and in the early days of equity, for instance, the absence of reports only led judges to refer to the Registrars' Books in which the facts, the steps in suit and the principles were set out.²⁹

Among the earliest writers no reliance on cases is to be found. Glanvil, writing at the end of the twelfth century, cited only one judgment in his treatise; Fleta and Hengham at the end of the thirteenth century quoted hardly any. The same is true of Fortescue in the late fifteenth century. The notable exception was Bracton, who compiled a Notebook of some two thousand cases as material for his treatise and employed some five hundred of them.³⁰ There was nothing resembling the modern use of precedent; he stated his view of what a rule should be and added an illustrative case.

It is possible that Bracton's use of cases may have had something to do with the appearance of the Year Books. These constituted the earliest law reports, but bore no resemblance to modern reports. Many were anecdotal in character, the authors being concerned to record asides and points of pleading rather than principle, and the decisions often passed unmentioned. Nevertheless, the Year Books were used by students and it is clear from occasional statement that judicial decisions were being treated as authoritative pronouncements of the law. Thus Prisot CJ said in 1454:

-And moreover if this plea were now adjudged bad, as you maintain, it would assuredly be a bad example to the young apprentices who study the Year Books, for they would never have confidence in their books if now we were to adjudge the contrary of what has no often been adjudged in the Books.

An utterance like this should not, however, be overestimated, and there was as yet no doctrine of *stare decisis*.

The Year Books, though useful, were not reliable reports and citation remained largely a matter of memory. The original record was the only official source of information³¹, but resort to this was impractical in the daily work of the court and, indeed, access to records was

²⁹ Winder -Precedent in Equity (1941) 57 LQR 245-249.

³⁰ Cf the Practises of early Scots law in which important decisions were noted by judges and counsel for their own use; Smith The Doctrine of Judicial Precedent in Scots Law p2.

³¹ For the distinction between -record and -report see Pollock -Judicial Records in Essays in the Law ch. 9, especially at p 233; A First Book of Jurisprudence p 293.

normally accorded only to lawyer acting for the Crown. The appearance of private compilations of cases was therefore the next landmark. Among the first, the of deservedly high repute, were the reports of Dyer and of Plowden, followed by the famous reports of Coke, which ceased in 1916. None of them was in modern dress for they consisted of lengthy account of pleadings and disquisitions upon the branches of the law involved. Shortly after this, but still in the seventeenth century, there emerged the idea that decisions of the court of Exchquer Chamber were of binding authority³². This was perhaps because such decisions were given by groups of judges. The same idea did not apply to decisions of the King's Bench, Common Pleas or even of the House of Lords. Indeed, decisions of the last mentioned body, which enjoy such authority today, enjoyed virtually none in those days. One reason was that lay peers took part in the deliberations, often to the confusion and embarrassment of lawyers, and it was not until 1844 that they ceased to participate in purely judicial matters.³³ Another reason was that this assembly did not distinguish between its legislative and judicial functions, both of which were covered by parliamentary privilege. The publication even of judicial proceedings would have continued a breach of it. Only in 1813 did Dow begin a series of House of Lords reports.

After Code a period of indifferent reporting set in until the publication of Burrow's reports, which cover the period from 1757 to 1771. These admirable compilations marked the beginning of the modern practice, for they distinguished between headnote, facts, argument and decision with a proper report of the judgment. The doctrine of stare decisis was beginning to cast its shadow. Thus Blackstone spoke of 'an established rule to follow previous cases unless flatly absurd or unjust'³⁴ it would appear also that from about 1785 judges began to favour particular reporters chosen for each court and to prefer citation from them and no other.³⁵ Eighty years later, in 1865, the series of reports known as the Law Reports was inaugurated by the Incorporated Council of Law Reporting. These enjoy the advantage of being revised by the judges before publication, but beyond that they are in no sense official. Law reporting remains, as always, a matter of private enterprise.

The question what cases should be reported bristles with problems. The decision rests ultimately with the individual reporter. 'Utility to the profession is the only test' said Pollock³⁶. Another aspect of the matter is that there is, on the one hand, a need for an expeditious service as possible, and on the other, that it is no easy matter to decide how useful a particular case is likely to prove. In 1936 the All England Law Reports began providing a rapid weekly service of cases both useful and otherwise. In 1953 the Council of Law Reporting introduced an alternative weekly service with an indication as to which of the reported cases would subsequently be more fully reported in the Law Reports. These are by no means all; there are other current series.

³² Herbert CJ in *Godden v Hales* (1686) State Tr 1166 at 1254-55

³³ *O'Connell v. R* (1844) 11 CI & Fin 155 at 421-426.

³⁴ BI Com I, 70.

³⁵ Daniel The history and Origin of 'The Law Reports' p 265. For a list of 'authorised reporters' just prior to 1865, see Moran *The Heralds of the Law* p 20.

³⁶ Pollock *Essays in the Law* p. 249.

Assessment of reports

A law report means any account of a case vouched for by a barrister who was present at the hearing³⁷. Today it is usual for a report to begin with catch-words indicating the main points involved. Followed by a headnote summarising the facts and decision, then the arguments of counsel, but these are included only in some series, and finally the judgment or relevant portion of it.

The following points may be borne in mind in estimating the value of a report. In the first place, any of the old reports may be consulted, but their authority varies. Some, for example those of Coke or Burrow, are viewed with approval, while others, for example those of Barnardiston or Epinasse, are not³⁸. In all old reports it is important to observe how fully the facts are stated and whether the judgment is reported verbatim or not. Secondly, if a case is reported in more than one report, all the versions should be compared, for significant discrepancies may appear.³⁹ Thirdly, as a general rule the Law Reports version; by virtue of having been revised by the judges, should be consulted in preference to others⁴⁰. The question may be asked; which is more authoritative – the original as taken down in court, or the subsequent revision? The Court of Appeal has ruled that it is the latter, since the former is only provisional and awaits approval by the judge. The Judge should not of course, later the

³⁷ Pollock *Essays in the Law* p 243. It must be by a barrister. *Birtwistle v. Tweedale* [1953] 2 All ER 1598, [1954] 1 WLR 190, on which see Megarry *Reporting the Unreported* (1954) 70 LQR 246. Cf Moran *The Heralds of the Law* p 13, where there is no mention of barrister; but see also p 120. For a solicitor's note of proceedings, see *Thompson v Andrews* (1968) 2 All ER 419, [1968] 1 WLR 777.

³⁸ Eg Denman CJ in *Small v. Nairne* 1849) 13 QB 840 at 844; Evershed, LJ in *Hamps v. Darby* [1948] 2 KB 311 at 317-318 [1948] 2 All ER 474 at 475-476; Denning LJ in *Warren v. Keen* [1954] 1 QB 15 at 20-21, [1953] 2 All ER 1118 at 1121.

³⁹ See Pollock *A First Book of Jurisprudence* p 317, who also points out the importance sometimes of comparing the report with the record; *Essays in the law* p 231. On *Williams v. Carwardian* and the Common Law p 11. Other examples of significant divergences: *Edwards v. Jones* [1947] KB 659 at 664, [1947] 1 All ER 830 at 833 where not quite the same reason is given for refusing to follow a *peior* decision. *Barker v. Levinson* [1951] 1 KB 342 [1950] 2 All ER 825 where a statement as to the criminal liability of masters for the acts of servants does not where a statement as to the criminal liability of master for the acts of servants does not appear in the latter report; *Perry v. Stopher* [1959] 1 WLR 415 at 420, where Hodson LJ alludes to a difference in the report of a previous case in [1953] 1 WLR 1486, and his observation is in fact omitted in [1959] 1 All ER 713 the report of *Woods v. Vartinø Bank Ltd.* [1959] 1 QB 55 at 72 is preferable to those in [1958] 3 All ER 166 and [1958] 1 WLR 1018; *Re Philpot* [1960] 1 KB 394 at 398, and in [1949] 2 All ER 810 at 812, which the phrases must be and should be appear respectively with reference to appoint of procedure; in *R v. Agricultural Land Tribunal for the South Eastern Areas, Ex p Bracey* (1960) 2 All ER 518, the applicant relied on a statement reported in [1953] 2 All ER 4 at 6, but which is omitted in [1953] 2 QB 147. The weekly issue [Part 14] of the All England Law Reports version of *Schelesinger* [1960] P 191, contains a fuller report than that which subsequently came out in the bound volume of the same parts.

⁴⁰ *Leather Cloth Co v. Lorisont* (1869) LR 9 Eq 345 at 351; *Brentnall and Cleland v. LCC* (1994) 2 All ER 552 at 555; *Duke of Buccleuch; IRC* {1967} 1 AC 506 at 527 -528 (1967) 1 All ER 129 at 133; *National Bank of Greece SA v. Westminster Bank Executor and Trustee co (Channel Islands) Ltd.* (1970) 3 All ER 656 n. [1970] 1 WLR 1400. Cf *CHT Ltd. V. Ward* [1963] 2 All ER 835 at 842 where the LR version of a case was rejected as unsatisfactory.

whole character of his judgement⁴¹ Fourthly, the best type of report is one which indicates, the arguments of counsel and sets out the judgment, or relevant portion of it, verbatim. A report which only summaries the judgment should only be used in the absence of a fuller report, but may not even then carry much weight⁴² Finally in the absence of all else the oral account of a case by a barrister is admissible, though again this may be of limited value.⁴³

Application of precedents

A precedent influences future decision. Every decision is pronounced on a specific set of past facts and from the decision on those facts a rule has to be extracted and projected into the future. No one can foresee, the precise situations that will arise, so that rule has to be capable of applying to a range of broadly similar situations against a background of changing conditions. It has therefore to be in general terms and -malleable. As pointed out at the beginning of the book, no word has one proper meaning, nor can anyone see to fix the meaning of words for others, so that interpretation of the rule remain flexible and open-ended⁴⁴.

Applying a precedent to the instant case is a process of matching the fact pattern of the precedent and the ruling thereon with the fact-pattern of the instant case; if they match, the rule is applied, if not, it is distinguished. This involves the first two kinds of knowledge mentioned at the start of this chapter, namely, knowing the facts and knowing the law applicable to those facts.

Knowing the facts

Knowing the facts of the instant case involves an exercise of discretion. This lies initially in believing or disbelieving the testimony of witnesses and weighing it on a balance of probability. Judges are human, so the quirks of individual personalities may also play some part occasionally.⁴⁵ The discretionary element is most significant in knowing how to state the facts, for, as pointed out in Chapter 1⁴⁶, it is not knowledge of facts, but knowledge of how to state facts that is relevant; and this applies to the statement of facts of both the instant and the

⁴¹ *Bromley v. Bromley* (1965) P 111 [1965] 3 All ER 226 See also *Young v. North Riding Justices* (1965) 1 QB 502 at 508, (1965) 1 All ER 141 at 143-144, where the omission from the revised version of a point included in the Justices of the Peace Report was considered; and *R v. Cockburn* [1968] 1 All ER 466 at 468, [1968] 1 WLR 281 at 283-284, where the court repudiated a remark in another case, which is reported in the All England Law Reports and Weekly Law Reports, but is eliminated from the Law Report and Criminal Appeal Reports.

⁴² *Hallett J in Rivoli Hats Ltd. V. Gooch* [1953] 2 All ER 823 at 824, [1953] 1 WLR 1190 at 1192 commenting on the summarized report of *Clayton Newbury Ltd. V. Findlay* in (1951) Current Law Consolidation 65 (a fuller report was immediately included in [1953] 1 WLR 1194; and, less fully, in [1953] 2 All ER 826. See also *Haley v. London Electricity Board* [1965] AC 778, [1964] 3 All ER 185, commenting on *Pritchard v. Post Office* as reported in [1950] WN 310 and (1950) 114 JP 370.

⁴³ See the observations of Lord Morton in *Champan v. Chapman* [1954] AC 429 at 464-465, [1954] 1 All ER 798 at 815-816.

⁴⁴ See Stone Legal System and Lawyers Reasonings pp 35-36.

⁴⁵ See pp 220-225 post.

⁴⁶ See pp 7-8 ante.

precedent cases. As Lord Simon has said. 'What is relevant is not only the statement of material facts by the deciding judge, but also their re-statement by other judges in later cases.'⁴⁷

First, the art of knowing how to state facts involves the distinction between statements of primary and secondary (or/inferential) facts: between saying, eg that A did so and so at such a time in such a place and saying that A acted negligently. 'Negligence' is commonly treated as a question of fact, but since it is a matter of inference from a set of primary facts two courts may state the inferential fact differently while agreeing on the primary facts⁴⁸

Secondly, there is knowledge of how to state facts at different levels of generality, which makes it possible for the deciding judge and a judge in a later case to make different statements of facts. Thus, A may have driven a Rolls Royce car at 30 mph through Piccadilly Circus at 2 pm on a certain Wednesday, run into B and broken his right leg. The individual A may be generalized into 'person', the Rolls Royce car may be generalized into 'vehicle', Piccadilly Circus into 'public highway', 30 mph through Piccadilly Circus at 2 pm. On Wednesday into negligence; and B's broken right leg into physical injury to the person. A restatement of these facts at a more general level would be: 'a person inflicted of physical damage' and more generally still: 'the negligent infliction of damage. The higher the level of generality, the wider the scope of the proposition. It is clear at a glance that negligent infliction of damage is wider than just 'the breaking of a given person's right leg by the careless driving of a Rolls Royce Car'. A later judge is at liberty to accept as the fact-statement of A v B a proposition at any level along the scale. Thus, one who is confronted with situation in which a careless false statement has caused damage to person or property, and who wishes to utilise the decision in A v B in order to hold the defendant liable, would no doubt regard that case as authority for the negligent infliction of physical damage since only at this level of generality would the ruling become wide enough to cover the instant case⁴⁹. On the other hand, another judge, wishing to impose liability for pecuniary loss would no doubt prefer the widest interpretation of A v. B, namely, the negligent infliction of damage.⁵⁰

Thirdly, it is necessary to know how to select the material facts. The fewer material facts included in a statement, the wider is its scope. In *Rylands v. Fletcher*⁵¹ the facts were as follows: (i) A had a reservoir built; (ii) A employed B to build it; (iii) A was not himself negligent; (iv) B was negligent; (v) water escaped owing to B's negligent construction of the

⁴⁷ *FA & AB Ltd v. Lupton (Inspector of Taxes)* [1972] AC 634 at 659, 659, [1971] 3 All ER 948 at 964, 965.

⁴⁸ *Benmax v. Austin Motor Co Ltd.* [1955] AC 370, [1955] 1 All ER 326.

⁴⁹ Eg. *Asquith LJ in Candler v. Crane, Christmas & Co* [1951] 2 KB 164 at 189, [1951] 1 All ER 426 at 439; *Clayton v. Woodman & Son (Builders) Ltd* [1962] 2 QB 533, [1961] 3 All ER 249 (reversed on the facts without affecting the principle [1962] 2 QB at 546, [1962] 2 All ER 891).

⁵⁰ Eg *Ross v Caunters* [1980] Ch 297, [1979] 3 All ER 580; *Junior Books Ltd. v. Veitchi Co Ltd.* [1983] 1 AC 520, [1982] 3 All ER 201.

⁵¹ [1868] LR 3 HL 330, and see Goodhart 'The Ratio Decidendi of a Case' in *Essays in jurisprudence and the Common Law* pp 17-18.

reservoir and damaged C's property. Only facts (i) and (v) were treated as material by the court. By ignoring the absence and presence of negligence in A and B respectively, and by generalising fact (i) into 'anything likely to do mischief', the decision creates the sweeping rule that whoever brings a 'mischievous substance' on to his land is liable for damage⁵² caused by its escape, irrespective of negligence.

Connected with this, fourthly, is the ability of a later judge to review the material facts of the precedent and add to or subtract from the sub-total of facts selected by the deciding judge; or he may re-state the facts at a different level of generality. Such re-statements extend or restrict the ambit of the precedent in *Wilsons and Clyde Coal Co Ltd. English*⁵³ the employers were held liable for the death of one of their employees owing to the default of another employee. At that date a servant could not hold his employer vicariously liable for an injury inflicted by a fellow-servant because of the prevailing doctrine of common-employment, which has since been abolished. Therefore, to hold the employers liable, it was essential to the ratio decidendi to ignore the fact that the party at fault was a servant and to say that the employers were being held liable, nor vicariously, but for the breach of a personal non-delegable duty to ensure that reasonable care would be taken. So stated, the rule would attach liability to the employer of even an independent contractor. In *Davie v. New Merton Board Mills Ltd*⁵⁴, however, Viscount Simonds and Lord Reid appeared to place an interpretation upon *Wilsons* Case which would dismantle this rule. They stressed the materiality of the fact that it was not a contractor but a servant who had been at fault, which would involve a fundamental reinterpretation of the case⁵⁵ The Employer's Liability (Defective Equipment) Act 1969, however, overruled *Davie* and restored the original interpretation of *Wilsons* in statutory form. The point is even more vividly brought out in the two *Wagon Mound* cases. A quantity of furnace oil was carelessly allowed to spill overboard from the SS *Wagon Mound* into the waters of a harbour. In *Wagon Mound*⁵⁶ the Judicial Committee of the Privy Council proceeded on the finding of the lower court that, according to scientific opinion at that date, the ignition of the oil in such circumstances was not reasonably foreseeable, and accordingly held that there was no answerability in negligence for damage by fire. In *Wagon Mound (No. 2)*⁵⁷, however, brought by different plaintiffs but based on the same occurrence, the lower court stated that a bare possibility of fire might have

⁵² Subsequent Interpretation of damage leaves open whether it includes personal injury: *Miles v Forest Rock Granite Co (Leicestershire) Ltd* (1918) 34 TLR 500; *Shiffman v. Order of St John* [1936] 1 All ER 557; *Hale v. Jennings* [1938] 1 All ER 579; *Perry v. Kendrick's Transport Ltd* [1956] 1 All ER 154, [1956] 1 WLR 85; *Cf Read v. J Lyons & Co Ltd.* [1947] AC 156, [1946] 2 All ER 471.

⁵³ [1938] AC 57, [1937] 3 All ER 628.

⁵⁴ [1959] AC 604, [1959] 1 All ER 346 (overruled by the Employer's Liability (Defective Equipment) Act 1969).

⁵⁵ [1959] AC at 621-622, 631, [1959] 1 All ER at 351-353, 358. See now Clerk & Lindsell on Torts, & 10-102. See also the attenuation of *Bailey v. Deddes* [1938] 1 KB 156, [1937] 3 All ER 671, in *Knight v. Sampson* [1938] 3 All ER 309; *Chisholm v. London Passenger Transport Board* [1939] 1 KB 426, [1938] 4 All ER 850; *Wilkinson v. Chetham-Strode* [1940] 2 KB 310, [1940] 2 All ER 643; *London Passenger Transport Board v. Upson* [1949] AC 155, [1949] 1 All ER 60.

⁵⁶ [1961] AC 388, [1961] 1 All ER 404.

⁵⁷ [1967] 1 AC 617, [1961] 2 All ER 709.

been foreseeable, but that the chance was so remote that it should be ignored. Accordingly, the defendants were held not liable on the basis that fire was not reasonably foreseeable. The Judicial Committee fastened on this advertence to even a bare possibility of fire as constituting a material difference between the first and the second case, and, reversing the lower court, held the defendant liable in negligence for fire damage after all. It will thus be seen how stressing one factor as material not only enabled two different courts to reach opposite results in the same case, but also enabled the same court to reach opposite results in two cases based on the same happening.

Fifthly, there is the art of knowing how to make different statements by taking different combinations of facts. The facts in *Donoghue v. Stevenson*⁵⁸ may be listed as follows, (i) A was a manufacturer of ginger beer; (ii) A was assumed to have been negligent in that a snail was alleged to have been found in one of the bottles; (iii) acting under contract with a retailer, B, A delivered the tainted bottle to B without knowing that it contained a snail and thereby committed a breach of his contract with B; (iv) B, acting under contract with C, innocently passed the bottle to C, thereby committing a breach of his contract with C; (v) C innocently passed the bottle to D; (vi) there had been no opportunity for an intermediate examination of the bottle at any stage since it left A; (vii), D was allegedly poisoned by drinking the remains of the snail; (viii) this being a Scottish case, D sued A in the Scottish courts, and the case was referred to the House of Lords on a preliminary point. It was held that, assuming A had been negligent in leaving a snail in the bottle, A would be liable to D. the case was remitted to the Scottish court for a decision on fact (ii), namely, whether there had in truth been a different combinations of the above facts. In the first place, on fact (viii) alone it might have been argued that an appeal from Scotland is not binding on English courts, since Scots law is a different system⁵⁹. Secondly on facts (i), (ii), (vi) and (vii) it could be said that a negligent manufacturer is liable for damage to the ultimate consumer where there is no likelihood of an intermediate examination the manufacturer proposition. Thirdly, on facts (ii), (ii), (vi) and (vii) it could be said that anyone who negligently misperforms a contract and physically damages a thirdly party, whom he ought reasonably to have contemplated as likely to be affected, is liable to such thirdly party in tort, though he would not be liable in contract. Fourthly, on facts (ii) and (vii) it could be said that anyone who negligently damages another, whom he ought reasonably to have contemplated as likely to be affected, is liable the neighbour proposition. Only in the light of later cases is it possible to determine the *ratio decidendi* of this important case. In recent years courts have come to regard the fourth proposition as being its ratio⁶⁰, while previously they generally adopted the second⁶¹. It is

⁵⁸ [1932] AC 562.

⁵⁹ Not after *Heyman v. Darwins* [1942] AC 356 at 401, [1942] 1 ALL ER 337 at 361.

⁶⁰ *Home office v. Dorset. Yacht co. Ltd.* [1970] AC 1004, [1970] 2 All ER 294; *Anns v. Merton London Borough Council* [1978] AC 728, [1977] 2All ER 492; *Ross v. Caunters* [1980] Ch 297, [1979] 3 All ER 580; *Junior Books Ltd. V. Veitchi Co Ltd.* [1983] 1 AC 520, [1982] 3 All ER 201.

⁶¹ Eg *Howard v. Walker and Lake (Trustees) and Crisp* [1947] DKB 860 at 863g.

clear, therefore, that until recently tribunals had the choice of adopting one or the other.⁶² In this way a case may even be given an interpretation quite other than that of the deciding judge.

Finally, as an aside, it may be remarked that Donoghue's case strikingly illustrates the point that what is important in law is the statement of facts rather than even their truth. The house of lords remitted the case to the Scottish court for trial on the ruling laid down by the House, but this did not take place because of the death of one of the parties. So the truth as to whether or not there was a snail in the bottle was never established and is irrelevant to the ruling.

Wide though the possibilities are of making different statements of facts, they are limited by the consensual domain of the usual meanings of words. The facts of Donoghue's case would support any of the statements given above, but not, eg the statement that the defendant caused a public nuisance.

Knowing the law

What is *law* in a precedent is its ruling or *ratio decidendi*, which concerns future litigants as well as those involved in the instant dispute. Knowing the law in this context means knowing how to extract the *rationes decidendi* from cases. Statements not part of the *ratio decidendi* as *obiter dicta* and are not authoritative. Three shades of meaning can be attached to the expression *ratio decidendi*. The first, which is the translation of it, is the reason for (or of) deciding⁶³. Even a finding of fact may in this sense be the *ratio decidendi*. Thus, a judge may state a rule and then decide that the facts do not fall within it. Secondly it may mean the rule of law proffered by the judge as the basis of his decision⁶⁴ or thirdly, it may mean the rule of law which others regard as being of binding authority.

There is a temptation to suppose that a case has one fixed ruling which is there and discoverable here and now and once and for all. This is not so, for the ratio is not only the ruling given by the deciding judge for his decision, but any one of a series of rulings as elucidated by subsequent interpretations⁶⁴ the pronouncement of the judge who decided the case is a necessary step towards ascertaining the ratio, but the process by no means ends there; subsequent interpretation is at least as significant, sometimes more so. *It is not sufficient*, said Jessel MR.

That the case should have been decided on a principle if that principle is not itself a right principle, or one not applicable to the case, and it is for a subsequent judge to

⁶² *Wherever the court wishes to find for the plaintiff, that doctrine (the fourth proposition) will be invoked, just as it will be disregarded when the defendant is the favoured party: Landon in Pollock on Torts p 329.*

⁶³ Lord Dinning MR in *Paal Wilson & Co A/S v. Partenreederer Hannah Blumenthal* [1983] 1 AC 854 at 873, [1982] 3 All ER 394 at 400, (varied [1983] 1 AC 854, [1983] 1 All ER 34, HL).

⁶⁴ Goodhart *Essays in Jurisprudence and the Common Law* pp2

say whether or not, it is a right principle, and, if not, he may himself lay down the true principle⁶⁵

Cases of overruling and reversal by superior authority are obvious instances of subsequent correction, but they are not within the scope of the immediate discussion. For, apart from these, the judge in a later case may restrict or enlarge the ruling as stated by the deciding judge, or he may reinterpret that ruling in such a way as to relegate it to the status of an obiter dictum. Accordingly, ratio is best regarded as a pointer towards the direction which subsequent decision should take within a broad spectrum of variations. It is not something identifiable once and for all, but a continuing process, and as such it has to be viewed in a continuum of time.

- (1) Difficult though the task of finding the ratio is, there would be a measure of agreement in propounding that no rule should be treated as ratio which would not support the ultimate order⁶⁶. Where a stated rule obviously bears no relation to the facts, it is no more than a dictum.
- (2) Even when the deciding judge has given no reason for the decision, it may be possible for a subsequent tribunal to extract one from it⁶⁷. However, no judge is required to accomplish the impossible. If it is not clear, said Viscount Dunedin, then I do not think it is part of the tribunal's duty to spell out with great difficulty a ratio decidendi in order to be bound by it⁶⁸.
- (3) It follows from what has previously been said that different ratios may be extracted from a case depending on different ways of stating the facts.
- (4) More rarely, a judge may demote a proposition in a previous case from its status of ratio to that of dictum. Thus, the neighbour proposition in *Donoghue v.*

⁶⁵ *Osborne v. Rowlett* (1880) 13 ChD 774 at 785. Lord Reid, in attempting to find the ratio decidendi of an earlier case, said 'If I had to try, the result might depend on whether or not I was striving to obtain a narrow ratio: *Scruttons Ltd. v. Midland Silicones Ltd.* [1962] 1 All ER 1 at 12. Cf *Devlin J* in *Behrens v Bertram Mills Circus Ltd.* [1957] 2 QB 1 at 24, [1957] 1 All ER 583 at 594.

⁶⁶ The reason sine qua non: Cardozo *Jurisprudence* in *Selected writings* (ed Hall) p 33. See also Lord Denning in *Penn-Texas Corp v. Murat Anstalt (No. 2)* [1964] 2 QB 647 at 660-661, [1964] 2 All ER 594 at 597; *Harper v. National Coal Board (Intended Action)* [1974] QB 614 at 621, [1974] 2 All ER 441 at 446. In *Pinchin v. Santam Insurance Co. Ltd.* 1963 (2) SA 254 (WLD) the ruling on a point which did not affect the ultimate decision was nevertheless made part of the ratio by being made the basis of the order on costs. See also *The Wagon Mound (No. 2)* [1967] 1 AC 617, [1966] 2 All ER 709, for the relationship between rulings and the ultimate order.

⁶⁷ Eg *Giles v. Walker* (1890) 24 QBD 656, discussed in *Davey v. Harrow Corp* [1958] 1 QB 60 at 71-72, [1957] 2 All ER 305 at 309-310.

⁶⁸ *Great Western Ry Co. v. Mosyn (Owners), The Mostym* [1928] AC 57 at 73. A remark by Lord Reid in *Nash (Inspector of Taxes) v. Tamplin & Sons Brewery, Brighton, Ltd.* (1952) AC 231 at 250, [1951] 2 All ER 869 at 880, to the effect that every case must have a ratio decidendi and that this should either be applied or distinguished appear to have been contradicted by Lord Reid himself in *Scruttons Ltd. v. Midland Silicones Ltd.* [1962] AC 446 at 479, [1962] 1 All ER 1 at 14, which he despaired of finding the ratio decidendi of a previous case.

Stevenson used to change its category according to whether the plaintiff or the defendant was thought entitled to succeed⁶⁹.

- (5) Certain types of cases do not deserve to be authorities. One type, already alluded to, is that in which there is no discoverable ratio decidendi. Others are cases turning purely on facts⁷⁰, those involving the exercise of discretion⁷¹, and those which judges themselves to not think worthy of being precedents⁷². Decisions on the interpretation of documents are sometimes used as precedents, which is regrettable since a court may find itself construing, not the document before it, but judicial interpretations of similar working in other, slightly different documents⁷³. I do not think it right to say Lord Denning MR, to look at previous cases in this way. The only legitimate purpose is to use them as a guide towards the meaning of words, so as to help in the search for the testator's intention. They should never be used so as to defeat this intention⁷⁴.

The difficulties so far considered by no means exhaust the problems that may arise, some of which are incapable of solutions. A case may involve two points, A and B, and a decision on either in favour of the defendant, be it supposed, is conclusive of the matter, while the plaintiff has to win on both A and B in order to win. Suppose that the judge decides in the defendant's favour on both issues. Which is the ratio, since either is sufficient to support the decision?⁷⁵ On the other hand, if he decides in favour of the plaintiff on point A, but in favour of the defendant on point B, who accordingly win, and if it is accepted that no ruling can be ratio unless it supports the order made, then the decision on point A is *obiter*. Even as a dictum it may nevertheless carry such authority that a subsequent tribunal may feel obliged to follow it. If so, the nomenclature ratio decidendi or obiter dictum for the decision on point A ceases to matter. In *Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd.*⁷⁶ the House of Lords overthrew a rule by virtue of

⁶⁹ See *Fairman v. Pertetual Investment. Burlding Society* [1923] AC 74, as interpreted by Scott LJ in *Haseldine v. CA Daw & Son Ltd.* [1941] 2 KB 343, [1941] 3 All ER 156, and in *Doylan v. Dublin Corp'n* [1949] IR 60, and in *Pearson v. Lambeth Borough Council* [1950] 2 KB 353, [1950] 1 All ER 682. See also *Jacobs v. LCC* [1950] AC 361; [1950] 1 All ER 737. See further *Adam v. Ward* [1917] AC 309, as interpreted in *Egger v. Viscount Chelmsford* [1965] 1 QB 248, [1964] 3 All ER 406.

⁷⁰ *Simpson v. Peat* [1952] 2 QB 24 at 28, [1952] 1 All ER 447 at 449; *R v. Young* [1953] 1 All ER 291.

⁷¹ *Bragg v. Crosville Motor Services Ltd.* [1959] 1 All ER 613 at 615, [1959] 1 WLR 324 at 326.

⁷² *R v. Stokesley (Torkshire) Justices, ex p Bartram* [1956] 1 All ER 563 at 565, [1956] 1 WLR 254 at 258.

⁷³ See the observations of Jessel MR in *Aspden v. Seddon* (1875) 10 Ch App 394 at 397, 398. As to whether such cases should be reported, see Moran *The Heralds of the Law* ch 7, summarizing the views of Lord Lindley, Mews and Burrows.

⁷⁴ *Re Jebb, Ward-Smith v. Jebb* (1966) Ch. 666 at 672, [1965] 3 All ER 358 at 361.

⁷⁵ In *Said v. Butt* [1920] 2 KB 497, the judge made it clear that his decision on point B was additional, which makes it a dictum.

⁷⁶ [1964] AC 465, [1963] 1 All ER 575. In the South African case of *Pinchin v. Santam Insurance Co. Ltd.* 1963 (2) SA 254 (WLD) the judge made his decision for the plaintiff on point A part of the ratio decidendi by basing his order as to costs on it. See also *The Wagon Mound (No. 2)* [1967] 1 AC 617, [1966] 2 All ER 709.

which the defendant had succeeded in the court of appeal and propounded a different rule, but with a qualification attached so that the defendant was still able to win. This rule and qualification together constitute the ratio; but even if it were said to be a dictum, the distinction is immaterial at this level of authority.

A judge may embark upon a line of reasoning involving a rule which justifies a certain conclusion. He may then proceed along another line of reasoning involving a different rule, wider or narrower, which also justifies that conclusion⁷⁷. Lord Simonds once declared that if two reasons are put forward by a court for its decision, both should be accepted as part of the *ratio decidendi*⁷⁸. One may later be rejected, as in *Fisher v. Taylors Furnishing Stores Ltd.*⁹ where the Court of appeal rejected as incorrect one of the two grounds which it had given in an earlier case, and the rejection was later confirmed by both the Court of Appeal and the House of Lords¹⁰. Again, if the House of Lords has given two reasons for a decision, and declares subsequently that one of them is correct and the other wrong, the authoritative ruling is the correct one¹¹. This shows how subsequent interpretation determines the ratio decidendi as between two stated rulings. Another illustration of the difficulty is *Donoghue v. Stevenson*¹² in which there are three rulings justifying the result, the wide 'neighbour' rule, the narrower 'manufacturer' rule and the 'fallacy of contractual privity' rule. It has been pointed out that judges used to regard the first as being ratio or dictum according to the way in which they wished to decide. On the other hand, even the considered opinion of a judge on a point not raised or argued will probably be treated as a dictum¹³. The same applies to a proposition which is merely a proposition of law assumed by the [Board] to be correct for the purpose of that particular case¹⁴.

These complications multiply in appellate tribunals where there is a plurality of judgments. It may happen that all the judges agree in the result for different reasons. Suppose that each of five judges gives a different reason for arriving at the same result and without disagreeing with the reasons given and a subsequent tribunal may be said to have five competing reasons and a subsequent tribunal may adopt any of them for the purpose of deciding the case before itself. Suppose instead that each of the five not only gives a different reason for the same conclusion, but also rejects the reasons given by the other four¹⁵. Here the difficulty in the way of adopting any one opinion is that it has been condemned in four others. Such a case, it is submitted, has no discoverable ratio and is, in any event, worthless as an authority. It has so far been assumed that the judges agree in the result. Whether they disagree, further difficulties arise. As long as three at least out of five, or two out of three, concur in the result for the same reason, their view may be said to constitute the ratio¹⁶. Where the majority differ in their reasons while the minority agree on the reason for their dissent, it is difficult to say what the discretion¹⁷. Finally, if a case has more than one issue and the tribunal is not that arise cannot be resolved by any test. The judge in a subsequent

⁷⁷ Eg Denning LJ in *Broom v. Morgan* [1953] 1 QB 597 at 609-610, [1953] 1 All ER 849 at 854-855.

⁷⁸ *Jacobs v. LCC* [1950] AC 361 at 369-371, [1950] 1 All ER 737 at 741-742. To the same effect, Lord Bramwell in *Membery v. Great Western Ry. Co.* (1889) 14 App Gas 179 at 187; Lord MacNaghten in *New South Wales Taxation Comrs v. Palmer* [1907] AC 179 at 184; Greer LJ in *London Jewellers Ltd. v. Attenborough* [1934] 2 KB 206 at 222; Pearce LJ in *Cane (Valuation Officer) v. Royal College of Music* [1961] 2 QB 89 at 114; [1961] 2 All ER 12 at 24; Stamp J in *Rogers v. Longsdon* [

case interpretation he chooses upon it¹⁸. All this does not imply that the solution would be to have only one judgement, even if the court is agreed. Differences in presentation and working will avoid the danger of any one judge's utterance being treated like an Act of Parliament¹⁹.

Obiter Dicta

Pronouncements of law, which are not part of the *ratio decidendi*, are classed as *obiter dicta* and are not authoritative. Rationes and dicta tend to shade into each other. The former have law-quality and are binding on lower courts, dicta, too, have law-quality, but are not binding at all. *Vis-a-vis* a higher court even the ratio decidendi of a lower court decision has only persuasive force like that of a dictum. It has been pointed out that some dicta are so authoritative that the distinction between ratio and dictum is reduced to vanishing point. Dicta, which have no force, are propositions stated by way of illustration or on hypothetical facts²⁰. Greater difficulties attend ruling of law which are subsequently relegated to the status of dicta by interpretation. The distinction in such cases between ratio and dictum is but a device employed by subsequent courts for the adoption or rejection of doctrine expressed in previous cases according to the inclination of the judges. An example would be the treatment of Lord Atkin's neighbour proposition in subsequent cases.

The weight accorded to dicta varies with the type of dictum. Mere casual expressions carry no weight at all. Not every passing expression of a judge, however eminent, can be treated as an ex cathedra statement¹. On the other hand, dicta which have been acted upon over the years may acquire increasing respect². A dictum may also be adopted as the ratio decidendi of a subsequent decision and will then acquire the authority of that tribunal. In *Zeidman v. Owen*³ Lord Goddard CJ said 'If we thought that the dicta, though obiter, expressed the true construction of the Act, we should feel we ought to follow them. Finally, a suggestion has been offered that a distinction be drawn between obiter dicta, those irrelevant to the case, and judicial dicta, those relevant to some collateral matter but no part of the ratio⁴. The latter will generally be more persuasive than the former.

Subsequent history of a case

It should be abundantly clear from all this that the ratio decidendi of a case depends on the interpretation put upon it no less than on what the deciding judge himself propounded. Later history is thus an indispensable and continuing part of ratio. It also shows the limits of bindingness.

Reversal

A case may be reversed on appeal. The effect of reversal is normally that the first judgment ceases to have any effect at all. The situation is different if the case is affirmed or reversed by an appellate court on a different point from that on which the decision in the lower court was based. In one case, Master of the Rolls said that in such a situation the previous decision will be of no effect at all⁵. This probably goes too far, and in another case it was said that the first judgment remains binding⁶. The truth seems to be that in such a situation a later court has freedom to deal as it pleases with the earlier decision.

Refusal to follow

Before the doctrine of stare decisis came into being, judges freely refused to follow cases which they considered to be contrary to principle. A judge may even now refuse to follow a decision of co-ordinate authority, in which event the conflict awaits resolution by a superior tribunal. Repeated refusals to follow will weaken the authority of a case; as also the refusal by a higher court to adopt the rule enunciated by a lower court, but only if such refusal implies disapproval of it.

The growing volume of reported cases often leads to unavoidable overlooking of relevant authorities. Sometimes, however, a precedent may be deliberately put on one side, though this is done rarely and perhaps as a last resort. Thus, Sellers LJ once said 'the best way to deal with that case is to say that it goes into the limbo of lost causes'⁸.

Distinguishing

Repeated distinguishing of a case is evidence that the decision is not approved, and the effect may also be to confine it more and more closely to its own special facts.

It should be evident already that the bindingness of stare decisis is not rigid since judges have some latitude in evading unwelcome authorities⁹. All that the doctrine means is that a judge must follow a precedent except where he can reasonably distinguish it; but the possibilities of the latter are such that they reduce bindingness to the semblance of a cloud, solid looking and clear cut when viewed from afar, but less so when one actually gets into it. A judge may, in the first place, restate the factual part of the precedent by lowering the level of generality in order to effect the necessary distinction. 'A case is only an authority for what it actually decides. I entirely deny that it can be quoted for a proposition that may seem to follow logically from it' so said Lord Halsbury¹⁰, and these words are classic authority for this particular distinguishing technique. The two decisions then, as Lord Simon put it, are like 'binary stars each part of which lives within the field of the other and is essentially influenced by it'¹¹. In this way it is theoretically possible to confine the authority of *Donoghue v Stevenson*¹² to the manufacture of ginger beer and to distinguish it from a case concerning the manufacture of fruit-salad; but it is obvious that the lengths to which this technique can be carried have to be regulated by common sense. A distinction has to be reasonable, else it will not satisfy the desire that justice should be done. Alternatively, a judge may restate the factual part of the precedent by treating as material such additional facts as will move it away from the case in hand¹³. Again, it is possible to evade a precedent by treating the less appropriate of alternate principles as its ratio. Or, the ruling hitherto regarded as being the ratio may be rejected as dictum. Asquith LJ once quoted the following remarks; 'the rule is quite simple: if you agree with the other bloke you say it part of the ratio; if you don't, you say it's obiter dictum, with the implication that he is a congenital idiot' and 'And this may well, as a matter of pure psychological fact, have more underlying truth than we know, or care to avow'¹⁴.

On occasions it may be difficult to decide whether a case has been overruled in a subsequent decision, or merely distinguished. Where the House of Lords, for example, has commented adversely on earlier decisions of inferior courts, there is often a great deal of discretion for future courts in deciding whether the House of Lords has by its comments

destroyed the authority of those cases, or merely distinguished them and left their authority unimpaired¹⁵.

Changed conditions

Although a case has neither been reversed nor overruled, it may cease to be law owing to changed conditions and changed law: *cessante ratione cessat ipsa lex*. It is not easy to detect when such situations occur, for as long as the traditional theory prevails that judges never make law, but only declare it, two situations need to be carefully distinguished. One is where a case is rejected as being no longer law on the ground that it is now thought never to have represented the law¹⁶; the other is where a case, which is acknowledged to have been law at the time, has ceased to have that character owing to altered circumstances. It is the latter that is under consideration. If the law-making function of courts is admitted, then it would be easy to reject out-of-date precedents openly on the ground of changed conditions and not have to resort to the threadbare fiction that cases only reflect what always has been law.

Willes CJ once said, 'When the nature of things changes, the rules of law must change too'¹⁷. This is a truism in that the legislature and, within limits, the court should change rules to keep the law abreast of change. The question under review is whether changed conditions may deprive a case of its law-quality. For instance, the decision of the Court of Appeal in *Re Polemis and Furness, Withy & Co. Ltd.*¹⁸ was disapproved by the Privy Council in the *Wagon Mound*¹⁹, but although it has never been overruled, it has been declared to be no longer law in the light of the change in the law of remoteness of damage that had taken place. There is also a strong suggestion in *The Heron II*²⁰ that *The Parana*¹, which had laid down a rule for assessing damages in the bygone days of sailing ships, had ceased to be law in the conditions of modern transport. When sterling changed from being a stable to a floating currency and after Britain's entry into the EEC, the Court of Appeal departed from the rule laid down by the House of Lords in an earlier case². Later, in following their decision, Lord Denning MR remarked 'When the nature of sterling changes, the rule of law may change too'³. On appeal, the House of Lords affirmed the Court of Appeal and refused to follow their previous decision, but indicated that it was for the House, and not the Court of Appeal, to do so. The 'changed conditions' rule applies only to decision which are not binding. In an important statement of the position Lord Simon said:

'To sum up on this part of the case: (1) the maxim in the form *cessante ratione cessat ipsa* reflects one of the considerations which your Lordships a previous decision of your Lordships' House; (2) in relation to courts bound by the rule of precedent the maxim *cessante ratione cessat ipsa lex*, in its literal and widest sense, is misleading and erroneous; (3) specifically, courts which are bound by the rule of precedent are not free to disregard an otherwise binding precedent on the ground that the reason which led to the formulation of the rule embodied in such precedent seems to the court to have lost cogency; (4) the maxim in reality reflects the process of legal reasoning whereby a previous authority is judicially distinguished or an exception is made to a principal legal rule; (5) an otherwise binding precedent or rule may, on proper analysis, be held to have been impliedly overruled by a subsequent decision of a higher court or impliedly abrogated by an Act of Parliament; but

this doctrine is not accurately reflected by citation of the maxim *ocessante ratione cessat ipsa lex*⁴

Overruling

This refers to the action of a superior court in upsetting the ratio laid down by a lower court in some other case. Reversal, which is the overthrow of a decision on appeal in the same case, may involve disapproval of the ratio as stated by the lower court; but it need not, as where the decision is reversed on some other point. Overruling necessarily involves disapproval of the ratio, but never affects the previous decision so that the parties in the *judicata*; and accounts that have been settled also are not affected⁵. A theoretical question arises when a superior court declares that a ratio enunciated previously by a lower court is wrong, but at the same time decides the present case with similar facts in the same way but for a different reason. If it is accepted that, whatever is held to constitute the ratio *decidendi* of a case, at least nothing can be ratio which does not support the order that is made, then the new ruling is ratio; but even if it is not, it may well prove to be so authoritative as to reduce the distinction between ratio and dictum to vanishing point⁶. If a case is overruled by statute, there is some ground for saying that its ratio is no longer authoritative⁷. A case may first be overruled and then reversed, as when the ratio is overthrown by superior authority in another case while there is still time within which to appeal in the first case, and an appeal is then lodged against the decision, which is duly reversed⁸. It is also possible for a case to be first reversed and then overruled, as when the decision is reversed on appeal on some other point without affecting the ratio, and the ratio is then overthrown in another case. If a case is overruled and the overruling case is itself reversed⁹, or overruled¹⁰, the first will revive. Statutory repeal operates prospectively, unless the statute itself subsequently overruled by statute. Does case A revive? By analogy with the case law position it is submitted that it does¹¹.

It is not possible to lay down a rule as to when it is or is not permissible to overrule¹². There will sometimes be a bold rejection even of settled doctrine¹³, at others there will be a timid refusal to eradicate obsolete and Lords considered whether or not to overrule a previous decision of its own. Various considerations were mentioned. In the first place, it was said to be (a) Finality is necessary in developing the law; (b) a tenable view taken in case 1 should not be cast aside by an equally tenable opposite view in case 2, or this in turn may be cast aside in case 3; and (c) it is important not to encourage the re-opening of questions. Secondly, overruling is legitimate when broad issues of legal principle are involved, or if a decision has been disapproved, or distinguished on inadequate grounds. Thirdly, it is earlier to overrule a recent decision before it has been acted on. Fourthly, overruling should rarely occur in matters of statutory construction according to two of their Lordships, but two others thought the earlier case to have been wrongly decided, only a minority were prepared to overrule it¹⁷.

Circumstances which might tend to strengthen the authority of a case and which would work against it being overruled are the unanimity of the court, the eminence of the judges who composed it, the approval of the decision in later cases and by the profession at large, the evidence in the report that the issue was fully and carefully argued by counsel and that the court took time to deliberate, and the length of time for which the decision has stood. This last is especially important since the longer a case has stood, the more people will have

governed their transactions on the basis of what is thought to be law¹⁸. Similarly, factors which might make a court more ready to overrule an earlier case are a lack of unanimity in the judgments, the failure to take notice of relevant authorities, the lack of eminence of the judges who decided notice of relevant authorities, the lack of eminence of the judges who decided it, the fact that the report is of poor quality, the fact that the issue was not fought out fully but was compromised, the fact that the judgment was extempore and the matter had not been properly argued, the fact that the case has been doubted or criticised in subsequent decisions or by the profession or in commentaries of jurists, and, by no means least, if the decision is thought to be plainly wrong.

Overruling may be express or implied. It is implied when the ratio of the later decision of a superior court is inconsistent with that of the inferior court. In view of the difficulty of ascertaining the ratio of a case, it follows that it is equally difficult to decide whether a case has been impliedly overruled or not¹⁹, but it does give court a loophole for escaping from stare decisis.

That effect of overruling is retroactive except that it does not unsettle matters which are res judicata as between the parties to the overruled decision, and accounts which have been settled²⁰. Retroactivity is logically reconcilable with the theory that judges do not make law but only declare what always has been law on the hypothesis that the overruled decision was an erroneous declaration of the law and hence void ab initio. This reason may be an ex post facto rationalisation. A more fundamental reason seems equally plausible, namely that just quality is inherent in every law. Therefore, an unjust (hence erroneous) precedent can never have been law. However, the retroactive rule creates a difficulty. The House of Lords insists that only the House can declare its own decisions wrong and that lower courts must follow them. This implies that such previous decisions are law albeit bad law, since no court can be bound to follow that which is not law. If so, the overruling by the House of Lords of one of its own decisions must operate prospectively, unless there is express provision to the contrary. Everything that occurred prior to repeal; remains governed by the repealed statute.

Even if it is conceded that judges do make law, the question of hardship would remain in that those who had acted in reliance on the law prevailing at the time would be judged on the basis of a different law made ex post facto. This consideration weighs powerfully against overruling except for compelling reasons. A suggestion that merits serious attention is that overruling, like repeal, should take effect for the future only, and that the decision in the instant case should abide by the previous law for the last time¹. The objections do not appear to be conclusive. It might be said that if the new rule, which is to supplant the old, does not support the actual decision it can only be a dictum. This might be countered by the argument that the tribunal is only freeing itself for the future from any constraining effect of its own decision, thus enabling itself to adopt the dictum later. It might also be objected that a litigant would not be encouraged to appeal against a bad precedent if the overruling of it would not avail him. There is probably some substance in this in a limited number of cases, but against it there is a factor which often stands in the way of much-needed reform. Besides, the objection would be met by coupling prospective overruling with a discretion to overrule for the future and for the instant case, or for the future only, or for the future, the instant case and

retrospectively. Prospective overruling will be helpful where the object is to create a new criminal offence, or extend an existing one, by overruling a case which had held that there is no liability in that situation; for this would avoid having to punish the accused in the instant case for conduct which was not a crime when he did it.

Following and applying

The ratio decidendi of a previous case may be followed or applied in a subsequent case. If a case has been repeatedly followed, this is a factor which enhances its authority. A case may be said to be followed, this is a factor which enhances its authority. A case may be said to be followed when the use made of it does not affect its ratio, for example, when the judge only trims the facts of the case before him to fit it into the precedent. A case may be said to be applied when the use made of it does affect its ratio, which could occur when the judge raises the level of its generality by reducing the material facts, or selects the more appropriate of alternative rationes. He may also adopt a dictum in it as the ratio of the case before him³.

Explaining

A judge may place a certain interpretation on a precedent and he may then follow it, or he may refuse to follow it, or he may distinguish it. Explaining is an indication that the ratio decidendi is being reshaped.

Judicial discretion

Since there is no fixed ratio of a case, there is an element of choice in determining it. The orthodox Blackstonian view, however, is that judges do not make law, but only declare what has always been law⁴. This doctrine is the product of many factors. It would appear to result from thinking exclusively in the present time-frame, which gives rise to the belief that there must be some rule which is always *there* at any given moment and waiting to be applied. In Blackstone's day another important foundation for the doctrine was the belief in natural law, which was supposed to be part of English Law. Despite the derision which this theory encountered⁵, and in the face of evidence to the contrary, its vitality is remarkable. Again, during the seventeenth-century struggle against the prerogative the judges maintained that the king was subject to the law and could not legislate, the corollary of which was that they, too, were subject to the law and unable to make law and bound only to apply it. The doctrine of the separation of powers also insisted upon the theoretical dissociation of judicial and legislative functions. The climate of opinion in the nineteenth century was favourable to the theory in so far as the prevailing positivism concerned itself only with the law as found, whether thought to have been produced by custom or laid down by sovereign authority. Also, public confidence is more easily retained by fostering the illusion that judges do but administer the law impersonally and that none of them can make the rules, especially since judicial law-disputes, particularly those in lower tribunals, which constitute the bulk of instigation. Judges, for their part, seek refuge in the theory when giving a harsh decision. Indeed, it has even been suggested that the theory satisfies the psychological preference of human beings to be led rather than have to find their own way, the need, in short, for a *father* *symbol*. Another factor is that judicial decisions in their nature have to pronounce on the legality of conduct after it has taken place⁶. Anything savouring of attainer is unpopular and

the orthodox theory conceals this suggestions under the pretence that the law has always been there. It should also be noted that, whether or not a creative element enters into a particular decision, it becomes for future purposes evidence of what the law is, and this evidential function overlays the creative factors that operated to bring it into being.

Finally, and by no means least, the orthodox theory finds support in the syllogistic form of reasoning by which the conclusion is ultimately reached. For a syllogism requires that the premises, from which the conclusion is deduced, should already be in existence. Thus: 'All men are mortal' (major premise); 'X is a man' (minor premise); Therefore 'X is mortal' (conclusion). In a judgement the syllogism assumes the following form: 'Facts of Type A are governed by Rule B, (major premise); 'Facts of the instant case are of Type A' (minor premise); 'Therefore the facts of the instant case are governed by Rule B' (conclusion)⁷. A syllogism can only make explicit that which is implicit in the premises; it neither creates nor reveals anything new. With reference to a judicial decision this gives rise to the idea that the result is deducible from a rule, which is already 'there'⁸.

The syllogistic form appears only in the way the conclusion is stated at the end of a judgment. Before a judge can deduce his conclusion, however, he has to find, and sometimes make, suitable premises and there is flexibility at every stage of the decisional process. First, he has to establish the major premise that 'Facts of Type A are governed by Rule B' by finding it in a precedent, statute or custom; or, if not, he creates one by analogy with other rules or by a process akin to indication or, in the absence of any other guide, he creates one out of his own sense of justice. When there is a rule of precedent, he has to consider whether or not to follow it either because it is binding and is not reasonably distinguishable, or, if not binding, because it is consonant with his sense of justice.

Next, he has to establish the minor premise that 'Facts of the instant case are of Type A'. Every case begins with the facts, but the finding of facts depends on opinion as to the credibility of witnesses and interpretation of the evidence generally. The facts have then to be stated at an appropriate level of generality and the statement is governed by linguistic conventions. It may also be coloured by a convenient rule which is to hand. The rule-statement, too, for its part is often trimmed according to the view taken of the facts so that it can be made to yield the conclusion which the judge wants to reach. The formulation of fact statements and rule statements are parallel processes.

In establishing that the facts of the instant case are of Type A, a distinction to be borne in mind is that between 'similarity' and 'identity'. It is unlikely that the factual part of a rule will be identical with the facts of the instant case because the chance of identity between facts in different situations occurring at different times is inconceivably remote and because rules are stated in general terms so as to accommodate variations and often utilise vague concepts, such as 'negligence' and 'possession'. As will be seen later, these have no fixed content and can be given different meanings in different context. What is crucial, therefore, is the perception of similarity, not identity, between the fact-situation of the case and the fact part of the rule; which is subjective, since perception of similarities and dissimilarities is a matter of choice and a desire to reach a justice decision⁹.

Finally, there is the conclusion that 'The facts of the instant case are governed by Rule B. Once the major and minor premises have been manipulated so as to show that the fact-statement in the instant case is similar to that of the rule, the conclusion will appear to follow syllogistically. The judicial process thus stands in a class of its own; it involves different kinds of reasoning.

A INDUCTION. This applies to finding a major premise. The term 'induction' is not a happy one but will serve for want of a better. The process bears only a board parallel to scientific induction in so far as it proceeds from instances of particular cases to a generalized rule. 'Facts of case A were decided Y' 'Facts of case B were decided Y' 'Therefore, strictly, facts A and B should be decided Y' It may, however, be reasonable to extract a broader proposition capable of yielding decision Y in situation C (and perhaps D and E) as well¹⁰. Any such broader proposition has to be reasonably warranted by the material out of which it was extracted, or it is liable to be cut down at being too wide by a later court¹¹.

There are differences between this type of reasoning and scientific induction:

- (a) A scientist can repeat his experiment and verify his principle; a judge cannot.
- (b) Scientific principles result from observations of data; judicial principles result from statements of fact and value-judgments.
- (c) A judge can reason by analogy and choose between competing analogies; a scientist does not.
- (d) A scientific principle has to be modified so as to accommodate new data; judicial principles are modified in response to moral and policy considerations.
- (e) A judge induces a principle in order to decide the case before him; for scientist the case before him is part of the data out of which the principle is drawn, or by which it is tested¹².
- (f) A scientist must accommodate all the data and has no choice; a judge can select his material by discarding unwelcome cases.

B ANALOGY: This applies to finding the minor premise. The reasoning proceeds case-by-case and by means of contrasting examples, first one way and then another to see which way one's judgment is swayed. In this way the scope of the 'facts' contained in the major premise is widened so that it can accommodate a new set of facts¹³. Professor Wisdom expressed it best when he said:

It is a presenting and re-presenting of those features of the case which severally co-operate in favour of the conclusion, in favour of saying what the reasoner wishes said, in favour of calling the situation by the name by which he wishes to call it. The reasons are like the legs of a chair, not the links of a chain¹⁴.

Analogical reasoning accommodates change with certainly painlessly and is, therefore, popular in the common law. The pressure exerted by the need for certainty in law is a powerful incentive to develop the law analogically when possible. It also helps to preserve

confidence by abiding with existing authority. The case-by-case method is thus a way of making one's own sense of justice plausible.

C JUSTIFICATION: The judge reaches a provisional conclusion and then tries to find authority to support it. The provisional conclusion may be the result of his trained instinct, or his opinion as to the merits of the dispute, or his sense of public need and social expediency; and he interprets and manipulates his authorities so as to justify that conclusion in a publicly satisfying way¹⁵. The 'public' for his purpose includes not only those charged with applying and administering the decision, but also all those interested in and affected by its application, which varies with the kind of rule¹⁶. Distinguishing depends on plausibly stating the facts of the instant case differently from the factual part of the rule that is being distinguished, or plausibly restating the rule so as to move it away from the instant case. Such techniques call for considerable skill and experience in handling authority. As Lord Wright once said 'A good judge is one who is the master, not the slave, of the case'¹⁷. MacKinnon LJ also gave a pointed hint when he said.

'so far as I am concerned; I freely avow that, inasmuch as in common-sense and decency Mr. Heap ought to be able to recover against somebody, and in the circumstances of this case and having regard to the correspondence which has taken place, in common-sense and decency he ought to recover against these defendants if the law allows, my only concern is to see whether upon the cases the law does allow him so to recover. I think that it does'¹⁸

Viscount Radcliffe began a speech by speculating on the merits of a particular conclusion before considering what support it had in law.

'My Lords, it sometimes helps to assess the merits of a decision, if one starts by noticing its results and only after doing that allots to it the legal principles upon which it is said to depend.'¹⁹ (Having done that, he proceeded) 'I start, then, with the assumption that something must have gone wrong in the application of legal principles that produce such a result.

A well-known ploy in this type of reasoning is for a judge to set out one line of argument leading to a certain conclusion, and then to set out a different line of argument also leading to the same conclusion²⁰. They alternative justifications.

Although all these methods play important parts in judicial reasoning, the first two types are frequently pressed into the service of the last¹. Thus, induction can be much influenced by the conclusion which the judge may want to reach. In scientific induction all the facts have to be accommodated in the rule, whereas in law a judge can and does get rid of inconvenient precedents by distinguishing them. In this way he selects the material out of which to induce a rule and can thereby bend legal development in a certain direction.

The case-by-case method likewise lends itself to finding justification for a provisional conclusion. The perception of similarities is a matter of choice. Cases are not labelled 'similar' or 'dissimilar'; they can be made to appear similar or dissimilar according to the way in which they are presented². The words of Professor Wisdom, quoted earlier, are worth repeating. The process, he said, is a presenting and re-presenting of those features of a case which co-operate in favour of saying what the reasoner wishes said, in favour of calling the situation by the name by which he wishes to call it³.

It is clear, therefore, that analogy can be pressed into the service of justification, but a caution needs to be uttered in case an exaggerated impression is created. Judges, like all human beings, prefer to avoid having to make personal decisions⁴ and they are very much aware of the need for consistency, which is an important dictat of justice. The position may be put as follows. If a judge has not strong feelings in the matter, and the resemblances thrown up by the case-by-case method are obvious, these are likely to exercise a ways of presenting the material may still help to sway the beam of judgment by wighting the similarities one way rather than another⁵. It should not be forgotten, however, the similarities are creations of the mind, not something given, and that some element of choice, perhaps imperceptible, underlies the application of every rule.

If a judge has strong feelings, the, however obvious the resemblances may be the other way, he will contrive, as far as he can reasonably do so, to manipulate the authorities to suit the decision he wants to give. -If I thought that injustice had been done to himø said Lindley LJ -I should have found some method, I have no doubt, of getting rid of the technical objectionø⁶. Lord denning, too, made a similar remar; -I confess that i should do my best to distinguish it in some way if I was quite satisfied that it was wrongø⁷. A candid avowal of judicial technique came from Lord Diplock.

-Yet all nine judges who have been concerned with the instant case in its various stages are convinced that the plaintiffø claim ought to succeed; and if I may be permitted to be candid, are determined that it shall. The problem of judicial technique is how best to surmount or to circumvent the obstacle presented by the speeches of the Lord Chancellor and Viscount Dunedin in Addieø case, and the way in which those speeches were dealt with the Privy Council in the comparatively recent Australian appeal of *Railways Comr v. Quinlan*ø⁸.

These statements should not be misunderstand to imply that bindingness is illusory and that judges decide as they please. To say that the doctrine is not rigid does not mean that it is non-existent. There are many pressures on judges to keep within the law, so their ability to manipulate rules is limited, and whenever they do so, their interpretations have to be reasonable and plausible. Far from being always free to decide as they please, they frequently confess that they are compelled by authority to decide in a certain way, even against their own inclinations.

When there is no rule of law

When there is no rule of precedent, statute or custom, knowing the law requires knowing how to create a rule. This may be done by the process akin to induction, which has been explained, or, failing all else, a judge may simply create a rule out of broad principle or doctrine, eg and fault principle or the maxims of equity, or out of his own sense of justice. In *Sommersett*ø case⁹ the question arose for the first time whether English law should countenance slavery. There was no authority and counsel on both sides resorted to current philosophy in their arguments. Lord Mansfield made short work of the matter and declared that the slave should go free. In *Wilson v. Glossop*¹⁰ a husband turned his wife out of doors and she pledged his credit for the necessities of life. When he sought to evade liability, the Court of Appeal held him liable on grounds of justice. If there had been no rule to that effect until then, there was one from then on. In *Corbett v. Corbett* (otherwise *Ashley*)¹¹. An

English court had to address itself for the first time to the question, What is a 'woman' when a person, who had undergone a sex-change operation converting himself into an apparent female, when through a ceremony of marriage. Part of the judgement consists of a biological exposition of male and female organisms, the rest deals with the purpose and function of marriage. In the result the judge held the marriage to be void, since the person in question was still a biological male.

A study of the judicial process, its reasoning and techniques, helps to assess the significance of a case. Where there is an existing rule, a judge may do any one of several things.

- (a) He may find complete similarity between the facts of the case before him and those contemplated by the rule. Not only is such a situation rare, but as a precedent the decision in such a case is, in any event, valueless.
- (b) The statement of facts in the rule may be sufficiently general to cover the more specific facts of the instant case. A rule which contemplates, for example, the fact of 'negligence' will cover a multitudinous variety of situations. The decision in the instant case is then only illustrative.
- (c) If the facts of the case before him differ from those stated in the rule, he may ignore the differences so as to be able to make a statement of fact which will fit the rule. Since this does not affect the rule, the decision is again only illustrative.
- (d) He may also, in the last situation, reinterpret the statement of facts of the rule so as to extract a sufficient measure of resemblance to the case in hand. Such reinterpretation will vary the scope of the rule and the decision is important because it hereby alters the rule.
- (e) Notwithstanding a difference between the statement of facts in the rule and in the case, he may apply the rule. The decision is again important because it has extended the rule to cover new facts.
- (f) If he dislikes the rule he may distinguish it on account of some difference in the statement of facts in the case before him. Such a distinction does not affect the rule; it means only that the rule has not been extended. The importance, if any, of such a decision will rest on other factors.
- (g) He may create a distinction by lowering the level of generality at which the facts in the rule are stated. Such a decision is again important because it has narrowed the rule.
- (h) He may deny the rule the dignity of 'law' by interpreting it as an obiter dictum. Such an interpretation is important for it has, in effects, unmade law.
- (i) In appropriate circumstances he may destroy the rule directly by reversing or overruling it.
- (j) He may select one of alternative or conflicting rules¹². Such a case is important in that it settles a point previously uncertain.

- (k) Where there is no existing rule, he has to find one, and a creative decision of this kind is of the highest importance.

FACTORS THAT KEEP STARE DECISIS IN BEING

The reasons why stare decisis continues to be a criterion of validity are not the same as those which brought about its acceptance though some do continue to play their part. The factors may be listed as the ethos of the profession, more doubtfully the continued absence of a code, and continued service of the requirements of justice. These, it will be noticed, are moral, sociological and practical requirements, and essential to the continuance of *stare decisis*. This is not to imply that an unjust or inconvenient precedent is not *law here and now*; the point is that injustice or inconvenience will in time kill it and, if this were to occur on a large enough scale, may even bring about the demise of *stare decisis* itself.

Professional ethos

Every specialist vocation evolves its own expertise and habits of thought, ie a way of going about the job¹³. It has been pointed out how, because of the absence of a code from the earliest days, lawyers were compelled to seek guidance in precedents and to distil principles from lines of decisions. This became so much the lawyers' way of thinking that it should now be regarded as one of the most influential factors in keeping stare decisis alive. The thinking habits of centuries as well as the individual perfecting of this craft over a lifetime make it difficult, if not impossible, for most lawyers to think in any other way¹⁴.

Absence of a code

The lack of a code an important factor in bringing stare decisis about, but what part this still plays is doubtful. Even if the common law were to be codified now, this would not dispel the ingrained habits of thinking of the profession and, moreover, there is no reason why stare decisis could not flourish under a code. The two are not incompatible, but complementary. The kind of code one has in mind would enunciate only the broad principles and what it would gain by way of economy of wording it would lose in details¹⁵. In the result, numberless decisions will mushroom forth to fill in the outlines, which will lead to a system of case-law hardly distinguishable from stare decisis ^ó as Continental experience has shown¹⁶. Therefore, where, as in Great Britain, stare decisis is the accepted practice, the introduction of a code is unlikely to produce a significant change in outlook¹⁷.

Continued service of justice

The need to continue treating like cases alike and so achieving equality, consistency and impartiality remains constant. It may be argued that the broad doctrine of precedent achieves all this no less than stare decisis. So a better way to put it is this; while failure to satisfy the needs of equality, consistency and impartiality will be fatal to stare decisis, fulfilment does not of itself account for its continuance. The other factors that have just been considered are responsible for this. The other factors that have just been considered are responsible for this. In view of this, it will be useful to compare briefly the working of stare decisis and its continental counterpart.

Equality of treatment, consistency and impartiality are bound up with the need for certainty and predictability. Complete certainty and predictability are elusive goals, for if law is to develop at all, uncertainties are bound to arise and, moreover, it may not be the rule that is uncertain, but which of competing rules should apply. So far as certainty can be achieved at all, there is no reason why precedent in the broad sense may not succeed as well as stare decisis. On the contrary, stare decisis is in some danger of making certainty in law become certainty of injustice. For a binding authority, however erroneous, has to be followed unless it can be distinguished, and a tenuous distinction to avoid an unwelcome precedent is not the happiest alternative. Again, it is important that there should be uniformity of treatment for all; but this, too, can be achieved without stare decisis. There should also be some limit to litigation, and if by this is meant that repeated agitation of a point that has once been determined should be discouraged, then, as the Continental experience has shown, it can be achieved as successfully without stare decisis as with it. No judge departs from previous decisions except for compelling reasons, and legal advisors do not encourage vain hopes in their clients. If a decision is clearly erroneous, an attempt will probably be made to get it overruled. Which happens here as elsewhere. Finally, it is desirable not to discount the experience of the past, but this is of limited value. It cannot avail in cases *primae impressionis* and it may also be that such wisdom is out-dated. In so far as past wisdom should be preserved, both precedent and stare decisis seem equally apt for this purpose. Summing up one might say that stare decisis does not seem to fulfil the requirements of justice any better than the doctrine of precedent. There is, however, another way of regarding the matter. It is because the things that stare decisis and precedent can accomplish are desirable that the two doctrines have now moved so near to each other as to be barely distinguishable.

One of the most important aspects of continued justice is the stare decisis should be adaptable to changing needs. This requires the avoidance of inconvenience and technicality and, above all, functioning flexibility.

Avoidance of inconvenience and technically

A practical drawback is the growing number of reported decisions, which may reach such proportions as to make stare decisis physically unworkable. The chances of relevant authorities being overlooked increases and this strikes at the roots of the doctrine, for a decision can hardly be treated as authoritative if it was given *per incuriam*. Digests of cases and comparable services are just about able to make the system work, but these may become inadequate in time. It might be possible to make less use of the decisions of judges sitting alone, or to have one opinion only in all appellate courts; and in order to avoid encumbering the court house the use of looseleaf reports has been advocated. The possibilities of computerised storage of decisions opens up new vistas altogether, but these are beset with other difficulties and will be discussed later¹⁸. A different objection to stare decisis is that in this overwhelming mass of cases there is the danger of losing sight of principle. This may well be, but it can be minimised to some extent by the work of legal authors whose business it is to expound and illuminate principle. It is also maintained that case law based on stare decisis is inconveniently slow in adapting itself to a rapidly changing society. However, rapidity of change depends, not on the system, but on the judges who work it. The charge had more substance as long as the House of Lords was bound, in effect, even by its own mistakes, but

now that rule has gone, the position has been eased and might become easier still if the Court of Appeal, too, refuses to be bound by itself.

Allied to the above is the inconvenience caused by the growing technically of an ever increasing multitude of rules and sub-rules and exceptions, which was castigated by Tennyson as 'that wilderness of single instances'. The common law possesses, however, the remarkable faculty of self-simplification, which from time to time saves stare decisis from collapsing under its own weight. This ability to slough off the top-heavy overgrowth and to start budding afresh has given it much of its resilience. Sometimes a single broad principle is drawn out of a number of precedents, thereby relegating them to the category of mere illustrations, an outstanding instance of which was Lord Atkin's review of a large number of authorities in *Donoghue v. Stevenson*¹⁹, and his formulation from them of a rule of liability for negligence of epochmaking significance. Again, in *Hedley Byrne & Co Ltd. V. Heller & Partners Ltd.*²⁰ the house of lords fused a number of diverse exceptions to the rule of non-liability for careless mis-statements¹ into a rule of liability for such statements².

Negligence, which is the branch of law in which decisions proliferate more rapidly perhaps than in any other, provides other examples of self-simplification. For instance, if the hosts of decisions as to whether a defendant's conduct was or was not careless were treated as laying down rules of law as to what does and does not constitute carelessness, the resulting state of affairs would be unthinkable. There has been an increasing tendency of recent years for courts not to treat such cases as 'law' but simply as illustrations of the rule that if a person causes damage carelessly he is liable, if he has not been careless is not liable. The basic rule and Pearson J is that negligence consists in doing something which a reasonable man would not have done in that situation, or omitting to do something which a reasonable man would have done in that situation, and I approach with scepticism any suggestions that there is any other rule of law properly so called in any of these cases³.

Notwithstanding these tendencies, negligence is still over-complex. 'There is no room today for mystique in the law of negligence' said Diplock LJ⁴, but the rules relating eg to 'foreseeability of harm' are of such artificiality and technicality as to belie that remark⁵. Obviously, courts do not indulge in artificialities for their own sake; what they strive to do is to give fair decisions in particular cases, and it is stare decisis that procedures the complications. Just as considerations such as the degree of likelihood of injury, cost and practicability of measures to avoid it, the end to be achieved, and so forth, are regarded only as helpful guidelines in determining whether a defendant has acted carelessly or not, might not the foreseeability rules of today similarly become guidelines for applying tomorrow's principle that in cases of negligence liability shall be attributed according as the court deems just⁶? Such a development would be in keeping with the genius of the common law.

Similar to the complexity in negligence is the 'course of employment' doctrine in vicarious liability. The only rule of law there should be the board and simple one that if a servant commits a tort while acting within the course of his employment, his master is answerable, but that if he was acting outside it, his master is not answerable. The question whether a servant was within or outside the course of employment, like the question whether a person was careless or not, is one of fact; to reduce it to rules of law governing types of

situations is to reduce it to chaos. The sensible attitude has prevailed with regard to the question of carelessness; why not here? The opinion is ventured that it is perhaps writers of textbooks, rather than judges, who have been responsible for undue technicality by trying to evolve rules of law. The judges themselves do not appear to be obsessed in this way, for, as Finmore J once said. "The answer to a lot of the arguments on both sides in this case is, I think, as it so often is in the law of this country, that there is no one test which is conclusive or exhaustive or exclusive by which this particular problem can be solved"⁷. It is not easy to gauge how far this remark represents the judicial attitude as a whole, but even if it does not, it may well be a pointer in the direction of future simplification.

Conclusions

Judges to make law. A scrutiny of the judicial process shows that the Blackstonian doctrine is unacceptable. It fails to explain how the common law and certainly equity have grown⁸. No judge may refuse to give a decision. If no rule is at hand, he invents one. "It may be said Lord Dinning MR "that there is no authority to be found in the books, but, if this be so, all I can say is that the sooner we make one the better"⁹. In such a situation declaring what the law is and what is ought to be amount to the same¹⁰. More usually a judge narrows, extends, or otherwise modifies some existing rule, but all rules, whether created or adapted, are subject to modification in their turn. The ratio of a case may be likened to a pellet of clay, which a potter can stretch and shape within limits. If he wants to stretch it, he can; or he can press it back into a pellet. A ratio cannot be stretched indefinitely any more than clay, for there is a limit beyond which the generalization of the statement of specific facts cannot go. When an unmanageable number of pellets accumulate, they may be gathered together and rolled into a single big pellet, and the moulding process begins anew. The analogy also holds in one further respect. The longer a decision has stood, the more brittle and less malleable does it become; it then has to be accepted as it stands or destroyed.

The line between creation and adaptation is a thin one, and the fact that judges do make law has been avowed by judges as well as writers. There is, however, a difference between judicial and legislative creativity. Allen put the matter thus:

The creative power of the courts is limited by existing legal material at their command. They find the material and shape it. The legislature may manufacture entirely new material¹¹.

This is approximately true, the difficulty being the sense in which a judge may be thought to use "existing legal material" when he decides a case purely out of a sense of justice. If Allen's expression refers to any source of inspiration of a decision, natural law for example, the proposition is true, but then Blackstone's orthodoxy would be equally true. Of, on the other hand, it connotes only existing material labelled English law, it is untrue, for the judge is not, in the situation envisaged, using such material. Such cases may be rare, but that does not alter the fact the judge does here legislate.

It is true also that the legislature may make entirely new material. It often happens, of course, that a statute only shapes existing material, as when it codifies; and besides, even new material has a better chance of success if it keeps within the spirit of existing material¹². A semantic point is involved in the word "make". One can "make" logs out of a tree trunk, but

the material of wood is already there¹² and this seems to be the idea behind Allen's statement. The weakness of his position is that there are times when judges do make new material. Perhaps, the distinction between statute and judge made law may be put as follows. Every decision is concerned primarily with a specific set of facts, and the rule for which it is then quoted as a precedent is derived from the decision on the facts as stated. Statutes only seek to control the future (except for retrospective legislation) and accordingly deal with classes of facts. So statutes aim at laying down rules applicable to specific sets of facts as and when they arise. At the normative level; ie for future purposes, rules, whether created by precedents or statutes, operate alike. So, the distinction between statute and judge-made law does not lie in the bare fact that the former manufactures new material while the latter only shapes it. But in the manner in which and the degree to which they respectively resort to existing material or create wholly new material.

The bindingness of stare decisis operates up to a point. It means that a judge is bound to follow a precedent unless he can reasonably distinguish it. Since distinguishing techniques are numerous, the element of bindingness is correspondingly limited.

3. such discretion as judges have in handing precedents is guided by values, which concerns knowing the just way of applying the law to the facts. This will be dealt with in Chapter 10.

4. the mechanics of the judicial process shows the genius of the common law in combining the need for certainty and the need to keep the law abreast of changing ideas and social conditions¹³. Certainty is preserved within the limits of rules and concepts; flexibility and adaptability are achieved through their interpretation and through the varieties of fact-statements.

Every decision pronounces on the legality or otherwise of conduct after it has been performed. This may seem hard on the litigant where a new rule or variation of a rule is enunciated, but it is the sort of imperfection that is unavoidable in a human institution such as this. The answer to any protest must be that the position cannot be otherwise, for it is beyond the wit of man to provide in advance for all contingencies. Besides, it would be true to say that in any immense number of situations the conduct of the persons concerned would not have been influenced even if the rule had been clear beforehand, while the value of having a rule for the future might be thought to outweigh any hardship that could occur by applying it retrospectively to the case in hand.

7. An unjust precedent is law¹⁴ here and now, but this is sometimes too high a price for certainty in law. 'Certainty in law' said Maitland 'must not become certainty of injustice'¹⁴. Injustice is a factor that will in time either minimise its effect through distinguishing or bring about its demise through overruling. Neither is a satisfactory way of dealing with unjust precedents, since distinctions introduce needless complexity through exceptions, while overruling by higher authority or statute is slow and chancy. Should unjust precedents become numerous, then the future of stare decisis itself would be in jeopardy.

LEARNING THE LAW

Glanville Williams

CASE LAW TECHNIQUE

Ratio Decidendi and Obiter Dictum

English courts make a habit of following their previous decisions within more or less well-defined limits. This is called the doctrine of precedent. The part of a case that is said to possess authority is the *ratio decidendi*, that is to say, the rule of law upon which the decision is founded. Finding the *ratio decidendi* of a case is an important part of the training of a lawyer. It is not a mechanical process but is an art that one gradually acquires through practice and study. One can, however, give a general description of the technique involved.

What the doctrine of precedent declares is that cases must be decided the same way when their material facts are the same. Obviously it does not require that *all* the facts should be the same. We know that in the flux of life all the facts of a case will never recur; but the legally material facts may recur and it is with these that the doctrine is concerned.

The *ratio decidendi* of a case can be defined as the material facts of the case plus the decision thereon. The same learned writer who advanced this definition went on to suggest a helpful formula. Suppose that in a certain case facts A, B and C exist; and suppose that the court finds that facts B and C are material and fact A immaterial, and then reaches conclusion X (*e.g.* judgment for the plaintiff, or judgment for the defendant). Then the doctrine of precedent enables us to say that in any future case in which facts B and C exist, or in which facts A and B and C exist, the conclusion must be X. If in a future case facts A, B, C and D exist, the fact D is held to be material, the first case will not be a direct authority, though it may be of value as an analogy.

What facts are legally material? Those depends on the particular case, but take as an illustration a running down action, that is to say, an action for injuries sustained through the defendant's negligent driving of a vehicle. The fact that the plaintiff had red hair and freckles, that his name was Smith, and that the accident happened on a Friday are immaterial, for the rule of law upon which the decision proceeds will apply equally to persons who do not possess these characteristics and to accidents that happen on other days. On the other hand, the fact that the defendant drove negligently, and the fact that in consequence he injured the plaintiff, are material, and a decision in the plaintiff's favour on such facts will be an authority for the proposition that a person is liable for causing damage through the negligent driving of a vehicle.

The foregoing is a general explanation of the phrase 'the *ratio decidendi* of a case.' To get a clearer idea of the way in which a *ratio decidendi* is extracted, let us take a decided case and study it in detail. I set out below the case of **Wilkinson v. Downton** [1897] 2 QB 57, where the plaintiff was awarded damages by a jury for nervous shock, and the trial judge then heard argument on the question whether the verdict could be upheld in law. The first part of the judgment, which is all that needs be considered here, runs as follows.

WRIGHT, J. – In this case the defendant, in the execution of what he seems to have regarded as a practical joke, represented to the plaintiff that he was charged by her husband with a message to her to the effect that her husband was smashed up in an accident, and was lying at The Elms at Leytonstone with both legs broken, and that she was to go at once in a cab with two pillows to fetch him home. All this was false. The effect of the statement of the plaintiff was a violent shock to her nervous system, producing vomiting and other serious and permanent physical consequences at one time threatening her reason, and entailing weeks of suffering and incapacity to her as well as expense to her husband for medical attendance. These consequences were not in any way the result of previous ill-health or weakness of the constitution; nor was there any evidence of predisposition to nervous shock or any other idiosyncrasy.

In addition to these matters of substance there is a small claim for 1s.10½d. for the cost of railway fares of persons sent by the plaintiff to Leytonstone in obedience to the pretended message. As to this 1s.10½d, expended in railway fares on the faith of the defendant's statement, I think the case is clearly within the decision in *Pasley v. Freeman* (1798) 3 T.R. 51. The statement was a misrepresentation intended to be acted on to the damage of the plaintiff.

The real question is as to the £100, the greatest part of which is given as compensation for the female plaintiff's illness and suffering. It was argued for her that she is entitled to recover this as being damages caused by fraud, and therefore within the doctrine established by *Pasley v. Freeman* and *Langridge v. Levy* (1837) 2 M. & W. 519. I am not sure that this would not be an extension of that doctrine, the real ground of which appears to be that a person who makes a false statement intended to be acted on must make good the damage naturally resulting from its being acted on. Here there is no *injuria* of that kind. I think, however, that the verdict may be supported upon another ground. The defendant has, as I assume for the moment, wilfully done an act calculated to cause physical harm to the plaintiff – that is to say, to infringe her legal right to personal safety, and has in fact thereby caused physical harm to her. That proposition without more appears to me to state a good cause of action, there being no justification alleged for the act. This wilful *injuria* in law malicious, although no malicious purpose to cause the harm which was caused nor any motive of spite is imputed to the defendant.

It remains to consider whether the assumptions involved in the proposition are made out. One question is whether the defendant's act was so plainly calculated to produce some effect of the kind which was produced that an intention to produce it ought to be imputed to the defendant, regard being had to the fact that the effect was produced on a person proved to be in an ordinary state of health and mind. I think that it was. It is difficult to imagine that such a statement, made suddenly and with apparent seriousness, could fail to produce grave effects under the circumstances upon any but an exceptionally indifferent person, and therefore an intention to produce such an effect must be imputed, and it is no answer in law to say that more harm was done than was anticipated, for that is commonly the case with all wrongs.

The reader will notice that the judge does not cite any authority for his decision that the £100 is recoverable. The only authorities he cites are authorities on which he says he prefers

not to rely. The reason is that at the date when the case was decided there was no English authority on the general question whether it was a tort intentionally to inflict bodily harm on another. There was, indeed, the very ancient tort of battery, which is committed when D hits or stabs or shoots P. But Downton committed no battery upon Mrs. Wilkinson; nor did he assault her by threatening a battery. Consequently, the case was one of first impression, and the judge decided it merely on common-sense principles. It would be a grave approach to a civilised system of law if it did not give a remedy on such facts.

Let us now see how the *ratio decidendi* is to be extracted. This is done by finding the material facts. The judge has already done much of the work for us, because he has omitted from his judgment many of the facts given in evidence that were obviously irrelevant to the legal issue – e.g. the address at which the plaintiff lived. But the judgment mentions the address at which the husband was supposed to be lying, which also is clearly irrelevant. As a first step in boiling it down we may say that the essential facts, and the pith of the judgment, were as follows:

The defendant by way of what was meant to be a joke told the plaintiff that the latter's husband had been smashed up in an accident. The plaintiff, who had previously been of normal health, suffered a shock and serious illness. Wright, J. held that the defendant was liable, not perhaps for the tort of deceit but because the defendant had wilfully done an act calculated to cause physical harm to the plaintiff, and had in fact caused such harm.

The above would represent the sort of note that an intelligent student would make of the case. How are we to frame the *ratio decidendi*? There are two main possibilities.

The first would be to take such of the detailed facts as may be deemed to be material, plus the decision on the facts. This would result in the following rule: that where the defendant has wilfully told the plaintiff a lie of a character that is likely (a clearer word that 'calculated') to frighten and so cause physical harm to the plaintiff, and it has in fact caused such harm, the defendant is liable, in the absence of some ground justification.

The *ratio* omits to specify the particular lie told by the defendant, because this was immaterial. What mattered was not the particular lie as to the plaintiff's husband's alleged injury, but the more general fact of lying. The particular lie told by the defendant was material only in the sense that it was the sort of lie that was likely to frighten and cause physical harm to the plaintiff.

But, it may be objected, such a *ratio* would be too narrow, because the learned judge evidently intended to lay down a wider rule. He did not confine his judgment to lies, but spoke only of wilfully doing an *act* which is calculated to and does cause physical harm; and this gives us the true *ratio*. It was immaterial that the particular form of mischief perpetrated by the defendant took the form of a verbal lie; it might have been some other act likely to cause harm, and the legal outcome would have been the same. This, indeed, is common sense. A person with Downton's juvenile sense of humour who dresses up as a ghost, or who puts a squib under somebody else's chair, would doubtless find himself in the same legal category as Downton.

Again, the judge did not speak of fright when he formulated the principle of his decision. He spoke of causing physical harm, which is much wider. On this principle, an outrageous

threat causing suffering is a tort. In a subsequent case, *Janvier v. Sweeny* [1919] 2 K.B. 316, which approved *Wilkinson v. Downton*, the defendant threatened to arrest and prosecute the plaintiff, a foreign servant-girl, if she did not give certain information; the defendant knew that any charge he brought against the girl would be quite unfounded, and the girl became ill with distress. It was held that she had a good cause of action. Another application of the principle occurs where the harm operates directly on the plaintiff's body, not indirectly through the mind – as where the defendant blackens a towel with which the plaintiff is about to wipe his face, or secretly adds poison to the plaintiff's drink. Although these situations have not been the subject of reported decisions, there is no doubt that they would fall under the principle of *Wilkinson v. Downton*.

The reader may now be feeling rather puzzled to the meaning of *ratio decidendi*. We started off with a possible narrow *ratio decidendi* of the case, incorporating the fact of lying and the fact of fright. Then we passed to a wider *ratio*, which evidently accords with common sense as well as with the language of the judgment, in which the facts of lying and fright have disappeared. How can this be reconciled with our definition of *ratio decidendi* as the material facts plus the decision thereon? Were not the lie and the fright material facts in *Wilkinson v. Downton*? If there had been no lie and no fright, and no equivalent facts in their place, the plaintiff would not have won. What exactly do we mean by a "material fact"?

The answer is that we have not been using this expression in a consistent way, and it is necessary to restate the position in more exact language. What is really involved in finding the *ratio decidendi* of a case is a process of abstraction. Abstraction is the mental operation of picking out certain qualities and relations from the facts of experience. Imagine a baby in whose household there is a terrier called Caesar. The baby will be taught to call this dog "bow-wow," because, "bow-wow" is easier to say than "Caesar." If he sees another dog he will guess or be told that this other dog is to be called "bow-wow" as well. This is an example of one of the baby's earliest feats of abstraction. Abstraction comes through the perception of similarities between individual facts, and all language and all thinking depend upon it.

The next point to be noticed is that this process of abstraction may be carried to progressively higher flights. The individual dog Caesar is, at a low level of abstraction, a terrier; at a higher level he is a dog; higher still, a mammal and then an animal and a living thing. In the same way a man might say that he was born at the Piccaninny Nursing Home; in London; in England; in Europe. All these are "facts," but they are facts belonging to different levels of abstraction.

We are not in a better position to state the *ratio decidendi* of a case. The ascertainment of the *ratio decidendi* of a case depends upon a process of abstraction from the totality of facts that occurred in it. The higher the abstraction, the wider the *ratio decidendi*. Thus a rule that "it is a tort to tell a lie that is likely to and does cause fright and consequent physical harm" is a narrow rule, belonging to a low level of abstraction from the facts of the particular case in which it was laid down; leave out the reference to fright, and it becomes wider; replace "tell a lie" by "do any act with intent to affect the plaintiff in body or mind" and it becomes wider still. It is the last rule that is the *ratio decidendi* of *Wilkinson v. Downton*. We carry on the process of abstraction until all the particular facts have been eliminated except the fact of the

doing of an act that is intended to affect the plaintiff adversely and is likely to cause physical harm; and the fact of the occurrence of such harm.

How do we know when to stop with our abstraction? The answer is: primarily by reading what the judge says in his judgment, but partly also our knowledge of the law in general, and by our common sense and our feeling for what the law ought to be. It so happens that in the case we have been considering the learned judge formulates the rule fairly clearly, but sometimes the rule stated in the judgment incorporates facts which as a matter of common sense are not essential, and sometimes it goes to the opposite extreme of being too sweeping ó as can be demonstrated either by the use of common sense or by referring to other decided cases. The finding of the *ratio decidendi* is not an automatic process; it calls for lawyerly skill and knowledge.

Distinguishing

Certain general truths implicit in the foregoing discussion may now be stated more explicitly.

In the first place, a case may have not but several *rationes decidendi*, of ascending degrees of generality. We have seen two of three possible *rationes* in ***Wilkinson v. Downton***. The third was accepted not only because it was stated by the judge but also because it accorded with common sense and with other authorities. Sometimes a judge will lay down a rule that is narrower than is required by common sense, and a later court may then say that the rule ought to be read more widely, by abandoning some limitation unnecessarily expressed in it. Indeed, one such unnecessary limitation can be found in the judgment in ***Wilkinson v. Downton***. The rule stated by Wright, J. refers to a person who has ðwilfullyö done an act calculated to cause physical harm, and the primary meaning of a ðwilfulö act is one that is done with the intention of bringing about a particular consequence. Downton did not, perhaps, intend to cause Mrs. Wilkinson a serious illness, but he did intend to frighten her, and that was sufficient. But, as a matter of common sense, the rule should be extended also to one who is merely *reckless* as to the harm in question (and the word ðwilfulö is, indeed, capable of extending to recklessness). If Downton had made the lying statement to Mrs. Wilkinson in order to persuade her to accompany him for some secret end of his own, realizing that the statement would be likely to frighten her but not desiring (and therefore not intending) the fright itself, his liability should be just the same as for a tort of intention. This was the essential position in the case of the foreign servant-girl referred to before: what the defendant intended in that case was to put pressure upon the girl to make her talk; he must have foreseen the possibility of causing her great distress, but his mind was directed towards making her do what he wanted, not towards distress. In analysis, the case is one of recklessness as to the plaintiff's fright, not one of intention as to the fright; but the legal liability should be, and is, the same.

One may argue that there is another unnecessary limitation contained in the judgment in ***Wilkinson v. Downton***. The judge referred to the fact that the plaintiff had been in normal health, yet it is not possible but probable that the decision would have been just the same even if her health had previously been poor - for the fact that the plaintiff is in poor health can be no excuse to a defendant who tells her a cruel lie that would be likely to cause her physical

harm. The fact that the particular plaintiff had been in good health removed a complication that the judge might otherwise have had to consider, and for that reason he referred to it; but all the same a later court may, on mature consideration and when the question arises, decide that the limitation is unnecessary.

Conversely, it sometimes happens that a judge will lay down a rule that is unnecessarily wide for the decision of the case before him; a later court may say that it is too wide, and needs to be cut down.

This point leads on to the second. The phrase 'the *ratio decidendi* of a case' is slightly ambiguous. It may mean either (1) the rule that the judge who decided the case intended to lay down and apply to the facts, or (2) the rule that a later court concedes him to have had the power to lay down. The last sentence is rather clumsy, but what I mean is this. Courts do not accord to their predecessors an unlimited power of laying down wide rules. They are sometimes apt to say, in effect: 'Oh yes, we know that in that case the learned judge purported to lay down such and such a rule; but that rule was unnecessarily wide for the decision of the case before him, because, you see, the rule makes no reference to fact A, which existed in the case, and which we regard as a material fact, and as a fact that ought to have been introduced into the *ratio decidendi*.' One circumstance that may induce a court to adopt this niggling attitude towards an earlier decision is the necessity of reconciling that decision with others. Or again, the court in the earlier case may have enunciated an unduly wide rule without considering all its possible consequences, some of which are unjust or inconvenient or otherwise objectionable. Yet another possibility is that the earlier decision is altogether unpalatable to the court in the later case, so that the latter court wishes to interpret it as narrowly as possible.

This process of cutting down the expressed *ratio decidendi* of a case is one kind of 'distinguishing.' It may be called 'restrictive' distinguishing, to differentiate it from the other kind, genuine or non-restrictive distinguishing. Non-restrictive distinguishing occurs where a court accepts the expressed *ratio decidendi* of the earlier case, and does not seek to curtail it, but finds that the case before it does not fall within this *ratio decidendi* because of some material difference of fact. Restrictive distinguishing cuts down the expressed *ratio decidendi* of the earlier case by treating as material to the earlier decision some fact, present in the earlier case, which the earlier court regarded as immaterial, or by introducing a qualification (exception) into the rule stated by the earlier court.

Wilkinson v. Downton has not been cut down, because the wide principle has commended itself to later judges. If, however, a case ever arises in which Wright J.'s wide rule is thought to carry the law too far, the decision can be restrictively distinguished.

I have stressed this matter of distinguishing because it plays a most important part in legal argument. Suppose that you are conducting a case in court, and that the other side cites a case against you. You then have only two alternatives (that is, if you are not prepared to throw your hand in altogether). One is to submit that the case cited is wrongly decided, and so should not be followed. This is possible only if the case is not binding on the court. The other is to 'distinguish' it, by suggesting that it contains or lacks some vital fact that is absent or present in your client's case. Sometimes you may have the sympathy of the judge in your

effort to distinguish it, even though the distinction you suggest involves tampering with the expressed *ratio decidendi* of the precedent case and even though you have no authority for the suggested distinction. Your judge may be gravely dissatisfied with the case and yet, owing to our excessively strict doctrine of precedent, it may be impossible for him to overrule it. In such circumstances it is simply human nature that he will distinguish it if he can. He may, in extreme and unusual circumstances, be apt to seize on almost any factual difference between this previous case and the case before him in order to arrive at a different decision. Some precedents are continually left on the shelf in this way; as a wag observed, they become very "distinguished." The limit of the process is reached when a judge says that the precedent is an authority only "on its actual facts." For most practical purposes this is equivalent to announcing that it will never be followed. It is not suggested that this extreme form of distinguishing is a common occurrence, for generally judges defer to the decisions of their predecessors both in the letter and in the spirit, even though they dislike them. But restrictive distinguishing does happen, and the possibility of its happening makes it of great importance to the lawyer.

Obiter Dicta

In contrast with the *ratio decidendi* is the *obiter dictum*. The latter is a mere saying by the way, a chance remark, which is not binding upon future courts, though it may be respected according to the reputation of the judge, the eminence of the court, and the circumstances in which it came to be pronounced. An example would be a rule of law stated merely by way of analogy or illustration, or a suggested rule upon which the decision is not finally rested. The reason for not regarding an *obiter dictum* as binding is that it was probably made without a full consideration of the cases on the point, and that, if very broad in its terms, it was probably made without a full consideration of all the consequences that may follow from it; or the judge may not have expressed a concluded opinion.

An example of an *obiter dictum* occurs in *Wilkinson v. Downton* when the learned judge is considering the argument that the plaintiff is entitled to recover damages for the tort of deceit. At first sight this may seem a good argument, because the defendant could certainly be said in a popular sense to have deceived the plaintiff. But it is generally taken to be essential for the tort of deceit that the defendant should have intended the plaintiff to have acted on the statement, and that the plaintiff should have so acted to his detriment, for which detriment he now claims damages. Mrs. Wilkinson recovered 1s. 10½d. as damages for deceit, because this was a sum of money that she had spent in reliance on the defendant's deceitful statement. But the fact that she became ill was not an act of reliance upon the statement. It was a spontaneous reaction to the statement. Consequently, the learned judge preferred not to rest his judgment upon this ground. He did not positively pronounce against it, but his words seem to indicate that he thought that as the law now stands the claim could not properly be based on the tort of deceit. One may say, therefore, that there is a very tentative dictum against the plaintiff on this particular issue. But the point was not finally decided, and in any case was not made the ground of the decision, and so the observations made upon it were *obiter*.

There is another kind of *obiter dictum*, which perhaps is not, properly speaking, an *obiter dictum* at all, namely, a *ratio decidendi* that in the view of a subsequent court is unnecessarily

wide. It is not an *obiter dictum* in the primary meaning of that phrase, because it is constructed out of the facts of the case and the decision is rested upon it. But, as we have seen, later courts reserve the right to narrow it down, and in doing so they frequently attempt to justify themselves by declaring that the unnecessarily wide statement was *obiter*. The real justification for the practice of regarding what is really *ratio decidendi* as *obiter dictum*, which is to say for restrictive distinguishing, is the undesirability of hampering the growth of English law through the too extensive application of the doctrine of precedent. A court may restrictively distinguish its own decisions, or those of a court on the same level, but it will not generally dare to do this with the decisions of courts superior to it in the hierarchy, particularly the House of Lords.

It is frequently said that a ruling based upon hypothetical facts is *obiter*. This is often true. Thus if the judge says: 'I decide for the defendant; but if the facts had been properly pleaded I should have found for the plaintiff,' the latter part of the statement is *obiter*. But there is at least one exception. In the past, when the defendant pleaded an objection in point of law (the former *demurrer*), legal arguments might take place on this before the trial, and for the purpose of the argument and the decision it was assumed that all the facts stated in the plaintiff's pleadings were true. A decision pronounced on such assumed facts is not an *obiter dictum*. However, the practice of arguing the law before adducing evidence is now virtually obsolete.

If a decision would otherwise be a binding authority, it does not lose that status merely because the point was not argued by counsel (this will be important only as a way of attacking a decision that is of merely persuasive authority). But what is called a decision *sub silentio* is not binding: that is to say, one in which the existence of the particular point was not perceived by the court, so that it was not discussed in the judgment in *Barrs v. Bethell* [1981] 3 W.L.R. 874. This is so, at least, where the precedent case is that of the same court. The House of Lords would probably regard its own decision *sub silentio* as binding on the Court of Appeal.

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LEGAL PROFESSION AND THE ADVOCATES ACT, 1961

A.N. Veera Raghvan

(Abridged, edited by H S Bhalla)

(i) King's Courts:

Law, as a profession, appears to have been in vogue in ancient Indian thought. Its concept was quite different from that it is today pursuant to the Regulating Act of 1773, authorised by the King's Charter of Letters Patent, the Supreme Court, was established at Fort William in Bengal through a Charter issued on the 26th of March, 1774, Clause 11 of the Charter provided:

And we do hereby further authorise and empower the said Supreme Court of Judicature, at Fort William in Bengal to approve, admit and enrol such and so many advocates and attorneys at law as to the said Supreme Court of Judicature at Fort William in Bengal, shall seem meet, who shall be attorneys of record and shall be and are hereby authorised to appear and plead, and act for the suitors of the said Supreme Court of Judicature at Fort William in Bengal and the said advocates and attorneys, on reasonable cause, to remove; and not other person or persons whatsoever, but such advocates or attorneys, so admitted and enrolled shall be allowed to appear and plead, or act in the said Supreme Court of Judicature at Fort William in Bengal, for or on behalf of such suitors, or any of them.

The Advocates entitled thus to appeal were only the English and Irish barristers and members of the Faculty of 5 Advocates in Scotland; the attorneys referred to were the Irish attorneys and solicitors. The Court was thus an exclusive preserve for member of the British legal profession. An Indian lawyer had no right of appearance in the Courts.

When the Supreme Courts with the same jurisdiction and power were established at Bombay and Madras later, the same powers for the enrolment of advocates and attorneys-at-law were conferred on them. The Indian had no right to appear before the Courts.

(ii) Company's Courts

Prior to the rise of British power in India, in Northern India, Justice was administered by Courts established by the Moghul Emperors called Vakils were available to litigants in these native Courts.

The Vakils practising before the Moghul Courts appeared in the Company's Courts also till Bengal Regulation VII of 1793 created for the first time a regular legal profession for the Company's Courts. The Bengal Regulation regulated the appointment of Vakils or native pleaders in the Courts of Civil judicature in the provinces of Bengal. Bihar and Orissa and gave power to the Sadar Dewani Adalat to enrol pleaders for all Company's Courts., to fix the retaining for pleaders and to fix a scale based on a percentage for the value of the property. Only Hindus and Muslims could be pleaders.

Under the *Bengal Regulation XXVII of 1814*, pleaders were empowered to act as arbitrators and give legal opinions on payment of fees. The next important legislation was the Bengal Regulation XII of 1833 which introduced a change. In that only persons duly

qualified, to whatever nationality or religion they might belong would be enrolled as pleaders of the Sadar Dewani Adalat.

The Bengal Practitioners Act, 1846, made three important changes namely:

- (1) the office of pleaders was thrown open to all persons of whatever nationality by the Sadar Courts to be of good character and duly qualified for the office;
- (2) attorneys and barristers of any of Her Majesty's Courts in India were eligible to plead in any of the Sadar Courts subjects to the rules of those Courts as regards language or otherwise
- (3) the pleaders were permitted to enter into agreements with their clients for their fees for professional services. The Act did not affect certain Vakils entitled to appear before the Village munsif and other authorities specified under the Madras Code.

The Legal Practitioners Act, 1855, permitted also barristers and attorneys of the Supreme Court not entitled till then to be admitted as pleaders in the Courts of the East India Company, subject to all the rules in force in the Court relating to language and other matters: connected with pleadings. It was also provided that a pleader was not bound to attend the Court except at the hearing of a case in which he was employed, thus barristers and attorneys were "empowered to practise in the Company's Courts while the Indian Legal practitioners could not appear before Courts.

The position clearly underwent a change after the British Crown took over the administration of the country from the Company and the Government of India Act, 1858, was passed. *The Indian High Courts Act, 1862* was enacted by the British Parliament authorising the setting up by Letters Patent of High Courts in the several presidencies in place of the respective Supreme Courts and the Sadar Dewani Adalats & Sadar Nizamat Adalats. Clause 9 of the Letters Patent of 1865 which replaced the earlier Letter Patent creating a High Court in Calcutta authorised it to approve, admit and enrol advocates, Vakils and attorneys. The persons so admitted were entitled to appear for the suitors of the High Court in the Letters Patent issued for the High Courts of Bombay and Madras. Several other High Courts came to be established later.

(iii) *The Legal Practitioners Act, 1879:*

The Legal Practitioners Act, 1879, which is in force today to a limited extent and is applicable now only to a limited class of persons as stated later in the article while dealing with the Advocate Act, 1961, was enacted to consolidate and amend the Law relating to legal practitioners of the High Court except the revenue agents were under the disciplinary jurisdiction of the High Courts under this Act. The Attorneys were under the disciplinary jurisdiction of the High Courts under the Letters Patent. The revenue agents were subject to the disciplinary authority of the Chief Controlling Revenue authority.

Section 4 of the Act empowered an advocate or Vakil on the roll of any High Court, or a Pleader of the Chief Court of the Punjab to practise in all the Courts subordinate the Court on the roll of which he was entered and in all revenue offices situated within the local limits of the appellate jurisdiction of such court subject to the rules relating to the language of the Court and also practice in any Court in British India other than a High Court on whose roll he

was not entered and in any revenue office. There was proviso, however, to the effect that this power would not extend to the original jurisdiction of the High Court in a Presidency Town. The High Court could dismiss any advocate so enrolled from practice but not without application and opportunity of defending himself.

In the Chartered High Courts rules had been framed. The persons who could be enrolled as advocates were barristers of England or Ireland or members of the Faculty of the Advocates of Scotland. An additional qualification by way of reading in chambers was also required. The High Court other than the Calcutta High Court allowed also persons who were not called to the Bar to enrol as advocates. Rules had been made by the Chartered High Courts. The Rules of the High Courts varied. In Madras a person who had taken a degree was qualified and underwent training with a practising advocate, vakil or attorney for a year. In Calcutta the requirement for admission of the vakil was that he should have been a graduate *in* Arts or Science, taken a degree in law and served as an articled Clerk with a vakil of five years' standing. Similarly rules had been made by the other High Courts also.

The High Courts were given the power, under section 6 to make rules as to the qualifications, admissions, and certificates of proper persons to be:

- (a) Pleaders of the subordinate Courts and of the revenue offices and
- (b) To be mukhtars of subordinate courts, and the fees to be paid for the examination and admission of such persons. The rules made by different High Courts regarding the qualifications of pleaders varied. In this connection it may be pointed out that in *Regina Ghua'* and in the matter of application by Miss Sudarshan Sabala Hazara' the Calcutta and Patna High Courts held that under the Rules made by the High Court under Section 6, women could not be admitted and enrolled as pleaders.

To remove doubts entertained as to the eligibility of women to be enrolled, the *Legal Practitioners (women) Act, 1923*, was passed to provide that not with standing anything contained in the previous enactments or other provisions in this regard, "no Women shall, by reason only of her sex, be disqualified from being admitted or enrolled as a legal practitioner and the number has been increasing every year. Reference may be made to the rules in Madras under which law graduates and graduates and who passed the pleadership examination if not enrolled in the High Court, could practice in all the civil and criminal Courts in the three contiguous districts by getting enrolled as Ist grade pleaders. Persons could get enrolled as 2nd grade pleaders if they were graduates in Arts only and had passed the pleadership examination.

Section 27 empowered the High Court to fix and regulate from time to time the fees payable by any party in respect of his adversary's advocate, pleader, vakil, mukhtar or attorney. Section 36 of the Act dealing with touts, which will continue to be in force even after all the Provisions of the Advocates Act are brought into force, empowers district judges, sessions Judges, district magistrates and presidency magistrates, every revenue officer not being below the rank of a Collector of a district and Chief Judge of a Presidency Small Causes Court to frame publish lists of persons proved to their satisfaction by evidence or general reports or otherwise to be touts. No persons' name is to be included in any such list without giving him a opportunity or showing cause against such inclusion. The Court or

Judge may exclude from the precincts of the Court any person included in such list. A person so named is punishable with imprisonment or fine.

(iv) The Chamber Committee and the Indian Bar Councils Act, 1926

Dissatisfaction was expressed about the distinction that existed- between barristers and vakil, and the special privileges enjoyed by the British barristers and solicitors. Consequently, the Government of India had to constitute in November, 1923, the Indian Bar Committee known as the Chamber Committee to report on:

(i) The proposals made from time to time for constitution of Indian Bar, whether on all India or provincial basis, with particular reference to the constitution, statutory recognition, functions and authority of a Bar Council or Bar Councils, and their positions, vis-à-vis High Courts.

(ii) The extent to which it might be possible to remove the distinction enforced by statute of practice between barristers and vakils.

On the question of the continuance of the dual system in Calcutta and Bombay, the Chamber Committee was sharply divided and hence did not make any recommendation. The significant recommendation of the Committee was regarding the establishment of Bar Councils for the High Courts.

The Bar Councils Act, 1926 passed with a view mainly to implementing some of the recommendations of the Chamber Committee and to consolidate and amend the law, relating to the legal practitioners. The Indian Bar Councils, Act, 1926 received the assent of the Governor-General on 9th September, 1926. Bar Councils were constituted in the different provinces on different dates in and after 1928.

The Act introduced, inter alia, two main changes. Firstly, it made separate provision for advocates while the Legal Petitioners Act of 1879 continued to be applicable to other legal practitioners.

Every Bar Council was to comprise of fifteen members, with the Advocate General as an ex-officio member, and four members nominated by the High Court, and ten members elected by and from amongst advocates of the High Court. With reference to the High Court of Fort William in Bengal and Bombay, a certain proportion of the members had to be advocates entitled to practise on the original side, and out of them a number fixed by the High Court has to be the barristers of England and Scotland. The Advocate-General in the Bar Councils of Madras, Bombay and Calcutta, was to be ex officio Chairman. The term of the Bar Council was for a period of three years.

The High Court had to prepare and maintain a roll of advocates, vakils and pleaders entitled as of right to practise immediately before the date when sanction of the Act was brought into force and of all and others admitted thereafter as advocates. While with reference to advocates the date of admission as advocates was the date of call to the bar if it was earlier.

While the roll was maintained by the High Courts, Section 9 authorised the Bar Council, with the sanction of the High Court to make rules to regulate the admission of persons to be advocates, to prescribe the qualifications of persons applying for admission as advocates, to

regulate the admission as advocates, by rules as their qualifications and the hearing of objections by the High Court preferred on behalf of the Bar Council

The qualifications for admission as laid down under the rules permitted inter alia those who had taken a degree in law and barristers and attorneys to be enrolled. The rules in some Bar Councils provided for a period of training as a pupil for a year by way of compulsory attendance in the chambers of the master (as advocate of a certain years' standing), maintenance of diaries, by the Bar Council. The rules in this regard varied in the different Bar Councils.

An applicant for enrolment had to pay a stamp duty for the entry in the rolls as provided for under the Indian Stamp Act. While the papers of the applicant for enrolment had to be presented to the Bar Councils, the enrolment was actually moved before the High Courts after the certificates were issued by the Bar Councils

Section 14 of the Act empowered an advocate to practise: -

(i) in the High Court where he was enrolled, subject to the rules of conditions to be made by the High Courts of Fort William in Bengal and at Bombay regarding persons practising in the High Courts, and in the exercise of their original jurisdiction.

(ii) in all subordinate Courts and tribunals (whether in the High Court where he was enrolled or not).

It may be pointed out that under the Act, the power of enrolment of advocates virtually remained in the High Court. The function of the Bar Council was advisory in nature. The Act did not affect the original side of the Calcutta and Bombay High Courts. Further the attorneys of Calcutta and Bombay High Courts were not affected by the Act and the enrolment of the disciplinary jurisdiction over the attorneys continued to be in the hands of the High Courts under their respective Letters Patent. The right of the advocates of one High Court to practise in another High Court was made subject to the rules made by the, High Court.

The rules made by the Bar Councils had stipulated that advocates of other High Courts would be permitted to appear and plead in the respective High Courts only with the permission of the Chief Justice provided all advocate enrolled in that High Court appeared with him. The provisions in the Bar Councils Act were regarded as unsatisfactory.

The recommendations of an India Bar Committee and the Law Commission:

The Bar was not satisfied with passing of the Bar Councils Act, 1926. The Act had not covered the pleaders, mukhtars and Revenue agents practising in the mofussil courts and Revenue offices and consequently did not set up a unified Indian Bar. Further the powers conferred on the Bar Councils constituted under the Act were limited and the Bar Councils were neither autonomous nor had any substantial authority. Therefore, several non-official members' bills had been introduced to amend the law relating to the legal profession and had lapsed and nothing concrete emerged. With the coming into force of the Constitution in 1950 and the establishment of a Supreme Court for India the need for an all-India bar was stressed by the legal fraternity. In this situation, the Union Government set up a Committee known as the All India Bar Committee under the Chairmanship of Justice S.R. Das of the Supreme Court.

Subsequently in 1955 the Law Commission, presided over by Mr. M.C. Stelvad, then Attorney-General of India, in its fourteenth report on the Reform of Judicial Administration endorsed the recommendations of the All India Bar Committee, as regard the creation of a unified All India Bar as well as the establishment, composition and functions of the State and all India Bar Councils.

To implement the recommendations of the All India Bar Committee and of the Law Commission in its fourteenth report, the Legal Practitioners Bill, 1959, was introduced in the Lok Sabha on 19th November, 1959. The Bill was to amend and consolidate the law relating to legal practitioners and to provide for the constitution of State Bar Councils and an All India Bar Council.

When the Bill came to be passed, the name legal Practitioners Bill was changed into the Advocate Act.

The Advocates Act, 1961, which received the assent of the President of India on the 18th May, 1961, extends to the whole of India, except the State of Jammu and Kashmir. Under Section 1, the Act is to come into force on such date as the Central Government may, by notification in the official gazette, appoint and different dates may be appointed for different provisions of this Act.

Broadly speaking, the main features of the Act are:

- (i) to have, in course of time only one class of legal practitioners viz. advocates,
- (ii) to take away the powers till then vested in the Courts, in the matter of admission of advocates and the maintenance of the rolls, and their disciplinary conduct (subject to an ultimate appeal to the Supreme Court), and
- (iii) the constitution of a Central Bar Council with powers, *inter alia*, to recognise the degree in law for admission as advocates. Every Bar Council constituted under the Act is a body corporate having a common seal, and may, by the name of which it is known sue and be sued.

(i) Every State Bar Council consists of-

(i) the Advocate-General as the ex-officio member (for the Bar Council of Delhi, since there is no Advocate-General for the Union Territory of Delhi, the Additional Solicitor General was made the ex-officio member, and when the office was made the ex-officio member, and when the office was abolished, the Solicitor-General of India was made ex-officio members, and

(ii) in the case of the Bar Councils of Assam and Nagaland, Orissa, Delhi and Himachal Pradesh fifteen other members and in the case of all the other State Bar Councils twenty other members elected in accordance with the system of proportional representation by means of the single transferable vote from amongst the advocates on the electorate of the State Bar Council concerned.

The Act as originally passed prescribed a term of six years for an elected member of a State Bar Council subject to the principle of rotation but this provision has since been

amended and the term as now fixed is four years from the date of the publication of the result of the election.

Even State Bar Council has

- (i) one or more disciplinary Committee,
- (ii) an executive Committee, consisting of five members,
- (iii) an enrolment Committee, consisting of those members and
- (iv) each other Committees as may be deemed necessary.

Every disciplinary Committee consists of two persons elected by the Council from amongst its members and one other person co-opted by the council who have practised for at least ten years, Each Bar Council has a Chairman and a Vice-Chairman elected in such manner as may be prescribed and has to appoint Secretary, and an accountant, if necessary

The functions of a State Bar Council are to admit persons as advocates on its roll, to prepare and maintain such roll, to entertain and determine cases of misconduct against advocates on its roll; to safeguard the rights privileges and interests of advocates on its roll, to promote and support law reform; to provide for the Election of its members; to perform all other functions assigned to it by or under the Act and to do all other things necessary for discharging the aforesaid functions.

(ii) The Bar Council of India: Membership and Function:

The Act provides that there shall be for the territories to which the Act extends a Bar Council known as the Bar Council of India, which consists of the Attorney General of India, and the Solicitor-General of India as ex-officio members, and one member elected by each State Bar Council from amongst its members. There shall be a Chairman and a Vice-Chairman of the Bar Council of India elected as prescribed by rules and a Secretary, and an Accountant, if any, under Section 7.

The functions of the Bar Council of India are to prepare and maintain a common roll of advocates, to lay down standards of professional conduct and etiquette for advocates, to lay down the procedure to be followed by its disciplinary committee of each State Bar Council; to safeguard the rights; privileges and interests, of advocates; to promote and support law reform; to deal with and dispose of any matter arising under Act, which may be referred to it by a State Bar Council to exercise general supervision and control over State Bar Councils, to promote legal education and to lay down standards of such education, the consultation with the Universities whose degree in law shall be a qualification for enrolment of an advocate and for the purpose visit and inspect Universities; to manage and invest the funds of the Bar Council, to provide for the election of its members; to perform all other functions conferred on it by or under the Act and to all other thing necessary for discharging the aforesaid functions.

The Bar Council of India is to have one or more disciplinary Committee, a Legal Education Committee, an executive Committee, and such other Committees as may be deemed necessary. Every disciplinary committee is to consist of three members, two persons

elected by it from amongst advocates as have practised for at least ten years. The senior most advocates from amongst its members is to be chairman of the committee. The legal education committee consists of ten members of whom five are persons elected by the Council from amongst its members and the other five are those who are not members of the Council. The executive committee consists of the members elected by the Council from amongst its members.

The main source of income of the Bar Council of India is the contribution of 40 per cent out of the fee of Rs. 250 paid by each applicant for enrolment to the State Bar Council.

(iii) Senior Advocates:

Persons who were "senior advocates immediately before the appointed day, i.e. 1-12-1961 have been deemed to be senior advocates for the purpose of the Act. Besides, power has been conferred under Section 16 of the Act to the Supreme Court and the High Courts to designate any advocate as senior advocate if in its opinion by virtue of his ability, experience and standing at the Bar, he is deserving of such distinction. Senior advocates are governed by the rules of the Supreme Court applicable to them, and are also subject to the restrictions laid down by the Bar Council of India in the interest of the legal profession.

(iv) Qualifications, for admission as an advocate:

Section 24 of the Act lays down the qualification for admission as an advocate. Broadly speaking, the following are entitled to be admitted as advocates, if they fulfil also certain other requirements laid down under the Section:

(i) A person who has obtained a degree in law from any University in India or from any University outside the territory of India, recognised by the Bar Council of India for the purposes of the Act,

(ii) A barrister;

(iii) A vakil or a pleader who is a law graduate if his application for enrolment was made within two years from the appointed day viz. 1-12-1961;

(iv). A person who has for at least three years been a vakil or a pleader or a mukhtar or was at any time entitled to be enrolled under any law for the time being in force as an advocate of a High Court or of a Court of a Judicial Commissioner or in any Union Territory.

An applicant for admission has to be a citizen of India and should have completed the age of 21 years. He should pay a fee of Rs. 250/- to the State Bar Council and should fulfil the other requirement as laid down by the rules of the State Bar Councils, which generally include an application for admission on the production of the certificate granted by the University in respect of the degree in law granted by the University, and character. However, a national of any other country may be admitted as an advocate in a State roll, if he is a citizen of India duly qualified and permitted to practise law in the country.

If the application is on the basis of the degree in law obtained from a University in India or outside the territory of India, Section 24 (1) (d) requires that the applicant should have undergone a course of training in law and passed an examination both of which prescribed by the State Bar Council. Under the rules of the State Bar Councils, the Course of training which

was originally for a period of one year, has subsequently been reduced for an advocate to a period of six months. It has to complete apprenticeship under an advocate of certain years standing, attendance at Courts and at Chambers, maintenance of diaries, attendance at lectures, and the passing of an examination on some subjects.

With regard to a barrister also, the Bar Council of India has specified, the same requirement as to a degree in law. A provision to this sub-section as amended provides that the clauses as to training and examination shall not apply to:

(1) Any person who have obtained a degree in law from any University in India on the results of an examination held before the 31st day of March, 1964, or such other later date as may be prescribed, or a barrister who, was the Bar before such date, or a barrister who, having qualified later that date, has received such practical training in law as may be recognised in this behalf by the Bar Council of India.

(2) Any person who has for at least two years held a judicial office in any area which was comprised before the 15th day of August, 1947 within India as specified in the Government of India Act, 1935, or has been an advocate of any High Court in any such area:

(3) Any person who has practised before any High Court and who had discontinued practice by reason of his taking up employment under the government, or local authority or any other person: and

(4) Any other class of persons by reason of their legal training or experience are declared by the Bar Council of India to be exempted from the provision of this clause.

The last date mentioned in the proviso had owing to agitations and representations, frequently been extended and sub-section was amended as above in 1964. Even the amendment of 1964 could not be final on the subject. The Government of India's latest notification relevant on the matter has narrowed down the scope of the requirement as to training and examination practically making it a nullity. Training and examination will not be necessary according to the notifications if the applicant has taken the degree of law (after undergoing a course of instruction the three years (laid down by the rules of the Bar Council of India) or has been called to the Bar on or before 31.12.1968, or if he had taken the master's degree in law.

(v) Legal Qualifications:

The degree in law mentioned as one of the qualifications for admission, may be degree in law:

- (i) of a university in India, or
- (ii) of a university contains the territory of India.
- (iii) A degree in law of University in India;

The standards laid down by the Bar Council of India on legal education and recognition of degree of law of the University prescribes inter alia the following conditions:

A person to be eligible to join the course of study in law should be a graduate of University or hold such academic qualification which is considered by the Bar Council of India equivalent to a graduate degree of a University. The duration of the course of instruction

shall be three years. This is with reference to those who join the course of instruction in or after the first term of the academic year 1967-68. In the case of fourteen universities, however, for reasons considered sufficient by the Bar Council of India, it was the first term or the academic years 1968-69 instead of 1967-68. The course of instruction comprises ten compulsory subject and six others as optional as mentioned in the rules.

During the last year of the course, the instruction and practical training should also be imparted for a period of six months in the rules of courts and in drafting and pleadings and documents.

According to the resolution of the Bar Council of India, practical training would include pleading and conveyancing, moot courts and conducting civil and criminal proceedings, attending courts; maintaining a record of the above three requirements and arrangements of at least six lectures of professional ethics, attendance at four of which shall be compulsory. The scope and nature of training as set out in this resolution is not to be deemed as exhaustive. It should thus be open to the Universities and law colleges to add to the same and work with Bar Council of India at the earliest. Practical training should be made a part of the examination system for which marks should be assigned and awarded.

The rules on standards of legal education were made, as required under the Act, in consultation with the Universities imparting legal education and the State Bar Councils. In accordance with the above rules, the Bar Council of India in exercise of the powers conferred under section 24 (i) (c) (iii) of the Advocates Act, has recognised degrees in law obtained from any of the Universities which fulfills the requirements of rule II of its rules and obtained by those who had commenced the three-year -course of instruction as provided for, in the first terms of the academic year 1967-68 by actual attendances at colleges. Under the powers vested in it, it has predicted the postponement of the three-year course to the academic year 1968-69 in the case of the Universities of Kanpur, Madras, Meerut, Bangalore, Aligarh, Mysore, Bhagalpur, Patna, Agra, Ranchi, Behrampur and Jiwaji, Sardar Patel and Vikram Universities, one of the functions of the Bar Council of India is as mentioned earlier, to visit and inspect Universities, imparting legal education.

(i) Conditions for admissions to roll:

Section 28 of the Act empowers the State Bar Councils to make rules, subject to the approval of the Bar Council of India. The rules can be made, inter alia, on the conditions subject to which a person may be admitted as an advocate on the roll of Bar Council. The rules accordingly made by State Bar Councils generally prohibit the enrolment of a person who though he may be otherwise qualified, is in full or part time service or employment or is engaged in any trade or profession. The prohibition against enrolment does not apply to certain categories of persons specifically referred to in the proviso to the rule such as 'law officers' fulfilling certain conditions, articled clerk or an attorney, a person in part-time service as a professor or Lecturer, teacher in law of a person who by virtue of his being a member of a Hindu Joint Family has an interest in a Joint management thereof or other classes of persons specifically exempted after approval by the Bar Council of India.

The compulsory subjects are: Indian Legal and Constitutional History, Contracts, Torts, Family Law including Hindu and Mohammedan Law; Evidence, Legal Theory (Jurisprudence and Comparative Law); Civil Procedure, Limitation and Arbitration.

(ii) Application for admission to roll:

An application for admission as an advocate has to be made in the prescribed form to the State Bar Council within whose jurisdiction the applicant proposes to practice. Applications for enrolment have to be referred to and disposed of by the enrolment committee of the State Bar Council. But if the enrolment committee proposed to refuse such applications, it has to refer the application with the statement of the grounds in support of the refusal to the Bar Council of India, and has to dispose of the application finally in conformity with such opinion.

(iii) Right to practise

Chapter IV of the Advocates Act regulates the right of Advocate to practice. One of the objects of the Act is to have in course of time only one class of legal practitioners. Section 29 provides that subject to the provisions of the Act as from the appointed day 1.6.1969, there shall be only one class of persons entitled to practice throughout the territories through which the Act extends in all courts including the Supreme Court, before any tribunal or person legally authorised to take evidence or before any other authority or person before whom such advocate is entitled to practise. Further under Section 33 advocates alone are entitled to practise in any Court.

(iv) Practice by persons not entitled to practice:

Persons illegally practising in Courts or before other authorities when they are not entitled to practise under the provisions of the Act are liable for punishment with imprisonment for a term which may extend to six months.

(v) Some important powers of the Bar Council or India:

Apart from the other powers already enumerated the Bar Council of India has been specifically conferred certain special powers.

1. *Power to remove name from the rolls.*

The Bar Council of India is empowered, either on a reference made to it or otherwise, if it is satisfied that any person has got his name entered in the roll of the Advocates by misrepresentation, to remove such person from the roll of advocates after giving him an opportunity of being heard. The Bar Council of India or any State Bar Council may also remove from the common roll or the State roll as the case may be, the name of any advocate, who is dead or from whom a request has been received to that effect. Besides, the name of advocate may be removed from the roll as punishment for misconduct in disciplinary proceedings.

2. *Revision*

Apart from the power vested in it to remove the name of an advocate in certain cases, and the power vested in its disciplinary committees to hear and dispose of the disciplinary matters whether by way of original hearing or on appeal, the Bar Council

of India has the power at any time to call for the record of any proceedings under the Act, which has been disposed of by a State Bar Council or a Committee thereof, and from which no appeal lies, for satisfying itself as to the legality or propriety of such a disposal and may pass such orders thereon as it deemed fit. No order which prejudicially affects any person can be passed without giving him a reasonable opportunity of being heard.

3. Directives:

Section 48 B empowers the Bar Council India for the proper and efficient discharge of the functions of a State Bar Council or any committee thereof, to give such directions to the State Bar Council or its committees as may appear it to be necessary, and the State Bar Council or the Committee has to comply with the directions. Where a State Bar Council is able to perform its functions for any reason whatsoever, the Bar Council of India may give such directions to the ex-officio member thereof as may appear to it to be necessary, and such directions shall have effect, notwithstanding anything contained in the rules made by the State Bar Council.

4. Rules 'to make and approval'

Section 15 enumerates the powers of the State Bar Councils and the Bar Council of India to make rules on the matters dealt with Chapter II of the Act relating to the Bar Councils. Section 28 gives power to the State Bar Councils to make rules on some matters connected with the preparation of rolls, training and examinations for admission of advocates, form of application for enrolment and conditions for enrolment. Any rule made by State Bar Council, whether under Section 15 or 28 shall have effect only if it has been approved by the Bar Council of India. It may be noted in this connection that under the Indian Bar Councils Act, 1926, the rules made by the Bar Councils required the previous sanction of the High Court.

Section 49 confers on the Bar Council of India a general power to make rules for discharging its functions under the Act. Besides the rules referred to earlier in this article they include rules on standards of professional conduct and etiquettes by Council advocates, principles for guidance of the State Bar Councils and the manner in which directions issued or orders made by the Bar Council of India may be enforced, and any other matter which may be prescribed. The Bar Council of India has made its rules on all these matters.

Supreme Court Rules to regulate the legal profession

Prior to the coming into force of the Constitution, the Federal Court was empowered under Section 214 of the Government of India Act, 1935 to make rules, with the approval of the Governor General, for regulating the practice and procedure of the Court including rules as to the persons practicing before it. The Federal Court rules, 1942 prescribed the qualifications of persons to be enrolled before it. The rules permitted the persons of ten year standing to be enrolled as senior advocates. No person could appear as an advocate before the Federal Court unless instructed by an agent.

Article 145(1) of the Constitution empowers the Supreme Court to make rules, with the approval of the President inter alia as to persons practicing before it. The Advocates Act, 1961 confers on all advocates whose names are on the rolls maintained under that Act to practice, inter alia, in the Court. The Supreme Court Rules, 1950 made in exercise of powers under Article 145(1) provides for the enrolment of persons as advocates who are entitled to practice before it. The rules laid down that the role of Supreme Court shall be in two parts, seniors and others. Persons who had more than ten years standing could be enrolled as senior advocates.

Order IV of the Supreme Court Rules deals with the Advocates. Rule 2(b) places some restrictions on the senior advocates. Rule 3 provides that every advocate appearing before the court shall wear robes and costumes as may from time to time be directed by the Court. In pursuance of this rule the Chief Justice of India directed that the costume that be worn by the advocates appearing before the Supreme Court should be black coat, robe and band worn by the barristers appearing before the High Courts. The rules also provide for registration of advocates on record and advocate who is not a senior advocate. Rule 5 lays down that an advocate shall not be qualified to be registered as an advocate on record unless he has undergone training for one year with an advocate on record approved by the Court and has thereafter passed such tests as may be held by the Court for advocates who apply to be registered as advocates on record. The particulars of the test are to be notified in the official gazette from time to time. The rules however, exempt an attorney from such training and test. An advocate on record is required to have an office in Delhi within a radius of ten miles from the Court house and give an undertaking to employ within one month of his being registered as an advocate on record, a registered clerk. He is also required to pay a registration fee of twenty five rupees.

The Supreme Court Advocate (Practice in High Court) Act, 1951, conferred the right on every advocate of the Supreme Court, to practice in any High Court whether or not he is an advocate of that High Court. In *Aswani Kumar Ghosh v. Arabindha Ghosh*, the Supreme Court held by a majority that an advocate of the Supreme Court became entitled as of right to appear and plead as well as act in all the High Courts in India and that he is also entitled to appear on the original side of the West Bengal and the Bombay High Courts without being instructed by an attorney and free from the restrictions in this regard to the Rules of the High Courts of West Bengal and Bombay.

In view of the provision of the Advocates Act, 1961, there has been no further admission of persons as advocates of the Supreme Court after 1.12.1961, when Chapter III of the Advocates Act came into force.

Under Section 50 (3) (d) of the Advocates Act, 1961- the Supreme Court Advocates (Practice in High Court) Act, 1951 shall stand repealed on the date when Chapter IV of the Advocate Act comes into force and as noted earlier, Section 35 in Chapter IV of the Act has not yet been brought into force.

CONCLUSION

What has been enumerated above will show that the Advocates Act. 1961, has marked the beginning of a new era in the history of the legal profession by vesting largely in the Bar

Councils the power and the jurisdiction which the Courts till then exercised, by fulfilling the aspirations of those who had been demanding an all Indian Bar and effecting a unification of the Bar in India, power to practise in all the Courts and bound by rules made and code of conduct laid down by their own bodies to which the members of Council resort to for the protection of their rights, interests or privileges. The Act has enabled representatives from the several States to come together to a common forum, and has brought about integration.

The conferment of the power in respect of legal education and the recognition of the degree in law and the power to visit and inspect universities imparting legal education, have resulted in a uniform pattern of legal education, while at the same time preserving intact the powers and responsibilities of the universities. A word of caution is necessary at this stage. The problem of language in so far as at any rate as regards legal education might present difficulties and would seem to be of utmost magnitude. This would require defect less handling.

An attempt had been made to provide by legislation for the Attorney-General of India to be the ex-officio Chairman of the Bar Council of India and for the Advocate-General in the States to be the Chairman of the Bar Councils. But this had been stoutly resisted by the Bar Councils, on the ground that it would encroach upon the autonomy given to the Bar Councils. As a result the Government had to drop the matter.

A few matters have to be set right by legislation. Of these may be mentioned the existing provisions under Section 49-A. Agitations have been there for putting an end to the dual system.

In the last ten years, the Bar Council has had an onerous task to perform. The foundation having been laid, the members of the legal profession and the public are entitled to look forward to the Bar Councils for the discharge of their functions and obligations.

The Province of Jurisprudence Determined*

The matter of jurisprudence is positive law: law, simply and strictly so called: or law set by political superiors to political inferiors. But positive law (or law, simply and strictly so called) is often confounded with objects to which it is related by *resemblance*, and with objects to which it is related in the way of *analogy*: with objects which are *also* signified, *properly* and *improperly*, by the large and vague expression *law*. To obviate the difficulties springing from that confusion, I begin my projected Course with determining the province of jurisprudence, or with distinguishing the matter of jurisprudence from those various related objects: trying to define the subject of which I intend to treat, before I endeavour to analyse its numerous and complicated parts.

A law, in the most general and comprehensive acceptation in which the term, in its literal meaning, is employed, may be said to be a rule laid down for the guidance of an intelligent being by an intelligent being having power over him. Under this definition are concluded, and without impropriety, several species. It is necessary to define accurately the line of demarcation which separates these species from one another, as much mistiness and intricacy has been infused into the science of jurisprudence by their being confounded or not clearly distinguished. In the comprehensive sense above indicated, or in the largest meaning which it has, without extension by metaphor or analogy, the term *law* embraces the following objects:- Law set by God to his human creatures, and laws set by men to men.

The whole or a portion of the laws set by God to men is frequently styled the law of nature, or natural law: being, in truth, the only natural law of which it is possible to speak without a metaphor, or without a blending of objects which ought to be distinguished broadly. But, rejecting the appellation Law of Nature as ambiguous and misleading, I name those laws or rules, as considered collectively or in a mass, the *Divine law*, or the *law of God*.

Laws set by men to men are of two leading or principal classes: classes which are often blended, although they differ extremely; and which, for that reason, should be severed precisely, and opposed distinctly and conspicuously.

Of the laws or rules set by men to men, some are established by *political* superiors, sovereign and subject: by persons exercising supreme and subordinate *government*, in independent nations, or independent political societies. The aggregate of the rules thus established, or some aggregate forming a portion of that aggregate, is the appropriate matter of jurisprudence, general or particular. To the aggregate of the rules thus established, or to some aggregate forming a portion of that aggregate, the term *law*, as used simply and strictly, is exclusively applied. But, as contradistinguished to *natural* law, or to the law of *nature* (meaning, by those expressions, the law of God), the aggregate of the rules, established by political superiors, is frequently styled *positive* law, or law existing *by position*. As contradistinguished to the rules which I style *positive morality*, and on which I shall touch immediately, the aggregate of the rules, established by political superiors, may also be marked

* John Austin, *The Province of Jurisprudence Determined* 9 6 221 (1954).

commodiously with the name of *positive law*. For the sake, then, of getting a name brief and distinctive at once, and agreeably to frequent usage, I style that aggregate of rules, or any portion of that aggregate, *positive law*: though rules, which are *not* established by political superiors, are also *positive*, or exist *by position*, if they be rules or laws, in the proper signification of the term.

Though *some* of the laws or rules, which are set by men to men, are established by political superiors, *others* are *not* established by political superiors, or are *not* established by political superiors, in that capacity or character.

Closely analogous to human laws of this second class, are a set of objects frequently but *improperly* termed *laws*, being rules set and enforced by *mere opinion*, that is, by the opinions or sentiments held or felt by an indeterminate body of men in regard to human conduct. Instances of such a use of the term *law* are the expressions "The law of honour;" "The law set by fashion;" and rules of this species constitute much of what is usually termed "International law."

The aggregate of human laws properly so called belonging to the second of the classes above mentioned, with the aggregate of objects *improperly* but by *close analogy* termed laws, I place together in a common class, and denote them by the term *positive morality*. The name *morality* severs them from *positive law*, while the epithet *positive* disjoins them from the *law of God*. And to the end of obviating confusion, it is necessary or expedient that they *should* be disjoined from the latter by that distinguishing epithet. For the name *morality* (or *morals*), when standing unqualified or alone, denotes indifferently either of the following objects: namely, positive morality *as it is*, or without regard to its merits; and positive morality *as it would be*, if it conformed to the law of God, and were, therefore, deserving of *approbation*.

Besides the various sorts of rules which are included in the literal acceptation of the term law, and those which are by a close and striking analogy, though *improperly*, termed laws, there are numerous applications of the term law, which rest upon a slender analogy and are merely metaphorical or figurative. Such is the case when we talk of *laws* observed by the lower animals; of *laws* regulating the growth or decay of vegetables; of *laws* determining the movements of inanimate bodies or masses. For where *intelligence* is not, or where it is too bounded to take the name of *reason*, and, therefore, is too bounded to conceive the purpose of a law, there is not the *will* which law can work on, or which duty can incite or restrain. Yet through these misapplications of a *name*, flagrant as the metaphor is, has the field of jurisprudence and morals been deluged with muddy speculation.

Having suggested the *purpose* of my attempt to determine the province of jurisprudence: to distinguish positive law, the appropriate matter of jurisprudence, from the various objects to which it is related by resemblance, and to which it is related, nearly or remotely, by a strong or slender analogy: I shall now state the essentials of a *law* or *rule* (taken with the largest signification which can be given to the term *properly*).

Every *law* or *rule* (taken with the largest signification which can be given to the term *properly*) is a *command*. Or, rather, laws or rules, properly so called, are a *species* of commands.

Now, since the term *command* comprises the term *law*, the first is the simpler as well as the larger of the two. But, simple as it is, it admits of explanation. And, since it is the *key* to the sciences of jurisprudence and morals, its meaning should be analysed with precision.

Accordingly, I shall endeavour, in the first instance, to analyse the meaning of ~~command~~ an analysis which I fear, will task the patience of my hearers, but which they will bear with cheerfulness, or, at least, with resignation, if they consider the difficulty of performing it. The elements of a science are precisely the parts of it which are explained least easily. Terms that are the largest, and, therefore, the simplest of a series, are without equivalent expressions into which we can resolve them *concisely*. And when we endeavour to *define* them, or to translate them into terms which we suppose are better understood, we are forced upon awkward and tedious circumlocutions.

If you express or intimate a wish that I shall do or forbear from some act, and if you will visit me with an evil in case I comply not with your wish, the *expression* or *intimation* of your wish is a *command*. A command is distinguished from other significations of desire, not by the style in which the desire is signified, but by the power and the purpose of the party commanding to inflict an evil or pain in case the desire be disregarded. If you cannot or will not harm me in case I comply not with your wish, the expression of your wish is not a command, although you utter your wish in imperative phrase. If you are able and willing to harm me in case I comply not with your wish, the expression of your wish amounts to a command, although you are prompted by a spirit of courtesy to utter it in the shape of a request. *Preces erant, sed quibus contradici nan posset.* Such is the language of Tacitus, when speaking of a petition by the soldiery to a son and lieutenant of Vespasian.

A command, then, is a signification of desire. But a command is distinguished from other significations of desire by this peculiarity: that the party to whom it is directed is liable to evil from the other, in case he comply not with the desire.

Being liable to evil from you if I comply not with a wish which you signify, I am *bound* or *obliged* by your command, or I lie under a *duty* to obey it. If, in spite of that evil in prospect, I comply not with the wish which you signify, I am said to disobey your command, or to violate the duty which it imposes.

Command and duty are, therefore, correlative terms: the meaning denoted by each being implied or supposed by the other. Or (changing the expression) wherever a duty lies, a command has been signified; and whenever a command is signified, a duty is imposed.

Concisely expressed, the meaning of the correlative expressions is this. He who will inflict an evil in case his desire be disregarded, utters a command by expressing or intimating his desire: He who is liable to the evil in case he disregard the desire, is bound or obliged by the command.

The evil which will probably be incurred in case a command be disobeyed or (to use an equivalent expression) in case a duty be broken, is frequently called a *sanction*, or an *enforcement of obedience*. Or (varying the phrase) the command or the duty is said to be *sanctioned* or *enforced* by the chance of incurring the evil.

Considered as thus abstracted from the command and the duty which it enforces, the evil to be incurred by disobedience is frequently styled a *punishment*. But, as punishments, strictly so called, are only a *class* of sanctions, the term is too narrow to express the meaning adequately.

I observe that Dr. Paley, in his analysis of the term *obligation*, lays much stress upon the *violence* of the motive to compliance. In so far as I can gather a meaning from his loose and inconsistent statement, his meaning appears to be this: that unless the motive to compliance be *violent* or *intense*, the expression or intimation of a wish is not a *command*, nor does the party to whom it is directed lie under a *duty* to regard it.

If he means, by a *violent* motive, a motive operating with certainty, his proposition is manifestly false. The greater the evil to be incurred in case the wish be disregarded, and the greater the chance of incurring it on that same event, the greater, no doubt, is the *chance* that the wish will *not* be disregarded. But no conceivable motive will *certainly* determine to compliance, or no conceivable motive will render obedience inevitable. If Paley's proposition be true, in the sense which I have now ascribed to it, commands and duties are simply impossible. Or, reducing his proposition to absurdity by a consequence as manifestly false, commands and duties are possible, but are never disobeyed or broken.

If he means by a *violent* motive, an evil which inspires fear, his meaning is simply this: that the party bound by a command is bound by the prospect of an evil. For that which is not feared is not apprehended as an evil: or (changing the shape of the expression) is not an evil in prospect.

The truth is, that the magnitude of the eventual evil, and the magnitude of the chance of incurring it, are foreign to the matter in question. The greater the eventual evil, and the greater the chance of incurring it, the greater is the efficacy of the command, and the greater is the strength of the obligation: Or (substituting expressions exactly equivalent), the greater is the *chance* that the command will be obeyed, and that the duty will not be broken. But where there is the smallest chance of incurring the smallest evil, the expression of a wish amounts to a command, and, therefore, imposes a duty. The sanction, if you will, is feeble or insufficient; but still there *is* a sanction, and, therefore, a duty and a command.

By some celebrated writers (by Locke, Bentham, and, I think Paley), the term *sanction*, or *enforcement of obedience*, is applied to conditional good as well as to conditional evil: to reward as well as to punishment. But, with all my habitual veneration for the names of Locke and Bentham, I think that this extension of the term is pregnant with confusion and perplexity.

Rewards are, indisputably, *motives* to comply with the wishes of others. But to talk of commands and duties as *sanctioned* or *enforced* by rewards, or to talk of rewards as *obliging* or *constraining* to obedience, is surely a wide departure from the established meaning of the terms.

If *you* expressed a desire that *I* should render a service, and if you proffered a reward as the motive or inducement to render it, *you* would scarcely be said to *command* the service, nor should *I*, in ordinary language be *obliged* to render it. In ordinary language, *you* would *promise* me a reward, on condition of my rendering the service, whilst *I* might be *incited* or *persuaded* to render it by the hope of obtaining the reward.

Again: If a law hold out a *reward* as an inducement to do some act, an eventual *right* is conferred, and not an *obligation* imposed, upon those who shall act accordingly: The *imperative* part of the law being addressed or directed to the party whom it requires to *render* the reward.

In short, I am determined or inclined to comply with the wish of another, by the fear of disadvantage or evil. I am also determined or inclined to comply with the wish of another, by the hope of advantage or good. But it is only by the chance of incurring *evil*, that I am *bound* or *obliged* to compliance. It is only by conditional *evil*, that duties are *sanctioned* or *enforced*. It is the power and the purpose of inflicting eventual *evil*, and *not* the power and the purpose of imparting eventual *good*, which gives to the expression of a wish the name of a *command*.

If we put *reward* into the import of the term *sanction*, we must engage in a toilsome struggle with the current of ordinary speech; and shall often slide unconsciously, notwithstanding our efforts to the contrary, into the narrower and customary meaning.

It appears, then, from what has been premised, that the ideas or notions comprehended by the term *command* are the following: 1. A wish or desire conceived by a rational being, that another rational being shall do or forbear. 2. An evil to proceed from the former, and to be incurred by the latter, in case the latter comply not with the wish. 3. An expression or intimation of the wish by words or other signs.

It also appears from what has been premised, that *command*, *duty*, and *sanction* are inseparably connected terms: that each embraces the same ideas as the others, though each denotes those ideas in a peculiar order or series.

'A wish conceived by one, and expressed or intimated to another, with an evil to be inflicted and incurred in case the wish be disregarded', are signified directly and indirectly by each of the three expressions. Each is the name of the same complex notion.

But when I am talking *directly* of the expression or intimation of wish, I employ the term *command*: The expression or intimation of the wish being presented *prominently* to my hearer; whilst the evil to be incurred, with the chance of incurring it, are kept (if I may so express myself) in the background of my picture.

When I am talking *directly* of the chance of incurring the evil, or (changing the expression) of the liability or obnoxiousness to the evil, I employ the term *duty*, or the term *obligation*: The liability or obnoxiousness to the evil being put foremost, and the rest of the complex notion being signified implicitly.

When I am talking *immediately* of the evil itself, I employ the term *sanction*, or a term of the like import: The evil to be incurred being signified directly; whilst the obnoxiousness to that evil, with the expression or intimation of the wish, are indicated indirectly or obliquely.

To those who are familiar with the language of logicians (language unrivalled for brevity, distinctness, and precision), I can express my meaning accurately in a breath:- Each of the three terms *signifies* the same notion; but each *denotes* a different part of that notion, and *connotes* the residue.

Commands are of two species. Some are *laws* or *rules*. The others have not acquired an appropriate name, nor does language afford an expression which will mark them briefly and

precisely. I must, therefore, note them as well as I can by the ambiguous and inexpressive name of '*occasional or particular commands*.'

The term *laws* or *rules* being not unfrequently applied to occasional or particular commands, it is hardly possible to describe a line of separation which shall consist in every respect with established forms of speech. But the distinction between laws and particular commands may, I think, be stated in the following manner.

By every command, the party to whom it is directed is obliged to do or to forbear.

Now where it obliges *generally* to acts or forbearances of a *class*, a command is a law or rule. But where it obliges to a *specific* act or forbearance, or to acts or forbearances which it determines *specifically* or *individually*, a command is occasional or particular. In other words, a class or description of acts is determined by a law or rule, and acts of that class or description are enjoined or forbidden generally. But where a command is occasional or particular, the act or acts, which the command enjoins or forbids, are assigned or determined by their specific or individual natures as well as by the class or description to which they belong.

The statement which I have given in abstract expressions I will now endeavour to illustrate by apt examples.

If you command your servant to go on a given errand, or *not* to leave your house on a given evening, or to rise at such an hour on such a morning, or to rise at that hour during the next week or month, the command is occasional or particular. For the act or acts enjoined or forbidden are specially determined or assigned.

But if you command him *simply* to rise at that hour, or to rise at that hour *always*, or to rise at that hour *till further orders*, it may be said, with propriety, that you lay down a *rule* for the guidance of your servant's conduct. For no specific act is assigned by the command, but the command obliges him generally to acts of a determined class.

If a regiment be ordered to attack or defend a post, or to quell a riot, or to march from their present quarters, the command is occasional or particular. But an order to exercise daily till further orders shall be given would be called a *general* order, and *might* be called a *rule*.

If Parliament prohibited simply the exportation of corn, either for a given period or indefinitely, it would establish a law or rule: a *kind* or *sort* of acts being determined by the command, and acts of that kind or sort being *generally* forbidden. But an order issued by Parliament to meet an impending scarcity, and stopping the exportation of corn *then shipped and in port*, would not be a law or rule, though issued by the sovereign legislature. The order regarding exclusively a specified quantity of corn, the negative acts or forbearances, enjoined by the command, would be determined specifically or individually by the determinate nature of their subject.

As issued by a sovereign legislature, and as wearing the form of a law, the order which I have now imagined would probably be *called* a law. And hence the difficulty of drawing a distinct boundary between laws and occasional commands.

Again: An act which is not an offence, according to the existing law, moves the sovereign to displeasure: and, though the authors of the act are legally innocent or unoffending, the

sovereign commands that they shall be punished. As enjoining a specific punishment in that specific case, and as not enjoining generally acts or forbearances of a class, the order uttered by the sovereign is not a law or rule.

Whether such an order would be *called* a law, seems to depend upon circumstances which are purely immaterial: immaterial, that is, with reference to the present purpose, though material with reference to others. If made by a sovereign assembly deliberately, and with the forms of legislation, it would probably be called a law. If uttered by an absolute monarch, without deliberation or ceremony, it would scarcely be confounded with acts of legislation, and would be styled an arbitrary command. Yet, on either of these suppositions, its nature would be the same. It would not be a law or rule, but an occasional or particular command of the sovereign One or Number.

To conclude with an example which best illustrates the distinction, and which shows the importance of the distinction most conspicuously, *judicial commands* are commonly occasional or particular, although the commands which they are calculated to enforce are commonly laws or rules.

For instance, the lawgiver commands that thieves shall be hanged. A specific theft and a specified thief being given, the judge commands that the thief shall be hanged, agreeably to the command of the lawgiver.

Now the lawgiver determined a class or description of acts; prohibits acts of the class generally and indefinitely; and commands, with the like generality, that punishment shall follow transgression. The command of the lawgiver is, therefore, a law or rule. But the command of the judge is occasional or particular. For he orders a specific punishment, as the consequence of a specific offence.

According to the line of separation which I have now attempted to describe, a law and a particular command are distinguished thus:- Acts or forbearances of a *class* are enjoined *generally* by the former. Acts *determined specifically*, are enjoined or forbidden by the latter.

A different line of separation has been drawn by Blackstone and others. According to Blackstone and others, a law and a particular command are distinguished in the following manner: A law obliges *generally* the members of the given community, or a law obliges *generally* persons of a given class. A particular command obliges a *single* person, or persons whom it determines *individually*.

That laws and particular commands are not to be distinguished thus, will appear on a moment's reflection.

For, *first*, commands which oblige generally the members of the given community, or commands which oblige generally persons of given classes, are not always laws or rules.

Thus, in the case already supposed; that in which the sovereign commands that all corn actually shipped for exportation be stopped and detained; the command is obligatory upon the whole community, but as it obliges them only to a set of acts individually assigned, it is not a law. Again, suppose the sovereign to issue an order, enforced by penalties, for a general mourning, on occasion of a public calamity. Now, though it is addressed to the community at large, the order is scarcely a rule, in the usual acceptation of the term. For, though it obliges

generally the members of the entire community, it obliges to acts which it assigns specifically, instead of obliging generally to acts or forbearances of a class. If the sovereign commanded that *black* should be the dress of his subjects, his command would amount to a law. But if he commanded them to wear it on a specified occasion, his command would be merely particular.

And, *secondly*, a command which obliges exclusively persons individually determined, may amount, notwithstanding, to a law or a rule.

For example, A father may set a *rule* to his child or children: a guardian, to his ward: a master, to his slave or servant. And certain of God's *laws* were as binding on the first man, as they are binding at this hour on the millions who have sprung from his loins.

Most, indeed, of the laws which are established by political superiors, or most of the laws which are simply and strictly so called, oblige generally the members of the political community, or oblige generally persons of a class. To frame a system of duties for every individual of the community, were simply impossible: and if it were possible, it were utterly useless. Most of the laws established by political superiors are, therefore, *general* in a twofold manner: as enjoining or forbidding generally acts of kinds or sorts; and as binding the whole community, or, at least, whole classes of its members.

But if we suppose that Parliament creates and grants an office, and that Parliament binds the grantee to services of a given description, we suppose a law established by political superiors, and yet exclusively binding a specified or determinate person.

Laws established by political superiors, and exclusively binding specified or determinate persons, are styled, in the language of the Roman jurists, *privilegia*. Though that, indeed, is a name which will hardly denote them distinctly: for, like most of the leading terms in actual systems of law, it is not the name of a definite class of objects, but of a heap of heterogeneous objects.

It appears, from what has been premised, that a law, properly so called, may be defined in the following manner.

A law is a command which obliges a person or persons.

But, as contradistinguished or opposed to an occasional or particular command, a law is a command which obliges a person or persons, and obliges *generally* to acts or forbearances of a *class*.

In language more popular but less distinct and precise, a law is a command which obliges a person or persons to a *course* of conduct.

Laws and other commands are said to proceed from *superiors*, and to bind or oblige *inferiors*. I will, therefore, analyse the meaning of those correlative expressions; and will try to strip them of a certain mystery, by which that simple meaning appears to be obscured.

Superiority is often synonymous with *precedence* or *excellence*. We talk of superiors in rank; of superiors in wealth; of superiors in virtue: comparing certain persons with certain other persons; and meaning that the former precede or excel the latter in rank, in wealth, or in virtue.

But, taken with the meaning wherein I here understand it, the term *superiority* signifies *might*: the power of affecting others with evil or pain, and of forcing them, through fear of that evil, to fashion their conduct to one's wishes.

For example, God is, emphatically, the *superior* of Man. For his power of affecting us with pain, and of forcing us to comply with his will, is unbounded and resistless.

To a limited extent, the sovereign One or Number is the superior of the subject or citizen: the master, of the slave or servant: the father, of the child.

In short, whoever can *oblige* another to comply with his wishes, is the *superior* of that other, so far as the ability reaches: The party who is obnoxious to the impending evil, being, to that same extent, the *inferior*.

The might or superiority of God, is simple or absolute. But in all or most cases of human superiority, the relation of superior and inferior, and the relation of inferior and superior, are reciprocal. Or (changing the expression) the party who is the superior as viewed from one aspect, is the inferior as viewed from another.

For example, to an indefinite, though limited extent, the monarch is the superior of the governed: his power being commonly sufficient to enforce compliance with his will. But the governed, collectively or in mass, is also the superior of the monarch: who is checked in the abuse of his might by his fear of exciting their anger; and of rousing to active resistance the might which slumbers in the multitude.

A member of a sovereign assembly is the superior of the judge: the judge being bound by the law which proceeds from that sovereign body. But, in his character of citizen or subject, he is the inferior of the judge: the judge being the minister of the law, and armed with the power of enforcing it.

It appears, then, that the term *superiority* (like the terms *duty* and *sanction*) is implied by the term *command*. For superiority is the power of enforcing compliance with a wish: and the expression or intimation of a wish, with the power and the purpose of enforcing it, are the constituent elements of a command.

'That *laws* emanate from *superiors*' is, therefore, an identical proposition. For the meaning which it affects to impart is contained in its subject.

If I mark the peculiar source of a given law, or if I mark the peculiar source of laws of a given class, it is possible that I am saying something which may instruct the hearer. But to affirm of laws universally 'that they flow from *superiors*', or to affirm of laws universally 'that *inferiors* are bound to obey them' is the merest tautology and trifling.

Like most of the leading terms in the sciences of jurisprudence and morals, the term *laws* is extremely ambiguous. Taken with the largest signification which can be given to the term properly, *laws* are a species of *commands*. But the term is improperly applied to various objects which have nothing of the imperative character: to objects which are *not* commands; and which, therefore, are *not* laws, properly so called.

Accordingly, the proposition 'that laws are commands' must be taken with limitations. Or, rather, we must distinguish the various meanings of the term *laws*; and must restrict the

proposition to that class of objects which is embraced by the largest signification that can be given to the term properly.

I have already indicated, and shall hereafter more fully described, the objects improperly termed laws, which are *not* within the province of jurisprudence (being either rules enforced by opinion and closely analogous to laws properly so called, or being laws so called by a metaphorical application of the term merely). There are other objects improperly termed laws (not being commands) which yet may properly be included within the province of jurisprudence. These I shall endeavour to particularise:-

1. Acts on the part of legislatures to *explain* positive law, can scarcely be called laws, in the proper signification of the term. Working no change in the actual duties of the governed, but simply declaring what those duties *are*, they properly are acts of *interpretation* by legislative authority. Or, to borrow an expression from the writers on the Roman Law, they are acts of *authentic* interpretation.

But, this notwithstanding, they are frequently styled laws; *declaratory laws*, or declaratory statutes. They must, therefore, be noted as forming an exception to the proposition ~~that laws are a species of commands.~~

It often, indeed, happens (as I shall show in the proper place), that laws declaratory in name are imperative in effect: Legislative, like judicial interpretation, being frequently deceptive; and establishing new law, under guise of expounding the old.

2. Laws to repeal laws, and to release from existing duties, must also be excepted from the proposition ~~that laws are a species of commands.~~ In so far as they release from duties imposed by existing laws, they are not commands, but revocations of commands. They authorize or permit the parties, to whom the repeal extends, to do or to forbear from acts which they were commanded to forbear from or to do. And, considered with regard to *this*, their immediate or direct purpose, they are often named *permissive laws*, or, more briefly and more properly, *permissions*.

Remotely and indirectly, indeed, permissive laws are often or always imperative. For the parties released from duties are restored to liberties or rights: and duties answering those rights are, therefore, created or revived.

But this is a matter which I shall examine with exactness, when I analyse the expressions ~~legal right~~ ~~permission by the sovereign or state~~ and ~~civil or political liberty.~~

3. Imperfect laws, or laws of imperfect obligation, must also be excepted from the proposition ~~that laws are a species of commands.~~

An imperfect law (with the sense wherein the term is used by the Roman jurists) is a law which wants a sanction, and which, therefore, is not binding. A law declaring that certain acts are crimes, but annexing no punishment to the commission of acts of the class, is the simplest and most obvious example.

Though the author of an imperfect law signifies a desire, he manifests no purpose of enforcing compliance with the desire. But where there is not a purpose of enforcing compliance with the desire, the expression of a desire is not a command. Consequently, an

imperfect law is not so properly a law, as counsel, or exhortation, addressed by a superior to inferiors.

Examples of imperfect laws are cited by the Roman jurists. But with us in England, laws professedly imperative are always (I believe) perfect or obligatory. Where the English legislature affects to command, the English tribunals not unreasonably presume that the legislature exacts obedience. And, if no specific sanction be annexed to a given law, a sanction is supplied by the courts of justice, agreeably to a general maxim which obtains in cases of the kind.

The imperfect laws, of which I am now speaking, are laws which are imperfect, in the sense of *the Roman jurists*: that is to say, laws which speak the desires of political superiors, but which their authors (by oversight or design) have not provided with sanctions. Many of the writers on *morals*, and on the so called *law of nature*, have annexed a different meaning to the term *imperfect*. Speaking of imperfect obligations, they commonly mean duties which are *not legal*: duties imposed by commands of God, or duties imposed by positive morality, as contradistinguished to duties imposed by positive law. An imperfect obligation, in the sense of the Roman jurists, is exactly equivalent to no obligation at all. For the term *imperfect* denotes simply, that the law wants the sanction appropriate to laws of the kind. An imperfect obligation, in the other meaning of the expression, is a religious or a moral obligation. The term *imperfect* does not denote that the law imposing the duty wants the appropriate sanction. It denotes that the law imposing the duty is *not* a law established by a political superior: that it wants that *perfect*, or that surer or more cogent sanction, which is imparted by the sovereign or state.

I believe that I have now received all the classes of objects, to which the term *laws* is improperly applied. The laws (improperly so called) which I have here lastly enumerated, are (I think) the only laws which are not commands, and which yet may be properly included within the province of jurisprudence. But though these, with the so called laws set by opinion and the objects metaphorically termed laws, are the only laws which *really* are not commands, there are certain laws (properly so called) which may *seem* not imperative. Accordingly, I will subjoin a few remarks upon laws of this dubious character.

1. There are laws, it may be said, which *merely* create *rights*: And, seeing that every command imposes a *duty*, laws of this nature are not imperative.

But, as I have intimated already, and shall show completely hereafter, there are no laws *merely* creating *rights*. There are laws, it is true, which *merely* create *duties*: duties not correlating with correlating rights, and which, therefore may be styled *absolute*. But every law, really conferring a right, imposes expressly or tacitly a *relative* duty, or a duty correlating with the right. If it specify the remedy to be given, in case the right shall be infringed, it imposes the relative duty expressly. If the remedy to be given be not specified, it refers tacitly to pre-existing law, and clothes the right which it purports to create with a remedy provided by that law. Every law, really conferring a right, is, therefore, imperative: as imperative, as if its only purpose were the creation of a duty, or as if the relative duty, which it inevitably imposes, were merely absolute.

The meaning of the term *right*, are various and perplexed; taken with its proper meaning, it comprises ideas which are numerous and complicated; and the searching and extensive analysis, which the term, therefore, requires, would occupy more room than could be given to it in the present lecture. It is not, however, necessary, that the analysis should be performed here. I proposed, in my earlier lectures, to determine the province of jurisprudence; or to distinguish the laws established by political superiors, from the various laws, proper and improper, with which they are frequently confounded. And this I may accomplish exactly enough, without a nice inquiry into the import of the term *right*.

2. According to an opinion which I must notice *incidentally* here, though the subject to which it relates will be treated *directly* hereafter, *customary laws* must be excepted from the proposition that laws are a species of commands.

By many of the admirers of customary laws (and, especially, of their German admirers), they are thought to oblige legally (independently of the sovereign or state), *because* the citizens or subjects have observed or kept them. Agreeably to this opinion, they are not the *creatures* of the sovereign or state, although the sovereign or state may abolish them at pleasure. Agreeably to this opinion, they are positive law (or law, strictly so called), inasmuch as they are enforced by the courts of justice: But, that notwithstanding, they exist *as positive law* by the spontaneous adoption of the governed, and not by the position or establishment on the part of political superiors. Consequently, customary laws, considered as positive law, are not commands. And consequently, customary laws, considered as positive law, are not laws or rules properly so called.

An opinion less mysterious, but somewhat allied to this, is not uncommonly held by the adverse party: by the party which is strongly opposed to customary law; and to all the law made judicially, or in the way of judicial legislation. According to the latter opinion, all judge-made law, or all judge-made law established by *subject* judges, is purely the creature of the judges by whom it is established immediately. To impute it to the sovereign legislature, or to suppose that it speaks the will of the sovereign legislature, is one of the foolish or knavish *fictions* with which lawyers, in every age and nation, have perplexed and darkened the simplest and clearest truths.

I think it will appear, on a moment's reflection, that each of these opinions is groundless: that customary law is *imperative*, in the proper signification of the term; and that all judge-made law is the creature of the sovereign or state.

At its origin, a custom is a rule of conduct which the governed observes spontaneously, or not in pursuance of a law set by a political superior. The custom is transmuted into positive law, when it is adopted as such by the courts of justice, and when the judicial decisions fashioned upon it are enforced by the power of the state. But before it is adopted by the courts, and clothed with the legal sanction, it is merely a rule of positive morality: a rule generally observed by the citizens or subjects; but deriving the only force, which it can be said to possess, from the general disapprobation falling on those who transgress it.

Now when judges transmute a custom into a legal rule (or make a legal rule not suggested by a custom), the legal rule which they establish is established by the sovereign legislature. A subordinate or subject judge is merely a minister. The portion of the sovereign power which

lies at his disposition is merely delegated. The rules, which he makes, derive their legal force from authority given by the state: an authority which the state may confer expressly, but which it commonly imparts in the way of acquiescence. For, since the state may reverse the rules which he makes, and yet permits him to enforce them by the power of the political community, its sovereign will that his rules shall obtain as law is clearly evinced by its conduct, though not by its express declaration.

The admirers of customary law love to trick out their idol with mysterious and imposing attributes. But to those who can see the difference between positive law and morality, there is nothing of mystery about it. Considered as rules of positive morality, customary laws arise from the consent of the governed, and not from the position or establishment of political superiors. But, considered as moral rules turned into positive laws, customary laws are established by the state: established by the state directly, when the customs are promulgated in its statutes; established by the state circuitously, when the customs are adopted by its tribunals.

The opinion of the party, which abhors judge-made laws, springs from their inadequate conception of the nature of commands.

Like other significations of desire, a command is express or tacit. If the desire be signified by *words* (written or spoken), the command is express. If the desire be signified by conduct (or by any signs of desire which are *not* words), the command is tacit.

Now when customs are turned into legal rules by decisions of subject judges, the legal rules, which emerge from the customs, are *tacit* commands of the sovereign legislature. The state, which is able to abolish, permits its ministers to enforce them: and it, therefore, signifies its pleasure, by that its voluntary acquiescence, that they shall serve as a law to the governed.

My present purpose is merely this: to prove that the positive law styled *customary* (and all positive law made judicially) is established by the state directly or circuitously, and, therefore, is *imperative*. I am far from disputing, that law made judicially (or in the way of improper legislation) and law made by statute (or in the properly legislative manner) are distinguished by weighty differences. I shall inquire, in future lectures, what those differences are; and why subject judges, who are properly ministers of the law, have commonly shared with the sovereign in the business of making it.

I assume, then, that the only laws which are not imperative, and which belong to the subject-matter of jurisprudence, are the following:- 1. Declaratory laws, or laws explaining the import of existing positive law; 2. Laws abrogating or repealing existing positive law; 3. Imperfect laws, or laws of imperfect obligation (with the sense wherein the expression is used by the Roman jurists).

But the space occupied in the science by these improper laws is comparatively narrow and insignificant. Accordingly, although I shall take them into account so often as I refer to them directly, I shall throw them out of account on other occasions. Or (changing the expression) I shall limit the term *law* to laws which are imperative, unless I extend it expressly to laws which are not.

Positive laws, the appropriate matter of jurisprudence, are related in the way of resemblance, or by a close or remote analogy, to the following objects: 1. In the way of resemblance, they are related to the laws of God. 2. In the way of resemblance, they are related to those rules of positive morality which are laws properly so called. 3. By a close or strong analogy, they are related to those rules of positive morality which are merely opinions or sentiments held or felt by men in regard to human conduct. 4. By a remote or slender analogy, they are related to laws merely metaphorical, or laws merely figurative.

I shall finish the purpose mentioned above, by explaining the marks or characters which distinguish positive laws, or laws strictly so called. And, in order to give an explanation of the marks which distinguish positive laws, I shall analyze the expression *sovereignty*, the correlative expression *subjection*, and the inseparably connected expression *independent political society*. With the ends or final causes for which governments *ought* to exist, or with their different degrees of fitness to attain or approach those ends, I have no concern. I examine the notions of *sovereignty* and *independent political society*, in order that I may finish the purpose to which I have adverted above: in order that I may distinguish completely the appropriate province of jurisprudence from the regions which lie upon its confines, and by which it is encircled. It is necessary that I should examine those notions, in order that I may finish that purpose. For the essential difference of a positive law (or the difference that severs it from a law which is not a positive law) may be stated thus. Every positive law, or every law simply and strictly so called, is set by a sovereign person, or a sovereign body of persons, to a member or members of the independent political society wherein that person or body is sovereign or supreme. Or (changing the expression) it is set by a monarch, or sovereign number, to a person or persons in a state of subjection to its author. Even though it sprung directly from another fountain or source, it *is* a positive law, or a law strictly so called, by the institution of that present sovereign in the character of political superior. Or (borrowing the language of Hobbes) the legislator is he, not by whose authority the law was first made, but by whose authority it continues to be a law.

Having stated the topic or subject appropriate to my present discourse, I proceed to distinguish sovereignty from other superiority or might, and to distinguish society political and independent from society of other descriptions.

The superiority which is styled sovereignty, and the independent political society which sovereignty implies, is distinguished from other superiority, and from other society, by the following marks or characters:- 1. The *bulk* of the given society are in a *habit* of obedience or submission to a *determinate* and *common* superior: let that common superior be a certain individual person, or a certain body or aggregate of individual persons. 2. That certain individual, or that certain body of individuals, is *not* in a habit of obedience to a determinate human superior. Laws (improperly so called) which opinion sets or imposes, may permanently affect the conduct of that certain individual or body. To express or tacit commands of other determinate parties, that certain individual or body may yield occasional submission. But there is no determinate person, or determinate aggregate of persons, to whose commands, express or tacit, that certain individual or body renders habitual obedience.

Or the notions of sovereignty and independent political society may be expressed concisely thus:- If a *determinate* human superior, *not* in a habit of obedience to a like

superior, receive *habitual* obedience from the *bulk* of a given society, that determinate superior is sovereign in that society, and the society (including the superior) is a society political and independent.

To that determinate superior, the other members of the society are *subject*: or on that determinate superior, the other members of the society are *dependent*. The position of its other members towards that determinate superior, is *a state of subjection*, or *a state of dependence*. The mutual relation which subsists between that superior and them, may be styled *the relation of sovereign and subject*, or *the relation of sovereignty and subjection*.

Hence it follows, that it is only through an ellipsis, or an abridged form of expression, that the *society* is styled *independent*. The party truly independent (independent, that is to say, of a determinate human superior), is not the society, but the sovereign portion of the society: that certain member of the society, or that certain body of its members, to whose commands, expressed or intimated, the generality or bulk of its members render habitual obedience. Upon that certain person, or certain body of persons, the other members of the society are *dependent*: or to that certain person, or certain body of persons, the other members of the society are *subject*. By -an independent political society or -an independent and sovereign nation we mean a political society consisting of a sovereign and subjects, as opposed to a political society which is merely subordinate: that is to say, which is merely a limb or member of another political society, and which therefore consists entirely of persons in a state of subjection.

In order that a given society may form a society political and independent, the two distinguishing marks which I have mentioned above must unite. The *generality* of the given society must be in the *habit* of obedience to a *determinate* and *common* superior: whilst that determinate person, or determinate body of persons must *not* be habitually obedient to a determinate person or body. It is the union of that positive, with this negative mark, which renders that certain superior sovereign or supreme, and which renders that given society (including that certain superior) a society political and independent.

To show that the union of those marks renders a given society a society political and independent, I call your attention to the following positions and examples.

1. In order that a given society may form a society political, the generality or bulk of its members must be in a *habit* of obedience to a determinate and common superior.

In case the generality of its members obey a determinate superior, but the obedience be rare or transient and not habitual or permanent, the relation of sovereignty and subjection is not created thereby between that certain superior and the members of that given society. In other words, that determinate superior and the members of that given society do not become thereby an independent political society. Whether that given society be political and independent or not, it is not an independent political society whereof that certain superior is the sovereign portion.

For example: In 1815 the allied armies occupied France; and so long as the allied armies occupied France, the commands of the allied sovereigns were obeyed by the French government, and, through the French government, by the French people generally. But since the commands and the obedience were comparatively rare and transient, they were not

sufficient to constitute the relation of sovereignty and subjection between the allied sovereigns and the members of the invaded nation. In spite of those commands, and in spite of that obedience, the French government was sovereign or independent. Or in spite of those commands, and in spite of that obedience, the French government and its subjects were an independent political society whereof the allied sovereigns were not the sovereign portion.

Now if the French nation, before the obedience to those sovereigns, had been an independent society in a state of nature or anarchy, it would not have been changed by the obedience into a society political. And it would not have been changed by the obedience into a society political, because the obedience was not habitual. For, inasmuch as the obedience was not habitual, it was not changed by the obedience from a society political and independent, into a society political but subordinate. A given society, therefore, is not a society political, unless the generality of its members be in a *habit* of obedience to a determinate and common superior.

Again: A feeble state holds its independence precariously, or at the will of the powerful states to whose aggressions it is obnoxious. And since it is obnoxious to their aggressions, it and the bulk of its subjects render obedience to commands which they occasionally express or intimate. Such, for instance, is the position of the Saxon government and its subjects in respect of the conspiring sovereigns who form the Holy Alliance. But since the commands and the obedience are comparatively few and rare, they are not sufficient to constitute the relation of sovereignty and subjection between the powerful states and the feeble state with its subjects. In spite of those commands, and in spite of that obedience, the feeble state is sovereign or independent. Or in spite of those commands, and in spite of that obedience, the feeble state and its subjects are an independent political society whereof the powerful states are not the sovereign portion. Although the powerful states are permanently *superior*, and although the feeble state is permanently *inferior*, there is neither a *habit* of command on the part of the former, nor a *habit* of obedience on the part of the latter. Although the latter is unable to defend and maintain its independence, the latter is independent of the former in fact or practice.

From the example now adduced, as from the example adduced before, we may draw the following inference: that a given society is not a society political, unless the generality of its members be in a *habit* of obedience to a determinate and common superior. By the obedience to the powerful states, the feeble state and its subjects are not changed from an independent, into a subordinate political society. And they are not changed by the obedience into a subordinate political society, because the obedience is not habitual. Consequently, if they were a natural society (setting that obedience aside), they would not be changed by that obedience into a society political.

2. In order that a given society may form a society political, habitual obedience must be rendered, by the *generality* or *bulk* of its members, to a determinate and *common* superior. In other words, habitual obedience must be rendered, by the *generality* or *bulk* of its members, to *one and the same* determinate person, or determinate body of persons.

Unless habitual obedience be rendered by the *bulk* of its members, and be rendered by the bulk of its members to *one and the same* superior, the given society is either in a state of nature, or is split into two or more independent political societies.

For example: In case a given society be torn by intestine war, and in case the conflicting parties be nearly balanced, the given society is in one of the two positions which I have now supposed. As there is no common superior to which the bulk of its members render habitual obedience, it is not a political society single or undivided. If the bulk of each of the parties be in a habit of obedience to its head, the given society is broken into two or more societies, which, perhaps, may be styled independent political societies. If the bulk of each of the parties be not in that habit of obedience, the given society is simply or absolutely in a state of nature or anarchy. It is either resolved or broken into its individual elements, or into numerous societies of an extremely limited size: of a size so extremely limited, that they could hardly be styled societies independent and *political*. For, as I shall show hereafter, a given independent society would hardly be styled *political*, in case it fell short of a *number* which cannot be fixed with precision, but which may be called considerable, or not extremely minute.

3. In order that a given society may form a society political, the generality or bulk of its members must habitually obey a superior *determinate* as well as common.

On this position I shall not insist here. For I have shown sufficiently in my fifth lecture, that no indeterminate party can command expressly or tacitly, or can receive obedience or submission: that no indeterminate body is capable of corporate conduct, or is capable, as a body, of positive or negative deportment.

4. It appears from what has preceded, that, in order that a given society may form a society political, the bulk of its members must be in a habit of obedience to a certain and common superior. But, in order that the given society may form a society political and independent, that certain superior must *not* be habitually obedient to a determinate human superior.

The given society may form a society political and independent, although that certain superior be habitually affected by laws which opinion sets or imposes. The given society may form a society political and independent, although that certain superior renders occasional submission to commands of determinate parties. But the society is not independent, although it may be political, in case that certain superior habitually obeys the commands of a certain person or body.

Let us suppose, for example, that a viceroy obeys habitually the author of his delegated powers. And, to render the example complete, let us suppose that the viceroy receives habitual obedience from the generality or bulk of the persons who inhabit his province. Now though he commands habitually within the limits of his province, and receives habitual obedience from the generality or bulk of its inhabitants, the viceroy is not sovereign within the limits of his province, nor are he and its inhabitants an independent political society. The viceroy, and (through the viceroy) the generality or bulk of its inhabitants, are habitually obedient or submissive to the sovereign of a larger society. He and the inhabitants of his province are therefore in a state of subjection to the sovereign of that larger society. He and

the inhabitants of his province are a society political but subordinate, or form a political society which is merely a limb of another.

A natural society, a society in a state of nature, or a society independent but natural, is composed of persons who are connected by mutual intercourse, but are not members, sovereign or subject, of any society political. None of the persons who composes it, lives in the positive state which is styled a state of subjection: or all the persons who compose it live in the negative state which is styled a state of independence.

Considered as entire communities, and considered in respect of one another, independent political societies live, it is commonly said, in a state of nature. And considered as entire communities, and as connected by mutual intercourse, independent political societies form, it is commonly said, a natural society. These expressions, however, are not perfectly apposite. Since all the members of the related societies are members of a society political, none of the related societies is strictly in a state of nature: nor can the larger society formed by their mutual intercourse be styled strictly a natural society. Speaking strictly, the several members of the several related societies are placed in the following positions. The sovereign and subject members of each of the related societies form a society political: but the sovereign portion of each of the related societies lives in the negative condition which is styled a state of independence.

Society formed by the intercourse of independent political societies, is the province of international law, or of the law obtaining between nations. For (adopting a current expression) international law, or the law obtaining between nations, is conversant about the conduct of independent political societies considered as entire communities: *circa negotia et causas gentium integrarum*. Speaking with greater precision, international law, or the law obtaining between nations, regards the conduct of sovereigns considered as related to one another.

And hence it inevitably follows, that the law obtaining between nations is not positive law: for every positive law is set by a given sovereign to a person or persons in a state of subjection to its author. As I have already intimated, the law obtaining between nations is law (improperly so called) set by general opinion. The duties which it imposes are enforced by moral sanctions: by fear on the part of nations, or by fear on the part of sovereigns, of provoking general hostility, and incurring its probable evils, in case they shall violate maxims generally received and respected.

A society political but subordinate is merely a limb or member of a society political and independent. All the persons who compose it, including the person or body which is its immediate chief, live in a state of subjection to one and the same sovereign.

Besides societies political and independent, societies independent but natural, society formed by the intercourse of independent political societies, and societies political but subordinate, there are societies which will not quadrate with any of those descriptions. Though, like a society political but subordinate, it forms a limb or member of a society political and independent, a society of the class in question is not a political society. Although it consists of members living in a state of subjection, it consists of subjects considered as private persons. A society consisting of parents and children, living in a state of subjection, and considered in those characters, may serve as an example.

To distinguish societies political but subordinate from societies not political but consisting of subject members, is to distinguish the rights and duties of subordinate political superiors from the rights and duties of subjects considered as private persons. And before I can draw that distinction, I must analyze many expressions of large and intricate meaning which belong to the detail of jurisprudence. But an explanation of that distinction is not required by my present purpose. To the accomplishment of my present purpose, it is merely incumbent upon me to determine the notion of sovereignty, with the inseparably connected notion of independent political society. For every positive law, or every law simply and strictly so called, is set directly or circuitously by a monarch or sovereign number to a person or persons in a state of subjection to its author.

The definition of the abstract term *independent political society* (including the definition of the correlative term *sovereignty*) cannot be rendered in expression of perfectly precise import, and is therefore a fallible test of specific or particular cases. The least imperfect definition which the abstract term will take, would hardly enable us to fix the class of every possible society. It would hardly enable us to determine of every *independent* society, whether it were *political* or *natural*. It would hardly enable us to determine of every *political* society, whether it were *independent* or *subordinate*.

In order that a given society may form a society political and independent, the positive and negative marks which I have mentioned above must unite. The *generality* or *bulk* of its members must be in a *habit* of obedience to a *certain* and *common* superior: whilst that certain person, or certain body of persons, must *not* be habitually obedient to a certain person or body.

But, in order that the *bulk* of its members may render obedience to a *common* superior, *how many* of its members, or *what proportion* of its members, must render obedience to *one and the same* superior? And, assuming that the bulk of its members render obedience to a common superior, *how often* must they render it, and *how long* must they render it, in order that that obedience may be *habitual*? Now since these questions cannot be answered precisely, the positive mark of sovereignty and independent political society is a fallible test of specific or particular cases. It would not enable us to determine of every *independent* society, whether it were *political* or *natural*.

In the cases of independent society which lie, as it were, at the extremes, we should apply that positive test without a moment's difficulty, and should fix the class of the society without a moment's hesitation. In some of those cases, so large a proportion of the members obey the same superior, and the obedience of that proportion is so frequent and continued, that, without a moment's difficulty and without a moment's hesitation, we should pronounce the society *political*: that, without a moment's difficulty and without a moment's hesitation, we should say the *generality* of its members were in a *habit* of obedience or submission to a certain and *common* superior. Such, for example, is the ordinary state of England, and of every independent society somewhat advanced in civilization. In other of those cases, obedience to the same superior is rendered by so few of the members, or general obedience to the same is so unfrequent and broken, that, without a moment's difficulty and without a moment's hesitation, we should pronounce the society *natural*: that, without a moment's difficulty and without a moment's hesitation, we should say the *generality* of its members were *not* in a

habit of obedience to a certain and *common* superior. Such, for example, is the state of the independent and savage societies which subsist by hunting or fishing in the woods or on the coasts of New Holland.

But in the cases of independent society which lie between the extremes, we should hardly find it possible to fix with absolute certainty the class of the given community. We should hardly find it possible to determine with absolute certainty, whether the generality of its members did or did not obey one and the same superior. Or we should hardly find it possible to determine with absolute certainty, whether the general obedience to one and the same superior was or was not habitual. For example: During the height of the conflict between Charles, the First and the Parliament, the English nation was broken into two distinct societies: each of which societies may perhaps be styled political, and may certainly be styled independent. After the conflict had subsided, those distinct societies were in their turn dissolved; and the nation was reunited, under the common government of the Parliament, into one independent and political community. But at what juncture precisely, after the conflict had subsided, was a common government completely re-established? Or at what juncture precisely, after the conflict had subsided, were those distinct societies completely dissolved, and was the nation completely reunited into one political community? When had so many of the nation rendered obedience to the Parliament, and when had the general obedience become so frequent and lasting, that the *bulk* of the nation were *habitually* obedient to the body which affected sovereignty? And after the conflict had subsided, and until that juncture had arrived, what was the class of the society which was formed by the English people? These are questions which it were impossible to answer with certainty, although the facts of the case were precisely known.

The positive mark of sovereignty and independent political society is therefore a fallible test. It would not enable us to determine of every *independent* society, whether it were *political* or *natural*.

The negative mark of sovereignty and independent political society is also an uncertain measure. It would not enable us to determine of every *political* society, whether it were *independent* or *subordinate*. Given a determinate and common superior, and also that the bulk of the society habitually obey that superior, is that common superior free from a habit of obedience to a determinate person or body? Is that common superior sovereign and independent, or is that common superior a superior in a state of subjection?

In numerous cases of political society, it were impossible to answer this question with absolute certainty. For example: Although the Holy Alliance dictates to the Saxon government, the commands which it gives, and the submission which it receives, are comparatively few and rare. Consequently, the Saxon government is sovereign or supreme, and the Saxon government and its subjects are an independent political society, notwithstanding its submission to the Holy Alliance. But, in case the commands and submission were somewhat more numerous and frequent, we might find it impossible to determine certainly the class of the Saxon community. We might find it impossible to determine certainly where the sovereignty resided; whether the Saxon government were a government supreme and independent; or were in a *habit* of obedience, and therefore in a state of subjection, to the allied or conspiring monarchs.

The definition or general notion of independent political society, is therefore vague or uncertain. Applying it to specific or particular cases, we should often encounter the difficulties which I have laboured to explain.

The difficulties which I have laboured to explain, often embarrass the application of those positive moral rules which are styled international law.

For example: When did the revolted colony, which is now the Mexican nation, ascend from the condition of an insurgent province to that of an independent community? When did the body of colonists, who affected sovereignty in Mexico, change the character of rebel leaders for that of a supreme government? Or (adopting the current language about governments *de jure* and *de facto*) when did the body of colonists, who affected sovereignty in Mexico, become sovereign *in fact*? And (applying international law to the specific or particular case) when did international law authorize neutral nations to admit the independence of Mexico with the sovereignty of the Mexican government?

Now the questions suggested above are equivalent to this: When had the inhabitants of Mexico obeyed that body so generally, and when had that general obedience become so frequent and lasting, that the *bulk* of the inhabitants of Mexico were *habitually* disobedient to Spain, and probably would not resume their discarded habit of submission?

Or the questions suggested above are equivalent to this: When had the inhabitants of Mexico obeyed that body so generally, and when had that general obedience become so frequent and lasting, that the inhabitants of Mexico were independent of Spain in practice, and were likely to remain permanently in that state of practical independence?

At that juncture exactly (let it have arrived when it may), neutral nations were authorized, by the morality which obtains between nations, to admit the independence of Mexico with the sovereignty of the Mexican government. But, by reason of the perplexing difficulties which I have laboured to explain, it was impossible for neutral nations to hit that juncture with precision, and to hold the balance of justice between Spain and her revolted colony with a perfectly even hand.

This difficulty presents itself under numerous forms in international law: indeed almost the only difficult and embarrassing questions in that science arise out of it. And as I shall often have occasion to show, law strictly so called is not free from like difficulties. What can be more indefinite, for instance, than the expressions, *reasonable* time, *reasonable* notice, *reasonable* diligence? Than the line of demarcation which distinguishes libel and fair criticism; than that which constitutes a violation of copyright; than that degree of mental aberration which constitutes idiocy or lunacy? In all these cases, the difficulty is of the same nature with that which adheres to the phrases sovereignty and independent society; it arises from the vagueness or indefiniteness of the terms in which the definition or rule is inevitably conceived. And this, I suppose, is what people were driving at when they have agitated the very absurd enquiry whether questions of this kind are questions of law or of fact. The truth is that they are questions neither of law nor of fact. The fact be perfectly ascertained, and so may the law, as far as it is capable of being ascertained. The rule is known, and so is the given species, as the Roman jurists term it; the difficulty is in bringing the species under the rule; in

determining not what the law is, or what the fact is, but whether the given law is applicable to the given fact.

I have tacitly supposed, during the preceding analysis, that every independent society forming a society political possesses the essential property which I will now describe.

In order that an independent society may form a society political, it must not fall short of a *number* which cannot be fixed with precision, but which may be called considerable, or not extremely minute. A given independent society, whose number may be called inconsiderable, is commonly esteemed a *natural*, and not a *political* society, although the generality of its members be habitually obedient or submissive to a certain and common superior.

Let us suppose, for example, that a single family of savages lives in absolute estrangement from every other community. And let us suppose that the father, the chief of this insulated family, receives habitual obedience from the mother and children. Now, since it is not a limb of another and larger community, the society formed by the parents and children is clearly an independent society. And, since the rest of its members habitually obey its chief, this independent society would form a society political, in case the number of its members were not extremely minute. But, since the number of its members is extremely minute, it would (I believe) be esteemed a society in a state of nature: that is to say, a society consisting of persons not in a state of subjection. Without an application of the terms which would somewhat smack of the ridiculous, we could hardly style the society a society *political* and independent, the imperative father and chief a *monarch* or *sovereign*, or the obedient mother and children *subjects*.-ô *La puissance politique*ø (says Montesquieu) *comprend necessairement l'union de plusieurs families*.ø

Again: let us suppose a society which may be styled independent, or which is not a limb of another and larger community. Let us suppose that the number of its members is not extremely minute. And let us suppose it in the savage condition, or in the extremely barbarous condition which closely approaches the savage.

Inasmuch as the given society lives in the savage condition, or in the extremely barbarous condition which closely approaches the savage, the generality or bulk of its members is not in a habit of obedience to one and the same superior. For the purpose of attacking an external enemy, or for the purpose of repelling an attack made by an external enemy, the generality or bulk of its members, who are capable of bearing arms, submits to one leader, or to one body of leaders. But as soon as that exigency passes, this transient submission ceases; and the society reverts to the state which may be deemed its ordinary state. The bulk of each of the families which composes the given society, renders habitual obedience to its own peculiar chief: but those domestic societies are themselves independent societies, or and not united or compacted into one political society by general and habitual obedience to a certain and common superior. And, as the bulk of the given society is not in a habit of obedience to one and the same superior, there is no law (simply or strictly so styled) which can be called the law of that given society or community. The so-called laws which are common to the bulk of the community, are purely and properly customary laws: that is to say, laws which are set or imposed by the general opinion of the community, but which are not enforced by legal or political sanctions. The state which I have briefly delineated, is the ordinary state of the

savage and independent societies which live by hunting or fishing in the woods or on the coasts of New Holland. It is also the ordinary state of the savage and independent societies which range in the forests or plains of the North American continent. It was also the ordinary state of many of the German nations whose manners are described by Tacitus.

Now, since the bulk of its members is not in a habit of obedience to one and the same superior, the given independent society would (I believe) be esteemed a society in a state of nature: that is to say, a society consisting of persons not in a state of subjection. But such it could not be esteemed, unless the term *political* were restricted to independent societies whose numbers are not inconsiderable. Supposing that the term *political* applied to independent societies whose numbers are extremely minute, each of the independent families which constitute the given society would form of itself a political community: for the bulk of each of those families renders habitual obedience to its own peculiar chief. And, seeing that each of those families would form of itself an independent political community, the given independent society could hardly be styled with strictness a natural society. Speaking strictly, that given society would form a congeries of independent political communities. Or, seeing that a few of its members might not be members also of those independent families, it would form a congeries of independent political communities mingled with a few individuals living in a state of nature. Unless the term *political* were restricted to independent societies whose numbers are not inconsiderable, few of the many societies which are commonly esteemed natural could be styled natural societies with perfect precision and propriety.

For the reasons which I have now produced, and for reasons which I pass in silence, we must, I believe, arrive at the following conclusion:- A given independent society, whose number may be called inconsiderable, is commonly esteemed a *natural*, and not a *political* society, although the generality of its members be habitually obedient or submissive to a certain and common superior.

And arriving at that conclusion, we must proceed to this further conclusion: In order that an independent society may form a society political, it must not fall short of a *number* which may be called considerable.

The lowest possible number which will satisfy that vague condition cannot be fixed precisely. But, looking at many of the communities which commonly are considered and treated as independent political societies, we must infer that an independent society may form a society political, although the number of its members exceed not a few thousands, or exceed not a few hundreds. The ancient Grison Confederacy (like the ancient Swiss Confederacy with which the Grison was connected) was rather an alliance or union of independent political societies, than one independent community under a common sovereign. Now the number of the largest of the societies which were independent members of the ancient Grison Confederacy hardly exceeded a few thousands. And the number of the smallest of those numerous confederated nations hardly exceeded a few hundreds.

The definition of the terms *sovereignty* and *independent political society*, is, therefore, embarrassed by the difficulty following, as well as by the difficulties which I have stated in a foregoing department of my discourse. In order that an independent society may form a

society political, it must not fall short of a *number* which may be called considerable. And the lowest possible number which will satisfy that vague condition cannot be fixed precisely.

But here I must briefly remark, that, though the essential property which I have not described is an essential or necessary property of *independent* political society, it is not an essential property of *subordinate* political society. If the independent society, of which it is a limb or member, be a political and not a natural society, a subordinate society may form a society political, although the number of its members might be called extremely minute. For example: A society incorporated by the state for political or public purposes is a society or body politic: and it continues to bear the character of a society or body politic, although its number be reduced, by deaths or other causes, to that of a small family or small domestic community.

Having tried to determine the notion of sovereignty, with the implied or correlative notion of independent political society, I will produce and briefly examine a few of the definitions of those notions which have been given by writers of celebrity.

Distinguishing *political* from *natural* society, Mr. Bentham, in his Fragment on Government, thus defines the former: "When a number of persons (whom we may style *subjects*) are supposed to be in the *habit* of paying *obedience* to a person, or an assemblage of persons, of a known and certain description (whom we may call *governor* or *governors*), such persons altogether (*subjects* and *governors*) are said to be in a state of *political* society." And in order to exclude from his definition such a society as the single family conceived of above, he adds a second essential of political society, namely that the society should be capable of indefinite duration. Considered as a definition of independent political society, this definition is inadequate or defective. In order that a given society may form a society political and independent, the superior habitually obeyed by the bulk or generality of its members must not be habitually obedient to a certain individual or body: which negative character or essential of independent political society Mr. Bentham has forgotten to notice. And, since the definition in question is an inadequate or defective definition of *independent* political society, it is also an inadequate or defective definition of political society in general. Before we can define political society, or can distinguish political society from society not political, we must determine the nature of those societies which are at once political and independent. For a political society which is not independent is a member or constituent parcel of a political society which is. Or (changing the expression) the powers or rights of subordinate political superiors are merely emanations of sovereignty. They are merely particles of sovereignty committed by sovereigns to subjects.

According to the definition of independent political society which is stated or supposed by Hobbes in his excellent treatises on government, a society is not a society political and independent, unless it can maintain its independence, against attacks from without, by its own intrinsic or unaided strength. But if power to maintain its independence by its own intrinsic strength be a character or essential property of an independent political society, or to any of the past societies which occur in the history of mankind. The weaker of such actual societies as are deemed political and independent, owe their precarious independence to positive international morality, and to the mutual fears or jealousies of stronger communities. The most powerful of such actual societies as are deemed political and independent, could hardly

maintain its independence, by its own intrinsic strength, against an extensive conspiracy of other independent nations. Any political society is (I conceive) independent, if it be not dependent in fact or practice: if the party habitually obeyed by the bulk of generality of its members be not in a habit of obedience to a determinate individual or body.

In his great treatise on international law, Grotius defines sovereignty. Now in order that an individual or body may be sovereign in a given society, two essentials must unite. The generality of the given society must render habitual obedience to that certain individual or body; whilst that individual or body must not be habitually obedient to a determinate human superior. In order to an adequate conception of the nature of international morality, as in order to an adequate conception of the nature of positive law, the former as well as the latter of those two essentials of sovereignty must be noted or taken into account. But, this notwithstanding, the former and positive essential of sovereign or supreme power is not inserted by Grotius in his formal definition. And the latter and negative essential is stated inaccurately. Sovereign power (according to Grotius) is perfectly or completely independent of other human power; inasmuch that its acts cannot be annulled by any human will other than its own. But if perfect or complete independence be of the essence of sovereign power, there is not in fact the human power to which the epithet *sovereign* will apply with propriety. Every government, let it be never so powerful, renders occasional obedience to commands of other governments. Every government defers frequently to those opinions and sentiments which are styled international law. And every government defers habitually to the opinions and sentiments of its own subjects. If it were not in a habit of obedience to the commands of a determinate party, a government has all the independence which a government can possibly enjoy.

According to Von Martens of Göttingen (the writer on positive international law already referred to), "a sovereign government is a government which *ought* not to receive commands from any external or foreign government." Of the conclusive and obvious objections to this definition of sovereignty the following are only a few. 1. If the definition in question will apply to sovereign governments, it will also apply to subordinate. If a sovereign ought to be free from the commands of foreign governments, so ought every government which is merely the creature of a sovereign, and which holds its powers or rights as a mere trustee for its author. 2. Whether a given government be or be not supreme, is rather a question of fact than a question of international law. A government reduced to subjection is actually a subordinate government, although the state of subjection wherein it is actually held be repugnant to the positive morality which obtains between nations or sovereigns. Though, according to that morality, it *ought* to be sovereign or independent, it is subordinate or dependent in practice. 3. It cannot be affirmed absolutely of a sovereign or independent government, that it *ought* not to receive commands from foreign or external governments. The intermeddling of independent governments with other independent governments is often repugnant to the morality which actually obtains between nations. But according to that morality which actually obtains between nations (and to that international morality which general utility commends), no independent government ought to be freed completely from the supervision and control of its fellows. 4. In this definition by Von Martens (as in that which is given by Grotius) there is not the shadow of an allusion to the positive character of sovereignty. The

definition points at the relations which are borne by sovereigns to sovereigns: but it omits the relations, not less essential, which are borne by sovereigns to their own subjects.

I have now endeavoured to determine the general notion of sovereignty, including the general notion of independent political society. But in order that I may further elucidate the nature or essence of sovereignty, and of the independent political society which sovereignty implies, I will call the attention of my hearers to a few concise remarks upon the following subjects or topics. 1. The various shapes which sovereignty may assume, or the various possible forms of supreme government. 2. The real and imaginary limits which bound the power of sovereigns, and by which the power of sovereigns is supposed to be bounded. 3. The origin of government, with the origin of political society: or the causes of the habitual obedience which is rendered by the bulk of subjects, and from which the power of sovereigns to compel and restrain the refractory is entirely or mainly derived.

An independent political society is divisible into two portions: namely, the portion of its members which is sovereign or supreme, and the portion of its members which is merely subject. The sovereignty can hardly reside in *all* the members of the society: for it can hardly happen that some of those members shall not be naturally incompetent to exercise sovereign powers. In most actual societies, the sovereign powers are engrossed by a single member of the whole, or are shared exclusively by a very few of its members: and even in the actual societies whose governments are esteemed popular, the sovereign number is a slender portion of the entire political community. An independent political society governed by itself, or governed by a sovereign body consisting of the whole community, is not impossible: but the existence of such societies is so extremely improbable, that, with this passing notice, I throw them out of my account.

Every society political and independent is therefore divisible into two portions: namely, the portion of its members which is sovereign or supreme, and the portion of its members which is merely subject. In case that sovereign portion consists of a single member, the supreme government is properly a *monarchy*, or the sovereign is properly a *monarch*. In case that sovereign portion consist of a number of members, the supreme government may be styled an *aristocracy* (in the generic meaning of the expression). And here I may briefly remark, that a monarchy or government of one, and an aristocracy or government of a number, are essentially and broadly distinguished by the following important difference. In the case of a monarchy or government of one, the sovereign portion of the community is simply or purely sovereign. In the case of an aristocracy or government of a number, that sovereign portion is sovereign as viewed from one aspect, but is also subject as viewed from another. In the case of an aristocracy or government of a number, the sovereign number is an aggregate of individuals, and, commonly, of smaller aggregates composed by those individuals. Now, considered collectively, or considered in its corporate character, that sovereign number is sovereign and independent. But, considered severally, the individuals and smaller aggregates composing that sovereign number are subject to the supreme body of which they are component parts.

In every society, therefore, which may be styled political and independent, *one* of the individual members engrosses the sovereign powers, or the sovereign powers are shared by a *number* of the individual members less than the number of the individuals composing the

entire community. Changing the phrase, every supreme government is a *monarchy* (properly so called), or an *aristocracy* (in the generic meaning of the expression).

Governments which may be styled aristocracies (in the generic meaning of the expression) are not unfrequently distinguished into the three following forms: namely, *oligarchies*, *aristocracies* (in the specific meaning of the name), and *democracies*. If the proportion of the sovereign number to the number of the entire community be deemed extremely small, the supreme government is styled an *oligarchy*. If the proportion be deemed small, but not extremely small, the supreme government is styled an *aristocracy* (in the specific meaning of the name). If the proportion be deemed large, the supreme government is styled *popular*, or is styled a *democracy*. But these three forms of *aristocracy* (in the generic meaning of the expression) can hardly be distinguished with precision, or even with a distant approach to it. A government which one man shall deem an oligarchy, will appear to another a liberal aristocracy: whilst a government which one man shall deem an aristocracy, will appear to another a narrow oligarchy. A government which one man shall deem a democracy, will appear to another a government of a few: whilst a government which one man shall deem an aristocracy, will appear to another a government of many. The proportion, moreover, of the sovereign number to the number of the entire community, may stand, it is manifest, at any point in a long series of minute degrees.

The distinctions between aristocracies to which I have now adverted, are founded on differences between the proportions which the number of the sovereign body may bear to the number of the community.

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HART'S CONCEPT OF LAW

Law as the Union of Primary and Secondary Rules^{*}

1. A Fresh Start

In the last three chapters we have seen that, at various crucial points, the simple model of law as the sovereign's coercive orders failed to reproduce some of the salient features of a legal system. To demonstrate this, we did not find it necessary to invoke (as earlier critics have done) international law or primitive law which some may regard as disputable or borderline examples of law; instead we pointed to certain familiar features of municipal law in a modern state, and showed that these were either distorted or altogether unrepresented in this over-simple theory.

The main ways in which the theory failed are instructive enough to merit a second summary. First, it became clear that though of all the varieties of law, a criminal statute, forbidding or enjoining certain actions under penalty, most resembles orders backed by threats given by one person to others, such a statute none the less differs from such orders in the important respect that it commonly applies to those who enact it and not merely to others. Secondly, there are other varieties of law, notably those conferring legal powers to adjudicate or legislate (public powers) or to create or vary legal relations (private powers) which cannot, without absurdity, be construed as orders backed by threats. Thirdly, there are legal rules which differ from orders in their mode of origin, because they are not brought into being by anything analogous to explicit prescription. Finally, the analysis of law in terms of the sovereign, habitually obeyed and necessarily exempt from all legal limitation, failed to account for the continuity of legislative authority characteristic of a modern legal system, and the sovereign person or persons could not be identified with either the electorate or the legislature of a modern state.

It will be recalled that in thus criticizing the conception of law as the sovereign's coercive orders we considered also a number of ancillary devices which were brought in at the cost of corrupting the primitive simplicity of the theory to rescue it from its difficulties. But these too failed. One device, the notion of a *tacit* order, seemed to have no application to the complex actualities of a modern legal system, but only to very much simpler situations like that of a general who deliberately refrains from interfering with orders given by his subordinates. Other devices, such as that of treating power-conferring rules as mere fragments of rules imposing duties, or treating all rules as directed only to officials, distort the ways in which these are spoken of, thought of, and actually used in social life. This had no better claim to our assent than the theory that all the rules of a game are really directions to the umpire and the scorer. The device, designed to reconcile the self-binding character of legislation with the theory that a statute is an order given to *others*, was to distinguish the legislators acting in their official capacity, as *one* person ordering *others* who include themselves in their private capacities. This device, impeccable in itself, involved supplementing the theory with

^{*} H.L.A. Hart, *The Concept of Law* 79-99 (1961).

something it does not contain: this is the notion of a rule defining what must be done to legislate; for it is only in conforming with such a rule that legislators have an official capacity and a separate personality to be contrasted with themselves as private individuals.

The last three chapters are therefore the record of a failure and there is plainly need for a fresh start. Yet the failure is an instructive one, worth the detailed consideration we have given it, because at each point where the theory failed to fit the facts it was possible to see at least in outline why it was bound to fail and what is required for a better account. The root cause of failure is that the elements out of which the theory was constructed, viz. the ideas of orders, obedience, habits, and threats, do not include, and cannot by their combination yield, the idea of a rule, without which we cannot hope to elucidate even the most elementary forms of law. It is true that the idea of a rule is by no means a simple one: we have already seen in Chapter III the need, if we are to do justice to the complexity of a legal system, to discriminate between two different though related types. Under rules of the one type, which may well be considered the basic or primary type, human beings are required to do or abstain from certain actions, whether they wish to or not. Rules of the other type are in a sense parasitic upon or secondary to the first: for they provide that human beings may be doing or saying certain things introduce new rules of the primary type, extinguish or modify old ones, or in various ways determine their incidence or control their operations. Rules of the first type impose duties; rules of the second type confer powers, public or private. Rules of the first type concern actions involving physical movement or changes; rules of the second type provide for operations which lead not merely to physical movement or change, but to the creation or variation of duties or obligations.

We have already given some preliminary analysis of what is involved in the assertion that rules of these two types exist among a given social group, and in this chapter we shall not only carry this analysis a little farther but we shall make the general claim that in the combination of these two types of rule there lies what Austin wrongly claimed to have found in the notion of coercive orders, namely, the key to the science of jurisprudence. We shall not indeed claim that wherever the word law is properly used this combination of primary and secondary rules is to be found; for it is clear that the diverse range of cases of which the word law is used are not linked by any such simple uniformity, but by less direct relations - often of analogy of either form or content - to a central case. What we shall attempt to show, in this and the succeeding chapters, is that most of the features of law which have proved most perplexing and have both provoked and eluded the search for definition can best be rendered clear, if these two types of rule and the interplay between them are understood. We accord this union of elements a central place because of their explanatory power in elucidating the concepts that constitute the framework of legal thought. The justification for the use of the word law for a range of apparently heterogeneous cases is a secondary matter which can be undertaken when the central elements have been grasped.

2. The Idea of Obligation

It will be recalled that the theory of law as coercive orders, notwithstanding its errors, started from the perfectly correct appreciation of the fact that where there is law, there human conduct is made in some sense non-optional or obligatory. In choosing this starting-point the theory was well inspired, and in building up a new account of law in terms of the interplay of

primary and secondary rules we too shall start from the same idea. It is, however, here, at this crucial first step, that we have perhaps most to learn from the theory's errors.

Let us recall the gunman situation. A orders B to hand over his money and threatens to shoot him if he does not comply. According to the theory of coercive orders this situation illustrates the notion of obligation or duty in general. Legal obligation is to be found in this situation writ large; A must be the sovereign habitually obeyed and the orders must be general, prescribing courses of conduct not single actions. The plausibility of the claim that the gunman situation displays the meaning of obligation lies in the fact that it is certainly one in which we would say that B, if he obeyed, was *obliged* to hand over his money. It is, however, equally certain that we should misdescribe the situation if we said, on these facts, that B *had an obligation* or a *duty* to hand over the money. So from the start it is clear that we need something else for an understanding of the idea of obligation. There is a difference, yet to be explained, between the assertion that someone *was obliged* to do something and the assertion that he *had an obligation* to do it. The first is often a statement about the beliefs and motives with which an action is done: B was obliged to hand over his money may simply mean, as it does in the gunman case, that he believed that some harm or other unpleasant consequences would befall him if he did not hand it over and he handed it over to avoid those consequences. In such cases the prospect of what would happen to the agent if he disobeyed has rendered something he would otherwise have preferred to have done (keep the money) less eligible.

Two further elements slightly complicate the elucidation of the notion of being obliged to do something. It seems clear that we should not think of B as obliged to hand over the money if the threatened harm was, according to common judgments, trivial in comparison with the disadvantage or serious consequences, either for B or for others, of complying with the orders, as it would be, for example, if A merely threatened to pinch B. Nor perhaps should we say that B was obliged, if there were no reasonable grounds for thinking that A could or would probably implement his threat of relatively serious harm. Yet, though such references to common judgments of comparative harm and reasonable estimates of likelihood, are implicit in this notion, the statement that a person was obliged to obey someone is, in the main, a psychological one referring to the beliefs and motives with which an action was done. But the statement that someone *had an obligation* to do something is of a very different type and there are many signs of this difference. Thus not only is it the case that the facts about B's action and his beliefs and motives in the gunman case, though sufficient to warrant the statement that B was obliged to hand over his purse, are *not sufficient* to warrant the statement that he had an obligation to do this; it is also the case that facts of this sort, i.e. facts about beliefs and motives, are *not necessary* for the truth of a statement that a person had an obligation to do something. Thus the statement that a person had an obligation, e.g. to tell the truth or report for military service, remains true even if he believed (reasonably or unreasonably) that he would never be found out and had nothing to fear from disobedience. Moreover, whereas the statement that he had this obligation is quite independent of the question whether or not he in fact reported for service, the statement that someone was obliged to do something, normally carries the implication that he actually did it.

Some theorists, Austin among them, seeing perhaps the general irrelevance of the person's beliefs, fears, and motives to the question whether he had an obligation to do something, have defined this notion not in terms of these subjective facts, but in terms of the *chance or likelihood* that the person having the obligation will suffer a punishment or *evil* at the hands of others in the event of disobedience. This, in effect, treats statements of obligation not as psychological statements but as predictions or assessments of chances of incurring punishment or *evil*. To many later theorists this has appeared as a revelation, bringing down to earth an elusive notion and restating it in the same clear, hard, empirical terms as are used in science. It has, indeed, been accepted sometimes as the only alternative to metaphysical conceptions of obligation or duty as invisible objects mysteriously existing *above* or *behind* the world of ordinary, observable facts. But there are many reasons for rejecting this interpretation of statements of obligation as predictions, and it is not, in fact, the only alternative to obscure metaphysics.

The fundamental objection is that the predictive interpretation obscures the fact that, where rules exist, deviations from them are not merely grounds for a prediction that hostile reactions will follow or that a court will apply sanctions to those who break them, but are also a reason or justification for such reaction and for applying the sanctions. We have already drawn attention in Chapter IV to this neglect of the internal aspect of rules and we shall elaborate it later in this chapter.

There is, however, a second, simpler, objection to the predictive interpretation of obligation. If it were true that the statement that a person had an obligation meant that *he* was likely to suffer in the event of disobedience, it would be a contradiction to say that he had an obligation, e.g. to report for military service but that, owing to the fact that he had escaped from the jurisdiction, or had successfully bribed the police or the court, there was not the slightest chance of his being caught or made to suffer. In fact, there is no contradiction in saying this, and such statements are often made and understood.

It is, of course, true that in a normal legal system, where sanctions are exacted for a high proportion of offences, an offender usually runs a risk of punishment; so, usually the statement that a person has an obligation and the statement that he is likely to suffer for disobedience will both be true together. Indeed, the connection between these two statements is somewhat stronger than this: at least in a municipal system it may well be true that, unless *in general* sanctions were likely to be exacted from offenders, there would be little or no point in making particular statements about a person's obligations. In this sense, such statements may be said to presuppose belief in the continued normal operation of the system of sanctions much as the statement *he is out in cricket* presupposes, though it does not assert, that players, umpire, and scorer will probably take the usual steps. None the less, it is crucial for the understanding of the idea of obligation to see that in individual cases the statement that a person has an obligation under some rule and the prediction that he is likely to suffer for disobedience may diverge.

It is clear that obligation is not to be found in the gunman situation, though the simpler notion of being obliged to do something may well be defined in the elements present there. To understand the general idea of obligation as a necessary preliminary to understanding it in its legal form, we must turn to a different social situation which, unlike the gunman situation,

includes the existence of social rules; for this situation contributes to the meaning of the statement that a person has an obligation in two ways. First, the existence of such rules, making certain types of behaviour a standard, is the normal, though unstated, background or proper context for such a statement; and, secondly, the distinctive function of such statement is to apply such a general rule to a particular person by calling attention to the fact that his case falls under it. We have already seen in Chapter IV that there is involved in the existence of any social rules a combination of regular conduct with a distinctive attitude to that conduct as a standard. We have also seen the main ways in which these differ from mere social habits, and how the varied normative vocabulary (‘ought’, ‘must’, ‘should’) is used to draw attention to the standard and to deviations from it, and to formulate the demands, criticisms, or acknowledgements which may be based on it. Of this class of normative words the words ‘obligation’ and ‘duty’ form an important sub-class, carrying with them certain implications not usually present in the others. Hence, though a grasp of the elements generally differentiating social rules from mere habits is certainly dispensable for understanding the notion of obligation or duty, it is not sufficient by itself.

The statement that someone has or is under an obligation does indeed imply the existence of a rule; yet it is not always the case that where rules exist the standard of behaviour required by them is conceived of in terms of obligation. ‘He ought to have’ and ‘He had an obligation to’ are not always interchangeable expressions, even though they are alike in carrying an implicit reference to existing standards of conduct or are used in drawing conclusions in particular cases from a general rule. Rules of etiquette or correct speech are certainly rules; they are more than convergent habits or regularities of behaviour; they are taught and efforts are made to maintain them; they are used in criticizing our own and other people’s behaviour in the characteristic normative vocabulary. ‘You ought to take your hat off’, ‘It is wrong to say “you was”’. But to use in connection with rules of this kind the words ‘obligation’ or ‘duty’ would be misleading and not merely stylistically odd. It would misdescribe a social situation; for though the line separating rules of obligation from others is at points a vague one, yet the main rationale of the distinction is fairly clear.

Rules are conceived and spoken of as imposing obligations when the general demand for conformity is insistent and the social pressure brought to bear upon those who deviate or threaten to deviate is great. Such rules may be wholly customary in origin: there may be no centrally organized system of punishments for breach of the rules; the social pressure may take only the form of a general diffused hostile or critical reaction which may stop short of physical sanctions. It may be limited to verbal manifestations of disapproval or of appeals to the individual’s respect for the rule violated; it may depend heavily on the operation of feelings of shame, remorse, and guilt. When the pressure is of this last-mentioned kind we may be inclined to classify the rules as part of the morality of the social group and the obligation under the rules as moral obligation. Conversely, when physical sanctions are prominent or usual among the forms of pressure, even though these are neither closely defined nor administered by officials but are left to the community at large, we shall be inclined to classify the rules as a primitive or rudimentary form of law. We may, of course, find both these types of serious social pressure behind what is, in an obvious sense, the same rule of conduct; sometimes this may occur with no indication that one of them is peculiarly

appropriate as primary and the other secondary, and then the question whether we are confronted with a rule of morality or rudimentary law may not be susceptible of an answer. But for the moment the possibility of drawing the line between law and morals need not detain us. What is important is that the insistence on importance or *seriousness* of social pressure behind the rules is the primary factor determining whether they are thought of as giving rise to obligations.

Two other characteristics of obligation go naturally together with this primary one. The rules supported by this serious pressure are thought important because they are believed to be necessary to the maintenance of social life or some highly prized feature of it. Characteristically, rules so obviously essential as those which restrict the free use of violence are thought of in terms of obligation. So too rules which require honesty or truth or require the keeping of promises, or specify what is to be done by one who performs a distinctive role or function in the social group are thought of in terms of either obligation or perhaps more often duty. Secondly, it is generally recognized that the conduct required by these rules may, while benefiting others, conflict with what the person who owes the duty may wish to do. Hence obligations and duties are thought of as characteristically involving sacrifice or renunciation, and the standing possibility of conflict between obligation or duty and interest is, in all societies, among the truisms of both the lawyer and the moralist.

The figure of a *bond* binding the person obligated, which is buried in the word obligation and the similar notion of a debt latent in the word duty are explicable in terms of these three factors, which distinguish rules of obligation or duty from other rules. In this figure, which haunts much legal thought, the social pressure appears as a chain binding those who have obligations so that they are not free to do what they want. The other end of the chain is sometimes held by the group or their official representatives, who insist on performance or exact the penalty: sometimes it is entrusted by the group to a private individual who may choose whether or not to insist on performance or its equivalent in value to him. The first situation typifies the duties or obligations of criminal law and second those of civil law where we think of private individuals having rights correlative to the obligations.

Natural and perhaps illuminating though these figures or metaphors are, we must not allow them to trap us into a misleading conception of obligation as essentially consisting in some feeling of pressure or compulsion experienced by those who have obligations. The fact that rules of obligation are generally supported by serious social pressure does not entail that to have an obligation under the rules is to experience feelings of compulsion or pressure. Hence there is no contradiction in saying of some hardened swindler, and it may often be true, that he had an obligation to pay the rent but felt no pressure to pay when he made off without doing so. To feel obliged and to have an obligation are different though frequently concomitant things. To identify them would be one way of misinterpreting, in terms of psychological feelings, the important internal aspects of rules.

Indeed, the internal aspect of rules is something to which we must again refer before we can dispose finally of the claims of the predictive theory. For an advocate of that theory may well ask why, if social pressure is so important a feature of rules of obligation, we are yet so concerned to stress the inadequacies of the predictive theory; for it gives this very feature a central place by defining obligation in terms of the likelihood that threatened punishment or

hostile reaction will follow deviation from certain lines of conduct. The difference may seem slight between the analysis of a statement of obligation as a prediction, or assessment of the chances, of hostile reaction to deviation, and our own contention that though this statement presupposes a background in which deviations from rules are generally met by hostile reactions, yet its characteristic use is not to predict this but to say that a person's case falls under such a rule. In fact, however, this difference is not a slight one. Indeed, until its importance is grasped, we cannot properly understand the whole distinctive style of human thought, speech, and action which is involved in the existence of rules and which constitutes the normative structure of society.

The following contrast again in terms of the 'internal' and 'external' aspect of rules may serve to mark what gives this distinction its great importance for the understanding not only of law but of the structure of any society. When a social group has certain rules of conduct, this fact affords an opportunity for many closely related yet different kinds of assertion; for it is possible to be concerned with the rules, either merely as an observer who does not himself accept them, or as a member of the group which accepts and uses them as guides to conduct. We may call these respectively the 'external' and the 'internal' points of view. Statements made from the external point of view may themselves be of different kinds. For the observer may, without accepting the rules himself, assert that the group accepts the rules, and thus may from outside refer to the way in which *they* are concerned with them from the internal point of view. But whatever the rules are, whether they are those of games, like chess or cricket, or moral or legal rules, we can if we choose occupy the position of an observer who does not even refer in this way to the internal point of view of the group. Such an observer is content merely to record the regularities of observable behaviour in which conformity with the rules partly consists and those further regularities, in the form of the hostile reaction, reproofs, or punishments, with which deviations from the rules are met. After a time the external observer may, on the basis of the regularities observed, correlate deviation with hostile reaction, and be able to predict with a fair measure of success, and to assess the chances that a deviation from the group's normal behaviour will meet with hostile reaction or punishment. Such knowledge may not only reveal much about the group, but might enable him to live among them without unpleasant consequences which would attend one who attempted to do so without such knowledge.

If, however, the observer really keeps austerely to this extreme external point of view and does not give any account of the manner in which members of the group who accept the rules view their own regular behaviour, his description of their life cannot be in terms of rules at all, and so not in the terms of the rule-dependent notions of obligation or duty. Instead, it will be in terms of observable regularities of conduct, predictions, probabilities, and signs. For such an observer, deviations by a member of the group from normal conduct will be a sign that hostile reaction is likely to follow, and nothing more. His view will be like the view of one who, having observed the working of a traffic signal in a busy street for some time, limits himself to saying that when the light turns red there is a high probability that the traffic will stop. He treats the light merely as a natural *sign that* people will behave in certain ways, as clouds are a *sign that* rain will come. In so doing he will miss out a whole dimension of the social life of those whom he is watching, since for them the red light is not merely a sign that

others will stop: they look upon it as a *signal for* them to stop, and so a reason for stopping in conformity to rules which make stopping when the light is red a standard behaviour and an obligation. To mention this is to bring into the account the way in which the group regards its own behaviour. It is to refer to the internal aspect of rules seen from their internal point of view.

The external point of view may very nearly reproduce the way in which the rules function in the lives of certain members of the group, namely those who reject its rules and are only concerned with them when and because they judge that unpleasant consequences are likely to follow violation. Their point of view will need for its expression, $\neg I$ was obliged to do it, $\emptyset \neg I$ am likely to suffer for it iff $\dots \emptyset \neg$ You will probably suffer for it iff $\dots \emptyset \neg$ They will do that to you iff $\dots \emptyset$. But they will not need forms of expression like $\neg I$ had an obligation \emptyset or \neg You have an obligation \emptyset for these are required only by those who see their own and other persons' conduct from the internal point of view. What the external point of view, which limits itself to the observable regularities of behaviour, cannot reproduce is the way in which the rules function as rules in the lives of those who normally are the majority of society. These are the officials, lawyers, or private persons who use them, in one situation after another, as guides to the conduct of social life, as the basis for claims, demands, admissions, criticism, or punishment, viz., in all the familiar transactions of life according to rules. For them the violation of a rule is not merely a basis for the prediction that a hostile reaction will follow but a *reason* for hostility.

At any given moment the life of any society which lives by rules, legal or not, is likely to consist in a tension between those who, on the one hand, accept and voluntarily co-operate in maintaining the rules, and so see their own and other persons' behaviour in terms of the rules, and those who, on the other hand, reject the rules and attend to them only from the external point of view as a sign of possible punishment. One of the difficulties facing any legal theory anxious to do justice to the complexity of the facts is to remember the presence of both these points of view and not to define one of them out of existence. Perhaps all our criticisms of the predictive theory of obligation may be best summarized as the accusation that this is what it does to the internal aspect of obligatory rules.

3. The Elements of Law

It is, of course, possible to imagine a society without a legislature, courts, or officials of any kind. Indeed, there are many studies of primitive communities which not only claim that this possibility is realized but depict in detail the life of a society where the only means of social control is that general attitude of the group towards its own standard modes of behaviour in terms of which we have characterized rules of obligation. A social structure of this kind is often referred to as one of \neg custom; \emptyset but we shall not use this term, because it often implies that the customary rules are very old and supported with less social pressure than other rules. To avoid these implications we shall refer to such a social structure as one of primary rules of obligation. If a society is to live by such primary rules alone, there are certain conditions which, granted a few of the most obvious truisms about human nature and the world we live in, must clearly be satisfied. The first of these conditions is that the rules must contain in some form restrictions on the free use of violence, theft, and deception to which human beings are tempted but which they must, in general, repress, if they are to coexist in

close proximity to each other. Such rules are in fact always found in the primitive societies of which we have knowledge, together with a variety of others imposing on individuals various positive duties to perform services or make contributions to the common life. Secondly, though such a society may exhibit the tension, already described, between those who accept the rules and those who reject the rules except where fear of social pressure induces them to conform, it is plain that the latter cannot be more than a minority, if so loosely organized a society of persons, approximately equal in physical strength, is to endure; for otherwise those who reject the rules would have too little social pressure to fear. This too is confirmed by what we know of primitive communities where, though there are dissidents and malefactors, the majority live by the rules seen from the internal point of view.

More important for our present purpose is the following consideration. It is plain that only a small community closely knit by ties of kinship, common sentiment, and belief, and placed in a stable environment, could live successfully by such a regime of unofficial rules. In any other conditions such a simple form of social control must prove defective and will require supplementation in different ways. In the first place, the rules by which the group lives will not form a system, but will simply be a set of separate standards, without any identifying or common mark, except of course that they are the rules which a particular group of human beings accepts. They will in this respect resemble our own rules of etiquette. Hence if doubts arise as to what the rules are or as to the precise scope of some given rule, there will be no procedure for settling this doubt, either by reference to an authoritative text or to an official whose declarations on this point are authoritative. For, plainly, such a procedure and the acknowledgment of either authoritative text or persons involve the existence of rules of a type different from the rules of obligation or duty which *ex hypothesi* are all that the group has. This defect in the simple social structure of primary rules we may call its *uncertainty*.

A second defect is the *static* character of the rules. The only mode of change in the rules known to such a society will be the slow process of growth, whereby courses of conduct once thought optional become first habitual or usual, and then obligatory, and the converse process of decay, when deviations, once severely dealt with, are first tolerated and then pass unnoticed. There will be no means, in such a society, of deliberately adapting the rules to changing circumstances, either by eliminating old rules or introducing new ones: for, again, the possibility of doing this presupposes the existence of rules of a different type from the primary rules of obligation by which alone the society lives. In an extreme case the rules may be static in a more drastic sense. This, though never perhaps fully realized in any actual community, is worth considering because the remedy for it is something very characteristic of law. In this extreme case, not only would there be no way of deliberately changing the general rules, but the obligations which arise under the rules in particular cases could not be varied or modified by the deliberate choice of any individual. Each individual would simply have fixed obligations or duties to do or abstain from doing certain things. It might indeed very often be the case that others would benefit from the performance of these obligations; yet if there are only primary rules of obligation they would have no power to release those bound from performance or to transfer to others the benefits which would accrue from performance. For such operations of release or transfer create changes in the initial positions of individuals

under the primary rules of obligation, and for these operations to be possible there must be rules of a sort different from the primary rules.

The third defect of this simple form of social life is the *inefficiency* of the diffuse social pressure by which the rules are maintained. Disputes as to whether an admitted rule has or has not been violated will always occur and will, in any but the smallest societies, continue interminably, if there is no agency specially empowered to ascertain finally, and authoritatively, the fact of violation. Lack of such final and authoritative determinations is to be distinguished from another weakness associated with it. This is the fact that punishments for violations of the rules, and other forms of social pressures involving physical effort or the use of force, are not administered by a special agency but are left to the individuals affected or to the group at large. It is obvious that the waste of time involved in the group's unorganized efforts to catch and punish offenders, and the smouldering vendettas which may result from self-help in the absence of an official monopoly of sanctions, may be serious. The history of law does, however, strongly suggest that the lack of official agencies to determine authoritatively the fact of violation of the rules is a much more serious defect; for many societies have remedies for this defect long before the other.

The remedy for each of these three main defects in this simplest form of social structure consists in supplementing the *primary* rules of obligation with *secondary* rules which are rules of a different kind. The introduction of the remedy for each defect might, in itself, be considered a step from the pre-legal into the legal world; since each remedy brings with it many elements that permeate law: certainly all three remedies together are enough to convert the regime of primary rules into what is indisputably a legal system. We shall consider in turn each of these remedies and show why law may most illuminatingly be characterized as a union of primary rules of obligation with such secondary rules. Before we do this, however the following general points should be noted. Though the remedies consist in the introduction of rules which are certainly different from each other, as well as from the primary rules of obligation which they supplement, they have important features in common and are connected in various ways. Thus they may all be said to be on a different level from the primary rules, for they are all *about* such rules; in the sense that while primary rules are concerned with the actions that individuals must or must not do, these secondary rules are all concerned with the primary rules themselves. They specify the ways in which the primary rules may be conclusively ascertained, introduced, eliminated, varied, and the fact of their violation conclusively determined.

The simplest form of remedy for the *uncertainty* of the regime of primary rules is the introduction of what we shall call a *rule of recognition*. This will specify some feature or features possession of which by a suggested rule is taken as a conclusive affirmative indication that it is a rule of the group to be supported by the social pressure it exerts. The existence of such a rule of recognition may take any of a huge variety of forms, simple or complex. It may, as in the early law of many societies, be no more than that an authoritative list or text of the rules is to be found in a written document or carved on some public monument. No doubt as a matter of history this step from the pre-legal to the legal may be accomplished in distinguishable stages, of which the first is the mere reduction to writing of hitherto unwritten rules. This is not itself the crucial step, though it is very important one:

what is crucial is the acknowledgement of reference to the writing or inscription as *authoritative*, i.e. as the *proper* way of disposing of doubts as to the existence of the rule. Where there is such an acknowledgement there is a very simple form of secondary rule: a rule for conclusive identification of the primary rules of obligation.

In a developed legal system the rules of recognition are of course more complex; instead of identifying rules exclusively by reference to a text or list they do so by reference to some general characteristic possessed by the primary rules. This may be the fact of their having been enacted by a specific body, or their long customary practice, or their relation to judicial decisions. Moreover, where more than one of such general characteristics are treated as identifying criteria, provision may be made for their possible conflict by their arrangement in an order of superiority, as by the common subordination of custom or precedent to statute, the latter being a superior source of law. Such complexity may make the rules of recognition in a modern legal system seem very different from the simple acceptance of an authoritative text: yet even in this simplest form, such a rule brings with it many elements distinctive of law. By providing an authoritative mark it introduces, although in embryonic form, the idea of a legal system: for the rules are now not just a discrete unconnected set but are, in a simple way, unified. Further, in the simple operation of identifying a given rule as possessing the required feature of being an item on an authoritative list of rules we have the germ of the idea of legal validity.

The remedy for the *static* quality of the regime of primary rules consists in the introduction of what we shall call *rules of change*. The simplest form of such a rule is that which empowers an individual or body of persons to introduce new primary rules for the conduct of the life of the group, or of some class within it, and to eliminate old rules. As we have already argued in Chapter IV it is in terms of such a rule, and not in terms of orders backed by threats, that the ideas of legislative enactment and repeal are to be understood. Such rules of change may be very simple or very complex: the powers conferred may be unrestricted or limited in various ways: and the rules may, besides specifying the persons who are to legislate, define in more or less rigid terms the procedure to be followed in legislation. Plainly, there will be a very close connection between the rules of change and the rules of recognition: for where the former exists the latter will necessarily incorporate a reference to legislation as an identifying feature of the rules, though it need not refer to all the details of procedure involved in legislation. Usually some official certificate or official copy will, under the rules of recognition, be taken as a sufficient proof of due enactment. Of course if there is a social structure so simple that the only source of law is legislation, the rule of recognition will simply specify enactment as the unique identifying mark or criterion of validity of the rules. This will be the case for example in the imaginary kingdom of Rex I depicted in Chapter IV: there the rule of recognition would simply be that whatever Rex I enacts is law.

We have already described in some detail the rules which confer on individuals power to vary their initial positions under the primary rules. Without such private power-conferring rules society would lack some of the chief amenities which law confers upon it. For the operations which these rules make possible are the making of wills, contracts, transfers of property, and many other voluntarily created structures of rights and duties which typify life under law, though of course an elementary form of power-conferring rule also underlies the

moral institution of a promise. The kinship of these rules with the rules of change involved in the notion of legislation is clear, and as recent theory such as Kelsen's has shown, many of the features which puzzle us in the institutions of contract or property are clarified by thinking of the operations of making a contract or transferring property as the exercise of limited legislative powers by individuals.

The third supplement to the simple regime of primary rules, intended to remedy the *inefficiency* of its diffused social pressure, consists of secondary rules empowering individuals to make authoritative determinations of the question whether, on a particular occasion, a primary rule has been broken. The minimal form of adjudication consists in such determinations, and we shall call the secondary rules which confer the power to make them *rules of adjudication*. Besides identifying the individuals who are to adjudicate, such rules will also define the procedure to be followed. Like the other secondary rules these are on a different level from the primary rules: though they may be reinforced by further rules imposing duties on judges to adjudicate, they do not impose duties but confer judicial powers and a special status on judicial declarations about the breach of obligations. Again these rules, like the other secondary rules, define a group of important legal concepts: in this case the concepts of judge or court, jurisdiction and judgment. Besides these resemblances to the other secondary rules, rules of adjudication have intimate connections with them. Indeed, a system which has rules of adjudication is necessarily also committed to a rule of recognition of an elementary and imperfect sort. This is so because, if courts are empowered to make authoritative determinations of the fact that a rule has been broken, these cannot avoid being taken as authoritative determinations of what the rules are. So the rule which confers jurisdiction will also be a rule of recognition, identifying the primary rules through the judgments of the courts and these judgments will become a *source of law*. It is true that this form of rule of recognition, inseparable from the minimum form of jurisdiction, will be very imperfect. Unlike an authoritative text or a statute book, judgments may not be couched in general terms and their use as authoritative guides to the rules depends on a somewhat shaky inference from particular decisions, and the reliability of this must fluctuate both with the skill of the interpreter and the consistency of the judges.

It need hardly be said that in few legal systems are judicial powers confined to authoritative determinations of the fact of violation of the primary rules. Most systems have, after some delay, seen the advantages of further centralization of social pressure; and have partially prohibited the use of physical punishments or violent self help by private individuals. Instead they have supplemented the primary rules of obligation by further secondary rules, specifying or at least limiting the penalties for violation, and have conferred upon judges, where they have ascertained the fact of violation, the exclusive power to direct the application of penalties by other officials. These secondary rules provide the centralized official *sanctions of the system*.

If we stand back and consider the structure which has resulted from the combination of primary rules of obligation with the secondary rules of recognition, change and adjudication, it is plain that we have here not only the heart of a legal system, but a most powerful tool for the analysis of much that has puzzled both the jurist and the political theorist.

Not only are the specifically legal concepts with which the lawyer is professionally concerned, such as those of obligation and rights, validity and source of law, legislation and jurisdiction, and sanction, best elucidated in terms of this combination of elements. The concepts (which bestride both law and political theory) of the state, of authority, and of an official require a similar analysis if the obscurity which still lingers about them is to be dissipated. The reason why an analysis in these terms of primary and secondary rules has this explanatory power is not far to seek. Most of the obscurities and distortions surrounding legal and political concepts arise from the fact that these essentially involve reference to what we have called the internal point of view: the view of those who do not merely record and predict behaviour conforming to rules, but *use* the rules as standards for the appraisal of their own and others' behaviour. This requires more detailed attention in the analysis of legal and political concepts than it has usually received. Under the simple regime of primary rules the internal point of view is manifested in its simplest form, in the use of those rules as the basis of criticism, and as the justification of demands for conformity, social pressure, and punishment. Reference to this most elementary manifestation of the internal point of view is required for the analysis of the basic concepts of obligation and duty. With the addition to the system of secondary rules, the range of what is said and done from the internal point of view is much extended and diversified. With this extension comes a whole set of new concepts and they demand a reference to the internal point of view for their analysis. These include the notions of legislation, jurisdiction, validity, and, generally, of legal powers private and public. There is a constant pull towards an analysis of these in terms of ordinary or 'scientific' fact-stating or predictive discourse. But this can only reproduce their external aspect: to do justice to their distinctive, internal aspect we need to see the different ways in which the law-making operations of the legislator, the adjudication of a court, the exercise of private or official powers, and other 'acts-in-the-law' are related to secondary rules.

In the next chapter we shall show how the ideas of the validity of law and sources of law, and the truths latent among the errors of the doctrines of sovereignty may be rephrased and clarified in terms of rules of recognition. But we shall conclude this chapter with a warning: though the combination of primary and secondary rules merits, because it explains many aspects of law, the central place assigned to it, this cannot by itself illuminate every problem. The union of primary and secondary rules is at the centre of a legal system; but it is not the whole, and as we move away from the centre we shall have to accommodate, in ways indicated in later chapters, elements of a different character.

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The Foundations of a Legal System *

1. Rule of Recognition and Legal Validity

According to the theory criticized in Chapter IV the foundations of a legal system consist of the situation in which the majority of a social group habitually obey the orders backed by threats of sovereign person or persons, who themselves habitually obey no one. This social situation is, for this theory, both a necessary and a sufficient condition of the existence of law. We have already exhibited in some detail the incapacity of this theory to account for some of the salient features of a modern municipal legal system: yet none the less, as its hold over the minds of many thinkers suggests, it does contain, though in a blurred and misleading form, certain truths about certain important aspects of law. These truths can, however, only be clearly presented, and their importance rightly assessed, in terms of the more complex social situation where a secondary rule of recognition is accepted and used for the identification of primary rules of obligation. It is this situation which deserves, if anything does, to be called the foundations of a legal system. In this chapter we shall discuss various elements of this situation which have received only partial or misleading expression in the theory of sovereignty and elsewhere.

Wherever such a rule of recognition is accepted, both private persons and officials are provided with authoritative criteria for identifying primary rules of obligation. The criteria so provided may, as we have seen, take any one or more of a variety of forms: these include reference to an authoritative text; to legislative enactment; to customary practice; to general declarations of specified persons, or to past judicial decisions in particular cases. In a very simple system like the world of Rex I depicted in Chapter IV, where only what he enacts is law and no legal limitations upon his legislative power are imposed by customary rule or Constitutional document, the sole criterion for identifying the law will be a simple reference to the fact of enactment by Rex I. The existence of this simple form of rule of recognition will be manifest in the general practice, on the part of officials or private persons, of identifying the rules by this criterion. In a modern legal system where there are a variety of sources of law, the rule of recognition is correspondingly more complex: the criteria for identifying the law are multiple and commonly include a written Constitution, enactment by a legislature, and judicial precedents. In most cases, provision is made for possible conflict by ranking these criteria in an order of relative subordination and primacy. It is in this way that in our system common law is subordinate to statute.

It is important to distinguish this relative *subordination* of one criterion to another from *derivation*, since some spurious support for the view that all law is essentially or really (even if only tacitly) the product of legislation, has been gained from confusion of these two ideas. In our own system, custom and precedent are subordinate to legislation since customary and common law rules may be deprived of their status as law by statute. Yet they owe their status of law, precarious as this may be, not to a tacit exercise of legislative power but to the acceptance of a rule of recognition which accords them this independent though subordinate

* H.L.A. Hart, *The Concept of Law* 100-123 (1961).

place. Again, as in the simple case, the existence of such a complex rule of recognition with this hierarchical ordering of distinct criteria is manifested in the general practice of identifying the rules by such criteria.

In the day-to-day life of a legal system its rule of recognition is very seldom expressly formulated as a rule; though occasionally, courts in England may announce in general terms the relative place of one criterion of law in relation to another, as when they assert the supremacy of Acts of Parliament over the other sources or suggested sources of law. For the most part the rule of recognition is not stated, but its existence is *shown* in the way in which particular rules are identified, either by courts or other officials or private persons or their advisers. There is, of course, a difference in the use made by courts of the criteria provided by the rule and the use of them by others: for when courts reach a particular conclusion on the footing that a particular rule has been correctly identified as law, what they say has a special authoritative status conferred on it by other rules. In this respect, as in many others, the rule of recognition of a legal system is like the scoring rule of a game. In the course of the game the general rule defining the activities which constitute scoring (runs, goals, & c.) is seldom formulated; instead it is *used* by officials and players in identifying the particular phases which count towards winning. Here too, the declarations of officials (umpire or scorer) have a special authoritative status attributed to them by other rules. Further, in both cases there is the possibility of a conflict between these authoritative applications of the rule and the general understanding of what the rule plainly requires according to its terms. This, as we shall see later, is a complication which must be catered for in any account of what it is for a system of rules of this sort to exist.

The use of unstated rules of recognition, by courts and others, in identifying particular rules of the system is characteristic of the internal point of view. Those who use them in this way thereby manifest their own acceptance of them as guiding rules and with this attitude there goes a characteristic vocabulary different from the natural expressions of the external point of view. Perhaps the simplest of these is the expression, 'It is the law that ϕ ', which we may find on the lips not only of judges, but of ordinary men living under a legal system, when they identify a given rule of the system. This, like the expression 'Out' or 'Goal' is the language of one assessing a situation by reference to rules which he in common with others acknowledges as appropriate for this purpose. This attitude of shared acceptance of rules is to be contrasted with that of an observer who records *ab extra* the fact that a social group accepts such rules but does not himself accept them. The natural expression of this external point of view is not 'It is the law that ϕ ' but 'In England they recognize as law ϕ ' whatever the Queen in Parliament enacts ϕ . The first of these forms of expression we shall call an *internal statement* because it manifests the internal point of view and is naturally used by one who, accepting the rule of recognition and without stating the fact that it is accepted, applies the rule in recognizing some particular rule of the system as valid. The second form of expression we shall call an *external statement* because it is the natural language of an external observer of the system who, without himself accepting its rule of recognition, states the fact that others accept it.

If this use of an accepted rule of recognition in making internal statements is understood and carefully distinguished from an external statement of fact that the rule is accepted, many

obscurities concerning the notion of legal validity disappear. For the word 'valid' is most frequently, though not always, used, in just such internal statements, applying to a particular rule of a legal system, an unstated but accepted rule of recognition. To say that a given rule is valid is to recognize it as passing all the tests provided by the rule of recognition and so as a rule of the system. We can indeed simply say that the statement that a particular rule is valid means that it satisfies all the criteria provided by the rule of recognition. This is incorrect only to the extent that it might obscure the internal character of such statements; for, like the cricketers' 'Out' these statements of validity normally apply to a particular case a rule of recognition accepted by the speaker and others, rather than expressly state that the rule is satisfied.

Some of the puzzles connected with the idea of legal validity are said to concern the relation between the validity and the 'efficacy' of law. If by 'efficacy' is meant that the fact that a rule of law which requires certain behaviour is obeyed more often than not, it is plain that there is no necessary connection between the validity of any particular rule and its efficacy, unless the rule of recognition of the system includes among its criteria, as some do, the provision (sometimes referred to as a rule of obsolescence) that no rule is to count as a rule of the system if it has long ceased to be efficacious.

From the inefficacy of a particular rule, which may or may not count against its validity, we must distinguish a general disregard of the rules of the system. This may be so complete in character and so protracted that we should say, in the case of a new system, that it had never established itself as the legal system of a given group, or, in the case of a once-established system, that it had ceased to be the legal system of the group. In either case, the normal context or background for making any internal statement in terms of the rules of the system is absent. In such cases it would be generally *pointless* either to assess the rights and duties of particular persons by reference to the primary rules of a system or to assess the validity of any of its rules by reference to its rules of recognition. To insist on applying a system of rules which had either never actually been effective or had been discarded would, except in special circumstances mentioned below, be as futile as to assess the progress of a game by reference to a scoring rule which had never been accepted or had been discarded.

One who makes an internal statement concerning the validity of a particular rule of a system may be said to *presuppose* the truth of the external statement of fact that the system is generally efficacious. For the normal use of internal statements is in such a context of general efficacy. It would however be wrong to say that statements of validity mean that the system is generally efficacious. For though it is normally pointless or idle to talk of the validity of a rule of a system which has never established itself or has been discarded, none the less it is not meaningless nor is it always pointless. One vivid way of teaching Roman Law is to speak as *if* the system were efficacious still and to discuss the validity of particular rules and solve problems in their terms; and one way of nursing hopes for the restoration of an old social order destroyed by revolution, and rejecting the new, is to cling to the criteria of legal validity of the old regime. This is implicitly done by the White Russian who still claims property under some rule of descent which was a valid rule of Tsarist Russia.

A grasp of the normal contextual connection between the internal statement that a given rule of a system is valid and the external statement of fact that the system is generally

efficacious, will help us see in its proper perspective the common theory that to assert the validity of a rule is to predict that it will be enforced by courts or some other official action taken. In many ways this theory is similar to the predictive analysis of obligation which we considered and rejected in the last chapter. In both cases alike the motive for advancing this predictive theory is the conviction that only thus can metaphysical interpretations be avoided: that either a statement that a rule is valid must ascribe some mysterious property which cannot be detected by empirical means or it must be a prediction of future behaviour of officials. In both cases also the plausibility of the theory is due to the same important fact: that the truth of the external statement of fact, which an observer might record, that the system is generally efficacious and likely to continue so, is normally presupposed by anyone who accepts the rules and makes an internal statement of obligation or validity. The two are certainly very closely associated. Finally, in both cases alike the mistake of the theory is the same: it consists in neglecting the special character of the internal statement and treating it as an external statement about official action.

This mistake becomes immediately apparent when we consider how the judge's own statement that a particular rule is valid functions in judicial decision; for, though here too, in making such a statement, the judge presupposes but does not state the general efficacy of the system, he plainly is not concerned to predict his own or others' official action. His statement that a rule is valid is an internal statement recognizing that the rule satisfies the tests for identifying what is to count as law in his court, and constitutes not a prophecy of but part of the *reason* for his decision. There is indeed a more plausible case for saying that a statement that a rule is valid is a prediction when such a statement is made by a private person; for in the case of conflict between unofficial statements of validity or invalidity and that of a court in deciding a case, there is often good sense in saying that the former must then be withdrawn. Yet even here, as we shall see when we come in Chapter VII to investigate the significance of such conflicts between official declarations and the plain requirements of the rules, it may be dogmatic to assume that it is withdrawn as a statement now shown to be *wrong*, because it has falsely *predicted* what a court would say. For there are more reasons for withdrawing statements than the fact that they are wrong, and also more ways of being wrong than this allows.

The rule of recognition providing the criteria by which the validity of other rules of the system is assessed is in an important sense, which we shall try to clarify, an *ultimate* rule: and where, as is usual, there are several criteria ranked in order of relative subordination and primacy one of them is *supreme*. These ideas of the ultimacy of the rule of recognition and the supremacy of one of its criteria merit some attention. It is important to disentangle them from the theory, which we have rejected, that somewhere in every legal system, even though it lurks behind legal forms, there must be a sovereign legislative power which is legally unlimited.

Of these two ideas, supreme criterion and ultimate rule, the first is the easiest to define. We may say that a criterion of legal validity or source of law is supreme if rules identified by reference to it are still recognized as rules of the system, even if they conflict with rules identified by reference to the other criteria, whereas rules identified by reference to the latter are not so recognized if they conflict with the rules identified by reference to the supreme

criterion. A similar explanation in comparative terms can be given of the notions of 'superior' and 'subordinate' criteria which we have already used. It is plain that the notions of a superior and a supreme criterion merely refer to a *relative* place on a scale and do not import any notion of legally *unlimited* legislative power. Yet 'supreme' and 'unlimited' are easy to confuse - at least in legal theory. One reason for this is that in the simpler forms of legal system the ideas of ultimate rule of recognition, supreme criterion, and legally unlimited legislature seem to converge. For where there is a legislature subject to no Constitutional limitations and competent by its enactment to deprive all other rules of law emanating from other sources of their status as law, it is part of the rule of recognition in such a system that enactment by that legislature is the supreme criterion of validity. This is, according to Constitutional theory, the position in the United Kingdom. But even systems like that of the United States in which there is no such legally unlimited legislature may perfectly well contain an ultimate rule of recognition which provides a set of criteria of validity, one of which is supreme. This will be so, where the legislative competence of the ordinary legislature is limited by a Constitution which contains no amending power, or places some clauses outside the scope of that power. Here there is no legally unlimited legislature, even in the widest interpretation of 'legislature'; but the system of course contains an ultimate rule of recognition and, in the clauses of its Constitution, a supreme criterion of validity.

The sense in which the rule of recognition is the *ultimate* rule of a system is best understood if we pursue a very familiar chain of legal reasoning. If the question is raised whether some suggested rule is legally valid, we must, in order to answer the question, use a criterion of validity provided by some other rule. Is this purported by-law of the Oxfordshire County Council valid? Yes: because it was made in exercise of the powers conferred, and in accordance with the procedure specified, by a statutory order made by the Minister of Health. At this stage the statutory order provides the criteria in terms of which the validity of the by-law is assessed. There may be no practical need to go farther; but there is a standing possibility of doing so. We may query the validity of the statutory order and assess its validity in terms of the statute empowering the minister to make such orders. Finally, when the validity of the statute has been queried and assessed by reference to the rule that what the Queen in Parliament enacts is law, we are brought to a stop in inquiries concerning validity: for we have reached a rule which, like the intermediate statutory order and statute, provides criteria for the assessment of the validity of other rules; but it is also unlike them in that there is no rule providing criteria for the assessment of its own legal validity.

There are, indeed, many questions which we can raise about this ultimate rule. We can ask whether it is the practice of courts, legislatures, officials, or private citizens in England actually to use this rule as an ultimate rule of recognition. Or has our process of legal reasoning been an idle game with the criteria of validity of a system now discarded? We can ask whether it is satisfactory form of legal system which has such a rule at its root. Does it produce more good than evil? Are there prudential reasons for supporting it? Is there a moral obligation to do so? These are plainly very important questions; but, equally plainly, when we ask them about the rule of recognition, we are no longer attempting to answer the same kind of question about it as those which we answered about other rules with its aid. When we move from saying that a particular enactment is valid, because it satisfies the rule that what

the Queen in Parliament enacts is law, to saying that in England this last rule is used by courts, officials, and private persons as the ultimate rule of recognition, we have moved from an internal statement of law asserting the validity of a rule of the system to an external statement of fact which an observer of the system might make even if he did not accept it. So too when we move from the statement that a particular enactment is valid, to the statement that the rule of recognition of the system is an excellent one and the system based on it one worthy of support, we have moved from a statement of legal validity to a statement of value.

Some writers, who have emphasized the legal ultimacy of the rule of recognition, have expressed this by saying that, whereas the legal validity of other rules of the system can be demonstrated by reference to it, its own validity cannot be demonstrated but is 'assumed' or 'postulated' or is a 'hypothesis'. This may, however, be seriously misleading. Statements of legal validity made about particular rules in the day-to-day life of a legal system whether by judges, lawyers, or ordinary citizens do indeed carry with them certain presuppositions. They are internal statements of law expressing the point of view of those who accept the rule of recognition of the system and, as such, leave unstated much that could be stated in external statements of fact about the system. What is thus left unstated forms the normal background or context of statements of legal validity and is thus said to be 'presupposed' by them. But it is important to see precisely what these presupposed matters are, and not to obscure their character. They consist of two things. First, a person who seriously asserts the validity of some given rule of law, say a particular statute, himself makes use of a rule of recognition which he accepts as appropriate for identifying the law. Secondly, it is the case that this rule of recognition, in terms of which he assesses the validity of a particular statute, is not only accepted by him but is the rule of recognition actually accepted and employed in the general operation of the system. If the truth of this presupposition were doubted, it could be established by reference to actual practice: to the way in which courts identify what is to count as law, and to the general acceptance of or acquiescence in these identifications.

Neither of these two presuppositions are well described as 'assumptions' of a 'validity' which cannot be demonstrated. We only need the word 'validity' and commonly only use it, to answer questions which arise *within* a system of rules where the status of a rule as a member of the system depends on its satisfying certain criteria provided by the rule of recognition. No such question can arise as to the validity of the very rule of recognition which provides the criteria; it can neither be valid nor invalid but is simply accepted as appropriate for use in this way. To express this simple fact by saying darkly that its validity is 'assumed but cannot be demonstrated', is like saying that we assume, but can never demonstrate, that the standard metre bar in Paris which is the ultimate test of the correctness of all measurement in metres, is itself correct.

A more serious objection is that talk of the 'assumption' that the ultimate rule of recognition is valid conceals the essentially factual character of the second presupposition which lies behind the lawyers' statement of validity. No doubt the practice of judges, officials, and others, in which the actual existence of a rule of recognition consists, is a complex matter. As we shall see later, there are certainly situations in which questions as to the precise content and scope of this kind of rule, and even as to its existence, may not admit of a clear or determinate answer. None the less is important to distinguish 'assuming' the

validity from presupposing the existence of such a rule; if only because failure to do this obscures what is meant by the assertion that such a rule *exists*.

In the simple system of primary rules of obligation sketched in the last chapter, the assertion that a given rule existed could only be an external statement of fact such as an observer who did not accept the rules might make and verify by ascertaining whether or not, as a matter of fact, a given mode of behaviour was generally accepted as a standard and was accompanied by those features which, as we have seen, distinguish a social rule from mere convergent habits. It is in this way also that we should now interpret and verify the assertion that in England a rule - though not a legal one - exists that we must bare the head on entering a church. If such rules as these are found to exist in the actual practice of a social group, there is no separate question of their validity to be discussed, though of course their value or desirability is open to question. Once their existence has been established as a fact we should only confuse matters by affirming or denying that they were valid or by saying that we assumed but could not show their validity. Where, on the other hand, as in a mature legal system, we have a system of rules which includes a rule of recognition so that the status of a rule as a member of the system now depends on whether it satisfies certain criteria provided by the rule of recognition, this brings with it a new application of the word *exist*. The statement that a rule exists may now no longer be what it was in the simple case of customary rules - an external statement of the *fact* that a certain mode of behaviour was generally accepted as a standard in practice. It may now be an internal assessment applying an accepted but unstated rule of recognition and meaning (roughly) no more than *valid* given the system's criteria of validity. In this respect, however, as in others a rule of recognition is unlike other rules of the system. The assertion that it exists can only be an external statement of fact. For whereas a subordinate rule of a system may be valid and in that sense *exist* even if it is generally disregarded, the rule of recognition exists only as a complex, but normally concordant, practice of the courts, officials, and private persons in identifying the law by reference to certain criteria. Its existence is a matter of fact.

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PURE THEORY OF LAW – HANS KELSEN*

LAW AND NATURE

1. The Pure Theory

The Pure Theory of Law is a theory of positive law. It is a theory of positive law in general, not of a specific legal order. It is a general theory of law, not an interpretation of specific national or international legal norms; but it offers a theory of interpretation.

As a theory, its exclusive purpose is to know and to describe its object. The theory attempts to answer the question what and how the law *is*, not how it ought to be. It is a science of law (jurisprudence) not legal politics.

It is called a *öpureö* theory of law, because it only describes the law and attempts to eliminate from the object of this description everything that is not strictly law. Its aim is to free the science of law from alien elements. This is the methodological basis of the theory.

Such an approach seems a matter of course. Yet, a glance upon the traditional science of law as it developed during the nineteenth and twentieth centuries clearly shows how far removed it is from the postulate of purity; uncritically the science of law has been mixed with elements of psychology, sociology, ethics, and political theory. This adulteration is understandable, because the latter disciplines deal with subject matters that are closely connected with law. The Pure Theory of Law undertakes to delimit the cognition of law against these disciplines, not because it ignores or denies the connection, but because it wishes to avoid the uncritical mixture of methodologically different disciplines (methodological syncretism) which obscures the essence of the science of law and obliterates the limits imposed upon it by the nature of its subject matter.

2. The Act and its Legal Meaning

If we differentiate between natural and social sciences - and thereby between nature and society as two distinct objects of scientific cognition - the question arises whether the science of law is a natural or a social science; whether law is a natural or a social phenomenon. But the clean delimitation between nature and society is not easy, because society, understood as the actual living together of human beings, may be thought of as part of life in general and hence of nature. Besides, law - or what is customarily so called - seems at least partly to be rooted in nature and to have a *önaturalö* existence. For if you analyze any body of facts interpreted as *ölegalö* or somehow tied up with law, such as a parliamentary decision, an administrative act, a judgment, a contract, or a crime, two elements are distinguishable: one, an act or series of acts - a happening occurring at a certain time and in a certain place, perceived by our senses: an external manifestation of human conduct; two, the legal meaning of this act; that is, the meaning conferred upon the act by Law. For example: People assemble in a large room, make speeches, some raise their hands, others do not - this is the external happening. Its meaning is that a statute is being passed, that law is created. We are faced here

* Hans Kelsen, *Pure Theory of Law* Translated by Max Knight. 1-17, 24-58 (1970)

with the distinction (familiar to jurists) between the process of legislation and its product, the statute. To give other illustrations: A man in a robe and speaking from a dais says some words to a man standing before him; legally this external happening means: a judicial decision was passed. A merchant writes a letter of certain content to another merchant, who, in turn answers with a letter; this means they have concluded a legally binding contract. Somebody causes the death of somebody else; legally, this means murder.

3. The Subjective and Objective Meanings of the Act: Its Self-interpretation

The legal meaning of an act, as an external fact, is not immediately perceptible by the senses - such as, for instance, that color, hardness, weight, or other physical properties of an object can be perceived. To be sure, the man acting rationally connects his act with a definite meaning that expresses itself in some way and is understood by others. This subjective meaning may, but need not necessarily, coincide with its objective meaning, that is, the meaning the act has according to the law. For example somebody makes some dispositions, stating in writing what is to happen to his belongings when he dies. The subjective meaning of this act is a testament. Objectively, however, it is not, because some legal formalities were not observed. Suppose a secret organization intending to rid the nation of subversive elements, condemns to death a man thought to be a traitor, and has a member execute what it subjectively believes to be and calls a death penalty; objectively and legally however, not a death penalty but a Feme murder was carried out, although the external circumstances of a Feme murder are no different from the execution of a legal death penalty.

A written or spoken act can even say something about its own legal meaning. Therein lies a peculiarity of the objects of legal cognition. A plant is unable to tell the classifying botanist anything about itself. It makes no attempt to explain itself scientifically. But an act of human conduct can indeed carry a legal self-interpretation: it can include a statement indicating its legal meaning. The men assembled in parliament can expressly declare that they are enacting a statute; a man making a disposition about his property may call it a last will and testament; two men can declare that they are making a contract. The scientist investigating the law, sometimes finds a legal self-interpretation which anticipates his own interpretation.

4. The Norm

a) *The Norm As a Scheme of Interpretation*

The external fact whose objective meaning is a legal or illegal act is always an event that can be perceived by the senses (because it occurs in time and space) and therefore a natural phenomenon determined by causality. However, this event as such, as an element of nature, is not an object of legal cognition. What turns this event into a legal or illegal act is not its physical existence, determined by the laws of causality prevailing in nature, but the objective meaning resulting from its interpretation. The specifically legal meaning of this act is derived from a norm whose content refers to the act; this norm confers legal meaning to the act, so that it may be interpreted according to this norm. The norm functions as a scheme of interpretation. To put it differently: The judgment that an act of human behavior, performed in time and space, is legal (or illegal) is the result of a specific, namely normative, interpretation. And even the view that this act has the character of a natural phenomenon is

only a specific interpretation, different from the normative, namely a causal interpretation. The norm which confers upon an act the meaning of legality or illegality is itself created by an act, which, in turn receives its legal character from yet another norm. The qualification of a certain act as the execution of the death penalty rather than as a murder - a qualification that cannot be perceived by the senses - results from a thinking process: from the confrontation of this act with the criminal code and the code of criminal procedure. That the mentioned exchange of letters between merchants constitutes legally a contract, results exclusively from the fact that such an exchange conforms with conditions defined in the civil code. That a document is objectively *as well* as subjectively a valid testament results from the fact that it conforms to conditions stipulated by this code. That an assembly of people is a parliament, and that the meaning of their act is a statute, results from the conformity of all these facts with the norms laid down in the constitution. That means, that the contents of actual happenings agree with a norm accepted as valid.

b) Norm and Norm Creation

Those norms, then, which have the character of legal norms and which make certain acts legal or illegal are the objects of the science of law. The legal order which is the object of this cognition is a normative order of human behavior - a system of norms regulating human behavior. By *norm* we mean that something *ought* to be or *ought* to happen, especially that a human being ought to behave in a specific way. This is the meaning of certain human acts directed toward the behavior of others. They are so directed, if they, according to their content, command such behavior, but also if they permit it, and - particularly - if they authorize it. *Authorize* means to confer upon someone else a certain power, specifically the power to enact norms himself. In this sense the acts whose meaning is a norm are acts of will. If an individual by his acts expresses a will directed at a certain behavior of another, that is to say, if he commands, permits, or authorizes such behavior - then the meaning of his acts cannot be described by the statement that the other individual *will* (future tense) behave in that way, but only that he *ought* to behave in that way. The individual who commands, permits, or authorizes *wills*; the man to whom the command, permission, or authorization is directed *ought to*. The word *ought* is used here in a broader than the usual sense. According to customary usage, *ought* corresponds only to a command, while *may* corresponds to a permission, and *can* to an authorization. But in the present work the word *ought* is used to express the normative meaning of an act directed toward the behavior of others; this *ought* includes *may* and *can*. If a man who is commanded, permitted, or authorized to behave in a certain way asks for the reason of such command, permission, or authorization, he can only do so by saying: Why *ought* I behave in this way? Or, in customary usage: Why may I or why can I behave in this way?

Norm is the meaning of an act by which a certain behavior is commanded, permitted, or authorized. The norm, as the specific meaning of an act directed toward the behavior of someone else, is to be carefully differentiated from the act of will whose meaning the norm is: then norm is an *ought*, but the act of will is an *is*. Hence the situation constituted by such an act must be described by the statement: The one individual *wills* that the other individual *ought* to behave in a certain way. The first part of this sentence refers to an *is*, the existing fact of the first individual's act of volition; the second part to an *ought*, to a norm as the

meaning of that act. Therefore it is incorrect to assert - as is often done - that the statement: "An individual ought merely means that another individual wills something; that the *ought* can be reduced to an *is*."

The difference between *is* and *ought* cannot be explained further. We are immediately aware of the difference. Nobody can deny that the statement: "something is" - that is, the statement by which an existent fact is described - is fundamentally different from the statement: "something ought to be" - which is the statement by which a norm is described. Nobody can assert that from the statement that something is, follows a statement that something ought to be, or vice versa.

This dualism of *is* and *ought* does not mean, however, that there is no relationship between *is* and *ought*. One says: an *is* conforms to an *ought*, which means that something is as it ought to be; and one says: an *ought* is "directed" toward an *is* - in other words: something ought to be. The expression: "an *is* conforms to an *ought*" is not entirely correct, because it is not the *is* that conforms the *ought*, but the "something" that one time is and the other time ought to be - it is the "something" which figuratively can be designated as the content of the *is* or as the content of the *ought*.

Put in different words, one can also say: a certain something - specifically a certain behavior - can have the quality of *is* or of *ought*. For example: In the two statements, "the door is being closed" and "the door ought to be closed," the closing of the door in the former statement is pronounced as something that is, in the latter as something that ought to be. The behavior that is and the behavior that ought to be are not identical, but they differ only so far as the one is and the other ought to be. *Is* and *ought* are two different modi. One and the same behavior may be presented in the one or the other of the two modi. Therefore it is necessary to differentiate the behavior stipulated by a norm as a behavior that ought to be from the actual behavior that corresponds to it. We may compare the behavior stipulated by the norm (as content of the norm) with the actual behavior; and we can, therefore, judge whether the actual behavior conforms to the norm, that is, to the content of the norm.

The behavior as it actually takes place may or may not be equal to the behavior as it ought to be. But equality is not identity. The behavior that is the content of the norm (that is, the behavior that ought to be) and the actual behavior (that is, the behavior that is) are not identical, though the one may be *equal* to the other. Therefore, the usual way to describe the relation between an actual behavior and a norm to which the behavior corresponds: "the actual behavior is the behavior that - according to the norm - ought to be," is not correct. The behavior that is cannot be the behavior that ought to be. They differ with respect to the modus which is in one case the *is*, in the other the *ought*.

Acts whose meaning is a norm can be performed in various ways. For example, by a gesture: The traffic policeman, by a motion of his arms, orders the pedestrian to stop or to continue; or by a symbol: a red light constitutes a command for the driver to halt, a green light, to proceed; or by spoken or written words, either in the imperative form - be quiet! - or in the form of an indicative statement - I order you to be silent. In this way also permissions or authorizations may be formulated. They are statements about the act whose meaning is a command, a permission, an authorization. But their meaning is not that something is, but that

something ought to be. They are not - as they linguistically seem to be - statements about a fact, but a norm, that is to say, a command, a permission, an authorization.

A criminal code might contain the sentence: Theft is punished by imprisonment. The meaning of this sentence is not, as the wording seems to indicate, a statement about an actual event; instead, the meaning is a norm it is a command or an authorization, to punish theft by imprisonment. The legislative process consists of a series of acts which, in their totality, have the meaning of a norm. To say that acts, especially legislative acts, *create* or *posit* a norm, is merely a figure of speech for saying that the meaning or the significance of the act or acts that constitute the legislative process is a norm. It is, however, necessary to distinguish the subjective and the objective meaning of the act. *Öught* is the subjective meaning of every act of will directed at the behavior of another. But not every such act has also objectively this meaning: and only if the act of will has also the objective meaning of an *ought*, is this *ought* called a *norm*. If the *ought* is also the objective meaning of the act, the behavior at which the act is directed is regarded as something that *ought* to be not only from the point of view of the individual who has performed the act, but also from the point of view of the individual at whose behavior the act is directed, and of a third individual not involved in the relation between the two. That the *ought* is the objective meaning of the act manifests itself in the fact that it is supposed to exist (that the *ought* is valid) even if the will ceases to exist whose subjective meaning it is - if we assume that an individual ought to behave in a certain way even if he does not know of the act whose meaning is that he ought to behave in this way. Then the *ought*, as the objective meaning of an act, is a valid *norm* binding upon the addressee, that is, the individual at whom it is directed. The *ought* which is the subjective meaning of an act of will is also the objective meaning of this act, if this act has been invested with this meaning, if it has been authorized by a norm, which therefore has the character of a *higher* norm.

The command of a gangster to turn over to him a certain amount of money has the same subjective meaning as the command of an income-tax official, namely that the individual at whom the command is directed ought to pay something. But only the command of the official, not that of the gangster, has the meaning of a valid norm, binding upon the addressed individual. Only the one order, not the other, is a norm-positing act, because the official's act is authorized by a tax law, whereas the gangster's act is not based on such an authorizing norm. The legislative act, which subjectively has the meaning of *ought*, also has the objective meaning - that is, the meaning of a valid norm - because the constitution has conferred this objective meaning upon the, legislative act. The act whose meaning is the constitution has not only the subjective but also the objective meaning of *ought*, that is to say, the character of a binding norm, if - in case it is the historically first constitution - we presuppose in our juristic thinking that we ought to behave as the Constitution prescribes.

If a man in need asks another man for help, the *subjective* meaning of this request is that the other ought to help him. But in an objective sense he ought to help (that is to say, he is morally obliged to help) only if a general norm - established, for instance, by the founder of a religion - is valid that commands, *ÖLove your neighbor.ö* And this latter norm is objectively valid only if it is presupposed that one ought to behave as the religious founder has commanded. Such a presupposition, establishing the objective validity of the norms of a

moral or legal order, will here be called a *basic norm* (*Grundnorm*). Therefore, the objective validity of a norm which is the subjective meaning of an act of will that men ought to behave in a certain way, does not follow from the factual act, that is to say, from an *is*, but again from a norm authorizing this act, that is to say, from an *ought*.

Norms according to which men ought to behave in a certain way can also be created by custom. If men who socially live together behave for some time and under the same circumstances in the same way, then a tendency - that is, psychologically, a will - comes into an existence within the men to behave as the members of the group habitually do. At first the subjective meaning of the acts that constitute the custom is not an *ought*. But later, when these acts have existed for some time, the idea arises in the individual member that he ought to behave in the manner in which the other members customarily behave, and at the same time the will arises that the other members ought to behave in that same way. If one member of the group does not behave in the manner in which the other members customarily behave, then his behavior will be disapproved by the others, as contrary to their will. In this way the custom becomes the expression of a collective will whose subjective meaning is an *ought*. However, the subjective meaning of the acts that constitute the custom can be interpreted as an objectively valid norm only if the custom has been instituted by a higher norm as a norm-creating fact. Since custom is constituted by human acts, even norms created by custom are created by acts of human behavior, and are therefore - like the norms which are the subjective meaning of legislative acts - *öpositedö* or *öpositiveö* norms. Custom may create moral or legal norms. Legal norms are created by custom, if the constitution of the social group institutes custom - a specially defined custom - as norm-creating fact.

Finally it is to be noted that a norm need not be only the meaning of a real act of will; it can also be the content of an act of thinking. This is the case if the norm is only presupposed in our thinking. Just as we can imagine things which do not really exist but *öexistö* only in our thinking, we can imagine a norm which is not the meaning of a real act of will but which exists only in our thinking. Then, it is not a positive norm. But since there is a correlation between the ought of a norm and a will whose meaning it is, there must be in our thinking also an imaginary will whose meaning is the norm which is only presupposed in our thinking - as is the basic norm of a positive legal order.

c) *Validity and Sphere of Validity of the Norm*

By the word *övalidityö* we designate the specific existence of a norm. When we describe the meaning or significance of a norm-creating act, we say: By this act some human behavior is ordered, commanded, prescribed, forbidden, or permitted, allowed, authorized. If we use the word *ought* to comprise all these meanings, as has been suggested, we can describe the validity of a norm by saying: Something ought to, or ought not to, be done. If we describe the specific existence of a norm as *övalidityö*, we express by this the special manner in which the norm - in contradistinction to a natural fact - is existent. The *öexistenceö* of a positive norm - that is to say, its *övalidityö* - is not the same as the existence of the act of will, whose objective meaning the norm is. A norm can be valid even if the act of will whose meaning the norm is, no longer exists. Indeed, the norm does not become valid until the act of will whose meaning the norm is has been accomplished and hence has ceased to exist. The individual who has

created a legal norm by an act directed at the behavior of others, need not continue to will this conduct in order that the norm be valid. When the men who act as legislators have passed a statute regulating certain affairs and have put this statute into *force* (i.e., into validity), they turn in their decisions to the regulation of other affairs; and the statutes put into validity may be valid long after these men have died and therefore are unable to will anything. It is incorrect, therefore, to characterize norms in general, and legal norms in particular, as the *will* or the *command* of the legislator or state, if by *will* or *command* a psychological act of will is meant. The norm is the *meaning* of an act of will, not the act of will.

Since the validity of a norm is an *ought* and not an *is*, it is necessary to distinguish the validity of a norm from its effectiveness. Effectiveness is an *is-fact* - the fact that the norm is actually applied and the fact that people actually behave according to the norm. To say that a norm is *invalid*, however, means something else than that it is actually applied and obeyed; it means that it *ought* to be obeyed and applied, although it is true that there may be some connection between validity and effectiveness. A general legal norm is regarded as valid only if the human behavior that is regulated by it actually conforms with it, at least to some degree. A norm that is not obeyed anybody anywhere, in other words a norm that is not effective at least to some degree, is not regarded as a valid legal norm. A minimum of effectiveness is a condition of validity. *Validity* of a legal norm presupposes, however, that it is possible to behave in a way contrary to it: a norm that were to prescribe that something ought to be done of which everyone knows beforehand that it must happen necessarily according to the laws of nature always and everywhere would be as senseless as a norm which were to prescribe that something ought to be done of which one knows beforehand that it is impossible according to the laws of nature.

Nor do validity and effectiveness coincide in time. A legal norm becomes valid before it becomes effective, that is, before it is applied and obeyed; a law court that applies a statute immediately after promulgation - therefore before the statute had a chance to become *effective* - applies a valid legal norm. But a legal norm is no longer considered to be valid if it is permanently ineffective. Effectiveness is a condition of validity in the sense that effectiveness has to join the positing of a legal norm if the norm is not to lose its validity.

By effectiveness of a legal norm, which attaches a sanction to certain behavior and thus qualifies the behavior conditioning the sanction as illegal, that is, as *delict*, two facts may be understood: (1) that this norm is *applied* by the legal organs (particularly the law courts), which means, that the sanction in a concrete case is ordered and executed; and (2) that this norm is *obeyed* by the individuals subjected to the legal order, which means, that they behave in a way which avoids the sanction. If the stipulation of sanctions intends to prevent the commission of delicts, we are faced with the ideal case of the validity of a legal norm if this norm is never applied, because the awareness among those subjected to the legal order of the sanction to be executed in case of the commission of a delict has become the motive to refrain from committing the delict. In this situation, the effectiveness of the legal norm is confined to obedience to it. But obedience to the legal norm can be induced by other motives, if, for instance, the legal delict is at the same time a religious delict, obedience to the law may be caused not by the wish to avoid the legal sanction, but to avoid the religious sanction. In this

case the law is effective, that is, actually obeyed, because religion is effective. The relation between validity and effectiveness will be discussed later.

Let us take the statement: "The norm refers to a certain human behavior." If by this behavior we mean the behavior that constitutes the content of the norm, then the norm can also refer to other facts than human behavior - however, only to the extent that these are *conditions* or (if existent in reality) *effects* of human behavior. For example: A legal norm can prescribe that in the event of a natural catastrophe those not immediately affected are obliged to render aid to the victims as much as possible. If a legal norm establishes the death penalty for murder, then the delict as well as the sanction do not only consist in a certain human behavior - directed toward the death of another human being - but also in a specific effect of such behavior, namely the death of a human being, which is a physiological event, not a human behavior. Since human behavior, as well as its conditions and effects, occur in space and time the legal norm must refer to space and time. The validity of norms regulating human behavior in general, and the validity of legal norms in particular, therefore, must be defined in terms of space and time, since these norms refer to spatial and temporal events in their content. That a norm is "valid" means always that it is valid for some specified space and time; it means that it relates to a behavior that can take place only somewhere and sometime (although it may perhaps not actually take place).

The relation of the norm to space and time is the spatial and temporal *sphere of validity* of the norm. This sphere of validity can be limited or unlimited. The norm can be valid either for a definite space and time (that determined by the norm itself or by a higher norm): it regulates, then, only those events that occur within a certain space and during a certain time; or the norm can be valid everywhere and always, that is, it can refer to events no matter where and when they occur. This latter alternative would be the meaning of a norm which does not contain any spatial or temporal limitations. Such a norm is not valid beyond space and time; the sphere of its validity in that case, does not lack space and time; it merely is not limited to a specific space or a specific time - its spatial and temporal sphere of validity is unlimited. The sphere of validity of a norm is an element of its content; and this content, as we shall see, can to some extent be determined by another, higher norm.

As for the temporal sphere of validity of a positive norm, it is necessary to distinguish between the time before and after the enactment of the norm. In general, norms refer only to future behavior, but they may also refer to the past. For example, a legal norm which attaches a sanction to a certain behavior may prescribe that an individual ought to be punished even for behavior that had occurred before the legal norm was enacted whereby the behavior is qualified as a delict. In this case we say that the norm is retroactive. But a legal norm may refer to the past not only with respect to the delict but also with respect to the sanction. A legal norm may stipulate not only that under certain conditions, fulfilled before its enactment, a coercive act as a sanction ought to be executed in the future, but also that under these conditions a coercive act that actually has been performed in the past without being prescribed by a norm then valid, ought to have been performed; so that the character of a sanction is conferred upon this coercive act with retroactive force. For example: In Nationalist Socialist Germany certain coercive acts which at the time of their performance were legally murder,

were subsequently retroactively legitimized as "sanctions"; and the behavior of the victim which elicited the murder was subsequently qualified as a "delict".

A legal norm can retroactively annul the validity of an earlier norm in such a way *that* the coercive acts carried out as sanctions under the earlier norm are divested of their character as punishments or civil executions; and that the human behavior that was the condition of the sanction is divested of its character as a delict. For example: A government that has come to power by revolution can, by a retroactive statute, repeal a statute enacted by the over-thrown government, under which certain acts committed by members of the revolutionary party had been punished as political crimes. Of course, that which had been done cannot be undone; but the normative interpretation in general, and the legal qualifications in particular, of acts can be subsequently changed on the basis of norms which are enacted after the acts have been performed.

In addition to a spatial and temporal sphere of validity of a norm, a personal and material sphere of validity is to be distinguished. For the behavior that is regulated by norms is the behavior of human beings and every behavior regulated by a norm contains a personal and a material element: the *individual* who ought to behave in a certain way, and the *manner* in which he ought to behave. Both elements are inseparably linked. In this respect it must be carefully observed that the norm does not refer to the individual as such, but to a definite behavior of an individual. The personal sphere of validity refers to the personal element of the behavior determined by the norm. This sphere of validity, again, can be unlimited or limited: a moral order may claim to be valid for all individuals; that is, the norm of this order regulates the behavior of all individuals and not only of individuals specifically qualified by the order; this is usually expressed by saying that this order addresses itself to all individuals. On the other hand, the behavior determined by the norms of a national legal order is only the behavior of individuals who live within the state territory and of the state's citizens who happen to be abroad. This is expressed by saying that the national legal order regulates only the behavior of human beings determined in this way - only these human beings are subject to the national legal order; in other words: the personal sphere of validity is limited to these individuals.

We speak of the material sphere of validity when we have in mind the various provinces of human behavior that are subject to regulation such as economic, religious, political behavior. A norm that regulates the economic behavior of men is said to be regulating the economy, one that regulates religious behavior to be regulating religion, and so on. One speaks of different objects of *regulation* and means by this the different directions of the behavior regulated by norms. What the norms of an order regulate is always human behavior - only *it* can be regulated by norms. Facts other than human behavior can be made the content of norms only in connection with human conduct - only as a condition or as the effect of it. The concept of a material sphere of validity is applied, for example, when a total legal order - such as that of a federal state comprising several member states - is articulated into several partial legal orders, whose spheres of validity are determined with respect to the objects to be regulated. For example, if the legal orders of the member states are competent to regulate only those objects which are specifically enumerated by the constitution; if - in other words - the regulating of these objects falls within the competence of the member states, whereas the

regulation of all other objects is reserved for the legal order of the federation, which, in itself is also a partial legal order. The material sphere of validity of a total legal order is always unlimited, in the sense that such an order, by its very nature, can regulate the behavior of the individuals subjected to it in all directions.

d) Positive and Negative Regulations: Commanding, Authorizing, Permitting

The behavior regulated by a normative order is either a definite action or the omission (nonperformance) of such an action. Human behavior, then, is either positively or negatively regulated by the normative order. Positively, when a definite action of a definite individual or when the omission of such an action is commanded. (When the omission of an action is commanded, the action is forbidden.) To say that the behavior of an individual is commanded by an objectively valid norm amounts to the same as saying the individual is obliged to behave in this way. If the individual behaves as the norm commands he fulfills his obligation - he obeys the norm; if he behaves in the opposite way, he violates the norm - he violates his obligation. Human behavior is positively regulated also, when an individual is authorized by the normative order to bring about, by a certain act, certain consequences determined by the order. Particularly an individual can be authorized (if the order regulates its own creation) to create norms or to participate in that creation; or when, in case of a legal order providing for coercive acts as sanctions, an individual is authorized to perform these acts under the conditions stipulated by the legal order; or when the norm permits an individual to perform an act, otherwise forbidden - a norm which limits the sphere of validity of a general norm that forbids the act. An example for the last-mentioned alternative is self-defense: although a general norm forbids the use of force of one individual against another, a special norm permits such use of force in self-defense. When an individual acts as he is authorized by the norm or behaves as he is permitted by a norm, he applies the norm. The judge, authorized by a statute (that is, a general norm) to decide concrete cases, applies the statute to a concrete case by a decision which constitutes an *individual* norm. Again, authorized by a judicial decision to execute a certain punishment, the enforcement officer applies the individual norm of the judicial decision. In exercising self-defense, one applies the norm that permits the use of force. Further, a norm is also applied in rendering a judgment that an individual does, or does not, behave as he is commanded, authorized, or permitted by a norm.

In the broadest sense, any human behavior determined by a normative order as condition or consequence, can be considered as being authorized by this order and in this sense as being positively regulated. Human behavior is regulated negatively by a normative order if this behavior is not forbidden by the order without being positively permitted by a norm that limits the sphere of validity of a forbidding norm, and therefore is permitted only in a negative sense. This merely negative function of permitting has to be distinguished from the positive function of permitting - positive, because it is the function of a positive norm, the meaning of an act of will. The positive character of a permission becomes particularly apparent when the limitation of the sphere of validity of a norm that forbids a certain conduct is brought about by a norm that permits the otherwise forbidden conduct under the condition that the permission has to be given by an organ of the community authorized thereto. The negative as well as positive function of permitting is therefore fundamentally connected with

the function of commanding A definite human behavior can be permitted only within a normative order that commands different kinds of behavior.

“To permit” is also used in the sense of “to entitle” (*berechtigen*). If A is commanded to endure that B behaves in a certain way, it is - said that B is permitted (that is, entitled) to behave in this way. And if A is commanded to render a certain service to B, it is said that B is permitted (that is, entitled) to receive the service of A. In the first example, then, the sentence “B is permitted to behave in a certain way” says the same as the sentence: “A is commanded to endure that B behaves in a certain way.” And in the second example the sentence: “B is permitted to receive a certain service from A” says the same as the sentence: “A is commanded to render a service to B.” The quality of B’s behavior “to be permitted” is merely the reflex of the quality of A’s behavior “to be commanded.” This kind of permitting is not a function of the normative order different from its function of commanding.

5. The Social Order *Social Orders Prescribing Sanctions*

The behavior of an individual can be - but need not be - in relation to other individuals: a man can behave in a certain way toward another man, but he can do so also toward animals, plants, and inanimate objects. The relation of one individual to other individuals can be direct or indirect. Murder is the behavior of a murderer toward the murdered - a direct relation between one individual and another. He who destroys a valuable object acts directly in relation to a thing but indirectly in relation to men who are interested in the object, particularly its owners. A normative order that regulates human behavior in its direct or indirect relations to other human beings, is a social order. Morals and law are such social orders.

On the other hand, logic has as its subject matter a normative order that does not have a social character. For the acts of human thought, which are regulated by the norms of this order, do not refer to other human beings; one does not think “toward” another man in the way that one acts toward another.

The behavior of one individual toward others may be useful or detrimental for them. From a psychological-sociological point of view, the function of every social order is to bring about a certain behavior of the individuals subject to this order; to motivate them to refrain from certain acts deemed detrimental “socially,” that is, to other individuals; and to perform certain acts deemed socially useful. This motivating function is rendered by the idea men have of norms, which command or forbid certain human acts.

Depending on the manner in which human acts are commanded or forbidden, different types may be distinguished - they are ideal types, not average types. The social order may command certain human behavior without attaching any consequence to the obeying or the disobeying of the command. Or the social order may command a definite human behavior and at the same time connect with that behavior the granting of an advantage, a reward; or with the opposite behavior a disadvantage, punishment in the broadest sense of the word. The principle, to react upon a certain human behavior with reward or punishment is the principle

of retribution. Reward and punishment may be called "sanctions," but usually only punishment, not reward, is so called.

Finally a social order may - and a legal order does - command a certain behavior just attaching a disadvantage to the opposite behavior, for example the deprivation of life, health, freedom, honor, material goods, in the broadest sense the word. Therefore, one may say that a certain behavior is "commanded" by a social order and - in case of a legal order - is legally commanded, only insofar as the contrary behavior is a condition of a sanction (in the narrower sense of the word). If a social order - like the legal order - commands a behavior by prescribing a sanction in case of the opposite behavior, this set of circumstances can be described by a sentence stating that in the event of a certain behavior a certain sanction *ought* to be executed. By this is implied that the behavior conditioning the sanction is prohibited, the opposite behavior commanded: The behavior which is "commanded" is not the behavior which "ought" to be executed. That a behavior is "commanded" means that the contrary behavior is the condition of a sanction that ought to be executed. The execution of the sanction is *commanded* (i.e., it is the content of a legal obligation if the non-execution is the condition of a sanction. If this is not the case, the sanction is only authorized, not commanded. Since this regression cannot go on indefinitely, the last sanction in this chain can only be authorized, not commanded.

It follows that within such a normative order the same behavior may be - in this sense - commanded and forbidden at the same time, and that this situation may be described without logical contradiction. This is the case if a certain conduct is the condition of a sanction and at the same time the omission of this conduct is also the condition of a sanction. The two norms: "a ought to be" and "a ought not to be" exclude each other insofar as they cannot be obeyed or applied by the same individual at the same time; only one can be valid. But the two norms: "If a is, x ought to be" and "If non-a is, x ought to be" are not mutually exclusive. These two norms can be valid at the same time. Under a legal order a situation may exist in which a certain human behavior and at the same time the opposite behavior is the condition of a sanction which ought to be executed. The two norms can be valid side by side. They can be described without logical contradiction, but they express two conflicting political tendencies, a teleological conflict. The situation is possible, but politically unsatisfactory. Therefore legal orders usually contain rules according to which one of the two norms is invalid or may be invalidated.

Insofar as the evil that functions as a sanction - the punishment in the widest sense - has to be inflicted against the will of the affected individual; and insofar as, in case of resistance, the evil has to be inflicted by force, the sanction has the character of a coercive act. A normative order, which prescribes coercive acts as sanctions (that is, as reactions against a certain human behavior), is a coercive order. But coercive acts can be prescribed - and are so prescribed in a legal order, as we shall see - not only as sanctions, but as reactions against socially undesirable facts that do not have character of human behavior and are therefore not to be regarded as prohibited.

From a sociological-psychological point of view, reward or punishment are ordered to make the desire for reward and the fear of punishment the motives for a socially desirable

behavior. But actually this behavior may be brought about by other motives. According to its inherent meaning, the order may prescribe sanctions without regard to the motives that actually, in each single case have brought about the behavior conditioning the sanctions. The meaning of the order is expressed in the statement that in the case of a certain behavior - brought about by whatever motives - a sanction (in the broader sense of the word, that is, reward or punishment) ought to be executed. Indeed, an order may attach a reward to a behavior only if it had not been motivated by the desire for reward. For example, a moral order may honor only the one who does good deeds for their own sake, not for honor's sake. Since in the foregoing pages the validity of a social order has been distinguished from its effectiveness, it should be noted that a social order prescribing rewards or punishments is effective in the literal sense of the word insofar only as the behavior conditioning the reward is caused by the desire for the reward, and the behavior avoiding the punishment is caused by the fear of punishment. However, it is usual to speak of an effective order also if the behavior of the individuals subjected to the order by and large corresponds to the order, that is to say, if the individuals by and large by their behavior fulfill the conditions of the rewards and avoid the conditions of the punishments, without regard to the motive of their behavior. Used in this way the concept of effectiveness has a normative, not a causal, meaning.

a) *Are There Social Orders without Sanctions?*

Distinctly different from a social order prescribing sanctions (in the wider sense of the word) is one that commands a certain behavior without attaching reward for it or punishment for its opposite - that is, an order in which the principle of retribution is not applied. Usually the moral order is considered to be such a social order, and is thereby distinguished from the legal order. Jesus, in his Sermon on the Mount, does not seem, at first glance to posit a moral order with sanctions, because he decidedly rejects the retribution principle of the Old Testament - evil for evil, good for good: "You have heard that it was said, 'An eye for an eye and a tooth for a tooth.' But I say to you, Do not resist one who is evil.... You have heard that it was said, 'You shall love your neighbor and hate your enemy.' But I say to you, Love your enemies." For if you love those who love you, what reward have you? Do not even the tax collectors do the same? Evidently Jesus refers here to the heavenly reward, and therefore even in this moral order of highest standard the principle of retribution is not entirely excluded. Heavenly (although not secular) reward is promised to the one who renounces the application of the principle of retribution in this world - who does not requite evil with evil, and not only the good with good. Also punishment in the other world is included in this moral order which does not provide for punishment in this world. It is not a moral order without sanctions, but an order with transcendental sanctions, and in that sense a religious order.

In order to judge the possibilities of a sanctionless moral order, it must be noted that: if a moral order commands a certain behavior, it commands simultaneously that the commanded behavior of the one subject is to be approved by the others opposite behavior disapproved. If somebody disapproves the commanded behavior or approves the opposite behavior, then he behaves immorally and must himself be morally disapproved. Approval and disapproval by the fellow members of the community are sensed as reward and punishment and may therefore be interpreted as sanctions. Sometimes they are more effective sanctions than other

forms of reward and punishment, because they satisfy or hurt man's desire for reputation, which is one of the most important components of the instinct for self-preservation. It is to be noted that the two moral norms - the one commanding a certain behavior and the one prescribing disapproval for the opposite behavior - are essentially connected and form a unity. It is therefore doubtful whether a distinction between social orders with and without sanctions is possible. The only relevant difference between social orders is not that some prescribe sanctions and the others do not, but that they prescribe different types of sanctions.

c) Transcendental and Socially Immanent Sanctions

The sanctions prescribed by a social order are either transcendental or socially immanent. Transcendental sanctions are those that according to the faith of the individuals subjected to the order originate from a superhuman authority. Such a faith is a specific element of a primitive mentality. Early man interprets natural events that affect his immediate interest according to the principle of retribution: favorable events as rewards for the observance, unfavorable events as punishment for disregard of the existing social order. Originally it was probably the spirits of the dead which, according to the religious ideas of early man, reward socially good behavior with success in the hunt, a rich harvest, victory in battle, health, fertility, and long life; and which punish bad behavior with disease and death. Nature, socially interpreted, appears as a normative social order connecting a definite human behavior with definite sanctions. This order has a religious character. But even within religions of the highest standards, such as the Judeo-Christian, the normative interpretation of nature plays a part that is not to be underestimated. Even modern man, when hit by misfortune, will often instinctively ask: What have I done to deserve such punishment? He will be inclined to interpret his good fortune as reward for conscientious observance of God's commands. In this respect higher developed religions are distinguished from the primitive ones only so far as they add to the sanctions to be executed in this world those that are imposed in the other world - by God rather than by the spirits of the dead. These sanctions are transcendental not only in the sense that they originate from a superhuman and therefore supersocial authority, but that they are executed outside society and even outside this world within a transcendental sphere.

Different from the transcendental sanctions are those that not only take place in this world and within society, but are executed by the members of the society and may therefore be described as "socially immanent" sanctions. These may consist merely in the approval or disapproval expressed by the fellow members or in specific acts directed against others, that is, in acts to be performed by certain individuals designated by the social order in a procedure regulated by this order. Then one can speak of socially organized sanctions. The oldest sanction of this kind is blood revenge as practiced in primitive society. This is a sanction by which the primitive social order reacts against the fact that a member of a group constituted by blood relationship (the narrower or wider family) kills the member of another group of this kind in a natural way or by magic. It is to be executed by the members of the latter against the members of the former group. Murder within a group originally was probably sanctioned only by the revenge taken by the spirit of the murdered on the murderer. But insofar as the spirit of the dead has power only within his own group, a murder committed by a member of another group can be revenged only by acts of the victim's relatives. Only the nonfulfillment of the

obligation for revenge is subject to the transcendental sanction of revenge from the soul of the murdered. It should be noted that blood revenge, the oldest socially organized sanction, originally worked only in the relation between groups. It developed to a sanction functioning within one and the same group only when the social community comprised several groups constituted by blood relationship and hence was larger than a mere family group.

Sociologically, the religious development was characterized by centralization of the superhuman authority, increase of its power, and increase of the distance between the authority and man. The many spirits of the dead were reduced to a few gods and finally to one all-powerful God transferred to another world. How much the social idea of retribution dominated this development shows the fact that when man in his faith imagined in addition to this world another world, then this other world, in accordance with the principle of reward and punishment, split into a heaven for the good and a hell for the evil.

It is remarkable that of the two sanctions, reward and punishment, the latter plays a much more important role in social reality than the former. This is shown not only by the fact that the most important social order, the legal order, essentially makes use only of punishment, but especially clearly under a social order which still has a purely religious character, that is, a social order guaranteed only by transcendental sanctions. The morally or legally correct behavior of primitive men, especially in the observance of the numerous prohibitions - the so-called tabus - is determined primarily by the fear of misfortunes imposed by a superhuman authority - the spirits of the dead - as a reaction against the violation of the traditional order. The hope of reward, if compared with the fear that dominates the life of the primitives, plays only a subordinate role. In the religious beliefs of civilized man, too, according to which divine retribution is not (or not only) imposed in this world but in the world beyond, fear of punishment after death takes first place. The image of hell as the place of punishment is much more vivid than the usually vague idea of a life in heaven which is the reward for piety. Even when no limits are imposed on man's wish-fulfilling phantasy, it produces a transcendental order which is not fundamentally different from that of the empirical society.

6. The Legal Order

a) *The Law: An Order of Human Behavior*

A theory of law must begin by defining its object matter. To arrive at a definition of law, it is convenient to start from the usage of language, that is, to determine the meaning of the word *řlawř* as equivalent to the German word *Recht*, French *droit*, Italian *diritto*. Our task will be to examine whether the social phenomena described by these words *have* common characteristics by which they may be distinguished from similar phenomena, and whether these characteristics are significant enough to serve as elements for a concept of social-scientific cognition. The result of such an investigation could conceivably be that the word *řlawř* and its equivalents in other language designates so many different objects that they cannot be comprehended in one concept. However, this is not so. Because, when we compare the objects that have been designated by the word *řlawř* by different peoples at different times, we see that all these objects turn out to be *orders of human behavior*. An *řorderř* is a system of norms whose unity is constituted by the fact that they all have the same reason for their validity; and the reason for the validity of a normative order is a basic norm - as we shall

see -from which the validity of all norms of the order are derived. A single norm is a valid legal norm, if it corresponds to the concept of *law* and is part of a legal order; and it *is* part of a legal order, if its validity is based on the basic norm of that order.

The norms of a legal order regulate human behavior. At first sight it seems as if this sentence applied only to the social orders of civilized peoples, because in primitive societies the behavior of animals, plants, and even inanimate objects is also regulated by a legal order. For example, we read in the Bible that an ox that has killed a man ought to be killed - evidently as a punishment. In ancient Athens, there was a special Court, in which a stone or spear or any other object could be tried by which a man - presumably inadvertently - had been killed. In the Middle Ages it was possible to sue an animal, for example a bull that had caused the death of a man or grasshoppers that had destroyed a harvest. The accused animal was condemned and executed in formal legal procedure, exactly like a human criminal. If the sanctions, provided by the legal order, are directed not only against men but also against animals, this means that not only human behavior, but also the behavior of animals is legally commanded. This means further: if that which is legally commanded is to be regarded as the content of a legal duty, then not only men, but also animals are regarded as being obliged to behave in a certain way. This, in our modern point of view, absurd legal content is the result of animistic ideas, according to which not only men, but also animals, and inanimate objects have a *öoulo* and are therefore basically not different from human beings. Consequently sanctions, and therefore norms that establish legal duties, are applicable to men as well as animals and things. Although modern legal orders regulate only the behavior of men, not of animals, plants, and things it is not excluded that these orders prescribe the behavior of man toward animals, plants, and things. For example, the killing of certain animals (in general or at specific times), the damaging of rare plants or historically valuable buildings may be prohibited. But these legal norms do not regulate the behavior of the protected animals, plants, and things, but of the men against whom the threat of punishment is directed.

This behavior may be a positive action or nonaction - a lack of action, an omission, a forbearance, a refrainment from action. The legal order, as a social order, regulates positively the behavior of individuals only so far as it refers, directly or indirectly, to other individuals. The object of regulation by a legal order is the behavior of one individual in relation to one, several, or all other individuals - the mutual behavior of individuals. The relation of the behavior of one man to others may be an individual one: for example, the norm that obliges every man to refrain from killing other men; or the norm that obliges the debtor to pay the creditor or the norm that obliges everybody to respect the property of others. But the relation may also have a collective character. For example, the behavior prescribed by the norm obliging a man to do military service, is not the behavior of an individual versus another individual, but versus the entire social community - versus all individuals subject to the legal order. The same is true where suicide attempt is punishable. And in the same way the mentioned norms protecting animals, plants, and inanimate objects may be interpreted as social norms. The legal authority commands a certain human behavior, because the authority, rightly or wrongly, regards such behavior as necessary for the human legal community. In the last analysis, it is this relation to the legal community which is decisive for the legal regulation of the behavior of one individual to another. For the legal norm obliges the debtor

not only and, perhaps, not so much in order to protect the creditor, but in order to maintain a certain economic system.

b) The Law: A Coercive Order

The first characteristic, then, common to all social orders designated by the word *ōlawō* is that they are orders of human behavior. A second characteristic is that they are *coercive orders*. This means that they react against certain events, regarded as undesirable because detrimental to society, especially against human behavior of this kind, with a coercive act; that is to say, by inflicting on the responsible individual an evil - such as deprivation of life, health, liberty, or economic values - which, if necessary, is imposed upon the affected individual even against his will by the employment of physical force. By the coercive act an evil is inflicted in the sense that the affected individual ordinarily regards it as such, although it may occasionally happen that this is not so. For example, somebody who has committed a crime may regret his action so much that he actually wishes to suffer the punishment of the law and therefore does not regard it as an evil; or somebody commits a crime in order to go to jail where he can be sure of food and shelter. But these are, of course, exceptions. Since, ordinarily, the affected individual regards the coercive act as an evil, the social orders, designated as *ōlawō* are coercive orders of human behavior. They command a certain human behavior by attaching a coercive act to the opposite behavior. This coercive act is directed against the individual who behaves in this way (or against individuals who are in some social relation to him). That means: the coercive order authorizes a certain individual to direct a coercive act as a sanction against another individual. The sanctions prescribed by the legal order are socially immanent (as distinguished from transcendental) sanctions; besides, they are socially organized (as distinguished from mere approval or disapproval).

By prescribing coercive acts, a legal order may not only react against a certain human behavior, but also against other socially detrimental facts, as will be described later. In other words: Whereas the coercive act prescribed by the legal order is always the behavior of a certain individual, the condition to which the coercive act is attached need not necessarily be the behavior of an individual but may be another fact, regarded as socially detrimental. As we shall see, the coercive act prescribed by the legal order may be interpreted as an action of the community constituted by the legal order and especially as a reaction of the legal community against a socially detrimental fact. That means that the coercive act may be *attributed* to this community; which is a figurative expression of the mental operation by which we refer the coercive act prescribed by the legal order to this legal order, the unity of which we personify as an acting entity. If the socially detrimental fact against which the community reacts with a coercive act is a definite human behavior, the reaction is interpreted as a sanction. That the law is a coercive order means that the legal norms prescribe coercive acts which may be attributed to the legal community. This does not mean that the execution of the sanctions each time requires the application of physical force; this is necessary only if execution meets resistance, which ordinarily does not happen.

Modern legal orders sometimes contain norms that provide for rewards, such as titles or decorations, for certain meritorious acts. But rewards are not an element common to all social orders designated as law; they are not an essential function of these orders. Within these

coercive orders they play a subordinate role. Besides, these norms authorizing certain organs to confer titles or decorations on individuals who have distinguished themselves in some way or another have a fundamental connection with the sanction-prescribing norms: For the use of a title or the display of a decoration is either legally not prohibited, that is, negatively permitted; or - and this is the usual situation - it is positively permitted, which means it is forbidden, unless expressly permitted. The legal situation, then, can only be described as a norm-stipulated restriction of the validity of a prohibitive norm; in other words, by referring to a coercive norm.

As a coercive order, the law is distinguished from other social orders. The decisive criterion is the element of force - that means that the act prescribed by the order as a consequence of socially detrimental facts ought to be executed even against the will of the individual and, if he resists, by physical force.

The coercive acts prescribed by the legal order as sanctions

Insofar as the coercive act prescribed by the legal order has the function of a reaction against a human behavior determined by the legal order, then this coercive act has the character of a sanction. The human behavior against which the coercive act is directed is to be considered as prohibited, illegal - as a delict. It is the opposite of *that* behavior that is regarded as commanded or legal, namely the behavior that avoids the application of the sanction. That the law is characterized as a 'coercive order' does not mean - as is sometimes asserted - that it 'enforces' the legal, that is, the commanded, behavior. This behavior is not enforced by the coercive act, because the coercive act is to be executed precisely when an individual behaves in the prohibited, not the commanded, manner. It is exactly for this case that the coercive act as a sanction is prescribed. Perhaps, however, the mentioned assertion should be taken to mean that the law, by prescribing sanctions, tries to induce men to behave in conformity with its command, in that the wish to avoid the sanctions becomes the motive that brings about this behavior. However this motivation in question is only a possible, not a necessary, function of the law; the legal - that is, the commanded - behavior may be brought about by other motives also, especially by religious and moral ones. And this happens frequently enough. The coercion that is implied in the motivation is a psychic coercion, which is a possible effect of the idea an individual has of the law, and which takes place within this individual. And this psychic coercion must not be confused with the prescription of the coercive act, which takes place within the legal order. Every effective social order exerts some kind of psychic coercion, and some orders - such as the religious order - in much higher degree than the legal order. This psychic coercion, then, is not a characteristic that distinguishes the law from other social orders. The law is not a coercive order in the sense that it exerts a psychic coercion; but in the sense that it prescribes coercive acts, namely the forcible deprivation of life, freedom, economic and other values as a consequence of certain conditions: These conditions are in the first place - but not exclusively - a definite human behavior, which precisely by being a condition of a sanction assumes the character of legally prohibited (illegal) behavior - a delict.

The monopoly of force of the legal community

Although the various legal orders largely agree about the coercive acts which may be attributed to the legal community - they always consist in the deprivation of the mentioned goods - these orders differ concerning the conditions to which the coercive acts are attached. They differ particularly concerning the human behavior whose opposite should be brought about by stipulating the sanctions, that is, concerning the socially desired status, which consists in the legal behavior prescribed by the legal order; in other words, concerning the *legal value* constituted by the legal norms. The development of the law from primitive beginnings to its present stage in the modern state displays, concerning the legal value to be realized, a tendency that is common to all legal orders. It is the tendency gradually and increasingly to prohibit the use of physical force from man to man. Use of force is prohibited by making it the condition for a sanction. But the sanction itself is a use of force. Therefore the prohibition of the use of force can only be a limited one; and one must distinguish between a permitted and a prohibited use of force. It is permitted as a reaction against a socially undesirable fact, especially against a socially detrimental human behavior, as a sanction, that is, as an authorized use of force attributable to the legal community. This distinction does not yet mean, however, that the use of force other than legally authorized as reaction against an undesirable fact, is prohibited and therefore illegal. Primitive legal orders do not prohibit all other kinds of use of force. Even the killing of men is prohibited to only a limited degree. Only the killing of free fellow countrymen is considered to be a crime in primitive societies, not the killing of aliens or slaves. The killing of the latter, insofar as it is not prohibited, is - in the negative sense - permitted. But it is not authorized as a sanction! Gradually, however, the principle is recognized that every use of physical force is prohibited unless - and this is a limitation of the principle - it is especially authorized as a reaction against a socially detrimental fact attributable to the legal community. In this case, the legal order determines exhaustively the conditions under which (and the men by whom) physical force may be used. Since the individual authorized to use force may be regarded as an organ of the legal order (or of the community constituted by the legal order), the execution of coercive acts by these individuals may be attributed to the community. Then we are confronted with a monopoly of force of the legal community. The monopoly is decentralized if the individuals authorized to use force do not have the character of special organs acting according to the principle of division of labor but if the legal order authorizes all individuals to use force who consider their interests violated by the illegal conduct of others; in other words if the principle of self-help still prevails.

Legal order and collective security

When the legal order determines the conditions under which, and the individuals by whom, physical force is to be used, it protects the individuals who live under this order against the use of force by other individuals. When this protection has reached a certain minimum we speak of collective security, because the security is guaranteed by the legal order as a social order. This minimum of protection against the use of physical force can be regarded as existing even when monopoly of force is decentralized, that is, even when self-help still prevails. It is possible to consider such a state as the lowest degree of collective

security. However, we may speak of collective security only in a narrower sense if the monopoly of force of the legal community has reached a minimum of centralization, so that self-help is excluded, at least in principle. Collective security, in this narrower sense, exists when at least the question of whether in a concrete situation the law was violated and of who is responsible for it, is not answered by the parties involved, but by a special organ, an independent court; when, therefore, the question of whether in a concrete case, the use of force is a delict or legal and an act that may be attributed to the community, particularly a sanction, can be objectively decided.

Collective security, then, can have different degrees depending on the degree of centralization of the procedure by which in concrete cases the existence of the conditions is determined to which the coercive action of a sanction is attached; and by which this coercive action is carried out. Collective security reaches its highest degree when the legal order installs law courts with compulsory jurisdiction and central executive organs whose coercive means are so effective that resistance ordinarily is hopeless. This is the situation in the modern state, which represents a highly centralized legal order.

The aim of collective security is peace, because peace is the absence of the use of physical force. By determining the conditions and the executive organs for the use of force, by establishing a monopoly of force of the legal community, the legal order pacifies this community. But the peace of law is only a relative peace. The law does not exclude the use of physical force of man versus man. The law is not a forceless order, as postulated for by utopian anarchism. The law is an order of coercion and, as a coercive order - according to its evolution - an order of security, that is, of peace. But precisely as the concept of collective security may be defined in a narrower sense and applied only where the monopoly of force of society is centralized, so we may assume that a pacification of the legal community takes place only on that level of legal development in which self-help is prohibited, at least in principle, and collective security in the narrower sense of the word prevails. Actually, we can hardly assume even a relative pacification of the legal community as long as the law is still in a primitive condition. As long as no courts exist that objectively ascertain whether a prohibited use of force has taken place; as long as every individual who considers his rights violated by another is authorized to use force as a sanction; as long as the individual against whom force was used is authorized to react against this use of force by the use of force, which he can justify as a sanction (that is, as a reaction against a wrong suffered) as long as blood revenge is a legal institution and the duel legally permitted and even regulated by law; as long as only the killing of free fellow countrymen, but not the killing of aliens and slaves is regarded as a crime; as long, finally, as war is not prohibited by international law in the relations between states: one cannot very well assert that the state of law is necessarily a state of peace and that the securing of peace is an essential function of the law. All one can say is that the development of the law runs in this direction. Therefore, even if peace is regarded as an absolute moral value or as a value common to all positive moral orders - which, as we shall see later, is not the case - the securing of peace, the pacification of the legal community, cannot be considered as an essential moral value common to all legal orders; it is not the *ömoral minimumö* common to all law.

The prohibition of all use of force reveals the tendency to enlarge the sphere of facts that are established by the legal order as condition of coercive acts; this tendency has developed far beyond this prohibition, by the attachment of coercive acts as consequences not only to the use of force, but also to other acts, and even to omissions of acts (This constitutes a significant modification of my view on the relation between law and peace as presented in my *General Theory of Law and State*, pp. 22.) If the coercive act established by the law is a reaction against socially detrimental behavior and if the function of such an establishment is to prevent such a behavior (individual or general prevention), then this act has the character of a sanction in the specific and narrower sense of the word; and the fact that a certain behavior is made the condition for a sanction in this sense means that this behavior is legally prohibited, a delict. There is a correlation between this concept of sanction and the concept of delict. The sanction is the consequence of the delict; the delict is the condition of the sanction. In primitive legal orders the reaction of the sanction against the delict is entirely decentralized. The reaction is left to the discretion of the individuals whose interests have been violated by the delict. They are authorized to identify *in concreto* as a delict what has been so identified by the legal order only *in abstracto*; and they are authorized to execute the sanction established by the legal order. The principle of self-help prevails. In the course of evolution this reaction against the delict is increasingly centralized, in that the identification of the delict and the execution of the sanction is reserved for special organs: the courts and executive authorities. Thereby the principle of self-help is limited, but it cannot be entirely eliminated. Even in the modern state, in which centralization has reached the highest degree, a minimum of self-help remains: self-defense. Besides, there are other cases in modern, centralized legal orders - cases that have been largely ignored in legal theory - in which, to a limited extent, the use of physical force is not reserved for special organs, but left to the discretion of individuals interested in it. We speak of the right of corporal punishment that even modern legal orders concede to parents as a means of educating their children. It is limited to the extent that it must not harm the child's health; but the decision, which behavior of the child is a condition of corporal punishment, that is, which behavior is pedagogically and hence socially undesirable, is in principle left to the parents who may pass this right to professional educators.

Coercive acts other than sanctions

As the state develops from a judicial to an administrative community, the sphere of facts that are made conditions for coercive acts grows. Now not only socially undesirable actions and omissions but also other facts, not having the character of delicts, are included. Among those facts is the suspicion that a definite individual has committed a delict. Special organs, having the character of police agents, may be legally authorized to deprive the suspected individual of his liberty in order to safeguard legal proceedings against him, in which it will be decided whether he has, in fact, committed the delict of which he is suspected. The condition for the deprivation of liberty is not a definite behavior of the individual, but the suspicion of such a behavior. Similarly, the police may be authorized by the legal order to take persons in so-called protective custody, that is, to deprive them of their liberty, in order to protect them against illegal aggression that threatens them. Further, modern legal orders prescribe the forced internment in institutions of insane individuals constituting a public

danger, and in hospitals of persons with contagious diseases. Further, property may be expropriated if necessary in the public interest, domestic animals may be destroyed if infected with an epidemic illness, buildings may be torn down by force to prevent their collapsing or the spread of a conflagration. The legal order of totalitarian states authorizes their governments to confine in concentration camps persons whose opinions, religion, or race they do not like; to force them to perform any kind of labor; even to kill them. Such measures may morally be violently condemned; but they cannot be considered as taking place outside the legal order of these states. All these acts constitute the same forced deprivation of life, liberty, and property as the sanctions of the death penalty, imprisonment, and civil execution. But, as we have said, they differ from sanctions insofar as they are not the consequence of a legally ascertained, socially undesirable action or omission of an individual; the condition is not a legally ascertained delict committed by an individual. Delict is a definite human behavior (an action or omission) which, because socially undesirable, is prohibited by the legal order and it is prohibited insofar as the legal order attaches to it (or, more correctly formulated: to the fact that it is ascertained in a legal procedure) a coercive act, as this fact is made by the legal order the condition of a coercive act. And this coercive act is a sanction (in the sense of a reaction against a delict) and as such distinguishable from other legally established coercive acts only in that the conditioning fact of the former is a legally ascertained human behavior, whereas the coercive acts which have not the character of sanctions are conditioned by other facts. Some of the coercive acts belonging to the second category may be interpreted as sanctions, if the concept of "sanction" is not limited to reactions against a definite human behavior whose actual existence is legally ascertained, but is extended to situations in which the coercive act is provided for as reaction against a delict - but against a delict whose commission by a definite individual has not yet been legally ascertained, though the individual may be suspected of having committed it and may therefore be arrested by the police: and to situations in which the coercive act is a reaction against a delict that has not even been committed yet but is expected in the future as a possibility - as in the cases of internment of dangerous psychopaths or persons of undesired opinions, religions, and races, insofar as they are interned in concentration camps to prevent them from a socially undesired behavior of which, rightly or wrongly, in the opinion of the legal authority, they are considered capable. Apparently, this motive is the basis for the limitations of liberty to which, in a war, the citizens of the one belligerent party living on the territory of the other are subjected by the latter. If we extend the concept of "sanction" in this sense, it is no longer congruent with "of a delict." Sanction in this wider sense of the word does not necessarily *follow* the delict.

Finally the concept of sanction may be extended to include all coercive acts established by the legal order, if the word is to express merely that the legal order reacts with this action against socially undesirable circumstances and qualifies in this way the circumstances as undesirable. This, indeed, is the common characteristic of all coercive actions commanded or authorized by legal orders. The concept of "sanction," understood in this broadest sense, then, the force monopoly of the legal community, may be formulated by the alternative: "The use of force of man against man is either a delict or a sanction."

The minimum of liberty

As a sanction-prescribing social order, the law regulates human behavior in two ways: in a positive sense, commanding such behavior and thereby prohibiting the opposite behavior; and, negatively, by not attaching a coercive act to a certain behavior, therefore not prohibiting this behavior and not commanding the opposite behavior. Behavior that legally is not prohibited is legally permitted in this negative sense. Since human behavior is either prohibited or not prohibited, and since, if not prohibited, is to be regarded as permitted by the legal order, any behavior of an individual subjected to a legal order may be regarded as regulated by it - positively or negatively. Insofar as the behavior of an individual is permitted by the legal order in the negative sense - and that means: not prohibited - the individual is legally free.

The freedom left to the individual by the legal order simply by not prohibiting a certain behavior must be distinguished from the freedom which is positively guaranteed to the individual by that order. The freedom of an individual which consists in permitting him a certain behavior by not prohibiting it, is guaranteed by the legal order only to the extent that the order commands the other individuals to respect this freedom; the order forbids them to interfere in this sphere of freedom, that is, the order forbids a behavior by which an individual is prevented from doing what is not prohibited and what therefore in this sense is permitted to him. Only then can the nonprohibited (in a negative sense permitted) behavior be looked upon as rightful: that is to say, as the content of a right, which is the reflex of a corresponding obligation.

However, not every behavior so permitted - in the negative sense of not being forbidden - is safeguarded by the prohibition of the opposite behavior of others; not every permitted behavior of one individual corresponds to an obligation of another individual. It is possible that a behavior is not prohibited by the legal order (and therefore, in this sense, permitted), without an opposite behavior of others being prohibited by the legal order, so that this opposite behavior is also permitted. A behavior may not be prohibited, for example, because it is not related to other individuals or at least does not hurt anybody. But not even every behavior that *does* hurt others is prohibited. For example, it may not be prohibited that the owner of a house install a ventilator into a wall situated directly at the borderline of his property. But, at the same time, it may not be prohibited that the owner of the neighboring property builds a house whose one wall directly adjoins the ventilator-equipped wall of the first house and thereby nullifies the effect of the ventilator. In this example, one party is permitted to prevent what the other party is permitted to do - namely to pipe air into one of his rooms by a ventilator.

If a behavior opposite to the not prohibited behavior of another individual is not prohibited, then a conflict is possible against which the legal order makes no provision. The legal order does not seek to prevent this conflict, like other conflicts, by prohibiting the opposite behavior. Indeed, the legal order cannot try to prevent all possible conflicts. Only one thing is prohibited practically universally by modern legal orders: to prevent another individual by force from doing what is not prohibited. For the exercise of physical force -

coercive action - is prohibited in principle, except where it is positively permitted for certain authorized individuals.

A legal order - like any normative social order - can command only specific acts or omissions of acts; therefore, no legal order can limit the freedom of an individual with respect to the totality of his external and internal behavior, that is, his acting, wishing, thinking, or feeling. The legal order can limit an individual's freedom more or less by commanding or prohibiting more or less. But a minimum of freedom, that is, a sphere of human existence not interfered by command or prohibition, always remains reserved. Even under the most totalitarian legal order there exists something like inalienable freedom; not as a right innate and natural, but as a consequence of the technically limited possibility of positively regulating human behavior. This sphere of freedom, however, can be regarded as legally guaranteed only to the extent that the legal order prohibits interference. In this respect the constitutionally guaranteed so-called civil liberties are politically particularly important. They are established by provisions of the constitution that limit the competence of the legislators to the extent that the latter are not authorized (or so authorized only under exceptional conditions to issue norms that command or forbid a certain behavior, such as the practice of a certain religion or the expression of certain opinions.

c) *The Law As a Normative Coercive Order; Legal Community and Gang of robbers*

The law as a coercive order is sometimes characterized by the statement that the law commands a certain behavior "under threat" of coercive acts, that is, of certain evils. But this formulation ignores the normative meaning with which coercive acts in general and sanctions in particular are stipulated by the legal order. The meaning of a threat is that an evil *will be* inflicted under certain conditions; the meaning of a legal order is that certain evils *ought to be* inflicted under certain conditions or - expressed more generally - that certain coercive acts ought to be executed under certain conditions. This is not only the subjective meaning of the acts by which the law is established but also their objective meaning. Only because this normative meaning is the objective meaning of these acts, do they have the character of law stipulating norm-creating, or norm-executing acts. The action of a highwayman who under threat commands somebody to surrender his money also has the subjective meaning of an "ought." If the situation created by such a command is described by saying that one individual expresses a will directed toward the behavior of another individual, then one merely describes the action of the first as an actually happening event. The behavior of the other individual, however, which is intended by the will of the first, cannot be described as something that actually takes place, because he does not yet behave and may not behave at all in the way that the first one had intended. It can only be described as something that according to the subjective meaning of the command ought to take place.

In this way every situation must be described in which one individual expresses a will directed toward the behavior of another individual. In this respect (namely, so far as only the subjective meaning of the acts are considered), there is no difference between describing the command of a robber and the command of a legal organ. The difference appears only when the objective meaning of the command is described, the command directed from one individual toward another. Then we attribute only to the command of the legal organ, not to

that of the robber, the objective meaning of a norm binding the addressed individual. In other words, we interpret the one command, but not the other, as an objectively valid norm; and then we interpret in the one case the connection of the nonfulfillment of the command with a coercive act merely as a *threat* (i.e., a statement that an evil *will be* inflicted), whereas in the other case, we interpret this connection to mean that an evil *ought to be* inflicted. Therefore we interpret the actual infliction of the evil in the second situation as the application or execution of an objectively valid norm, stipulating a coercive act as a sanction, but in the first situation - if we offer a normative interpretation - as a crime.

But why do we interpret the subjective meaning of the one act also as its objective meaning, but not so of the other act? Why do we suppose that of the two acts, which both have the subjective meaning of an *ought*, only one established a valid, that is, binding, norm? In other words: What is the reason for the validity of the norm that we consider to be the objective meaning of this act? This is the decisive question.

By analyzing the judgments that interpret the acts as legal (that is, as acts whose objective meaning is norms) we get the answer to the question. Such an analysis reveals the *presupposition* that makes such an interpretation possible.

Let us start from the earlier-mentioned interpretation of the killing of one individual by another as the execution of a death sentence and not as murder. Our interpretation is based on the recognition that the act of killing constitutes the execution of a court decision that has commanded the killing as a punishment. This means: We attribute to the act of the court the objective meaning of an individual norm and in this way interpret the individuals who perform the act, as a court. We do this, because we recognize the act of the court as the execution of a statute (that is, of general norms stipulating coercive acts) in which we see not only the subjective but also the objective meaning of an act that had been established by certain individuals whom we consider, for this reason as legislators. For we regard the act of legislation as the execution of the constitution, that is, of general norms that, according to their subjective meaning, authorize these individuals to establish general norms prescribing coercive acts. In this way we interpret these individuals as legislative organs. By regarding the norms authorizing the legislative organ not only as the subjective but also as the objective meaning of an act performed by definite individuals, we interpret these norms as *constitution*. For the historically first constitution such an interpretation is possible only, if we *presuppose* that one ought to behave according to the subjective meaning of the act, that one ought to perform coercive acts only under the conditions and in the manner the constitution stipulates; if, in other words, we presuppose a norm according to which (a) the act whose meaning is to be interpreted as *constitution* is to be regarded as establishing objectively valid norms, and (b) the individuals who establish this act as the constitutional authorities. As will be developed later, this norm is the basic norm, of the national legal order. It is not established by a positive legal act, but is presupposed, *if* the act mentioned under (a) is interpreted as establishing a constitution and the acts based on the constitutions are interpreted as legal acts. To make manifest this presupposition is an essential function of legal science. This presupposition is the ultimate (but in its character conditional and therefore hypothetical) reason for the validity of the legal order.

By making these statements we are considering, at this point, only a national legal order, that is, a legal order whose territorial sphere of validity is limited to the territory of a state. The reason for the validity of international law, whose territorial sphere of validity is not so limited, and the relationship of the international legal order to the national legal orders, are, for the present, outside our discussion. It was observed earlier that the validity of a norm (which means that one ought to behave as the norm stipulates) should not be confounded with the effectiveness of the norm (which means that one, in fact, does so behave); but that an essential relation may exist between the two concepts, namely, that a coercive order, presenting itself as the law, is regarded as valid only if it is by and large effective. That means: The basic norm which is the reason for the validity of a legal order, refers only to a constitution which is the basis of an effective coercive order. Only if the actual behavior of the individuals conforms, by and large, with the subjective meaning of the acts directed toward this behavior if, in other words, the subjective meaning is recognized as the objective meaning - only then are the acts interpreted as legal acts.

Now we are ready to answer the question why we do not attribute to the command of a robber, issued under threat of death, the objective meaning of a valid norm binding on the addressed victim; why we do not interpret this act as a legal act; why we *regard* the realization of the threat as a crime, and not as the execution of a sanction.

An isolated act of one individual cannot be regarded as a legal act, its meaning cannot be regarded as a legal norm, because law, as mentioned, is not a single norm, but a system of norms; and a particular norm may be regarded as a legal norm only as a part of such a system. How about a situation, however, in which an organized gang systematically jeopardizes a certain territory by forcing the people living there, under threat, to surrender their money? In this situation we will have to distinguish between the order that regulates the mutual behavior of the members of this robber gang and the external order, that is, the commands that the members of the gang direct at outsiders under the threat of inflicting evils. For it is only in relation to outsiders that the group behaves as a *robber* gang. If robbery and murder were not forbidden in the relations between the robbers, no community, no robber *gang* would exist. Nevertheless, even the internal order of the gang may be in conflict with the coercive order, considered to be a legal order, valid for the territory in which the gang is active. Why is the coercive order that constitutes the community of the robber gang and comprises the internal and external order not interpreted as a legal order? Why is the subjective meaning of this coercive order (that one ought to behave in conformity with it) not interpreted as its objective meaning? Because no basic norm is presupposed according to which one ought to behave in conformity with this order. But why is no such basic norm presupposed? Because this order does not have the lasting effectiveness without which no basic norm is presupposed. The robbers' coercive order does not have this effectiveness, if the norms of the legal order in whose territorial sphere of validity the gang operates are actually applied to the robbers' activity as being illegal behavior; if the members of the gang are deprived of their liberty or their lives by coercive acts that are interpreted as imprisonment and death sentences; and if thus the activity of the gang is terminated - in short, if the coercive order regarded as the legal order is more effective than the coercive order constituting the gang.

If the validity of this coercive order is restricted to a certain territory and if it is effective within this territory in such a way that the validity of any other coercive order of this kind is excluded, then the coercive order may indeed be regarded as a legal order and the community constituted by it may be regarded as a *“state”* - even if its external activity is illegal according to positive international law. Thus, from the sixteenth to the beginning of nineteenth century so-called pirate states existed along the northwest coast of Africa (Algiers, Tunis, Tripolis) whose ships preyed upon navigation in the Mediterranean. These communities were *“pirates”* only with respect to their exercise of force on ships of other states, in defiance of international law. Yet, their internal order presumably prohibited mutual employment of force, and this prohibition was by and large obeyed, so that the minimum of collective security existed which is the condition for the existence of a relatively lasting community constituted by a normative order.

Collective security or peace - as we have said - is a function that the coercive orders designated as *“law”* have in various degrees when they have reached a certain level of development. This function is an objectively determinable fact. The scientific statement that a legal order is pacifying the legal community, is not a value judgment. Specifically, this statement does not mean that the realization of justice is essential to the law; this value, therefore, cannot be made an element of the concept of law and can therefore not serve as a criterion for the distinction between a legal community and a robber gang. This, however, is the distinction made by St. Augustine who says in his *Civitas Dei*: *“Set justice aside then, and what are kingdoms but thievish purchases? because what are thieves’ purchases but little kingdoms?”* A state, which is according to Augustine a legal community, cannot exist without justice. *“Where true justice is wanting, there can be no law. For what law does, justice does, and what is done unjustly, is done unlawfully.”* But what is justice? *“Justice is a virtue distributing unto everyone his due. What justice is that then, that takes man from the true God and gives him unto the condemned fiends? Is this distribution according to due? Is not he that takes away thy possessions and gives them to one that has no claim to them, guilty of injustice, and is not he so likewise, that takes himself away from his Lord God, and gives himself to the service of the devil?”*

According to this reasoning, the law is a just coercive order and is distinguished from the coercive order of the robbers by the justice of its content.

That justice cannot be the criterion distinguishing law from other coercive orders follows from the relative character of the value judgment according to which a social order is just. Saint Augustine recognizes as *“just”* only that order which gives each his due, and applies this empty formula by saying that an order is just only when it gives the true God -who, to him, is the Judeo-Christian God, not the gods of the Romans - what is his due, namely the worship that is expressed in a certain cult; therefore, according to Augustine, an order that does not conform with this postulate, cannot be law, and the community based on this order cannot be a state, but only a robber gang. With this, Roman Law is denied the character of law. If justice is assumed to be the criterion for a normative order to be designated as *“law”*, then the capitalistic coercive order of the West is not law from the point of view of the Communist ideal of justice, nor the Communist coercive order of the Soviet Union from the point of view of the capitalist ideal of justice. A concept of law with such consequences is unacceptable by

a positivist legal science. A legal order may be judged to be unjust from the point of view of a certain norm of justice. But the fact that the content of an effective coercive order may be judged unjust, is no reason to refuse to acknowledge this coercive order as a legal order. After the victory of the French Revolution in the eighteenth century and after the victory of the Russian Revolution in the twentieth, the other states showed the distinct inclination not to interpret the coercive orders established by the revolution as legal orders and the acts of the revolutionary governments as legal acts, because the one government had violated the monarchic principle of legitimacy and the other had abolished private property of the means of production. For the last-named reason, even American courts refused to acknowledge acts of the revolutionary Russian government as legal acts; the courts declared that these were not acts of a state, but of a robber gang. However, as soon as the revolution-born coercive orders turned out to be effective, they were recognized as legal orders, the governments as state governments, and their acts as state acts, that is, legal acts.

d) Legal Obligations without Sanctions?

If the law is conceived of as a coercive order, then the formula by which the basic norm of a national legal order is expressed runs as follows: "Coercion of man against man ought to be exercised in the manner and under the conditions determined by the historically first constitution. The basic norm delegates the first constitution to prescribe the procedure by which the norms stipulating coercive acts are to be created. To be interpreted objectively as a legal norm, a norm must be the subjective meaning of an act performed in this procedure, hence in accordance with the basic norm; besides, the norm must stipulate a coercive act or must be in essential relation to such a norm. Together with the basic norm the definition of law as a coercive order is presupposed. From the definition of law as a coercive order follows that a behavior may be regarded as legally commanded (i.e., as the content of a legal obligation) only if the contrary behavior is made the condition of a coercive act directed against the individual thus behaving. It is to be noted, however, that the coercive act itself need not be commanded in this sense: its ordering and executing may be merely authorized.

Against the definition of law as a coercive order, that is, against the inclusion of the element of coercion into the concept of law, the objections have been raised (1) that legal orders actually contain norms that do not stipulate coercive acts: norms that permit or authorize a behavior, and also norms that command a behavior without attaching to the opposite behavior a coercive act; and (2) that the non-application of the norms that stipulate coercive acts are frequently not made the condition for coercive acts functioning as sanctions.

The second objection is not valid, because the definition of law as a coercive order can be maintained even if the norm that stipulates a coercive act is not itself essentially connected with a norm that attaches, in a concrete case, a sanction to the nonordering or nonexecuting of the coercive act if, therefore, the coercive act stipulated in the general norm is to be interpreted objectively not as commanded but only as authorized or positively permitted (although the subjective meaning of the act by which the general norm stipulates the coercive act is a commanding). As for the first objection, the definition of law as a *coercive* order can be maintained even with respect to norms that authorize a behavior not having the character of a coercive act; or norms that positively permit such a behavior insofar as they are

dependent norms, because they are essentially connected with norms that stipulate the coercive acts. A typical example for norms cited as arguments against the inclusion of coercion into the definition of law are the norms of constitutional law. It is argued that the norms of the constitution that regulate the procedure of legislation do not stipulate sanctions as a reaction against nonobservance. Closer analysis shows, however, that these are dependent norms establishing only one of the conditions under which coercive acts stipulated by other norms are to be ordered and executed. Constitutional norms authorize the legislator to create norms - they do not command the creation of norms; and therefore the stipulation of sanctions do not come into question at all. If the provisions of the constitution are not observed, valid legal norms do not come into existence, the norms created in this way are void or voidable. This means: the subjective meaning of the acts established unconstitutionally and therefore not according to the basic norm, is not interpreted as their objective meaning or such a temporary interpretation is annulled.

The most important case of norms which according to traditional science of law constitute legal obligations without stipulating sanctions, is the so-called natural obligation. Natural obligations are obligations whose fulfillment cannot be asserted in a court, and whose nonfulfillment is not the condition of a civil execution. Still, one speaks of a legal obligation, because that which, in fulfillment of a so-called natural obligation, has been given by one individual to another cannot be recovered as an unjustified enrichment. If this is so, however, it merely means: A general norm is valid stipulating that: (1) if the beneficiary of a performance to which the performer was legally not obligated refuses restitution, civil execution ought to be directed into the property of the beneficiary; and (2) the validity of this coercion-stipulating norm is restricted with respect to cases determined by the legal order. This situation, therefore, can be described as a restriction of the validity of a sanction-stipulating norm; it is not necessary to assume the existence of a sanctionless norm.

It is possible, of course, for a legislator to establish, in a procedure conforming with the basic norm, an act whose subjective meaning is a behavior-commanding norm, without (1) establishing an act whose subjective meaning is a norm prescribing a sanction as a reaction against the opposite behavior; and without (2) the possibility of describing the situation as a restriction of the validity of a sanction-stipulating norm. In this case the subjective meaning of the act in question cannot be interpreted as its objective meaning; the norm, which is the act's subjective meaning cannot be interpreted as a legal norm, but must be regarded as legally irrelevant.

And there are other reasons why the subjective meaning of an act established in conformity with the basic norm may be regarded as legally irrelevant: namely, if the subjective meaning of such an act is not a norm that commands, permits, or authorizes human behavior. A law, established strictly according to the constitution, may have a content that is not a norm, but the expression of a religious or political theory - for example, the statement that the law is given by God or that the law is just or that the law realizes the interest of the entire population. Or, to give another example in the form of a constitutionally established statute the nation's congratulations may be conveyed to the head of time state on the occasion of an anniversary of his accession to power; this may be done in this form merely to invest the congratulations with special solemnity. After all, since constitutionally established acts are

expressed by words, the acts may have any meaning whatever, not only the meaning of norms. If law is defined as norm at all, legal science cannot dispense with the concept of legally irrelevant contents.

Since the law regulates the procedure by which it is itself created, one might distinguish this legally regulated procedure as *legal form* from the *legal content* established by the procedure, and speak of a legally irrelevant legal content. In traditional science of law this thought is expressed to some extent by the distinction between law in the formal sense and law in the material sense. This distinction acknowledges the fact that not only general behavior-regulating norms are issued in the form of laws, but also administrative decisions, such as the naturalization of a person, the approval of the state budget, or judicial decisions (when, in certain cases, the legislator acts as a judge). But it would be more correct to speak of form of law and content of law rather than of law in the formal and in the material sense. However, the words "legal form" and "legal content" are unprecise and even misleading in this respect; in order to be interpreted as a legal act it is not only required that the act be established by a certain procedure, but also that the act have a certain subjective meaning. The meaning depends on the definition of law, presupposed together with the basic norm. If the law is not defined as a coercive order, but only as an order established according to the basic norm (and if, therefore, the basic norm is formulated as: one ought to behave as the historically first constitution prescribes), then sanctionless legal norms could exist, that is, legal norms that under certain conditions command a human behavior without another norm stipulating a sanction as a reaction against nonobservance. In this case the subjective meaning of an act, established in accordance with the basic norm - if this meaning is not a norm and in no relation to a norm - would be legally irrelevant. Then, a norm established by the constitutional legislator and commanding a certain behavior without attaching a coercive act to its nonobservance, could be distinguished from a moral norm only by its origin; and a legal norm established by custom could not be distinguished from a customarily established moral norm at all.

If the constitution has established custom as a law-creating fact, then all moral norms created by custom constitute a part of the legal order. Therefore, then, a definition of law, which does not determine law as a coercive order, must be rejected (1) because only by including the element of coercion into the definition of law is the law clearly distinguished from any other social order; (2) because coercion is a factor of great importance for the cognition of social relationships and highly characteristic of the social orders called "law"; and, (3) particularly, because by defining law as a coercive order, a connection is accounted for that exists in the case most important for the cognition of the law, the law of the modern state: the connection between law and state. The modern state is essentially a coercive order - a centralized coercive order, limited in its territorial validity.

Norms that are the subjective meaning of legislative acts and that command a certain behavior without the opposite behavior being made the condition of a sanction are very rare in modern legal orders. If the social orders designated as law *did* contain significant numbers of sanctionless norms, then the definition of law as a coercive order could be questioned; and if from the existing social orders designated as law the element of coercion were to disappear - as predicted by Marx's socialism - then these social orders would indeed fundamentally

change their character. They would - from the point of view of the offered definition of law - lose their legal character, and the social orders constituted by them would lose their character as states. In Marxian terms the state - and along with the state, the law - would wither away.

e) *Dependent Legal Norms*

It was pointed out earlier that: if one norm commands a certain behavior and a second norm stipulates a sanction as reaction against nonobservance, the two norms are tied to each other. This is particularly true if a social order - as the legal order - commands a certain behavior specifically by attaching a coercive act as sanction to the opposite behavior. Therefore a behavior according to such an order may be regarded as commanded - and in case of a legal order as legally commanded - only so far as the opposite behavior is the condition of a sanction. If a legal order, such as a statute passed by parliament, contains one norm that prescribes a certain behavior and a second norm that attaches a sanction to the nonobservance of the first, then the first norm is not an independent norm, but fundamentally tied to the second; the first norm merely designates - negatively - the condition under which the second stipulates the sanction; and if the second one positively designates the condition under which it stipulates the sanction, then the first one is superfluous from the point of view of legislative technique. For example: If a civil code contains the norm that a debtor ought to pay back the received loan to the creditor; and the second norm that a civil execution ought to be directed into the property of the debtor if the debtor does not repay the loan; then everything prescribed by the first norm is contained conditionally in the second. Modern criminal codes usually do not contain norms that prohibit, like the Ten Commandments, murder, adultery and other crimes: they limit themselves to attach penal sanctions to certain behavior. This shows clearly that a norm: "You shall not murder" is superfluous, if a norm is valid: "He who murders ought to be punished"; it shows, further, that the legal order indeed prohibits a certain behavior by attaching to it a sanction or that it commands a behavior by attaching a sanction to the opposite behavior.

Dependent are also those legal norms that positively permit a certain behavior. For - as shown before - they merely limit the sphere of validity of a legal norm that prohibits this behavior by attaching a sanction to the opposite. The example of self-defense has been cited earlier. Another example is found in the United Nations Charter. Article 2, paragraph 4, forbids all members to use force; the Charter attaches to the use of force the sanctions stipulated in Article 39. But the Charter permits in Article 51 the use of force as individual or collective self-defense by limiting the general prohibition of Article 2, paragraph 4. The named articles form a unit. The Charter could have combined them all in a single article forbidding all members to use force which does not have the character of individual or collective self-defense by making the thus restricted use of force the condition of a sanction. Yet another example: A norm prohibits the sale of alcoholic beverages, that is, makes it punishable; but this prohibition is restricted by another norm according to which the sale of these beverages, if a license is obtained, is not forbidden; that means that the sale is not punishable.

The second norm, restricting the sphere of *validity* of the first, is a dependent norm: it is meaningful only in connection with the first; both form a unit. Their contents may be

expressed in the single norm: "If somebody sells alcoholic beverages without a state license, he ought to be punished." The function of the merely negative permission, consisting in the nonprohibition by the legal order of a certain behavior, need not be considered here because negative permission is not granted by a positive norm.

A legal norm may not only restrict the sphere of validity of another norm, but may entirely annul the validity. These derogating norms too are dependent norms, meaningful only in connection with other, sanction-stipulating norms. Further, legal norms authorizing a certain behavior are dependent norms likewise, if "authorizing" is understood to mean: confer upon an individual a legal power, that is, the power to create legal norms. These authorizing norms designate only one of the conditions under which - in an independent norm - the coercive act is prescribed. These are the norms that authorize the creation of general norms: (1) the norms of the constitution which regulate legislation or institute custom as a law-creating fact; and (2) the norms that regulate judicial and administrative procedures in which the general norms created by statute or custom are applied by authorized courts and administrative officials through individual norms created by these organs.

To give an example: Suppose the legal order of a state prohibits theft by attaching to it in a statute the penalty of imprisonment. The condition of the punishment is not merely the fact that a man has stolen. The theft has to be ascertained by a court authorized by the legal order in a procedure determined by the norms of the legal order; the court has to pronounce a punishment determined by statute or custom; and this punishment has to be executed by a different organ. The court is authorized to impose, in a certain procedure, a punishment upon the thief, only if in a constitutional procedure a general norm is created that attaches to theft a certain punishment. The norm of the constitution, which authorizes the creation of this general norm, determines a condition to which the sanction is attached. The rule of law that describes this situation says: "If the individuals authorized to legislate have issued a general norm according to which a thief is to be punished in a certain way; and if the court authorized by the Code of Criminal Proceedings in a procedure prescribed by this code has ascertained that an individual has committed theft; and if that court has ordered the legally determined punishment; then a certain organ ought to execute the punishment." By thus phrasing the rule of law that describes the law, it is revealed that the norms of the constitution which authorize the creation of general norms by regulating the organization and procedure of legislation; and the norms of a Code of Criminal Procedure which authorize the creation of the individual norms of the judicial court decisions by regulating the organization and procedure of the criminal courts, are dependent norms; for they determine only conditions under which the punitive sanctions are to be executed. The execution of all coercive acts stipulated by a legal order - including those that are ordered by an administrative procedure and those that do not have the character of sanctions - is conditioned in that manner. The constitutional creation of the general norms to be applied by courts and administrative agencies, and the creation of the individual norms by which these organs have to apply the general norms, are as much conditions of the execution of the coercive act as the ascertainment of the fact of the delict or as other circumstances which the legal norms have made the condition of coercive acts that are not sanctions. But the general norm that stipulates the coercive act under all these conditions is an independent legal norm - even if the coercive act is not commanded because

its nonexecution is not made the condition of a further coercive act. If we say that in this case the coercive act is authorized, then the word "authorized" is used in a wider sense. It then does not merely mean conferring a legal power in the sense of a power to create legal norms, but also conferring the power to perform the coercive acts stipulated by the legal norms. In a wider sense, then, this power may also be designated as a legal power.

Dependent norms are, finally, also those that further determine the meaning of other norms, by defining a concept used in a second norm or by authentically interpreting a second norm otherwise. For example, a Criminal Code might contain an article saying: "By murder is to be understood the behavior of an individual which intentionally causes the death of another individual." This article defines murder; however, the article has normative character only in connection with another article that says: "If a man commits murder, the authorized court ought to impose the death penalty." And this article, again, is inseparably connected with a third article that says: "The death penalty is to be carried out by hanging."

It follows, that a legal order may be characterized as a coercive order, even though not all its norms stipulate coercive acts; because norms that do not themselves stipulate coercive acts (and hence do not command, but authorize the creation of norms or positively permit a definite behavior) are dependent norms, valid only in connection with norms, that *do* stipulate coercive acts. Again, not all norms that stipulate a coercive act but only those that stipulate the coercive act as a reaction against a certain behavior (that is, as a sanction), command a specific, namely the opposite, behavior. This, therefore, is another reason why the law does not have exclusively a commanding or imperative character. Since a legal order, in the sense just described, is a coercive order, it may be described in sentences pronouncing that under specific conditions (that is, under conditions determined by the legal order) specific coercive acts ought to be performed. All legally relevant material contained in a legal order fits in this scheme of the rule of law formulated by legal science - the *rule of law* which is to be distinguished from the *legal norm* established by the legal authority.

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Historical^{*}

The historical outlook will be dealt with in this chapter. It comprises, on the one hand, inquiries into the past and evolution generally with the object of elucidating the position today. The question to be answered is to what extent the thoughts of contemporary laws have been fashioned by the past. This is what some of the jurists, who belong to what is known as the Historical School, have purported to do. On the other hand, there are inquiries into the past, especially into primitive and undeveloped communities, which are conducted for their own sake in order to discover what law might appropriately be taken to mean in them. Such inquiries are distinguishable as the Anthropological approach and will be touched on at the end of the chapter.

Historical School

The Historical School arose more or less contemporaneously with Analytical positivism at the beginning of the nineteenth century, and should be regarded as another manifestation of the reaction against natural law theories. It did not emerge as something novel in European thought, for it had been germinating long before then. The reaction against natural law theories provided a rich bed in which the seeds of historical scholarship took root and spread.

The prelude to the historical approach to law is the story of the study and reception of Roman law in Europe. The gradual disappearance and decay of Roman law in the ages which followed the dissolution of the Roman Empire were arrested by a revival of academic interest in that system in the eleventh century in France and Italy and principally at the law school in Bologna. This new interest took the form of adding to the texts explanatory glosses and commentaries. The Glossators accepted Justinian's boast that conflicts had been eliminated from his codification, and they devoted their ingenuity to reconciling and explaining away the many conflicts that did undoubtedly exist. There was another more significant side to their work, which was that they endeavoured to fit the problems of their feudal society into Roman terminology and thus paved the way for the later reception of Roman law into Europe. The work of the Glossators culminated in the *Glossa Ordinaria* of Accursius in the early twelfth century, which superseded all previous glosses and came to be accepted as the final resolution of the conflicting opinions of individual Glossators. The scholars who followed them were known as the Post-Glossators or Commentators. The most interesting feature of their work is the way in which they attempted to relate the Roman law to contemporary problems, but they used for this purpose, not the original texts, but the *Glossa*. So it was that when Roman law was eventually received into Europe in the fifteenth and sixteenth centuries it was a diluted version adapted from the *Glossa* that was received.

The Renaissance kindled fresh interest in the teachings of the Romans themselves. The outstanding name in this connection is that of Cujas, a Frenchman, who resorted to the Roman originals underneath the accumulated silt of commentary and gloss. He did more: he was the first scholar to understand Justinian's *Corpus Juris* in historical perspective. It is difficult to appreciate nowadays how lacking in historical sense people were in those days. The tendency

^{*} R.W.M. Dias, *Jurisprudence* 375-393 (5th ed., 1985).

was to regard the *Corpus Juris* more or less as a simultaneous product, rather than a collection of materials which had been changing and developing over centuries. More than one hundred years spanned the jurists of the Classical period, whose writings comprise the Digest, while between them and Justinian another three centuries elapsed. This lack of historical sense led to elaborate and fanciful explanations of differences which were easily explicable on historical grounds. The admirable work of Cujas, however, was confined to the academic sphere and failed to penetrate through to practice. For this there was good reason. As long as Roman law remained the law in the countries of Europe, inconsistencies had to be reconciled and historical explanations of their origin were of no avail. The living law could not be self-contradictory. Accordingly, there developed a gulf between the academic jurist and the practitioner, which also explains why the historical approach remained for so long in the background.

The position of Germany at the start of the nineteenth century deserves special mention, since this was the cradle of the Historical School. Roman law functioned as the common law subject to canon law, imperial enactments and customary law, so far as this was still extant. The Roman law was assumed to have been accepted as a whole, not in fragments, in the form of Justinian's codification as found in the works of the Glossators and Commentators. The practical problems which lawyers had to solve had altered with the ages, but the methods of applying the law differed little from that of the Italian courts in the time of the Glossators. Moreover, the panorama of the law as a whole was confusing, for local variations were innumerable. In these circumstances a proposal was made by Thibaut, of Heidelberg, in 1814 for a code on the lines of the Code Napoleon [For review of the events of 1814 leading to Savigny's publication, see Stammler 'Fundamental Tendencies in Modern Jurisprudence' (1923) 21 Mich L.R. 623]. This was immediately answered by von Savigny (1779-1861) in an essay entitled *On the Vocation of our Age for Legislation and Jurisprudence* [Savigny *Vom Beruf unserer Zeit für Gesetzgebung und Rechtswissenschaft*, hereafter referred to as *On the Vocation*], with which, in the words of Ihering, a new jurisprudence was born. So powerful was his influence that the move towards codification was effectively halted and it was not until 1900, after many years of sustained agitation, that Germany ultimately acquired her code, the *Bürgerliches Gesetzbuch*.

Although Thibaut's proposals were the immediate stimulus for the rise of the Historical School, other factors had combined to prepare the way. The first of these has already been mentioned, namely, the reaction against the unhistorical assumptions of the natural law theorists. As these were exposed as hollow and false, so the need was felt for a realistic investigation into historical truths. Secondly, the attempt to found legal systems based on reason without reference to past or existing circumstances had proved to be revolutionary, culminating in the French Revolution, with all its brutalities. A reaction set in against the rationalism that promoted such barbarity. This was a factor which weighed heavily with Savigny, a conservative nobleman, who acquired a deep and lasting hatred for the revolution. Thirdly, the French conquests under Napoleon aroused the nationalism of Europe. Fourthly, the French had spread the idea of codified law, and the reaction against anything French carried with it hostility to codification. Finally, the influence of certain early pioneers in the new way of thinking should not be ignored. Montesquieu had maintained that law was shaped

by social, geographical and historical considerations; Burke in England had voiced the same sentiment by pointing to the importance of tradition as a guide to social change. These factors, boosted by the genius of Savigny, started European thought along a new road.

Savigny was born in Frankfurt in 1779, and was nurtured in the natural law discipline. His interest in historical studies was kindled at the universities, first of Marburg and then of Göttingen, and was greatly encouraged when he became acquainted with Niebuhr at the University of Berlin. He also acquired a lasting veneration for Roman law. In 1803 appeared his first major work, *Das Recht des Besitzes (The Law of Possession)*. He traced the process by which the original Roman doctrines of possession had developed into the doctrines and actions prevailing in contemporary Europe. Savigny next set himself the task of laying the foundation for future historical labours by producing a basic history of the development of Roman law in medieval Europe. It was his thesis that Roman law had been received into Germany so long ago that her legal soul had become a mixture of Roman and local laws. In this great work, *The History of Roman Law in the Middle Ages*, which appeared in six volumes between 1815 and 1831, he analysed the Roman element to its roots, and in his other great work, *The System of Modern Roman Law*, he analysed Roman and local laws. These two together form an imperishable monument to his learning and industry. He was also supremely conscious of his mission, which was *not* opposed to reform; it was to preach the warning that reforms, which went against the stream of a nation's continuity, were doomed [Savigny was Prussian Minister of Legislation]. He emphasised that the muddled and outmoded nature of a legal system was usually due to a failure to comprehend its history and evolution. The essential pre-requisite to the reform of German law was, for him, a deep knowledge of its history. Historical research was therefore the indispensable means to the understanding and reform of the present, and he said, somewhat belatedly it is true, but nonetheless clearly:

The existing matter will be injurious to us so long as we ignorantly submit to it; but beneficial if we oppose to it a vivid creative energy & obtain the mastery over it by a thorough grounding in history and thus appropriate to ourselves the whole intellectual wealth of preceding generations [Savigny Introduction to *The System of Modern Roman Law*].

His warning, then, was that legislators should look before they leap into reform, but he spoilt this advice by over-generalisation. The core of Savigny's thesis is to be found in his essay *On the Vocation*. The nature of any particular system of law, he said, was a reflection of the spirit of the people, who evolved it. This was later characterised as the *Volksgeist* by Puchta, Savigny's most devoted disciple. All law, according to him, is the manifestation of this common consciousness. He wrote,

Law grows with the growth, and strengthens with the strength of the people, and finally dies away as the nation loses its nationality [Puchta, *Outlines of the Science of Jurisprudence* (trans. Hastie)].

A nation, to him, meant only a community of people linked together by historical, geographical and cultural ties. The boundaries of some nations may be clearly defined, but not of other nations, and this is reflected in the unity or variety of their respective laws. Even where the unity of a people is clear, there may lie within it -inner circles- of variations, such

as cities and guilds. He then went on to elaborate the theory of the *Volksgeist* by contending that it is the broad principles of the system that are to be found in the spirit of the people and which become manifest in customary rules. From this premise it followed that law is a matter of unconscious growth. Any law-making should therefore follow the course of historical development. Custom not only precedes legislation, but is superior to it, and legislation should always conform to the popular consciousness. Law is thus not of universal application; it varies with peoples and ages. The *Volksgeist* cannot be criticised for being what it is. It is the standard by which laws, which are the conscious product of the will as distinct from popular conviction, are to be judged. An individual jurist may misapprehend the popular conviction, but that is another matter. In place of the moral authority, which the natural lawyers of the preceding age had sought to posit behind law, the Historical School substituted social pressure, which provided the bridge between the work of the Historical School and that of the Sociological School.

This view of the nature of law dovetailed with Savigny's historical method of work, for if law is a reflection of people's spirit, then it can only be understood by tracing their history. It is clear, all the same, that in his revolt against the lack of historical sense, which characterised natural law theory, he swung the pendulum of legal thought too much the other way. To point out Savigny's exaggerations, however, is not to detract from the importance of his contribution.

On the idea of *Volksgeist* several comments should be made.

(1) There is an element of truth in it, for there is a stream of continuity and tradition; the difficulty lies in fixing it with precision. Savigny, however, made too much of it. As with most pioneers, he drew too sweeping an inference from modest premises. The idea of the *Volksgeist* certainly suited the mood of the German peoples. It was a time of the growing sense of nationhood, a desire for unification, an interest in the dramatic marking the appearance of the Romantic movement. German thinking, also, seems prone to personify the abstract, and to attribute a mystical coherence to ideals. Gierke's personification of corporate existence, was an example: Savigny's *Volksgeist* is another. The idea of a *Volksgeist* is acceptable in a limited way. Thus, the psychological associations built up around the law-making institutions in a particular state could be regarded as a manifestation of the *Geist* of that community. Savigny, however, extrapolated his *Volksgeist* into a sweeping universal. He treated it as a discoverable thing; but it is common experience that even in a small group (*a fortiori* in a nation) people hold different views on different issues. The spirit does not exist. So Savigny's thesis is probably best treated as the juristic contribution to Romanticism. In this it would appear that his historical sense deserted him, for it amounts, in effect, to the adoption of an *a priori* preconception. It will be remembered that in dealing with possession he did much the same thing, namely, to draw an inference from limited data, and then to use it as an *a priori* talisman.

(2) The transplanting of Roman law in the alien climate of Europe nearly a thousand years later is inconsistent with Savigny's idea of a *Volksgeist*. It postulates, if anything, some quality in law other than popular consciousness. His endeavour to establish that the reception of Roman law had taken place so long ago as to make the Germanic *Volksgeist*

an expression of it was unconvincing. Apart from this, a survey of the contemporary scene shows that the German Civil Code has been adopted in Japan, the Swiss Code in Turkey and the French Code in Egypt without any apparent violence to popular susceptibilities. The French Code was also introduced into Holland during the Napoleonic era, displacing the Roman-Dutch common law, and it is significant that after the overthrow of Napoleon the Dutch never went back. They had, however, taken Roman-Dutch law to their colonies in the Cape of Good Hope and Ceylon (now Sri Lanka) with the odd result that it flourishes today in two such dissimilar national climates as southern Africa and Sri Lanka, although it has long since disappeared in its homeland. The reception of English law in so many parts of the world is also evidence of supra-national adaptability and resilience. Indeed, the protest in South Africa today is that far too much English law has been allowed to overlay the national Roman-Dutch law.

(3) The *Volksgeist* theory minimises the influence which individuals, sometimes of alien race, have exercised upon legal development. Every man is a product of his time, but occasionally there are men who by their genius are able to give legal development new directions. The Classical jurists of Rome, Littleton, Coke, may be cited as examples. This is especially the case in modern times when new doctrines are deliberately introduced by a handful of policy-makers. Ehrlich pointed out that customs are norms of conduct, juristic laws are norms for decision. They are always the creation of jurists.

(4) The last two points lead to the further objection that the influence of the *Volksgeist* is at most only a limited one. The national character of law seems to manifest itself more strongly in some branches than in others, for example, in family law rather than in commercial or criminal law. Thus, the general reception of Roman law in Europe did not include Roman family law. Even more significant is the fact that the successful introduction of alien systems into India and Turkey affected the indigenous family laws least of all. The inference appears to be that very few branches of law, perhaps only family law and succession to some extent, are really personal to a nation. A further distinction may have to be drawn between the creative influence of the *Volksgeist* and its adaptative and abrogative influence. It is undoubtedly the case that doctrines have been, and are constantly being, introduced by individuals. The most that indigenous tradition can do is to bring about practical modifications of these gradually and by degrees. Turkey provides an example, where new marriage laws, which were contrary to the existing traditional laws, were introduced as a matter of deliberate policy. The result from a juristic point of view was a fascinating process of action and reaction between the old and the new law. It might be thought that this bears out Savigny's contention that legislation should conform to existing traditional law, or it is doomed. In a sense so it does, but an example such as this also reveals something else. It shows that in modern times the function of the *Volksgeist* is that of modifying and adapting rather than creating, and that, in any case, even this function manifests itself only in the very personal branches of the law. There is less evidence today of its creative force and none of its influence over the whole body of the law. If one thinks in the time-frame of the moment, the *Volksgeist* is of little or no relevance, for many existing laws have come from outside. Savigny's theory only makes sense to a limited extent in a continuum. Even so,

the *Volksgeist* is discernible only in retrospect, but he sought to make it a test of validity, i.e. to use it in the present time frame where it is irrelevant. This confusion in his frames of reference left his theory open to attack.

(5) Law is sometimes used deliberately to change existing ideas; and it may also be used to further inter-state co-operation in many spheres. Even in Germany one may instance Bismarck's shrewd and successful attempt to cut the ground from under the feet of the socialist movement by introducing the Railway and Factories Accident Law 1871, well before social conditions were ripe.

(6) Many institutions have originated, not in a *Volksgeist*, but in the convenience of a ruling oligarchy, e.g. slavery.

(7) Many customs owe their origin to the force of imitation rather than to any innate conviction of their righteousness.

(8) Some rules of customary law may not reflect the spirit of the whole population, e.g. local customs. Savigny, it will be remembered, did allow for these by recognising the existence of 'inner circles' within a society. The question remains: if law is the product of a *Volksgeist*, how is it that only some people and not all have evolved a special rule? On the other hand, some customs, e.g. the Law Merchant, were cosmopolitan in origin: they were not the creatures of any particular *nation* or *race*. In short, it is not at all clear who the *Volk* are whose *Geist* determines the law.

(9) Important rules of law sometimes develop as the result of conscious and violent struggle between conflicting interests within the nation, and not as a result of imperceptible growth, e.g. the law relating to trade unions and industry. Evolution does not follow an inexorably determined path.

(10) A different objection to the *Volksgeist* came from Savigny's opponents. They pointed out that, taken literally, his thesis would thwart the unification of Germany permanently by emphasising the individuality of each separate state and by fostering a parochial sense of nationalism.

(11) An inconsistency in Savigny's work was that, while he was the protagonist of the *Volksgeist* doctrine, he worked at the same time for the acceptance of a purified Roman law as the law of Germany. There was in Germany in his day a vigorous school of jurists who strongly advocated the resuscitation of ancient Germanic laws and customs as the foundation of a modernised German system. The leader of this school, Eichorn, was a fellow professor with Savigny at the University of Berlin. Savigny never opposed the work of Eichorn, but he opposed the expulsion of Roman law. The obvious objection to Savigny is that his endeavour to preserve Roman law as the law of Germany was inconsistent with his idea of the *Volksgeist* of the German nation. One explanation lies in his personal devotion to Roman law. Another is that in his earliest work on possession he had been able to expose the misinterpretations of Roman law by later commentators, and this possibly implanted in his mind the idea that the Romans were better craftsmen than incompetent moderns. Even so the point apparently overlooked by Savigny was that, whatever may have been the case with possession, in other branches of the law these post-Roman interpretations were 'adaptations,' rather than 'perversions,' to meet

contemporary needs. It might even be argued that the so-called 'misinterpretations' were indeed expressions of the *Volksgeist* of each different country. Another and better reason for the preservation of Roman law might have been that, in view of its long established reception, to dispense with it would have unsettled three centuries of development. In order to account for the original reception of an alien system Savigny argued that at that date the Germanic law was incapable of expressing the *Volksgeist*. This questionable proposition fails to show how an alien system was better able to express it than the indigenous law. Far from the law being a reflection of the *Volksgeist*, it would seem that the *Volksgeist* had been shaped by the law.

Such are the objections to Savigny's idea of the *Volksgeist*. Other aspects of his work also need mention. His veneration for Roman law led him to advance certain dubious propositions. For instance, there was in Roman law a strict adherence to the doctrine of privity of contract with few exceptions, i.e. no one other than parties to a contract can be entitled or obliged under it. The law of negotiable instruments, of course, is a contradiction of this. Savigny accordingly condemned negotiable instruments as 'logically impossible.' This reveals one of the more unfortunate results of devotion to a postulate as well as the limitations of the *Volksgeist* idea. It could hardly be supposed that the populace had any feeling in the matter one way or the other, while the feelings of the commercially minded were strongly in favour of negotiable instruments. Indeed, the crucial weakness of Savigny's approach was that he venerated past institutions without regard to their suitability to the present.

The *Volksgeist*, according to Savigny, only formulates the rudimentary principles of a legal system. He saw clearly enough that it could not provide all the detail that is necessary. He accordingly maintained that as society, and consequently law, becomes more complex, a special body of persons is called into being whose business is to give technical, detailed expression to the *Volksgeist* in the various matters with which the law has to deal. These are the lawyers, whose task is to reflect accurately the prevailing *Geist*. This is nothing but a fictitious assumption, in no way related to reality, to cover up an obvious weakness in his principal contention. As Sir Carleton Allen said, it is not possible to pretend that the rule in *Shelley's* case, for instance, is rooted in the instincts of the British. Savigny's thesis, however, contained another and even more awkward implication. The only persons who talked of the *Volksgeist* were academic jurists, unversed in the practical problems of legal administration. Therefore, the *Volksgeist* resolved itself into what these theorists imagined it to be. On the other hand, it is possible that there is a limited sense in which Savigny's contention is acceptable. It has already been pointed out that the *Volksgeist* manifests itself, if at all, only in a few branches of the law and, even in these, by way of modifying and adapting any innovations that may be introduced. So, Savigny's proposition might be taken to mean simply that in these spheres of the law it would be helpful if legislators took account of tradition when framing new laws.

Consistently with this theory, Savigny further maintained that legislation was subordinate to custom. It should at all times conform to the *Volksgeist*. It has been pointed out that he did not oppose legislation or reform by way of codification at some appropriate time in the future, but his attitude was generally one of pessimism. He certainly opposed the project of immediate codification on several grounds. In the first place, he pointed to the defects of

contemporary codes which, to his mind, preserved adventitious, subsidiary and often unsuitable rules of Roman law, even while they rejected its main principles. Secondly, in matters on which there is no *Volksgeist*, a code, in his opinion, might introduce new and unadaptable provisions and so add to the prevailing difficulties. Such an argument would appear to have been disposed of by the subsequent experience of many countries. Thirdly, he argued that codification could never cater exhaustively for all problems that are likely to arise in the future and hence was not a suitable instrument for the development of law. Fourthly, he suggested that an imperfect code would create the worst possible difficulties by perpetuating the follies underlying it. On the other hand, when lawyers were in a position to create a perfect code, no code would then be necessary since the lawyers could adequately cope with the problems that arise. Fifthly, he argued, even more oddly, that codification would highlight the loopholes and weaknesses of the law and so encourage evasion. The short answer to the last two contentions is that they leave out of account the possibility of amendment and alteration. Codification, in Savigny's view, should be preceded by an organic, progressive, scientific study of the laws, by which he meant of course historical study. Reform should await the results of the historians' work. It is true that reformers should not plunge into legislation without paying some heed to the past as well as to the present. Savigny was over-cautious in this respect, for as Allen observed, his doctrines had the unfortunate tendency to hang traditions like fetters upon the hands of reformative enterprises. So little in fact did the historians contribute in the years that followed that drastic legislative action became imperative; which it did in 1900.

Savigny's work, on the whole, was a salutary corrective to the methods of the natural lawyers. He did grasp a valuable truth about the nature of law, but ruined it by overemphasis.

Another writer of whom some mention should be made is Gierke (1841-1921) [*Natural Law and the Theory of Society 1500-1800* (trans. Barker) and Barker's introduction], who was profoundly interested in the associations, which has always exercised a peculiar fascination for German thinkers. Associations have significance in law, and are sometimes treated as persons. Gierke denied that the recognition of an association as a person depended on the state. The reality of social control lies in the way in which autonomous groups within society organise themselves. He then proceeded to trace the progress of social and legal development in the form of a history of the law and practice of associations and propounded a classification of associations on the following lines: firstly, he contrasted groups organised on a territorial basis, such as the state, with those organised on a family or extraterritorial basis; then he contrasted associations founded on the idea of fraternal collaboration (*Genossenschaften*) with those founded on the idea of domination (*Herrschaften*). In his view legal and social history is most accurately portrayed as a perpetual struggle between the *Genossenschaft* and the *Herrschaft*. Thus, in feudal society men were organised in tight hierarchical groups based on the holding of property; this system was opposed in the Middle Ages by the emergence of collaborative groups such as the guild and the city. These degenerated in turn, and with the Renaissance and Reformation the state appeared as the significant factor in social organisation. In his own day Gierke felt that the collaborative principle had prevailed and that the state encouraged the growth of independent collaborative organisations within its own

framework. The pivot of social control, then, lay not in state organisation but rather in these collective bodies within the state.

Gierke represented a collectivist, rather than an individualist, approach. To this extent his work touched on that of the sociologists, but his interpretation of this development on historical lines entitles him to be ranked among the historians. His doctrines of mass psychology, though largely fanciful, anticipated modern inquiries. He also never quite succeeded in reconciling the independence of autonomous bodies with the supreme power of the state. He devised a pyramidal structure, which made society consist of a hierarchy of corporate bodies culminating in the state. He wished at the same time to defend the independent existence of the lesser corporate bodies and to limit absolute state power by arguing that the state was the expression of reason and the sense of right. This, of course, was easily brushed aside by those who wished to use Gierke's doctrines as a justification for absolute totalitarian power.

Anthropological Approach

Anthropological investigations into the nature of primitive and undeveloped systems of law are of modern origin and might be regarded as a product of the Historical School. Pride of place will here be accorded to Sir Henry Maine (1822-1888), who was the first and still remains the greatest representative of the historical movement in England. It is not easy to place Maine's contributions to the theory of law. He began his work with a mass of material already published on the history and development of Roman law by the German Historical School, and he was able to build upon that and also to bring to bear a more balanced view of history than is found in Savigny. Maine, however, went further. He was learned in English, Roman and Hindu laws and also had knowledge of Celtic systems. In this respect he parted company with the German historians. Instead of stressing the uniqueness of national institutions, he brought to bear a scientific urge to unify, classify and generalise the evolution of different legal orders. Thus he inaugurated both the comparative and anthropological approaches to the study of law, and history in particular, which was destined to bear abundant fruit in the years to come.

Maine set out to discover whether a pattern of legal development could be extracted from a comparative examination of different systems, especially between Roman law and the common law. What he sought were laws of historical development. He was led to distinguish between what he called 'static' and 'progressive' societies. The early development of both types is roughly the same and falls, in his thesis, into four stages. The first stage is that of law-making by personal command, believed to be of divine inspiration, e.g. Themistes of ancient Greece, and the dooms of the Anglo-Saxon kings. The second stage occurs when those commands crystallise into customs. In the third stage the ruler is superseded by a minority who obtain control over the law, e.g. the pontiffs in ancient Rome. The fourth stage is the revolt of the majority against this oligarchic monopoly, and the publication of the law in the form of a code, e.g. the XII Tables in Rome.

'Static' societies, according to Maine, do not progress beyond this point. The characteristic feature of 'progressive' societies is that they proceed to develop the law by three methods - fiction, equity and legislation. Ample examples of the use of fiction are to be

found in Roman and early English law. The operation of equity and legislation has been considered in the earlier chapters of this book.

As a general inference Maine believed that no human institution was permanent, and that change was not necessarily for the better. Unlike Savigny, he favoured legislation and codification. He recognised that the advance of civilisation demanded an increasing use of legislation, and he often contended that the confused state of English law was due to its preeminently judge-made character. Codification is an advanced form of legislative development, and represents the stage at which all the preceding phases of development are woven into a coherent whole. He also did not share Savigny's mystique of the *Volkgeist*.

Side by side with these doctrines Maine developed another thesis. In early societies, both static and progressive the legal condition of the individual is determined by status, i.e. his claims, duties, liberties etc. are determined by law. The march of progressive societies witnesses the disintegration of status and the determination of the legal condition of the individual by free negotiation on his part. This was expressed in one of Maine's most famous generalisations:

The movement of progressive societies has hitherto been a movement from *Status to Contract*.

An evaluation of Maine's work must take into account the pioneer character of his comparative investigations. Since his day the study of anthropology has developed into a separate branch of learning. Modern research over a wider field and with better equipment has corrected Maine's work at many points, and departed from it at others. One should be charitable about his errors and marvel at his genius in accomplishing so much. Some comment should, however, be made about the development from status to contract. There was much to support it. In Roman law there was the gradual amelioration of the condition of children, women and slaves, the freeing of adult women from tutelage, and the acquisition of a limited contractual capacity by children and slaves. In English law the bonds of serfdom were relaxed and eventually abolished. Employment came to be based on a contractual basis between master and servant. Maine's own age was one in which legislation was removing the disabilities of Catholics, Jews, Dissenters and married women. He witnessed the triumph in the American Civil War of the North, a community based on contract, over the feudal and status-regulated South. In the modern age, however, a return to status has been detected. In public affairs, and in industry in particular, the individual is no longer able to negotiate his own terms. This is the age of the standardised contract, and of collective bargaining. Such developments, however, should not be held against Maine. He was not purporting to prophesy and, indeed, he expressly qualified his proposition by saying that the development had hitherto been a movement towards contract.

Modern anthropologists have had the advantage of following the trails blazed by Maine and by others after him with the added advantage of being able to profit from the researches of fellow-workers in many directions. It is not surprising, therefore, to find that Maine's conclusions about primitive law have now been discredited or modified. The idea that early development passed through the successive stages of personal judgments, oligarchic monopoly and code has been abandoned as drawing too simple a picture. Primitive societies are seen to have been more complex than had been supposed. There have been several forms

of such societies, so there is an initial problem of determining what sorts of societies should be classified as 'primitive'. It is now thought that there were seven grades of them, the First and Second Hunters, the First, Second and Third Agricultural Grades, and the First and Second Pastoral Grades. The agricultural and pastoral grades are to some extent parallel. The degree of development of social institutions does bear some correspondence with the degree of economic development. From all this it will be gathered that primitive societies exhibit a wide range of institutions; there is nothing like a single pattern as Maine had supposed.

There has also been modification of the sequence, as stated by Maine, of later development, namely by means of fiction, equity and legislation. Deliberate legislation is now seen to have been an early method of law-making with fiction and equity coming in at a later stage. The codes, which one finds at the culmination of the primitive period, were chiefly collections of earlier legislation.

Primitive law was by no means as rigid as Maine had supposed, nor were people inflexibly bound by it. Field-work among 'contemporary primitives' has revealed that considerable latitude is inherent in the content of their customary practices. For instance, Malinowski's first-hand experience of life among certain Pacific islanders enabled him to demonstrate how, eg their practices made allowance for good and bad harvests, or take due account of an excess of generosity on the part of individuals. Observations by Gluckman of the Barotse in Northern Rhodesia have shown that the very indeterminate character of their standards permits a desirable flexibility in application. Rigidity develops at a much later period. Above all, it is generally agreed that even in primitive societies people do control their destinies, that they are by no means blindly subservient to custom. The conscious purpose of achieving some and precedes the adaptation of human behaviour, and the adaptation of behaviour is followed by adaptation of the structure of social organisation.

It used to be accepted that law and religion were indistinguishable in primitive societies. This view has given way to an increased recognition of the secular character of primitive law. The exact extent to which law and religion were associated, seems, however, to be in some doubt. Diamond, for example, criticises Maine most strongly for his assertion that they were indistinguishable; the association of the two, in his view, is a comparatively late development. Hoebel, on the other hand, defends Maine on this point. Hocart believed that the dualism between religion and the secular authority (the state) originated in a division of function of between a 'sky-king' who was the supreme regulator and as such responsible for law, and an 'earth-king' who was charged with the task of dealing with evil and wrongdoing; the former was reflective and unimpassioned, the latter quick in decision and violent in action. The role of the 'sky-king' would seem to have combined religion and law. further, if Hocart is right there seems to be implicit in this the distinction between the primitive, prescriptive patterns of conduct and the secondary machinery of sanction; which leads on to the next point.

It is likewise agreed among anthropologists that there is, at any rate as far as contemporary primitive societies are concerned, a phenomenon that can be isolated from religious and other social observances and for which the term 'law' would be convenient. Bohannan has suggested that law comes into being when customary reciprocal obligations become further institutionalised in a way that society continues to function on the basis of rules. These concern mainly the relations of individuals *inter se* and groups, i.e. primary

patterns of conduct importing an 'ought'. Gluckman has shown that among the Barotse the laws consist mainly of positive injunctions, 'you ought' rather than negative, 'you ought not'. These 'oughts' of primitive law are distinguishable from others by the nature of the obligation to obey them. It was a cardinal point of Malinowski's thesis, supported by Hogbin, that obedience to customs rests on the reciprocity of services. People do unto others what the law bids them do because they depend on some service in return as part of their mutual co-existence. It is spontaneous and incessant goodwill that promotes and preserves social existence. It is possible that Malinowski underestimated the part played by sanction. It might also be that the ceremonial with which these services are usually rendered underlines their obligatory character, but this is of minor significance. Moreover, it is obedience, not disobedience, that is contemplated by law, the primary rule, not sanction. Yet some mechanism there has to be for dealing with cases of conflict and breach. As long as obedience prevails there is no call for this machinery. Examples of its working are also of interest. For instance, the records kept by Gluckman of the judicial processes among the Barotse show that the main task is reconciliation rather than the ordering of sanctions, which implies that even at the secondary stage an attempt is made to ensure conformity with the primary pattern of conduct. Sanctions apply only when reconciliation has failed or is not possible. One form which these take is to abandon the wrongdoer to the avenger, who has the moral support of the community behind him. In other cases, compensation may be payable to the victim, and it is a matter of dispute whether vengeance preceded compensation or whether they existed side by side. This is why it is difficult to distinguish between civil and criminal wrongdoing in early societies. The question depended on whether the action was thought to affect the society or only individual. In the result, the conclusion which most anthropologists have reached is that what is called 'law' should be described in terms of its function and the attitude of the people towards it rather than in terms of form or enforcement. It would appear to be something compulsory observed and certainly far from what is commanded or backed by sanction.

Lastly, another point, which has emerged from modern investigations, is the disposal of the belief in communism as the primitive form of society. This may be seen in many ways, particularly in the prevalence of jealously protected private ownership of socially productive weapons and institutions, such as spells, incantations and, above all, ritual.

So far not much has been said, save indirectly, of the organisation of government. In this connection the outstanding contribution of Hocart deserves mention, especially as his name is insufficiently known among jurists. On the evidence collected from a large number of widely separated tribes in many parts of the world, Hocart came to the conclusion that the functions of modern government were gradually fitted into the framework of a machinery that was previously fulfilling other functions. In other words, the framework of government was there before there was any governing to be done. Man does not consciously seek government; he seeks life, and with that end in view he does one thing after another, evolving and adapting special procedures and techniques, till he finds himself governed. The means by which primitive societies sought life was ritual. The lives and well-being of individuals depended on the life and well-being of society. Ritual was therefore a social affair and society had to organise itself for it. The structure of ritual was such that different rules were assigned to

different individuals and groups. In all this one may detect the origin of caste; the various castes that one finds, the fisher, the farmer, the launderer, the potter, etc., may not have derived from the trades that the people actually pursued, but from the roles they fulfilled in the ritual. There probably was some connection between trade and a role, for no doubt it was usual to assign to a person the role which he was fitted to fulfil whenever this was possible.

It was the organisation, founded on ritual, that was adapted for purposes of government. Since the king could not play every role simultaneously, he assigned to each chieftain a particular role which had a particular objective. The aim of the ritual was the control of nature so as to render it bounteous and abundant. The particular form which the ritual assumed in any given case depended on the aspect of nature which was to be controlled, whether sunshine or rain or harvest or game etc. To the group that was identified with some aspect of nature was entrusted the ritual concerning it. It follows from this, first, that only the group that exclusively owned a particular ritual was competent to perform it; secondly, every ritual had its leader; thirdly, the performers did not merely imitate nature as it happened to be at the moment, but as they wanted it to behave, e.g. to shed rain at a time of drought - an ought not an is; fourthly, in order to control nature the performers had to become one with nature and identify themselves with it; and fifthly, such equivalence was accompanied by the words, which thus acquired special significance.

There was always a tendency for rituals to coalesce in one person or group of persons. The greatest cumulator was the king, and this process of cumulation is centralisation. Even after the king had begun to fulfil several roles, his chiefs had to stand ready to lend their assistance if called on to do so. In the role of the sun the king became the supreme regulator of the world, and this regulative function assumed greater and greater importance and eventually became the mark of the king. The aim of the ritual, as has been remarked, was to make nature bounteous. It followed that nature should itself be amply provided before a generous return could be expected of it. The king being identified with nature, the prosperity of the people could only be achieved by making the king prosperous. Revenue and tribute were the means of making him so.

In these and various other ways Hocart discerned the outlines of government, the organs of which were fitted into the existing framework of ritual. It is not possible in this short space to pursue his demonstration further, nor to consider his parallel investigations into the meaning of ceremonial statements, doctrines and courtesies relating to monarchy even today. One thing which his analysis has endorsed is the prescriptive nature and function of primitive law.

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Roscoe Pound^{*}

Nowhere has the study of laws in society been taken up with such industry and enthusiasm as in America. Here, the law school and the jurist enjoy a status akin to that of jurists on the Continent and superior to that of their counterparts in Great Britain. These factors have combined to produce an American movement in sociological jurisprudence of great importance which draws its exponents both from the faculty and the bench. Outstanding among these was Pound (1870-1964), of the Harvard Law School. As with Bentham, his theme was a constant one, maintained in his extensive writings throughout a long period.

Sociological jurisprudence, according to Pound, should ensure that the making, interpretation and application of laws take account of social facts. Towards achieving this end there should be (a) a factual study of the social effects of legal administration, (b) social investigations as preliminaries to legislation, (c) a constant study of the means for making laws more effective, which involves, (d) the study, both psychological and philosophical, of the judicial method, (e) a sociological study of legal history, (f) allowance for the possibility of a just and reasonable solution of individual cases, (g) a ministry of justice in English-speaking countries, and (h) the achievement of the purposes of the various laws. This comprehensive programme covers, as is evident, every aspect of the social study of laws. It is not possible to follow Pound's elaboration of each of these aspects, and all that can be done here is to outline his thought.

The common law, he said, still bears the impress of individual rights. So in order to achieve the purposes of the legal order there has to be (a) a recognition of certain interests, individual, public and social, (b) a definition of the limits within which such interests will be legally recognised and given effect to, and (c) the securing of those interests within the limits as defined. When determining the scope and subject-matter of the system the following five things require to be done: (i) preparation of an inventory of interests, classifying them; (ii) selection of the interests which should be legally recognised; (iii) demarcation of the limits of securing the interests so selected; (iv) consideration of the means whereby laws might secure the interests when these have been acknowledged and delimited; and (v) evolution of the principles of valuation of the interests.

Pound likened the task of the lawyer to engineering, an analogy which he used repeatedly. The aim of social engineering is to build as efficient a structure of society as possible, which requires the satisfaction of the maximum of wants with the minimum of friction and waste. It involves the balancing of competing interests. For this purpose interests were defined as 'claims or wants or desires (or, I would like to say, expressions) which men assert *de facto*, about which the law must do something if organised societies are to endure. It is the task of the jurist to assist the courts by classifying and expatiating on the interests protected by law. Pound's arrangement of these, elaborated in detail, was as follows:

A. Individual Interests. These are claims or demands or desires involved in and looked at from the standpoint of the individual life. They concern:-

^{*} R.W.M. Dias, *Jurisprudence*, 431-35 (1985).

- (1) **Personality.** This includes interests in (a) the physical person, (b) freedom of will, (c) honour and reputation, (d) privacy, and (e) belief and opinion.
- (2) **Domestic relations.** It is important to distinguish between the interest of individuals in domestic relationships and that of society in such institutions as family and marriage. Individual interests include those of (a) parents, (b) children, (c) husbands, and (d) wives.
- (3) **Interest of substance.** This includes interests of (a) property, (b) freedom of industry and contract, (c) promised advantages, (d) advantageous relations with others, (e) freedom of association, and (f) continuity of employment.

B. Public Interests. These are claims or demands or desires asserted by individuals involved in or looked at from the standpoint of political life.

—The claims asserted in title of a politically organised society; as one might say for convenience, the claims of the state, the political organization of society.ø

There are two of them:

- (1) **Interests of the state as a juristic person.** These, as pointed out earlier, are not applicable in this country where the position of the Crown has obviated the need for the personification of the state. They include (a) the integrity, freedom of action and honour of the state's personality, and (b) claims of the politically organised society as a corporation to property acquired and held for corporate purposes.
- (2) **Interests of the state as guardian of social interests.** This seems to overlap with the next major category.

C. Social Interests. These are claims or demands or desires, even some of the foregoing in other aspects, thought of in terms of social life and generalised as claims of the social group. This is much the most important category, since most, if not all, the interests in category A would be statable here from a social, rather than an individual, point of view. Social interests are said to include

- (1) **Social interest in the general security.**

—The claim or want or demand, asserted in title of social life in civilized society and through the social group, to be secure against those forms of action and courses of conduct which threaten its existence.ø

This embraces those branches of the law which relate to (a) general safety, (b) general health, (c) peace and order, (d) security of acquisitions, and (e) security of transactions.

- (2) **Social interest in the security of social institutions.**

—The claim or want or demand involved in life in civilised society that its fundamental institutions be secure from those forms of action and courses of conduct which threaten their existence or impair their efficient functioning.ø

This comprises (a) domestic institutions, (b) religious institutions, (c) political institutions, and (d) economic institutions. Divorce legislation might be adduced as an example of the conflict between the social interest in the security of the institution of the marriage and the individual interests of the unhappy spouses. Pound pointed out that the law has at times attached disabilities to the children of illegitimate and adulterous unions with the object of preserving the sanctity of marriage. The example is not altogether fortunate, since

the extent to which such vicarious suffering has deterred would-be offenders is minimal. Then again, there is tension between the individual interest in religious freedom and the social interest, at any rate in some countries, in preserving the dominance of an established church.

(3) *Social interest in general morals.*

—The claim or want or demand involved in social life in civilised society to be secured against acts or courses of conduct offensive to the moral sentiments of the general body of individuals therein for the time being.ø

This conveys a variety of laws, for example, those dealing with prostitution, drunkenness and gambling.

(4) *Social interest in the conservation of social resources.*

—The claim or want or demand involved in social life in civilised society that the goods of existence shall not be wasted; that where all human wants may not be satisfied, in view of infinite individual desires and limited natural means of satisfying them, the latter may be made to go as far as possible; and, to that end, the acts or courses of conduct which tend needlessly to impair these goods shall be restrained.ø

Thus this social interest clashes to some extent with the individual interest in dealing with one's own property as one pleases. It covers (a) conservation of natural resources, and (b) protection and training of dependants and defectives, i.e. conservation of human resources.

(5) *Social interest in general progress*

'The claim or want or demand involved in social life in civilised society that the goods of existence shall not be wasted; that where all human wants may not be satisfied, in view of infinite individual desires and limited natural means of satisfying them, the latter be made to go as far as possible; and, to that end, the acts or courses of conduct which tend needlessly to impair these goods shall be restrained.'

This has three aspects, (a) Economic progress, which covers (i) freedom of use and sale of property, (ii) free trade, (iii) free industry, and (iv) encouragement of invention by the grant of patents. Now, (i) and (ii) are less marked today than they used to be. Indeed, it might even be said that progress has been achieved by a reversal of them. The policy of free trade, which has as its corollary the disapproval of monopolies, might appear to have been indorsed by legislation against restrictive practices. While this is true of private monopolies, it should be noted that there is an ever-growing demand for monopolies in the state or state-controlled institutions. The encouragement of invention by the grant of patents, too, is somewhat suspect, for it opens the possibility of acquiring patents in order to suppress inventions. On the whole, therefore, item (a) is the least happy.

The interest in general progress also includes (b) political progress, which covers (i) free speech, and (ii) free associations; and (c) cultural progress, which covers (i) free science, (ii) free letters, (iii) free arts, (iv) promotion of education and learning, and (v) aesthetics.

(6) *Social interest in individual life.*

The claim or want or demand involved in social life in civilised society that each individual be able to live a human life therein according to the standards of the society.

It involves (a) self-assertion, (b) opportunity, and (c) conditions of life.

Having listed the interests recognised by law, Pound considered the means by which they are secured. These consist of the device of legal person and the attribution of claims, duties, liberties, powers and immunities. There is also the remedial machinery behind them, which aims sometimes at punishment, sometimes at redress and sometimes at prevention. He also addressed himself to the question of how in any given case the interests involved are to be balanced or weighed. Interests, he insisted, should be weighed on the same plane as it were. One cannot balance an individual interest against a social interest, since that very way of stating them may reflect a decision already made. One should transfer the interests involved on to the same plane, preferably in most cases to that of the social plane, which is the most general. Thus, freedom of the person might be regarded as an individual interest, but it is translatable as an interest of the society that its members should be free. But, assuming that a choice has been made, the extent to which it can be given effect in any given case depends on the texture of the legal institutions that are involved. Some are more flexible than others and permit a freer play for the balancing process. Elsewhere Pound classified the institutions of the law as follows. There are, first, rules, which are precepts attaching definite consequences to definite factual situations. Secondly, there are principles, which are authoritative points of departure for legal reasoning in cases not covered by rules. Thirdly, there are conceptions, which are categories to which types or classes of transactions and situations can be referred and on the basis of which a set of rules, principles or standards becomes applicable. Fourthly, there are doctrines, which are the union of rules, principles and conceptions with regard to particular situations or types of cases in logically independent schemes so that reasoning may proceed on the basis of the scheme and its logical implications. Finally, there are standards prescribing the limits of permissible conduct, which are to be applied according to the circumstances of each case.

Such, then, is the substance of Pound's theory. That his contribution is considerable goes without saying. He more than anyone helped to bring home the vital connection between laws, their administration and the life of society. His work also set the seal on prior demonstrations of the responsible and creative task of lawyers, especially the judges. In so far as his theory laid such heavy emphasis on the existence of varied and competing interests and the need for adjustment between them, it will have enduring value. There are, however, some other respects in which his views are less happy.

In the first place, Pound's engineering analogy is apt to mislead. What, for instance, is the waste and friction in relation to the conflict of interests? Further, the construction, for example of a bridge, is guided by a plan of the finished product, and the stresses and strains to be allowed to each part are worked out with a view to producing the best bridge of that kind in that place. With laws there can be no plan, worked out in detail, of any finished product, for society is constantly developing and changing, and the pressures behind interests are changing

too. Therefore, the value or importance to be allotted to each interest cannot be predetermined.

Pound assumed that *de facto* claims pre-exist laws, which are required to 'do something' about them. Some claims, however, are consequent on law, e.g. those that have resulted from welfare legislation. Besides, what does 'do something' about them mean? It is not enough to say that law has to select those that are to be recognised. 'Recognition' has many gradations, which makes it necessary to specify in what sense an interest is recognised as such. Thus, the cult of Scientology is not outlawed, but it has been officially condemned, which makes it difficult to say in what sense the law recognises or does not recognise it.

It is not interests as such, but the yardsticks with reference to which they are measured that matter. It may happen that some interest is treated as an ideal in itself, in which case it is not the interest as an interest, but as an ideal that will determine the relative importance between it and other interests. Thus, whether the proprietary right of a slave-owner is to be upheld or not depends upon whether sanctity of property or sanctity of the person is adopted as the ideal. The choice of an ideal, or even a choice between competing ideals, is a matter of decision, not of balancing; and it is with the choice made by judges and the ideals which they adopt that lawyers are concerned.

The balancing metaphor is also misleading. If two interests are to be balanced, that presupposes some 'scale' or 'yardstick' with reference to which they are measured. One does not weigh interests against one another, even 'on the same plane.' Only with reference to some ideal is it possible to say that the upholding of one interest is more consonant with, or more likely to achieve it than another, which means that with reference to that given ideal the one interest is entitled to preference over the other. This leads to another consideration. The 'weight' to be attached to an interest will vary according to the ideal that is used. For example, with reference to the ideal of freedom of the individual all interests pertaining to individual self-assertion will carry more weight and social interests; but with reference to the ideal of the welfare of society the reverse might be true. The point is that the whole idea of balancing is subordinate to the ideal that is in view. The march of society is gauged by changes in its ideals and standards for measuring interests.

In any case, all questions of interests and ideals should be considered in the context of particular issues as and when they come up for decision. An interest is not presented to a judge preclassified as part of an overall scheme, but in relation to one or more other interests in a given situation. Each situation has a pattern of its own, and the different types of interests and activities that might be involved are infinitely various. It is for the judge to translate the activity involved in the case before him in terms of an interest and to select the ideal with reference to which the competing interests are to be measured. Therefore, the listing of interests is not as important as the views which particular judges take of given activities and the criteria by which they evaluate them.

How does one know when interests exist, how are they made articulate? The answer is: when presented in litigation. Lists of interests can be drawn up, not in advance of, but after the various interests have been contended for in successive cases.

The recognition of a new interest is a matter of policy. The mere presence of a list of interests is, therefore, of limited assistance in helping to decide a given dispute. What this and the last paragraph suggest is that interests need only be considered as and when they arise in disputes; the matter that is of importance is the way in which they are viewed and evaluated by the particular judge.

In any case, lists of interests are only the products of personal opinion. Different writers have presented them differently. With reference to Pound's own elaborate scheme, it is to be observed that his distinction between categories B and C, Public and Social interests, is doubtful. Even the distinction between A and C, Individual and Social interests, is of minor significance. As Pound himself says, in most cases it is preferable to transfer individual interests on to the plane of social interests when considering them. On the suggestion previously made, it is the ideal with reference to which any interest is considered that matters, not so much the interest itself, still less the category in which it is placed. None of these remarks is intended to detract from the value of Pound's analysis of the interests themselves. All that is urged is that as a guide to the administration of laws the listing of interests is unhelpful.

It is difficult to see how the balancing of interests will produce a cohesive society where there are minorities whose interests are irreconcilable with those of the majority. How does one 'balance' such interests? Whichever interest is favoured, the decision will be resented by those espousing the other, a compromise will most likely be resented by both. There is a different problem where a substantial proportion of the populace is parochially minded and have little or no sense of nationhood. The prime task in such countries is the creation of interests and the emphasis is, once more, on the need for ideals. Pound's theory cannot be accepted too generally.

It is worth while repeating that the criticism here is not that Pound ignored ideals of guidance, but that he seems to have devoted too little attention to them. His awareness of them is evident, for example, in his own distinction between 'natural natural law' and 'positive natural law'. The former, according to him, is 'a rationally conceived picture of justice as an ideal relation among men, of the legal order as a rationally conceived means of promoting and maintaining that relation, and of legal precepts as rationally conceived ideal instruments of making the legal order effective for its ideal end'. The latter is 'a system of logically derived universal legal precepts shaped to the experience of the past, postulated as capable of formulation to the exigencies of universal problems and so taken to give legal precepts of universal validity. It is submitted with respect that it would have been preferable had he enlarged on the criteria of evaluating interests instead of developing particular interests. It is possible that his work has not had the practical impact that it ought to have had because of this somewhat sterile preoccupation with interests and too little attention to the criteria of evaluation.

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JUDICIAL PROCESS

The Case of the Speluncean Explorers^{*}

By

Lon L Fuller

In the Supreme Court of Newgarth, 4300

The defendants, having been indicted for the crime of murder, were convicted and sentenced to be hanged by the Court of General Instances of the County of Stowfield. They bring a petition of error before this Court. The facts sufficiently appear in the opinion of the Chief Justice.

TRUPENNY, J. The four defendants are members of the Speluncean Society, an organization of amateurs interested in the exploration of caves. Early in May of 4299 they, in the company of Roger Whetmore, then also a member of the Society, penetrated into the interior of a limestone cavern of the type found in the Central Plateau of this Commonwealth. While they were in a position remote from the entrance to the cave, a landslide occurred. Heavy boulders fell in such a manner as to block completely the only known opening to the cave. When the men discovered their predicament they settled themselves near the obstructed entrance to wait until a rescue party should remove the detritus that prevented them from leaving their underground prison. On the failure of Whetmore and the defendants to return to their homes, the Secretary of the Society was notified by their families. It appears that the explorers had left indications at the headquarters of the Society concerning the location of the cave they proposed to visit. A rescue party was promptly dispatched to the spot.

The task of rescue proved one of overwhelming difficulty. It was necessary to supplement the forces of the original party by repeated increments of men and machines, which had to be conveyed at great expense to the remote and isolated region in which the cave was located. A huge temporary camp of workmen, engineers, geologists and other experts was established. The work of removing the obstruction was several times frustrated by fresh landslides. In one of these, ten of the workmen engaged in clearing the entrance were killed. The treasury of the Speluncean Society was soon exhausted in the rescue effort, and the sum of eight hundred thousand frelars, raised partly by popular subscription and partly by legislative grant, was expended before the imprisoned men were rescued. Success was finally achieved on the thirty-second day after the men entered the cave.

Since it was known that the explorers had carried with them only scant provisions and since it was also known that there was no animal or vegetable matter within the cave on which they might subsist, anxiety was early felt that they might meet death by starvation before access to them could be obtained. On the twentieth day of their imprisonment it was learned for the first time that they had taken with them into the cave a portable wireless machine capable of both sending and receiving messages. A similar machine was promptly installed in the rescue camp and oral communication established with the unfortunate men

^{*} Lon L. Fuller, "The Case of Speluncean Explorers," 62 *Harvard Law Review* 616-664 (1949).

within the mountain. They asked to be informed how long a time would be required to release them. The engineers in charge of the project answered that at least ten days would be required even if no new landslides occurred. The explorers then asked if any physicians were present and were placed in communication with a committee of medical experts. The imprisoned men described their condition and the rations they had taken with them, and asked for a medical opinion whether they would be likely to live without food for ten days longer. The chairman of the committee of physicians told them that there was little possibility of this. The wireless machine within the cave then remained silent for eight hours. When communication was re-established the men asked to speak again with the physicians. The chairman of the physicians' committee was placed before the apparatus and Whetmore, speaking on behalf of himself and the defendants, asked whether they would be able to survive for ten days longer if they consumed the flesh of one of their number. The physicians' chairman reluctantly answered this question in the affirmative. Whetmore asked whether it would be advisable for them to cast lots to determine which of them should be eaten. None of the physicians present was willing to answer the question. Whetmore then asked if there were among the party a judge or other official of the Government who would answer this question. None of those attached to the rescue camp was willing to assume the role of advisor in this matter. He then asked if any minister or priest would answer their question, and none was found who would do, so. Thereafter no further messages were received from within the cave and it was assumed (erroneously, it later appeared) that the electric batteries of the explorers' wireless machine had become exhausted. When the imprisoned men were finally released it was learned that on the twenty-third day after their entrance into the cave Whetmore had been killed and eaten by his companions.

From the testimony of the defendants, which was accepted by the jury, it appears that it was Whetmore who first proposed that they might find the nutriment without which survival was impossible in the flesh of one of their own number. It was also Whetmore who first proposed the use of some method of casting lots, calling the attention of the defendants to a pair of dice he happened to have with him. The defendants were at first reluctant to adopt so desperate a procedure, but after the conversations by wireless related above, they finally agreed on the plan proposed by Whetmore. After much discussion of the mathematical problems involved, agreement was finally reached on a method of determining the issue by the use of the dice.

Before the dice were cast, however, Whetmore declared that he withdrew from the arrangement, as he had decided on reflection to wait for another week before embracing an expedient so frightful and odious. The others charged him with a breach of faith and proceeded to cast the dice. When it came Whetmore's turn, the dice were cast for him by one of the defendants, and he was asked to declare any objections he might have to the fairness of the throw. He stated that he had no such objections. The throw went against him and he was then put to death and eaten by his companions.

After the rescue of the defendants, and after they had completed a stay in a hospital where they underwent a course of treatment for malnutrition and shock, they were indicted for the murder of Roger Whetmore. At the trial, after the testimony had been concluded, the foreman of the jury (a lawyer by profession) inquired of the Court whether the jury might not find a

special verdict, leaving it to the court to say whether on the facts as found the defendants were guilty. After some discussion, both the Prosecutor and counsel for the defendants indicated their acceptance of this procedure and it was adopted by the court. In a lengthy special verdict the jury found the facts as I have related them above and found further that if on these facts the defendants were guilty of the crime charged against them, then they found the defendants guilty. On the basis of this verdict, the trial judge ruled that the defendants were guilty of murdering Roger Whetmore. The judge then sentenced them to be hanged, the law of our Commonwealth permitting him on discretion with respect to the penalty to be imposed. After the release of the jury, its members joined in a communication to the Chief Executive asking that the sentence be commuted to an imprisonment of six months. The trial judge addressed a similar communication to the Chief Executive. As yet no action with respect to these pleas has been taken, as the Chief Executive is apparently awaiting our disposition of this petition of error.

It seems to me that in dealing with this extraordinary case the jury and the trial judge followed a course that was not only fair and wise, but the only course that was open to them under the law. The language of our statute is well known:

öWhoever shall willfully take the life of another shall be punished by death.ö

N.C.S.A. (N.S.) § 12-A. This statute permits of no exception applicable to this case, however our sympathies may incline us to make allowance for the tragic situation in which these men found themselves.

In a case like this the principle of executive clemency seems admirably suited to mitigate the rigors of the law and I propose to my colleagues that we follow the example of the jury and the trial judge by joining in the communications they have addressed to the Chief Executive. There is ever reason to believe that these requests for clemency will be heeded, coming as they do from those who have studied the case and had an opportunity to become thoroughly acquainted with all its circumstances. It is highly improbable that the Chief Executive would deny these requests unless he were himself to hold hearings at least as extensive as those involved in the trial below, which lasted for three months. The holding of such hearings (which would virtually amount to a retrial of the case) would scarcely be compatible with the function of the Executive as it is usually conceived. I think we may therefore assume that some form of clemency will be extended to these defendants. If this is done, then justice will be accomplished without impairing either the letter or spirit of our statutes and without offering any encouragement for the disregard of law.

FOSTER, J. I am shocked that the Chief Justice, in an effort to escape the embarrassments of this tragic case, should have adopted and should have proposed to his colleagues, an expedient at once so sordid and so obvious. I believe something more is on trial in this case than the fate of these unfortunate explorers; that is the law of our Commonwealth. If this Court declares that under our law these men have committed a crime, then our law is itself convicted in the tribunal of common sense, no matter what happens to the individuals involved in this petition of error. For us to assert that the law we uphold and expound compels us to a conclusion we are ashamed of, and from which we can only escape by appealing to a

dispensation resting within the personal whim of the Executive, seems to me to amount to an admission that the law of this Commonwealth no longer pretends to incorporate justice.

For myself, I do not believe that our law compels the monstrous conclusion that these men are murderers. I believe, on the contrary, that it declares them to be innocent of any crime. I rest this conclusion on two independent grounds, either of which is of itself sufficient to justify the acquittal of these defendants.

The first of these grounds rests on a premise that may arouse opposition until it has been examined candidly. I take the view that the enacted or positive law of this Commonwealth, including all of its statutes and precedents, is inapplicable to this case, and that the case is governed instead by what ancient writers in Europe and America called "the law of nature."

This conclusion rests on the proposition that our positive law is predicated on the possibility of men's coexistence in society. When a situation arises in which the coexistence of men becomes impossible, then a condition that underlies all of our precedents and statutes has ceased to exist. When that condition disappears, then it is my opinion that the force of our positive law disappears with it. We are not accustomed to applying the maxim *cessante ratione legis, cessat et ipsa lex* to the whole of our enacted law, but I believe that this is a case where the maxim should be so applied.

The proposition that all positive law is based on the possibility of men's coexistence has a strange sound, not because the truth it contains is strange, but simply because it is a truth so obvious and pervasive that we seldom have occasion to give words to it. Like the air we breathe, it so pervades our environment that we forget that it exists until we are suddenly deprived of it. Whatever particular objects may be sought by the various branches of our law, it is apparent on reflection that all of them are directed toward facilitating and improving men's coexistence and regulating with fairness and equity the relations of their life in common. When the assumption that men may live together loses its truth, as it obviously did in this extraordinary situation where the life only became possible by the taking of life, then the basic premises underlying our whole legal order have lost their meaning and force.

Had the tragic events of this case taken place a mile beyond the territorial limits of our Commonwealth, no one would pretend that our law was applicable to them. We recognize that jurisdiction rests on a territorial basis. The grounds of this principle are by no means obvious and are seldom examined. I take it that this principle is supported by an assumption that it is feasible to impose a single legal order upon a group of men only if they live together within the confines of a given area of the earth's surface. The premise that men shall coexist in a group underlies, then, the territorial principle, as it does all of law. Now I contend that a case may be removed morally from the force of a legal order, as well as geographically. If we look to the purposes of law and government, and to the premises underlying our positive law, these men when they made their fateful decision were as remote from our legal order as if they had been a thousand miles beyond our boundaries. Even in a positive sense, their underground prison was separated from our courts and writ-serves by a solid curtain of rock that could be removed only after the most extraordinary expenditures of time and effort.

I conclude, therefore, that at the time Roger Whetmore's life was ended by these defendants, they were, to use the quaint language of nineteenth-century writers, not in a "state

of civil societyö but in a state östate of natureö. This has the consequence that the law applicable to them is not the enacted and established law of this Commonwealth, but the law derived from those principles that were appropriate to their condition. I have no hesitancy in saying that under those principles they were guiltless of any crime.

What these men did was done in pursuance of an agreement accepted by all of them and first proposed by Whetmore himself. Since it was apparent that their extraordinary predicament made inapplicable the usual principles that regulate men's relations with one another, it was necessary for them to draw, as it were, a new charter of government appropriate to the situation in which they found themselves.

It has from antiquity been recognized that the most basic principle of law or government is to be found in the notion of contract or agreement. Ancient thinkers, especially during the period from 1600 to 1900, used to base government itself on a supposed original social compact. Skeptics pointed out that this theory contradicted the known facts of history, and that there was no scientific evidence to support the notion that there was no scientific evidence to support the notion that any government was ever founded in the manner supposed by the theory. Moralists replied that, if the compact was a fiction from a historical point of view, the notion of compact or agreement furnished the only ethical justification on which the powers of government, which include that of taking life, could be rested. The powers of government can only be justified morally on the ground that these are powers that reasonable men would agree upon and accept if they were faced with the necessity of constructing a new some order to make their life in common possible.

Fortunately, our Commonwealth is not bothered by the perplexities that beset the ancients. We know as a matter of historical truth that our government was founded upon a contract or free accord of men. The archeological proof is conclusive that in the first period following the Great Spiral the survivors of that holocaust voluntarily came together and drew up a charter of government. Sophistical writers have raised questions as to the power of those remote contractors to bind future generations, but the fact remains that our government traces itself back in an unbroken line to that original charter.

If, therefore, our hangmen have the power to end men's lives, if our sheriffs have the power to put delinquent tenants in the street, if our police have the power incarcerate the inebriated reveler, these powers find their moral justification in that original compact of our forefathers. If we can find no higher source for our legal order, what higher source should we expect these starving unfortunates to find for the order they adopted for themselves?

I believe that the line of argument I have just expounded permits of no rational answer. I realize that it will probably be received with a certain discomfort by many who read this opinion, who will be inclined to suspect that some hidden sophistry must underlie a demonstration that leads to so many unfamiliar conclusions. The source of this discomfort is, however, easy to identify. The usual conditions of human existence incline us to think of human life as an absolute value, not to be sacrificed under any circumstances. There is much that is fictitious about this conception even when it is applied to the ordinary relations of society. We have an illustration of this truth in the very case, before us. Ten workmen were killed in the process of removing the rocks from the opening to the cave. Did not the engineers and government officials who directed the rescue effort know that the operations

they were undertaking were dangerous and involved a serious risk to the lives of the workmen executing them? If it was proper that these ten lives should be sacrificed to save the lives of five imprisoned explorers to carry out an arrangement which would save four lives at the cost of one?

Every highway, every tunnel, every building we project involves a risk to human life. Taking these projects in the aggregate, we can calculate with some precision how many deaths the construction of them will require; statisticians can tell you the average cost in human lives of a thousand miles of a four-lane concrete highway. Yet we deliberately and knowingly incur and pay this cost on the assumption that the values obtained for those who survive outweigh the loss. If these things can be said of a society functioning above ground in a normal and ordinary manner, what shall we say of the supposed absolute value of a human life in the desperate situation in which these defendants and their companion Whetmore found themselves?

This concludes the exposition of the first ground of my decision. My second ground proceeds by rejecting hypothetically all the premises on which I have so far proceeded. I concede for purposes of argument that I am wrong in saying that the situation of these men removed them from the effect of our positive law, and I assume that the Consolidated Statutes have the power to penetrate five hundred feet of rock and to impose themselves upon these starving men huddled in their underground prison.

Now it is, of course, perfectly clear that these men did an act that violates the literal wording of the statute which declares that he who shall willfully take the life of another is a murderer. But one of the most ancient bits of legal wisdom is the saying that a man may break the letter of the law without breaking the law itself. Every proposition of positive law, whether contained in a statute or a judicial precedent, is to be interpreted reasonably, in the light of its evident purpose. This is a truth so elementary that it is hardly necessary to expatiate on it. Illustrations of its application are numberless and are to be found in every branch of the law. In *Commonwealth v. Staymore* the defendant was convicted under a statute making it a crime to leave one's car parked in certain area for a period longer than two hours. The defendant had attempted to remove his car, but was prevented from doing so because the streets were obstructed by a political demonstration in which he took no part and which he had no reason to anticipate. His conviction was set aside by this Court, although his case fell squarely within the wording of the statute. Again, in *Fehler v. Neegas* there was before this Court for construction a statute in which the word "not" had plainly been transposed from its intended position in the final and most crucial section of the act. This transposition was contained in all the successive drafts of the act, where it was apparently overlooked by the draftsmen and sponsors of the legislation. No one was able to prove how the error came about, yet it was apparent that, taking account of the contents of the statute as a whole, an error had been made, since a literal reading of the final clause rendered it inconsistent with everything that had gone before and with the object of the enactment as stated in its preamble. This Court refused to accept a literal interpretation of the statute, and in effect rectified its language by reading the word "not" into the place where it was evidently intended to go.

The statute before us for interpretation has never been applied literally. Centuries ago it was established that a killing in self-defense is excused. There is nothing in the wording of the statute that suggests this exception. Various attempts have been made to reconcile the legal treatment of self-defense with the words of the statute, but in my opinion these are all merely ingenious sophistries. The truth is that the exception in favor of self-defense cannot be reconciled with the *words* of the statute, but only with its *purpose*.

The true reconciliation of the excuse of self-defense with the statute making it a crime to kill another is to be found in the following line of reasoning. One of the principal objects underlying any criminal legislation is that of deterring men from crime. Now it is apparent that if it were declared to be the law that a killing in self-defense is murder such a rule could not operate in a deterrent manner. A man whose life is threatened will repel his aggressor, whatever the law may say. Looking therefore to the broad purposes of criminal legislation, we may safely declare that this statute was not intended to apply to cases of self-defense.

When the rationale of the excuse of self-defense is thus explained, it becomes apparent that precisely the same reasoning is applicable to the case at bar. If in the future any group of men ever find themselves in the tragic predicament of these defendants, we may be sure that their decision whether to live or die will not be controlled by the contents of our criminal code. Accordingly, if we read this statute intelligently it is apparent that it does not apply to this case. The withdrawal of this situation from the effect of the statute is justified by precisely the same considerations that were applied by our predecessors in office centuries ago to the case of self-defense.

There are those who raise the cry of judicial usurpation whenever a court, after analyzing the purpose of a statute gives to its words a meaning that is not at once apparent to the casual reader who has not studied the statute closely or examined the objectives it seeks to attain. Let me say emphatically that I accept without reservation the proposition that this Court is bound by the statutes of our Commonwealth and that it exercises its powers in subservience to the duty expressed will of the Chamber of Representatives. The line of reasoning I have applied above raises no question of fidelity to enacted law, though it may possibly raise a question of the distinction between intelligent and unintelligent fidelity. No superior wants a servant who lacks the capacity to read between the lines. The stupidest housemaid knows that when she is told to peel the soup and skim the potatoes her mistress does not mean what she says. She also knows that when her master tells her to drop everything and come running he has overlooked the possibility that she is at the moment in the act of rescuing the baby from the rain barrel. Surely we have a right to expect the same modicum of intelligence from the judiciary. The correction of obvious legislative errors or oversights is not to supplant the legislative will, but to make that will effective.

I therefore conclude that on any aspect under which this case may be viewed these defendants are innocent of the crime of murdering Roger Whetmore, and that the conviction should be set aside.

TATTING, J. In the discharge of my duties as a justice of this Court, I am usually able to dissociate the emotional and intellectual sides of my reactions, and to decide the case before me entirely on the basis of the latter. In passing on this tragic case I find that my usual resources fail me. On the emotional side I find myself torn between sympathy for these men

and a feeling of abhorrence and disgust at the monstrous act they committed. I had hoped that I would be able to put these contradictory emotions to one side as irrelevant, and to decide the case on the basis of a convincing and logical demonstration of the result demanded by our law. Unfortunately, this deliverance has not been vouchsafed me.

As I analyze the opinion just rendered by my brother Foster, I find that it is shot through with contradictions and fallacies. Let us begin with his first proposition: these men were not subject to our law because they were not in a *state of civil society* but in a *state of nature*. I am not clear why this is so, whether it is because of the thickness of the rock that imprisoned them, or because they were hungry, or because they had set up a *new charter of government* by which the usual rules of law were to be supplanted by a throw of the dice. Other difficulties intrude themselves. If these men passed from the jurisdiction of our law to that of *the law of nature*, at what moment did this occur? Was it when the entrance to the cave was blocked, or when the threat of starvation reached a certain undefined degree of intensity, or when the agreement for the throwing of the dice was made? These uncertainties in the doctrine proposed by my brother are capable of producing real difficulties. Suppose, for example one of these men had had his twenty-first birthday while he was imprisoned within the mountain. On what date would we have to consider that he had attained his majority - when he reached the age of twenty-one, at which time he was, by hypothesis, removed from the effects of our law, or only when he was released from the cave and became again subject to what my brother calls our *positive law*? These difficulties may seem fanciful, yet they only serve to reveal the fanciful nature of the doctrine that is capable of giving rise to them.

But it is not necessary to explore these niceties further to demonstrate the absurdity of my brother's position. Mr. Justice Foster and I are the appointed judges of a court of the Commonwealth of Newgarth, sworn and empowered to administer the laws of that Commonwealth. By what authority do we resolve ourselves into a Court of Nature? If these men were indeed under the law of nature, whence comes our authority to expound and apply that law? Certainly *we* are not in a state of nature.

Let us look at the contents of this code of nature that my brother proposes we adopt as our own and apply to this case. What a topsy-turvy and odious code it is! It is a code in which the law of contracts is more fundamental than the law of murder. It is a code under which a man may make a valid agreement empowering his fellows to eat his own body. Under the provisions of this code, furthermore, such an agreement once made is irrevocable, and if one of the parties attempts to withdraw, the others may take the law into their own hands and enforce the contract by violence - for through my brother passes over in convenient silence the effect of Whetmore's withdrawal, this is the necessary implication of his argument.

The principles my brother expounds contain other implications that cannot be tolerated. He argues that when the defendants set upon Whetmore and killed him (we know not how, perhaps by pounding him with stones) they were only exercising the rights conferred upon them by their bargain. Suppose, however, that Whetmore had had concealed upon his person a revolver, and that when he saw the defendants about to slaughter him he had shot them to death in order to save his own life. My brother's reasoning applied to these facts would make Whetmore out to be a murderer, since the excuse of self-defense would have to be denied to him. If his assailants were acting rightfully in seeking to bring about his death, then of course

he could no more plead the excuse that he was defending his own life than could a condemned prisoner who struck down the executioner lawfully attempting to place the noose about his neck.

All of these considerations make it impossible for me to accept the first part of my brother's argument. I can neither accept his notion that these men were under a code of nature which this Court was bound to apply to them, nor can I accept the odious and perverted rules that he would read into that code. I come now to the second part of my brother's opinion, in which he seeks to show that the defendants did not violate the provisions of N.C.S.A. (N.S.) § Par. 12-A. Here the way, instead of being clear, becomes for me misty and ambiguous, though my brother seems unaware of the difficulties that inhere in his demonstrations.

The gist of my brother's argument may be stated in the following terms: No statute, whatever its language, should be applied in a way that contradicts its purpose. One of the purposes of any criminal statute is to deter. The application of the statute making it a crime to kill another to the peculiar facts of this case would contradict this purpose, for it is impossible to believe that the contents of the criminal code could operate in a deterrent manner on men faced with the alternative of life or death. The reasoning by which this exception is read into the statute is, my brother observes, the same as that which is applied in order to provide the excuse of self-defense.

On the face of things this demonstration seems very convincing indeed. My brother's interpretation of the rationale of the excuse of self-defense is in fact supported by a decision of this court, *Commonwealth v. Parry*, a precedent I happened to encounter in my research on this case. Though *Commonwealth v. Parry* seems generally to have been overlooked in the texts and subsequent decisions, it supports unambiguously the interpretation my brother has put upon the excuse of self-defense.

Now let me outline briefly, however, the perplexities that assail me when I examine my brother's demonstration more closely. It is true that a statute should be applied in the light of its purpose, and that *one* of the purposes of criminal legislation is recognized to be deterrence. The difficulty is that other purposes are also ascribed to the law of crimes. It has been said that one of its objects is to provide an orderly outlet for the instinctive human for retribution. *Commonwealth v. Scape*. It has also been said that its object is the rehabilitation of the wrongdoer. *Commonwealth v. Makeover*. Other theories have been propounded. Assuming that we must interpret a statute in the light of its purpose, what are we to do when it has many purposes or when its purposes are disputed?

A similar difficulty is presented by the fact that although there is authority for my brother's interpretation of the excuse of self-defense, there is other authority which assigns to that excuse a different rationale. Indeed, until I happened on *Commonwealth v. Parry* I had never heard of the explanation given by my brother. The taught doctrine of our law schools, memorized by generations of law students, runs in the following terms: The statute concerning murder required a *willful* act. The man who acts to repel an aggressive threat to his own life does not act *willfully*, but in response to an impulse deeply ingrained in human nature. I suspect that there is hardly a lawyer in this Commonwealth who is not familiar with this line of reasoning, especially since the point is a great favorite of the bar examiners.

Now the familiar explanation for the excuse of self-defense just expounded obviously cannot be applied by analogy to the facts of this case. These men acted not only *willfully* but with great deliberation and after hours of discussing what they should do. Again we encounter a forked path, with one line of reasoning leading us in one direction and another in a direction that is exactly the opposite. This perplexity is in this case compounded, as it were for we have to set off one explanation, incorporated in a virtually unknown precedent of this Court, against another explanation, which forms a part of the taught legal tradition of our law schools, but which, so far as I know, has never been adopted in any judicial decision.

I recognize the relevance of the precedents cited by my brother concerning the displaced *not* and the defendant who parked overtime. But what are we to do with one of the landmarks of our jurisprudence, which again my brother passes over in silence? This is *Commonwealth v. Valjean*. Though the case is somewhat obscurely reported, it appears that the defendant was indicted for the larceny of a loaf of bread, and offered as a defense that he was in a condition approaching starvation. The court refused to accept this defense. If hunger cannot justify the theft of wholesome and natural food, how can it justify the killing and eating of a man? Again, if we look at the thing in terms of deterrence, is it likely that a man starve to death to avoid a jail sentence for the theft of a loaf of bread? My brother's demonstrations would compel us to overrule *Commonwealth v. Valjean*, and many other precedents that have been built on that case.

Again, I have difficulty in saying that no deterrent effect whatever could be attributed to a decision that these men were guilty of murder. The stigma of the word *murderer* is such that it is quite likely, I believe, that if these men had known that their act was deemed by the law to be murder they would have awaited for a few days at least before carrying out their plan. During that time some unexpected relief might have come. I realize that this observation only reduces the distinction to a matter of degree, and does not destroy it altogether. It is certainly true that the element of deterrence would be less in this case than is normally involved in the application of the criminal law.

There is still a further difficulty in my brother Foster's proposal to read an exception into the statute to favor this case, though again a difficulty not even intimated in his opinion. What shall be the scope of this exception? Here the men cast lots and the victim was himself originally a party to the agreement. What would we have to decide if Whetmore had refused from the beginning to participate in the plan? Would a majority be permitted to overrule him? Or, suppose that no plan were adopted at all and the others simply conspired to bring about Whetmore's death, justifying their act by saying that he was in the weakest condition. Or again, that a plan of selection was followed but one based on a different justification than the one adopted here, as if the others were atheists and insisted that Whetmore should die because he was the only one who believed in an afterlife. These illustrations could be multiplied, but enough have been suggested to reveal what a quagmire of hidden difficulties my brother's reasoning contains.

Of course I realize on reflection that I may be concerning myself with a problem that will never arise, since it is unlikely that any group of men will ever again be brought to commit the dread act that was involved here. Yet, on still further reflection, even if we are certain that no similar case will arise again, do not the illustrations I have given show the lack of any

coherent and rational principle in the rule my brother proposes? Should not the soundness of a principle be tested by the conclusions it entails, without reference to the accidents of later litigational history? Still, if this is so, why is it that we of this Court so often discuss the question whether we are likely to have later occasion to apply a principle urged for the solution of the case before us? Is this a situation where a line of reasoning not originally proper has become sanctioned by precedent, so that we are permitted to apply it and may even be under an obligation to do so?

The more I examine this case and think about it, the more deeply I become involved. My mind becomes entangled in the meshes of the very nets I throw out for my own rescue. I find that almost every consideration that bears on the decision of the case is counterbalanced by an opposing consideration leading in the opposite direction. My brother Foster has not furnished to me, nor can I discover for myself, any formula capable of resolving the equivocations that beset me on all sides.

I have given this case the best thought of which I am capable. I have scarcely slept since it was argued before us. When I feel myself inclined to accept the view of my brother Foster, I am repelled by a feeling that his arguments are intellectually unsound and approach mere rationalization. On the other hand, when I incline toward upholding the conviction, I am struck by the absurdity of directing that these men be put to death when their lives have been saved at the cost of the lives of ten heroic workmen. It is to me a matter of regret that the Prosecutor saw fit to ask for an indictment for murder. If we had a provision in our statutes making it a crime to eat human flesh, that would have been a more appropriate charge. If no other charge suited to the facts of this case could be brought against the defendants, it would have been wiser, I think, not to have indicted them at all. Unfortunately, however, the men have been indicted and tried, and we have therefore been drawn into this unfortunate affair.

Since I have been wholly unable to resolve the doubts that beset me about the law of this case, I am with regret announcing a step that is, I believe, unprecedented in the history of this tribunal. I declare my withdrawal from the decision of this case.

KEEN, J. I should like to begin by setting to one side two questions which are not before this Court.

The first of these is whether executive clemency should be extended to these defendants if the conviction is affirmed. Under our system of government, that is a question for the Chief Executive, not for us. I therefore disapprove of that passage in the opinion of the Chief Justice in which he in effect gives instructions to the Chief Executive as to what he should do in this case and suggests that some impropriety will attach if these instructions are heeded. This is a confusion of governmental functions ó a confusion of which the judiciary should be the last to be guilty. I wish to state that if I were the Chief Executive I would go farther in the direction of clemency than the pleas addressed to him propose. I would pardon these men altogether, since I believe that they have already suffered enough to pay for any offense they may have committed. I want it to be understood that this remark is made in my capacity as a private citizen who by the accident of his office happens to have acquired an intimate acquaintance with the facts of this case. In the discharge of my duties as judge, it is neither my function to address directions to the Chief Executive, nor to take into account what he may or may not

do, in reaching my own decision, which must be controlled entirely by the law of this Commonwealth.

The second question that I wish to put to one side is that of deciding whether what these men did was *ōrightō* or *ōwrongō*, *ōwickedō* or *ōgoodō*. That is also a question that is irrelevant to the discharge of my office as a judge sworn to apply, not my conceptions of morality, but the law of the land. In putting this question to one side I think I can also safely dismiss without comment the first and more poetic portion of my brother Foster's opinion. The element of fantasy contained in the arguments developed there has been sufficiently revealed in my brother Tatting's somewhat solemn attempt to take those arguments seriously.

The sole question before us for decision is whether these defendants did, within the meaning of N.C.S.A. (N.S.) § Par. 12-A, willfully take the life of Roger Whetmore. The exact language of the statute is as follows: *ōWhoever shall willfully take the life of another shall be punished by deathō*. Now I should suppose that any candid observer, content to extract from these words their natural meaning, would concede at once that these defendants did *ōwillfully take the lifeō* of Roger Whetmore.

Whence arise all the difficulties of the case, then, and the necessity for so many pages of discussion about what ought to be so obvious? The difficulties, in whatever tortured form they may present themselves, all trace back to a single source, and that is a failure to distinguish the legal from the moral aspects of this case. To put it bluntly, my brothers do not like the fact that the written law requires the conviction of these defendants. Neither do I, but unlike my brothers I respect the obligations of an office that requires me to put my personal predilections out of my mind when I come to interpret and apply the law of this Commonwealth.

Now, of course, my brother Foster does not admit that he is actuated by a personal dislike of the written law. Instead he develops a familiar line of argument according to which the court may disregard the express language of a statute when something not contained in the statute itself, called its *ōpurposeō*, can be employed to justify the result the court considers proper. Because this is an old issue between myself and my colleague, I should like, before discussing his particular application of the argument to the facts of this case, to say something about the historical background of this issue and its implications for law and government generally.

There was a time in this Commonwealth when judges did in fact legislate very freely, and all of us know that during that period some of our statutes were rather thoroughly made over by the judiciary. That was a time when the accepted principles of political science did not designate with any certainty the rank and function of the various arms of the state. We all know the tragic issue of that uncertainty in the brief civil war that arose out of the conflict between the judiciary, on the one hand, and the executive and the legislature, on the other. There is no need to recount here the factors that contributed to that unseemly struggle for power, though they included the unrepresentative character of the Chamber, resulting from a division of the country into election districts that no longer accorded with the actual distribution of the population, and the forceful personality and wide popular following of the then Chief Justice. It is enough to observe that those days are behind us, and that in place of the uncertainty that then reigned we now have a clear-cut principle, which is the supremacy of

the legislative branch of our government. From that principle flows the obligation of the judiciary to enforce faithfully the written law, and to interpret that law in accordance with its plain meaning without reference to our personal desires or our individual conceptions of justice. I am not concerned with the question whether the principle that forbids the judicial revision of statutes is right or wrong, desirable or undesirable; I observe merely that this principle has become a tacit premise underlying the whole of the legal and governmental order I am sworn to administer.

Yet though the principle of the supremacy of the legislature has been accepted in theory for centuries, such is the tenacity of professional tradition and the force of fixed habits of thought that many of the judiciary have still not accommodated themselves to the restricted role which the new order imposes on them. My brother Forster is one of that group; his way of dealing with statutes is exactly that of a judge living in the 3900's.

We are all familiar with the process by which the judicial reform of disfavored legislative enactments is accomplished. Anyone who has followed the written opinions of Mr. Justice Foster will have had an opportunity to see it at work in every branch of the law. I am personally so familiar with the process that in the event of my brother's incapacity I am sure I could write a satisfactory opinion for him without any prompting whatever, beyond being informed whether he liked the effect of the terms of the statute as applied to the case before him.

The process of judicial reform requires three steps. The first of these is to divine some single "purpose" which the statute serves. This is done although not one statute in a hundred has any such single purpose, and although the objectives of nearly every statute are differently interpreted by the different classes of its sponsors. The second step is to discover that a mythical being called *the legislator*, in the pursuit of this imagined "purpose", overlooked something or left some gap or imperfection in his work. Then comes the final and most refreshing part of the task, which is, of course, to fill in the blank thus created. *Quod erat faciendum*.

My brother Foster's penchant for finding holes in statutes reminds one of the story told by an ancient author about the man who ate a pair of shoes. Asked how he liked them, he replied that the part he liked best was the holes. That is the way my brother feels about statutes; the more holes they have in them the better he likes them. In short, he doesn't like statutes.

One could not wish for a better case to illustrate the specious nature of this gap-filling process than the one before us. My brother thinks he knows exactly what was sought when men made murder a crime, and that was something he calls *deterrence*. My brother Tatting has already shown how much is passed over in that interpretation. But I think the trouble goes deeper. I doubt very much whether our statute making murder a crime really has a *purpose* in any ordinary sense of the term. Primarily, such a statute reflects a deeply-felt human conviction that murder is wrong and that something should be done to the man who commits it. If we were forced to be more articulate about the matter, we would probably take refuge in the more sophisticated theories of the criminologists, which, of course, were certainly not in the minds of those who drafted our statute. We might also observe that men will do their own work more effectively and live happier lives if they are protected against the threat of violent assault. Bearing in mind that the victims of murders are often unpleasant

people, we might add some suggestion that the matter of disposing of undesirables is not a function suited to private enterprise, but should be a state monopoly. All of which reminds me of the attorney who once argued before us that a statute licensing physicians was a good thing because it would lead to lower life insurance rates by lifting the level of general health. There is such a thing as over explaining the obvious.

If we do not know the purpose of § Par. 12-A, how can we possibly say there is a *ögapö* in it? How can we know what its draftsmen thought about the question of killing men in order to eat them? My brother Tatting has revealed an understandable, though perhaps slightly exaggerated revulsion to cannibalism. How do we know that his remote ancestors did not feel the same revulsion to an even higher degree? Anthropologists say that the dread felt for a forbidden act may be increased by the fact that the conditions of a tribe's life create special temptations toward it, as incest is most severely condemned among those whose village relations make it most likely to occur. Certainly the period following the Great Spiral was one that had implicit in it temptations to anthropophagy. Perhaps it was for that very reason that our ancestors expressed their prohibition in so broad and unqualified a form. All of this is conjecture, of course, but it remains abundantly clear that neither I nor my brother Foster knows what the *öpurposeö* § of Par. 12-A is.

Considerations similar to those I have just outlined are also applicable to the exception in favor of self-defense, which plays so large a role in the reasoning of my brothers Foster and Tatting. It is of course true that in *Commonwealth v. Parry* an obiter dictum justified this exception on the assumption that the purpose of criminal legislation is to deter. It may well also be true that generations of law students have been taught that the true explanation of the exception lies in the fact that a man who acts in self-defense does not act *öwillfullyö*, and that the same students have passed their bar examinations by repeating what their professors told them. These last observations I could dismiss, of course, as irrelevant for the simple reason that professors and bar examiners have not as yet any commission to make our laws for us. But again the real trouble lies deeper. As in dealing with the statute, so in dealing with the exception, the question is not the conjectural *purpose* of the rule, but its *scope*. Now the scope of the exception in favor of self-defense as it has been applied by this Court is plain: it applies to cases of resisting an aggressive threat to the party's own life. It is therefore too clear for argument that this case does not fall within the scope of the exception, since it is plain that Whetmore made no threat against the lives of these defendants.

The essential shabbiness of my brother Foster's attempt to cloak his remaking of the written law with an air of legitimacy comes tragically to the surface in my brother Tatting's opinion. In that opinion Justice Tatting struggles manfully to combine his colleague's loose moralisms with his own sense of fidelity to the written law. The issue of this struggle could only be that which occurred, a complete default in the discharge of the judicial function. You simply cannot apply a statute as it is written and remake it to meet your own wishes at the same time.

Now I know that the line of reasoning I have developed in this opinion will not be acceptable to those who look only to the immediate effects of a decision and ignore the long-run implications of an assumption by the judiciary of a power of dispensation. A hard decision is never a popular decision. Judges have been celebrated in literature for their sly

prowess in devising some quibble by which a litigant could be deprived of his rights where the public thought it was wrong for him to assert those rights. But I believe that judicial dispensation does more harm in the long run than hard decisions. Hard cases may even have a certain moral value by bringing home to the people their own responsibilities toward the law that is ultimately their creation, and by reminding them that there is no principle of personal grace that can relieve the mistakes of their representatives.

Indeed, I will go farther and say that not only are the principles I have been expounding those which are soundest for our present conditions, but that we would have inherited a better legal system from our forefathers if those principles had been observed from the beginning. For example, with respect to the excuse of self-defense, if our courts had stood steadfast on the language of the statute the result would undoubtedly have been a legislative revision of it. Such a revision would have drawn on the assistance of natural philosophers and psychologists, and the resulting regulation of the matter would have had an understandable and rational basis, instead of the hodgepodge of verbalisms and metaphysical distinctions that have emerged from the judicial and professorial treatment.

These concluding remarks are, of course, beyond any duties that I have to discharge with relation to this case, but I include them here because I feel deeply that my colleagues are insufficiently aware of the dangers implicit in the conceptions of the judicial office advocated by my brother Foster.

I conclude that the conviction should be affirmed.

HANDY, J. I have listened with amazement to the tortured ratiocinations to which this simple case has given rise. I never cease to wonder at my colleagues' ability to throw an obscuring curtain of legalisms about every issue presented to them for decision. We have heard this afternoon learned disquisitions on the distinction between positive law and the law of nature, the language of the statute and the purpose of the statute, judicial functions and executive functions, judicial legislation and legislative legislation. My only disappointment was that someone did not raise the question of the legal nature of the bargain struck in the cave - whether it was unilateral or bilateral, and whether Whetmore could not be considered as having revoked an offer prior to action taken thereunder.

What have all these things to do with the case? The problem before us is what we, as officers of the government, ought to do with these defendants. That is a question of practical wisdom, to be exercised in a context, not of abstract theory, but of human realities. When the case is approached in this light, it becomes, I think one of the easiest to decide that has ever been argued before this Court.

Before stating my own conclusions about the merits of the case, I should like to discuss briefly some of the more fundamental issues involved - issues on which my colleagues and I have been divided ever since I have been on the bench.

I have never been able to make my brothers see that government is a human affair, and that men are ruled, not by words on paper or by abstract theories, but by other men. They are ruled well when their rulers understand the feelings and conceptions of the masses. They are ruled badly when that understanding is lacking.

Of all branches of the government, the judiciary is the most likely to lose its contact with the common man. The reasons for this are, of course, fairly obvious. Where the masses react to a situation in terms of a few salient features, we pick into little pieces every situation presented to us. Lawyers are hired by both sides to analyze and dissect. Judges and attorneys vie with one another to see who can discover the greatest number of difficulties and distinctions in a single set of facts. Each side tries to find cases, real or imagined, that will embarrass the demonstrations of the other side. To escape this embarrassment, still further distinctions are invented and imported into the situation. When a set of facts has been subjected to this kind of treatment for a sufficient time, all the life and juice have gone out of it and we have left a handful of dust.

Now I realize that wherever you have rules and abstract principles lawyers are going to be able to make distinctions. To some extent the sort of thing I have been describing is a necessary evil attaching to any formal regulation of human affairs. But I think that the area which really stands in need of such regulation is greatly overestimated. There are, of course, a few fundamental rules of the game that must be accepted if the game is to go on at all. I would include among these the rules relating to the conduct of elections, the appointment of public officials, and the term during which an office is held. Here some restraint on discretion and dispensation, some adherence to form, some scruple for what does and what does not fall within the rule, is, I concede, essential. Perhaps the area of basic principle should be expanded to include certain other rules, such as those designed to preserve the free civilmoign system.

But outside of these fields I believe that all government officials, including judges, will do their jobs best if they treat forms and abstract concepts as instruments. We should take as our model, I think, the good administrator, who accommodates procedures and principles to the case at hand, selecting from among the available forms those most suited to reach the proper result.

The most obvious advantage of this method of government is that it permits us to go about our daily tasks with efficiency and common sense. My adherence to this philosophy has, however, deeper roots. I believe that it is only with the insight this philosophy gives that we can preserve the flexibility essential if we are to keep our actions in reasonable accord with the sentiments of those subject to our rule. More governments have been wrecked, and more human misery cause, by the lack of this accord between ruler and ruled than by any other factor that can be discerned in history. Once drive a sufficient wedge between the mass of people and those who direct their legal, political, and economic life, and our society is ruined. Then neither Foster's law of nature nor Keen's fidelity to written law will avail us anything.

Now when these conceptions are applied to the case before us, its decision becomes, as I have said, perfectly easy. In order to demonstrate this I shall have to introduce certain realities that my brothers in their coy decorum have seen fit to pass over in silence, although they are just as acutely aware of them as I am.

The first of these is that this case has aroused an enormous public interest, both here and abroad. Almost every newspaper and magazine has carried articles about it; columnists have shared with their readers confidential information as to the next governmental move; hundreds of letters-to-the-editor have been printed. One of the great newspaper chains made a

poll of public opinion on the question, "What do you think the Supreme Court should do with the Speluncean explorers?" About ninety per cent expressed a belief that the defendants should be pardoned or let off with a kind of token punishment. It is perfectly clear, then, how the public feels about the case. We could have known this without the poll, of course, on the basis of common sense, or even by observing that on this Court there are apparently four-and-a-half men, or ninety per cent, who share the common opinion.

This makes it obvious, not only what we should do, but what we must do if we are to preserve between ourselves and public opinion a reasonable and decent accord. Declaring these men innocent need not involve us in any undignified quibble or trick. No principle of statutory construction is required that is not consistent with the past practices of this Court. Certainly no layman would think that in letting these men off we had stretched the statute any more than our ancestors did when they created the excuse of self-defense. If a more detailed demonstration of the method of reconciling our decision with the statute is required, I should be content to rest on the arguments developed in the second and less visionary part of my brother Foster's opinion.

Now I know that my brothers will be horrified by my suggestion that this Court should take account of public opinion. They will tell you that public opinion is emotional and capricious, that it is based on half-truths and listens to witnesses who are not subject to cross-examination. They will tell you that the law surrounds the trial of a case like this will elaborate safeguards, designed to insure that the truth will be known and that every rational consideration bearing on the issues of the case has been taken into account. They will warn you that all of these safeguards go for naught if a mass opinion formed outside this framework is allowed to have any influence on our decision.

But let us look candidly at some of the realities of the administration of our criminal law. When a man is accused of crime, there are, speaking generally, four ways in which he may escape punishment. One of these is a determination by a judge that under the applicable law he has committed no crime. This is, of course, a determination that takes place in a rather formal and abstract atmosphere. But look at the other three ways in which he may escape punishment. These are: (1) a decision by the Prosecutor not to ask for an indictment; (2) an acquittal by the jury; (3) a pardon or commutation of sentence by the executive. Can anyone pretend that these decisions are held within a rigid and formal framework of rules that prevents factual error, excludes emotional and personal factors, and guarantees that all the forms of the law will be observed?

In the case of the jury we do, to be sure, attempt to cabin their deliberations within the area of the legally relevant, but there is no need to deceive ourselves into believing that this attempt is really successful. In the normal course of events the case now before us would have gone on all of its issues directly to the jury. Had this occurred we can be confident that there would have been an acquittal or at least a division that would have prevented a conviction. If the jury had been instructed that the men's hunger and their agreement were no defense to the charge of murder, their verdict would in all likelihood have ignored this instruction and would have involved a good deal more twisting of the letter of the law than any that is likely to tempt us. Of course the only reason that didn't occur in this case was the fortuitous

circumstance that the foreman of the jury happened to be a lawyer. His learning enabled him to devise a form of words that would allow the jury to dodge its usual responsibilities.

My brother Tatting expresses annoyance that the Prosecutor did not, in effect, decide the case for him by not asking for an indictment. Strict as he is himself in complying with the demands of legal theory, he is quite content to have the fate of these men decided out of court by the Prosecutor on the basis of common sense. The Chief Justice, on the other hand, wants the application of common sense postponed to the very end, though like Tatting, he wants no personal part in it.

This brings me to the concluding portion of my remarks, which has to do with executive clemency. Before discussing that topic directly, I want to make a related observation about the poll of public opinion. As I have said, ninety per cent of the people wanted the Supreme Court to let the men off entirely or with a more or less nominal punishment. The ten per cent constituted a very oddly assorted group, with the most curious and divergent opinions. One of our university experts has made a study of this group and has found that its members fall into certain patterns. A substantial portion of them are subscribers to *ōcrankō* newspapers of limited circulation that gave their readers a distorted version of the facts of the case. Some thought that *ōSpelunceanō* means *ōcannibalō* and that anthropophagy is a tenet of the Society. But the point I want to make, however, is this: although almost every conceivable variety and shade of opinion was represented in this group, there was, so far as I know, not one of them, nor a single member of the majority of ninety per cent, who said, *ōI think it would be a fine thing to have the courts sentence these men to be hanged, and then to have another branch of the government come along and pardon them.ō* Yet this is a solution that has more or less dominated our discussions and which our Chief Justice proposes as a way by which we can avoid doing an injustice and at the same time preserve respect for law. He can be assured that if he is preserving anybody's morale, it is his own, and not the public's, which knows nothing of his distinctions. I mention this matter because I wish to emphasize once more the danger that we may get lost in the patterns of our own thought and forget that these patterns often cast not the slightest shadow on the outside world.

I come now to the most crucial fact in this case, a fact known to all of us in this Court, though one that my brothers have seen fit to keep under the cover of their judicial robes. This is the frightening likelihood that if the issue is left to him, the Chief Executive will refuse to pardon these men or commute their sentence. As we all know, our Chief Executive is a man now well advanced in years, of very stiff notions. Public clamor usually operates on him with the reverse of the effect intended. As I have told my brothers, it happens that my wife's niece is an intimate friend of his secretary. I have learned in this indirect, but, I think, wholly reliable way, that he is firmly determined not to commute the sentence if these men are found to have violated the law.

No one regrets more than I the necessity for relying in so important a matter on information that could be characterized as gossip. If I had my way this would not happen, for I would adopt the sensible course of sitting down with the Executive, going over the case with him, finding out what his views are, and perhaps working out with him a common program for handling the situation. But of course my brothers would never hear of such a thing.

Their scruple about acquiring accurate information directly does not prevent them from being very perturbed about what they have learned indirectly. Their acquaintance with the facts I have just related explains why the Chief Justice, ordinarily a model of decorum, saw fit in his opinion to flap his judicial robes in the face of the Executive and threaten him with excommunication if he failed to commute the sentence. It explains, I suspect, my brother Foster's feat of levitation by which a whole library of law books was lifted from the shoulders of these defendants. It explains also why even my legalistic brother Keen emulated Pooh-Bah in the ancient comedy by stepping to the other side of the stage to address a few remarks to the Executive in my capacity as a private citizen. (I may remark, incidentally, that the advice of Private Citizen Keen will appear in the reports of this court printed at taxpayers' expense).

I must confess that as I grow older I become more and more perplexed at men's refusal to apply their common sense to problems of law and government, and this truly tragic case has deepened my sense of discouragement and dismay. I only wish that I could convince my brothers of the wisdom of the principles I have applied to the judicial office since I first assumed it. As a matter of fact, by a kind of sad rounding of the circle, I encountered issues like those involved here in the very first case I tried as Judge of the Court of General Instances in Fanleigh Country.

A religious sect had unfrocked a minister who, they said, had gone over to the views and practices of a rival sect. The minister circulated a handbill making charges against the authorities who had expelled him. Certain lay members of the church announced a public meeting at which they proposed to explain the position of the church. The minister attended this meeting. Some said he slipped in unobserved in a disguise; his own testimony was that he had walked in openly as a member of the public. At any rate, when the speeches began he interrupted with certain questions about the affairs of the church and made some statements in defense of his own views. He was set upon by members of the audience and given a pretty thorough pommeling, receiving among other injuries a broken jaw. He brought a suit for damages against the association that sponsored the meeting and against ten named individuals who he alleged were his assailants.

When we came to the trial, the case at first seemed very complicated to me. The attorneys raised a host of legal issues. There were nice questions on the admissibility of evidence, and in connection with the suit against the association, some difficult problems turning on the question whether the minister was a trespasser or a licensee. As a novice on the bench I was eager to apply my law school learning and I began studying these questions closely, reading all the authorities and preparing well-documented rulings. As I studied the case I became more and more involved in its legal intricacies and I began to get into a state approaching that of my brother Tatting in this case. Suddenly, however, it dawned on me that all these perplexing issues really had nothing to do with the case, and I began examining it in the light of common sense. The case at once gained a new perspective, and I saw that the only thing for me to do was to direct a verdict for the defendants for lack of evidence.

I was led to this conclusion by the following considerations. The melee in which the plaintiff was injured had been a very confused affair, with some people trying to get to the center of the disturbance, while others were trying to get away from it; some striking at the

plaintiff, while others were apparently trying to protect him. It would have taken weeks to find out the truth of the matter. I decided that nobody's broken jaw was worth that much to the Commonwealth. (The minister's injuries, incidentally, had meanwhile healed without disfigurement and without any impairment of normal faculties). Furthermore, I felt very strongly that the plaintiff had to a large extent brought the thing on himself. He knew how inflamed passions were about the affair, and could easily have found another forum for the expression of his views. My decision was widely approved by the press and public opinion, neither of which could tolerate the views and practices that the expelled minister was attempting to defend.

Now, thirty years later, thanks to an ambitious Prosecutor and a legalistic jury foreman, I am faced with a case that raises issues which are at bottom much like those involved in that case. The world does not seem to change much, except that this time it is not a question of a judgment for five or six hundred frelars, but of the life or death of four men who have already suffered more torment and humiliation than most of us would endure in a thousand years. I conclude that the defendants are innocent of the crime charged, and that the conviction and sentence should be set aside.

TATTING, J. I have been asked by the Chief Justice whether, after listening to the two opinions just rendered, I desire to reexamine the position previously taken by me. I wish to state that after hearing these opinions I am greatly strengthened in my conviction that I ought not to participate in the decision of this case.

The Supreme Court being evenly divided, the convicted sentence of the Court of the General Instances is *affirmed*. It ordered that the execution of the sentence shall occur at 6 a.m., Friday, April 2, 4300, at which time the Public Executioner is directed to proceed with all convenient dispatch to hang each of the defendants by the neck until he is dead.

Postscript

Now that the court has spoken its judgment, the reader puzzled by the choice of date may wish to be reminded that the centuries which separate us from the year 4300 are roughly equal to those that have passed since the Age of Pericles. There is probably no need to observe that the *Speluncean Case* itself is intended neither as a work of satire nor as a prediction in any ordinary sense of the term. As for the judges who make up Chief Justice Truepenny's court, they are, of course, as mythical as the facts and precedents with which they deal. The reader who refuses to accept this view, and who seeks to trace out contemporary resemblances where none is intended or contemplated, should be warned that he is engaged in a frolic of his own, which may possibly lead him to miss whatever modest truths are contained in the opinions delivered by the Supreme Court of Newgarth. The case was constructed for the sole purpose of bringing into a common focus certain divergent philosophies of law and government. These philosophies presented men with live questions of choice in the days of Plato and Aristotle. Perhaps they will continue to do so when our era has had its say about them. If there is any element of prediction in the case, it does not go beyond a suggestion that the questions involved are among the permanent problems of the human race.

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CONCEPT OF RIGHTS AND DUTIES: JURISPRUDENTIAL ANALYSIS

***HOHFELD'S CONTRIBUTIONS TO THE SCIENCE OF LAW*^{79*}**

“*Fundamental Legal Conceptions as Applied in Judicial Reasoning*” ó the very title reveals the true character of Hohfeld's interest in the analytical field. ðAs applied in judicial reasoningö ó that is the important thing: fundamental legal conceptions not in abstract, but used concretely in the solving of the practical problems which arise in the everyday work of lawyer and judge.

Before we examine the main outlines of the structure which Hohfeld had planned and started to build, let one thing be clearly said. No one realized more clearly than did he that none of us can claim to have been the originator of any very large portion of any science, be it legal or physical. It is all that can be expected if each one of us succeeds in adding a few stones, or even one, to the ever-growing edifice which science is rearing. It follows that anything which one writes must largely, be made up of a restatement of what has already been said by others in another form. Each one of us may congratulate himself if he has added something of value, even if that consists only in so rearranging the data which others have accumulated as to throw new light upon the subject ó a light which will serve to illuminate the pathway of those who come after us and so enable them to make still further progress.

In the first of the two essays upon *Fundamental Legal Conceptions* Hohfeld sets forth the eight fundamental conceptions in terms of which he believed all legal problems could be stated. He arranges them in the following scheme:

right	privilege	power	immunity
no-right	duty	disability	liability
right	privilege	power	immunity
duty	no-right	liability	disability

One thing which at once impresses itself upon one who is familiar with law and especially with the work of writers upon jurisprudence who preceded Hohfeld, is that the terms found in this scheme are with one exception not new, but have always been more or less frequently used. To be sure, they have not ordinarily been used with precision of meaning as in the table we are considering; on the contrary, they have been given one meaning by one person, another by another, or indeed, different meanings by the same person upon different occasions. It is also true that nearly all the concepts which these terms represent in Hohfeld's system have been recognized

* Walter Wheeler Cook (ed.), *Fundamental Legal Conceptions as Applied in Judicial Reasoning and Other Legal Essays* by Wesley Newcomb Hohfeld, -Introductionø by W.W. Cook, pp. 1 -15 (1919).

and discussed by more than one writer upon jurisprudence. A brief consideration serves to show, however, that the concepts and terms which are new are needed to logically complete the scheme and make of it a useful tool in the analysis of problems. When so completed, these legal concepts become the "lowest common denominators" in terms of which all legal problems can be stated, and stated so as to bring out with greater distinctness than would otherwise be possible the real questions involved. Moreover, as previously suggested, the writers who did recognize many of these concepts failed to make any real use of them in other portions of their work.

That the word *right* is often used broadly to cover legal relations in general has probably been at least vaguely realized by all thoughtful students of law. Thus, to take a concrete example, nearly all of us have probably noted at some time or other that the "right" (privilege) of self-defense is a different kind of "right" from the "right" not to be assaulted by another; but that legal thinking can never be truly accurate unless we constantly discriminate carefully between these different kinds of rights, few of us have sufficiently realized. We constantly speak of the right to make a will; the right of a legislative body to enact a given statute; of the right not to have one's property taken without due process of law, etc. In these and innumerable other instances it turns out upon examination that the one word "right" is being used to denote first one concept and then another, often with resulting confusion of thought.

With the clear recognition of the fact that the same term is being used to represent four distinct legal conceptions comes the conviction that if we are to be sure of our logic we must adopt and consistently use a terminology adequate to express the distinctions involved. The great merit of the four terms selected by Hohfeld for this purpose — right, privilege, power and immunity — is that they are already familiar to lawyers and judges and are indeed at times used with accuracy to express precisely the concepts for which he wished always to use them.

Right in the narrow sense — as the correlative of *duty* — is too well known to require extended discussion at this point. It signifies one's affirmative claim against another, as distinguished from "privilege", one's freedom from the right or claim of another. *Privilege* is a term of good repute in the law of defamation and in that relating to the duty of witnesses to testify. In defamation we say that under certain circumstances defamatory matter is "privileged", that is, that the person publishing the same has a *privilege* to do so. By this statement we are not asserting that the person having the privilege has an affirmative claim against another, i.e., that that other is under a duty to refrain from publishing the defamatory matter, as we are when we use "right" in the strict sense, but just the opposite. The assertion is merely that under the circumstances there is *an absence of duty* on the part of the one publishing the defamatory matter to refrain from doing so under the circumstances. So in reference to the duty of a witness to testify: upon some occasions we say the witness is privileged, i.e., that under the circumstances there is an absence of duty to testify, as in the case of the privilege against self-incrimination. "Privilege" therefore denotes absence of duty, and its correlative must denote absence of right. Unfortunately there is no term in general use which can be used to express this correlative of privilege, and the coining of a new term was necessary. The term devised by Hohfeld was "no-right", obviously fashioned upon an analogy to our common words *nobody* and *nothing*. The exact term to be used is, of

course, of far less importance than the recognition of the concept for which a name is sought. The terms *no-privilege* and *no-right*, therefore, denote respectively absence of duty on the part of the one having the privilege and absence of right on the part of the one having the *no-right*.

All lawyers are familiar with the word *power* as used in reference to *powers of appointment*. A person holding such a *power* has the legal ability by doing certain acts to alter legal relations, viz., to transfer the ownership of property from one person to another. Now the lawyer's world is full of such legal *power*, and in Hohfeld's terminology any human being who can by his acts produce changes in legal relations has a legal *power* or powers. Whenever a power exists there is at least one other human being whose legal relations will be altered if the power is exercised. This situation Hohfeld described by saying that the one whose legal relations will be altered if the power is exercised is under a "*liability*". Care must be taken to guard against misapprehension. *Liability* as commonly used is a vague term and usually suggests something disadvantageous or burdensome. Not so in Hohfeld's system, for a *liability* may be a desirable thing. For example, one who owns a chattel may *abandon* it. By doing so he confers upon each person in the community a legal power to acquire ownership of the chattel by taking possession of it with the requisite state of mind. Before the chattel is abandoned, therefore, every person other than the owner is under a legal *liability* to have suddenly conferred upon him a new legal power which previously he did not have. So also any person can by offering to enter into a contract with another person confer upon the latter *without his consent*, be it noted *a power* by *accepting* the offer to bring into existence new legal relations. It follows that every person in the community who is legally capable of contracting is under a *liability* to have such a power conferred upon him at any moment.

Another use of the term *right*, possibly less usual but by no means unknown, is to denote that one person is not subject to the power of another person to alter the legal relations of the person said to have the *right*. For example, often when we speak of the *right* of a person not to be deprived of his liberty or property without due process of law, the idea sought to be conveyed is of the exemption of the person concerned from a legal power on the part of the persons composing the government to alter his legal relations in a certain way. In such cases the real concept is one of exemption from legal power, i.e., "*immunity*". At times, indeed, the word *immunity* is used in exactly this sense in constitutional law. In Hohfeld's system it is the generic term to describe any legal situation in which a given legal relation vested in one person cannot be changed by the acts of another person. Correlatively, the one who lacks the power to alter the first person's legal relations is said to be under a "*disability*", that is, he lacks the legal power to accomplish the change in question. This concept of legal *immunity* is not unimportant, as Salmond in his *Jurisprudence* seems to indicate by placing it in a brief footnote. For example, the thing which distinguishes a *spendthrift trust* from ordinary trusts is not merely the lack of power on the part of the *cestui que trust* to make a conveyance of his interest, but also the *immunities* of the *cestui* from having his equitable interest divested without his consent in order to satisfy the claims of creditors. Ordinary exemption laws, homestead laws, etc., also furnish striking illustrations of immunities.

A power, therefore, bears the same general contrast to an immunity that a right does to a privilege. A right is one's affirmative claim against another, and a privilege is one's freedom from the right or claim of another. Similarly, a power is one's affirmative control over a given legal relation as against another; whereas an immunity is one's freedom from the legal power or control of another as regards some legal relation.

Rights, privileges, powers, immunities – these four seem fairly to constitute a comprehensive general classification of legal rights in the generic sense. The four correlative terms – duty, no-right, liability and disability – likewise sufficiently classify the legal burdens which correspond to the legal benefits. It is interesting in passing to note that of the two writers who preceded Hohfeld, neither Terry nor Salmond had completed the scheme. In Terry's *Principles of Anglo-American Law*, rights *stricto sensu* appears as correspondent rights, privileges as permissive rights, powers as facultative rights; but immunities not at all. Moreover the correlatives are not worked out. In Salmond's *Jurisprudence* privileges are called liberties – a mere question of phraseology, – immunities are treated as relatively unimportant, and liability is treated as the correlative of both liberty (privilege) and power. This assignment of a single correlative for two independent conceptions must result sooner or later in confusion of thought, for if the distinction between privilege and power be valid – as it clearly is – then the distinction between the correlatives, no-right and liability, must be equally valid.

The credit for the logical completion of the scheme of classification and the recognition of the importance of each element in it may thus fairly be given to Hohfeld. It is believed also that his presentation of it in the form of a table of juristic correlatives and juristic opposites has done much to clarify and explain it. A still more important thing, as has been suggested above, is that he demonstrated how these fundamental legal concepts were of the utmost utility and importance in bringing about a correct solution of concrete legal problems. Here also credit to some extent must in all fairness be given to Terry, as above indicated, but Hohfeld seems to the present writer to be the first one who appreciated to the full the real significance of the analysis. In the first of the articles upon *Fundamental Legal Conceptions* he demonstrated its utility by many examples from the law of contracts, torts, agency, property, etc., showing how the courts are constantly confronted by the necessity of distinguishing between the eight concepts and are all too often confused by the lack of clear concepts and precise terminology. On the other hand, so clear a thinker as Salmond has shown himself to be in his *Jurisprudence* fails to make any substantial use of the analysis in his book on *Torts*. Indeed, so far as the present writer has been able to discover, one might read his *Torts* through and never realize that any such analysis as that found in the *Jurisprudence* had ever been made. Yet the problems involved in such subjects as easements, privilege in defamation, and other portions of the law of torts too numerous to mention, require for their accurate solution careful discrimination between these different concepts.

Even in the work on *Jurisprudence* itself Salmond completely fails in certain chapters to show an appreciation of the meaning of these fundamental conceptions. Consider, for example, the following passage from the chapter on Ownership:

Ownership, in its most comprehensive signification, denotes the relation between a person and any right that is vested in him. That which a man *owns* is in all cases a *right*. When, as is often the case, we speak of the ownership of a material object, this is merely a convenient figure of speech. To *own* a piece of land means in truth to *own a particular kind of right* in the land, namely *the fee simple* of it.

From the point of view of one who understand the meaning of the eight fundamental legal concepts, it would be difficult to pen a more erroneous passage. To say that A owns a piece of land is really to assert that he is vested by the law with a complex ó exceedingly complex, be it noted ó aggregate of legal rights, privileges, powers and immunities ó all relating of course to the land in question. He does not *own* the rights, etc., he *has* them; because he has them, he ðownsö in very truth the material object concerned; there is no ðconvenient figure of speechö about it. To say that A has the ðfee simpleö of a piece of land is, therefore, to say not that he ðowns a particular kind of *right* in the landö but simply that he has a very complex aggregate of rights, privileges, powers and immunities, availing against a large and indefinite number of people, all of which rights, etc., naturally have to do with the land in question.

The full significance and great practical utility of this conception of ðownershipö would require a volume for its demonstration. When one has fully grasped it he begins to realize how superficial has been the conventional treatment of many legal problems and to see how little many commonly accepted arguments prove. He discovers, for example, that ða *right* of wayö is a complex aggregate of rights, privileges, powers and immunities; is able to point out precisely which one of these is involved in the case before him, and so to demonstrate that decisions supposed to be in point really dealt with one of the other kinds of ðrightsö (in the generic sense) and so are not applicable to the case under discussion. He soon comes to look upon this newer analysis as an extraordinary aid to clearness of thought, as a tool as valuable to a lawyer as up-to-date instruments are to a surgeon.

In the second of the articles upon *Fundamental Legal Conceptions* Hohfeld outlined in brief the remainder of the work as he planned it, as follows:

In the following pages it is proposed to begin the discussion of certain important classifications which are applicable to each of the eight individual jural conceptions represented in the above scheme. Some of such overspreading classifications consist of the following: relations *in personam* (÷paucitalørelations), and relations *in rem* (÷multitalørelations); common (or general) relations and special (or particular) relations; consensual relations and constructive relations; primary relations and secondary relations; substantive relations and adjective relations; perfect relations and imperfect relations; concurrent relations (i.e., relations concurrently legal and equitable) and exclusive relations (i.e., relations exclusively equitable). As the bulk of our statute and case law becomes greater and greater, these classifications are constantly increasing in their practical importance: not only because of their intrinsic value as mental tools for the comprehending and systematizing of our complex legal materials, but also because of the fact that the opposing ideas and terms involved are at the present time, more than ever before, constituting part of the normal foundation of judicial reasoning and decision.

Of this comprehensive programme, only two parts were even partially finished at the time of Hohfeld's untimely death, viz., that devoted to a discussion of the classification of legal relations as *in rem* (õmultitalö) and *in personam* (õpaucitalö) and that dealing with the division of legal relations into those which are õconcurrentö and those which are õexclusiveö.

The division of õrightsö into rights *in rem* and rights *in personam* is a common one and is frequently thought to be of great importance. It is, however, a matter upon which there is still much confusion even on the part of those who are as a rule somewhat careful in their choice of terms. As the present writer has elsewhere pointed out, as able a thinker as the late Dean Ames at times used the phrase õright *in rem*ö in a sense different from that given to it in the usual definitions, apparently without being conscious of the fact that he was doing so. In the second of the articles upon *Fundamental Legal Conceptions*, Hohfeld sought by careful discussion and analysis to dispel the existing confusion. In doing so he necessarily went over much ground that is not new. The greatest merit of his discussion seems to the present writer to consist in bringing out clear the fact that legal relations *in rem* (õmultitalö legal relations) differ from those *in personam* (õpaucitalö) merely in the fact that in the case of the former there exists an indefinite number of legal relations, all similar, whereas in the case of the latter the number of similar relations is always definitely limited. For this reason he suggested the name õmultitalö for those which are *in rem* and õpaucitalö for those *in personam*. These new terms have, to be sure, other things to commend them: (1) they are free from all suggestion that legal relations *in rem* relate necessarily to a physical *res* or thing or are õrights against a thingö, (2) they do not lead to the usual confusion with reference to the relation of rights *in rem* and *in personam* to actions and procedure *in rem* and *in personam*.

Even a slight consideration of the application of this portion of Hohfeld's analysis to õownershipö of property will show the extent of his contribution at this point. It is frequently said that an owner of property has "a right *in rem*" as distinguished from õa mere right *in personam*ö. As has already been pointed out above, what the owner of property has is a very complex aggregate of rights, privileges, powers and immunities. These legal relations prove on examination to be chiefly *in rem*, i.e., õmultitalö. Looking first at the owner's rights in the strict sense ó these clearly include a large number that are *in rem*. Note the plural form ó õrightsö. As Hohfeld very properly insisted, instead of having a single right *in rem*, the õownerö of property has an indefinite number of such rights ó as many, that is as there are persons under correlative duties to him. A single right is always a legal relation between a person who has the right and some one other person who is under the correlative duty. Each single right ought therefore to be called õa right *in rem*ö, or a õmultitalö right. The õownershipö includes the whole group of rights *in rem* or õmultitalö rights, as well as other groups of õmultitalö privileges, õmultitalö powers, and õmultitalö immunities.

Familiarity with an adequate analysis of this kind reveals the hopeless inadequacy of a question which has frequently been asked and to which varying answers have been given, viz., whether a *cestui que trust* has õa right *in rem*ö or õa right *in personam*ö. The so-called õequitable titleö of the *cestui* proves upon analysis to consist of an exceedingly complex aggregate of legal relations ó rights, privileges, power and immunities. These in turn upon examination are found to include groups of rights *in rem* or õmultitalö rights ó different

perhaps in some details from common-law rights *in rem* but nevertheless true rights *in rem* according to any accurate analysis. So of the privileges, the powers, the immunities, of the equitable owner or groups of multiple relations are found. In other words, the usual analysis to which we have been accustomed has treated a very complex aggregate of legal relations as though it were a simple thing, a unit. The result is no more enlightening than would it be were a chemist to treat an extraordinarily complex chemical compound as if it were an element.

This reference to the true nature of the legal relations vested in a *cestui que trust* leads to a consideration of the only other portion of Hohfeld's contemplated treatise which was in any sense completed, viz., his classification of legal relations as concurrent and exclusive.

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