CHAPTER 16

Positivism: British theories

The start of the nineteenth century might be taken as marking the beginning of the positivist movement. It represented a reaction against the *a priori* methods of thinking that characterised the preceding age. Prevailing theories of natural law shared the feature of turning away from the realities of actual law in order to discover in nature or reason principles of universal validity. Actual laws were then explained or condemned according to these canons. Unverified hypotheses of this sort failed to satisfy the intelligence of an age nurtured in the critical spirit of new scientific learning. Scrutiny of natural law postulates had damaging results, for they were shown to be without foundation or else the products of extrapolation.

The term 'positivism' has many meanings, which were tabulated by Professor Hart as follows[1]: (1) Laws are commands. This meaning is associated with the two founders of British positivism, Bentham and his disciple Austin, whose views will be considered in this chapter. (2) The analysis of legal concepts is (a) worth pursuing, (b) distinct from sociological and historical inquiries, (c) distinct from critical evaluation. (3) Decisions can be deduced logically from predetermined rules without recourse to social aims, policy or morality. (4) Moral judgments cannot be established or defended by rational argument, evidence or proof. (5) The law as it is actually laid down, *positum*, has to be kept separate from the law that ought to be. Whatever meanings are ascribed to positivism, it is contrasted with natural law, which also has different meanings[2]. In view of these differences one needs to be chary of classifying any particular writer as positivist or naturalist. However, subject to that general caution, it would be safe to assert that the authors discussed in this and the following chapter are commonly regarded as positivists. What matters are their views on particular issues, not how they are labelled[3].

The fifth meaning given above seems to be the one currently associated with positivism. It may spring from a love of order, which aims at the clarification of legal conceptions and their orderly presentation. To insist that 'what the law is' is one question, 'what the law ought to be' is another, looks neat thd tidy. Precision may be elusive but striving towards it whenever possible is commendable and profitable. Positivism flourishes in stable social conditions; the difficulties of maintaining a rigid separation between 'what is' and 'what ought to be' are only projected to the forefront when conditions are in turmoil. It is worth remarking that neither Bentham nor Austin should be thought of as writing in periods of particular stability. What they represent is the intellectual reaction against naturalism and a love of order and precision. Bentham was a tireless campaigner for reform, and both he and

1 'Positivism and the Separation of Law and Morals' (1957-58) 71 Harvard Law Review at p 601 n 25.

2 See p 470 post.

3 J Hall *Foundations of Jurisprudence* ch 2.

Austin insisted that prior to reform there has to be a thorough-going clarification of the law as it is. The significance of stable conditions might conceivably be seen in the fact that the Austinian theory made no headway until after his death, until after the Chartist movement had collapsed, and it then rapidly reached the zenith of its influence in the serene atmosphere of Victorian England.

Whether a separation between the 'is' and the 'ought' is tenable or not is a debateable issue to which allusion will be made on several occasions. It is necessary, therefore, to try and clarify what that issue is. The preceding portions of this book, especially the analysis of 'Duty', will have shown that a large part of law consists of prescriptive patterns of behaviour, ie models of conduct to which people ought to conform and by which their actual behaviour is judged. Therefore the 'is', which positivists are anxious to preserve inviolate, is largely composed of 'oughts'. So far most positivists would agree[4], but they would add that only those 'oughts' acquire the character of 'law' which have filtered through certain accepted criteria of validity. In English law these are precedent, legislation and immemorial customs. The distinction, in other words, between an 'ought' proposition that 'is' law and an 'ought' proposition that 'ought to become' law lies solely in the fact that the former has passed through one or other of the media which regulate the use of the label 'law'. It follows that positivists need not deny that judges make law; indeed, the majority admit it[5]. They also acknowledge the influence of ethical considerations on judges and legislators, and that generally it is because a proposition was thought to be moral and just that a judge or legislator adopted it. What they do say is that it is only incorporation in precedent, statute or customs that imparts the quality of 'law'. This quality follows from such incorporation irrespective of morality, so that even if an unjust proposition were embodied in precedent or statute, it would be 'law' none the less because it would exhibit the formal stamp of validity. Therefore, they maintain, every proposition which passes through one or other of the accepted media is 'law' irrespective of all considerations which go towards saying that it should be, or should not be, law. It ~~is~~ this contention which touches the heart of a modern controversy to which some anticipatory reference is necessary. Natural lawyers would assert that a proposition is 'law' not merely because it satisfies some formal requirement, but by virtue of an additional minimum moral content. According to them an immoral rule would not be 'law' however much it may satisfy formal requirements[6].

It is also thought to follow from the positivist obsession with the 'is' that they distinguish between formal analysis on the one hand, and historical and functional analysis on the other. Those who assert this do not deny the value of the latter, but contend that these should be kept apart from the former. Any such attempt, however, suffers from the inherent difficulty that it is seldom possible to study institutions as they are except in the light of their history and function. Many can only be understood in the light of their origins and past influences, which is especially the case with common law institutions, reaching back as they do unbroken for centuries. The suggested

4 Though not, perhaps, some of the early 'realists', whose views are considered in ch 21 post.

5 Positivism has sometimes been taken to refer to the doctrine that judges do not make law, but this has been discredited.

6 Sajjad Ahmad J in *Jilani v Government of Punjab* PakLD (1972) SC 139 at 261; pp 500—501 post. See also pp 87 et seq ante.

division between 'analytical' and 'functional' study is unhappier still. The preceding chapters should have demonstrated that legal conceptions are shaped by the way in which they are used and the ends which they serve, all of which import social, moral and other value considerations[7]. This leads to a more general objection. If the analysis of legal conceptions as they are inevitably brings in a consideration of their function, which in turn as inevitably brings in considerations of what ought to be law, what then becomes of the alleged distinction between formal and functional analysis?

Some further objections to the 'is'/'ought' distinction may also be mentioned at this juncture. It is said that a law is what its maker thought it ought to be, whether it be moral or immoral, as with Herod's decree for the massacre of the innocents. In so far as this assertion relates to the content of a law, no positivist need disagree. The real thrust of the objection, however, becomes apparent when one considers the structures of concepts, which are shaped by the ends which they serve. This is not a mere matter of content, but of the texture of the law itself. The point is also apparent in the judicial process which, as pointed out, is guided by values. In a situation uncovered by authority, for instance, a judge will enunciate as law an appropriate rule, which will lead to the desired decision; but the point is that he states the rule *to be* what he feels it *ought to be*. As far as he is concerned he accepts it as law already because it appeals to his sense of right and *before* it is made into a precedent. As Sir Garfield Barwick CJ said 'the common law is what the court, so informed, decides that it should be ... For where no authority binds or current of acceptable decision compels, it is not enough, nor indeed apposite, to say that the function of the court in general is to declare what the law is and not to decide what it ought to be'[8]. As has been suggested, the same sentiment may underlie the converse situation: what ought not to be law cannot have been law, which may be the explanation of the retrospective effect of overruling[9]. Even where there is a rule of law, its application blurs the line between the 'is' and the 'ought'. As should have been evident from the discussions of precedent, statutory interpretation and values, rules are occasionally shaped and reshaped so as to yield the desired conclusion, ie the rule is stated as being what it ought to be to lead to the decision. Another point is that principles and doctrines operate differently from rules in that they exert pressure as to the direction in which rules ought to develop[10]. No one disputes that they, too, are part of law, so what 'is' law here are statements as to what it ought to be. If, then, for these reasons a total separation of the 'is' and the 'ought' cannot be maintained, any assertion that they are separate does not represent the position that 'is', but only what positivists think ought to be; which makes positivism itself an ideology[11].

When considering this debate two questions have to be asked: How far is there a separation? and, Is it desirable that there ought to be a separation? With regard to the first, the relationship between the 'is' and the 'ought' is close, as both sides will agree. It is submitted that if the matter is viewed in a temporal perspective a reconciliation may be found. There is no separation in a continuum, since the continuity of laws, their application and even their

7 See pp 16–18, 226 ante.
8 *Mutual Life & Citizens Assurance Co v Evatt* (1968) 42 ALJR 316 at 318.
9 See p 156 ante.
10 See p 46 ante.
11 Silving *Sources of Law* pp 298 et seq.

criteria of validity are in the long run dependent on conformity with moral and other such dictates. In this time-frame the naturalists can make out a case[12]. On the other hand, in the present time-frame positivists can likewise make out a case for at least some degree of separation for the practical purposes of here and now. They themselves must concede that total separation is difficult to maintain in the day to day business of applying rules. So their contention narrows itself to the *means of identifying* 'law' at any given point of time, in short to the criteria of validity. When the matter is reduced in this way, the two questions can be restated as follows: Are the criteria of validity purely formal and separate from moral considerations? and, Should they incorporate a minimum moral criterion? Identification of that which is 'law' is the concern of lawyers in their daily business, and in this context the answer to the first question is on the side of the positivists. Even so, it may be possible to draw a slight distinction between precedent and statute as criteria of identification. A lower court is bound to apply an undistinguishable precedent of a superior court, however wrong it may be, so that, with regard to such court, there is a distinction between what 'is' and what 'ought to be' law[13]. A superior court, however, when overruling the unjust precedent declares that it never was law notwithstanding the formal stamp of validity which it had borne until then. With regard to such a court the 'is'/'ought' separation in precedent as a criterion of identification breaks down at that point. Repeal of a statute, on the other hand, takes effect only from the date of repeal, and even when the effect of repeal is expressly made retroactive, there is no denial that the repealed statute was law until it was repealed. Summing up, therefore, one may say that the answer to the first question is that, within the limits of here and now and for the purpose of identifying laws, there is a separation in the criteria of identification (subject to the suggestion to the contrary with regard to precedent). It is for this reason that ways had to be explored in Chapter 5 for introducing a moral element into the criteria of identification (validity).

The second question is whether such a separation is desirable. The arguments that it is undesirable have been considered and need not be rehearsed[14]. In this chapter it is necessary to consider why positivists contend that separation is desirable. Their arguments are practical. (a) Valid laws are what those charged with administering laws identify as such, and the principal reason for keeping the means of identification as clear cut as possible is convenience. For otherwise no one could know how to regulate his or her daily actions and the task of lawyers when advising clients, law-teachers instructing pupils, businessmen conducting their affairs etc would be impossible. The importance of being able to tell as clearly and simply as possible whether this is, or is not, a 'law' at any given point of time is obvious. The introduction of morality into the criterion of identification presents difficulties. Morality is a diffuse idea and no one, not even a naturalist, maintains that everything which is moral is 'law'. Since the area of 'law' is bound to be narrower than that of morality, its boundary should be made as clear as possible. (b) There is a difference in the application of formal and moral criteria. Establishing the validity of a precept by means of a formal test and a moral test involve different processes. Courts have neither the time nor the

12 See pp 498 et seq.

13 *Miliangos v George Frank (Textiles) Ltd* [1976] AC 443 at 478, [1975] 3 All ER 801 at 822.

14 See p 89 ante.

training to undertake the latter. (c) A separation between the 'is' and the 'ought' is useful in providing a standard by which positive law can be evaluated and criticised. Even naturalists concede that there will always be some discrepancy between law as it is and as it ought to be, and as long as this is so the latter can be used to evaluate the former[15]. This argument is thus not conclusive.

The above is an attempt to clarify what is perhaps the most important contention of contemporary positivism. In considering positivist theories it should not be forgotten that although there is value in identifying laws clearly for practical purposes, there is more to law besides that; but these are matters which will have to be dealt with in due course.

BENTHAM

Analytical positivism in Britain will be associated to posterity with the names of Jeremy Bentham (1748–1832) and John Austin (1790–1859). The latter used to be styled until recently the 'Father of English jurisprudence', but it is clear from a work of Bentham first published in 1945 that it is he, if anyone, who deserves such a title. Bentham was a champion of codified law and of reforming English law, which to him was in chaos. He saw, however, that there could be no reform of substantive law without reform of its structure: so analysis of structure was an essential prelude to reform. Accordingly, he distinguished between what he termed 'expositorial' jurisprudence (what the law is) and 'censorial' jurisprudence, or the art of legislation (what law ought to be)[16]. In the course of writing *An Introduction to the Principles of Morals and Legislation* he was moved to ask:' 'What is a penal code of laws? What is a civil code'[17]? In seeking the answer he had to investigate the nature of 'a law', which led him into a maze through which he mapped out a path in *Of Laws in General*. Thus, what was originally conceived as a substantial appendix developed into a major contribution on its own and which was finished more or less in 1782. It remained unpublished and was disinterred fom the vaults of University College, London, by Professor C W Everett in 1939 and published under the title *The Limits of Jurisprudence Defined* in 1945. A revised edition was published as *Of Laws in General* in 1970 under the editorship of Professor Hart[18].

Bentham's analysis of a law has to be approached through his *Theory of Fictions*, which in modern terminology would be styled semantics. There is a tendency to believe that each word corresponds to some object. Indeed, some words do: 'real entities'. Other words stand for 'fictional entities'. These have to be understood in terms of real entities by a process called 'paraphrasis'[19], a new method of elucidation with a new name made necessary by the inapplicability of the traditional *per genus et differentiam* technique[20].

15 Unless it is said with Hobbes that no positive law can be unjust: *Leviathan* ch 30. Cf Kelsen 'The Pure Theory of Law' (1934) 50 LQR at 482.

16 Bentham *An Introduction to the Principles of Morals and Legislation* (eds Burns and Hart) p 293.

17 *Bentham* p 299.

18 References will be to this edition (*OLG*).

19 Bentham *The Theory of Fictions* (ed Ogden) pp 86 et seq, 138 et seq; *OLG* pp 251–252. Cf 'low-order' and 'high-order' referents of Ogden and Richards. *The Meaning of Meaning*. In a letter to the author shortly before his death in 1956, Ogden expressed the view that Bentham's work would reveal him to have been one of the greatest semanticists. See also the Introduction to his edition of *The Theory of Legislation* pp xi et seq.

20 *OLG* pp 294–295.

Parenthetically it might be remarked here that Bentham anticipated modern linguistic philosophy in a remarkable way by his insight that the meaning of words depends on how they are used in statements in which they occur[1]. 'A law', as distinct from 'law', was to him a real entity, and so was an 'act'; rights and duties, on the other hand, were fictional[2]. 'Law' is a fictional entity made up of an aggregate of individual laws[3]. At this point a comment has to be made. As pointed out earlier, 'law' in the sense of 'legal system' is much more than the sum-total of laws, just as a railway system is more than the sum-total of tracks and rolling stock[4]; it is the pattern of their linkage and a good deal more besides. By assuming that the clue to 'law' lies in the nature of 'a law', it would seem that Bentham overlooked a significant and different set of phenomena.

'A law may be defined' said Bentham 'as an assemblage of signs, declarative of a volition, conceived or adopted by the *sovereign* in a state, concerning the conduct to be observed in a certain *case* by a certain person or class of persons, who in the case in question are or are supposed to be subject to his power'[5]. Bentham's concept of a law is thus an imperative one, for which he himself preferred the term 'mandate'[6]. This definition is flexible enough to cover 'a set of objects so intimately allied and to which there would be such continual occasion to apply the same propositions', eg not only laws made by legislators, but also judicial, administrative, domestic orders as well as declaratory laws[7]. It also isolates a unit in terms of which more complex phenomena may be analysed. An important point is that permissions are included; but this so waters down the idea of mandate that it seems inappropriate to rank Bentham among the imperative jurists. Indeed, the imperative aspect of his theory, such as it is, is its least happy part, as will appear. Finally, every law may be considered in eight different respects: source, subjects, objects, extent, aspects, force, remedial appendages and expression[8].

SOURCE

The source of a law is the will of the sovereign, who may conceive laws which he personally issues, or adopt laws previously issued by former sovereigns or subordinate authorities ('susception'), or he may adopt laws to be issued in future by subordinate authorities ('pre-adoption')[9]. Pre-adoption may take the form of (a) permission given to the subordinate in the negative sense of his 'not being made the subject of a law commanding him not to issue the subordinate mandate which is in question'; or (b) a more positive permission to issue the mandate (which may be reinforced by permission to punish offenders, and by commands to others to assist); or (c) a mandate issued to the subjects of the subordinate to obey[10]. Pre-adoption in senses (b)

1 Bowring edition, vol 8, p 322; Hart *Bentham*.
2 *OLG* pp 293-294.
3 Bentham *Collected Works* p 141. Cf Jolowicz: 'For him, as for his disciple Austin, there is no law but laws': *Jeremy Bentham and the Law* (eds Keeton and Schwarzenberger) p 10.
4 See pp 60-62 ante, and pp 503-505 post.
5 *OLG* p 1.
6 *OLG* pp 10-16.
7 *OLG* pp 4-10.
8 *OLG* p 1.
9 *OLG* pp 21, 22.
10 *OLG* pp 22, 27, 28.

and (c) can be accommodated within Bentham's broad version of an imperative theory. The difficulty is with susception and pre-adoption in sense (a). Where a sovereign consciously allows a prior law to continue, or a subordinate to continue issuing laws, he may be said to exercise his will not to interfere; but where such continuance goes by default, this can hardly be said to be an exercise of will, except by way of an exceedingly tenuous fiction.

Bentham's sovereign is 'any person or assemblage of persons to whose will a whole political community are (no matter on what account) supposed to be in a disposition to pay obedience: and that in preference to the will of any other person'[11]. There is a difficulty about this in that 'political community' is defined elsewhere as follows: 'Where a number of persons (whom we may style *subjects*) are supposed to be in the *habit* of paying *obedience* to a person, or 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*'[12]. The result is partly circular: 'sovereign' is defined partly in terms of 'political society' and the latter is defined partly in terms of the former. Also, it is not clear what exactly is meant by 'supposed'.

The attributes of sovereignty are interesting. Such power is indefinite unless limited by express convention or by religious or political motivations[13]. The sovereign may consist of more than one body, each of which is obeyed in different respects. Habitual obedience may thus be divided and partial, ie owed in certain areas of conduct[14]. When divided in this way the power of each is limited by the other and each has a limited power to prescribe for the other[15]. These laws are of a special kind: 'The business of the ordinary sort of laws is to prescribe to the people what *they* shall do: the business of this transcendental class of laws is to prescribe to the sovereign what *he* shall do'[16]. Thus, there is created a form of self-bindingness which has legal quality. This fascinating piece of analysis seems to have been lost on Bentham's disciple Austin, whose simplification in this and other respects long stultified British jurisprudence by providing nothing better than an arid basis for exploration and criticism.

SUBJECTS

These may be persons or things[17]. Each of these may be 'agible' (active) or 'passible' (passive) subjects, ie the agent with which an act commences or terminates. Thus, a person may be the striker or the party struck, a thing may be the instrument of destruction or the thing destroyed. They may be direct or indirect, the latter constituting the circumstances of an act.

OBJECTS

It is crucial in understanding Bentham's analysis to appreciate that each act-situation (including forbearance) is the object of an individual law[18].

11 *OLG* p 18.
12 *A Fragment on Government* ch 1, para 10.
13 *A Fragment on Government* ch 4, para 23 and n 1; *OLG* pp 68-70.
14 *OLG* pp 18 n *b*, 168 n *n*.
15 *OLG* p 68 n.
16 *OLG* p 64.
17 *OLG* pp 34 et seq.
18 *OLG* pp 41 et seq.

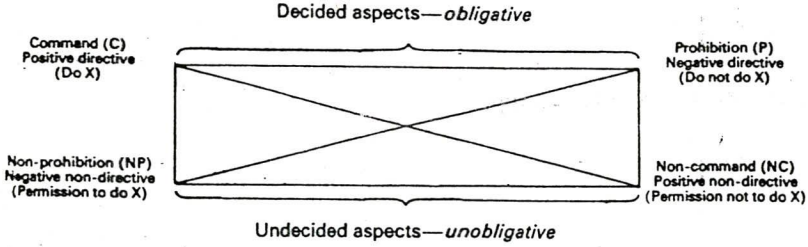
This was because he believed that 'a law' is a 'real entity', and so sought to reduce it to its factual basis. It is perhaps unfortunate that he did not apply here his own insight into the way words are used rather than seek their reference. An act originates in persons, but may end in a person or thing. (He might perhaps have amplified the part played by forbearance in this respect.) All laws regulate conduct positively or negatively, by imposing duties or granting permissions, 'imperatively' or 'de-imperatively'. To classify act-situations would be too cumbrous a task, but it is possible to classify the sovereign's reactions to them so that they become offences or not. These reactions are the 'aspects' of the sovereign's will.

EXTENT[19]

Direct extent means that a law covers a portion of land on which acts have their termination; indirect extent refers to the relation of an actor to a thing, eg being in a certain place at the time of the act, in short the circumstances. Bentham also alluded in passing to extent in point of time, or duration of a law[20]. He was thinking of time only as a way of determining the subjects of a law. It has been pointed out that time is significant in another way. Whatever the intended duration, the very concept of duration is dependent on certain factors, which, following Bentham's own line of thought, could be regarded as a part of every law[1]. At this point Bentham seems casually to have opened a door without pausing to peer at the vistas that it reveals.

ASPECTS

Every law has a 'directive' and a 'sanctional' or 'incitative' part. The former concerns the aspects of the sovereign's will towards an act-situation; the latter concerns the force of a law. Command is only one of four aspects of the sovereign's will, permutations of which comprehend the whole range of laws. These four are related by 'opposition' (incompatibility) and 'concomitancy' (compatibility); and Bentham evolved a 'deontic logic' with which to demonstrate the relationship between command, prohibition and permission[2].



The logic of imperation is as follows:

(1) C ('Do X')

(a) can co-exist with NP ('Permission to do X')—an obligative duty is not cancelled (de-obligated) by an unobligative liberty to do the same thing;

19 *OLG* pp 72 et seq.
20 *OLG* pp 74, 75.
1 See p 21 ante.
2 *OLG* pp 95 et seq.

(b) cannot co-exist with P ('Do not do X')—an obligative duty is cancelled (de-obligated) by an obligative duty to do the opposite;

(c) cannot co-exist with NC ('Permission not to do X')—an obligative duty cancels (de-obligates) the unobligative liberty to do the opposite.

(2) P ('Do not do X')

(a) can co-exist with NC ('Permission not to do X')—for the same reason as in (1) (a);

(b) cannot co-exist with C ('Do X')—for the same reason as in (1) (b);

(c) cannot co-exist with NP ('Permission to do X')—for the same reason as in (1) (c).

(3) NC ('Permission not to do X')

(a) cannot co-exist with C ('Do X')—an unobligative liberty is cancelled (de-obligated) by an obligative duty to do the opposite;

(b) can co-exist with P ('Do not do X')—an unobligative liberty is not cancelled (de-obligated) by an obligative duty to do the same thing; *or*

(c) with NP ('Permission to do X')—an unobligative liberty is not cancelled (de-obligated) by an unobligative liberty to do the opposite;

but *not* both together, since (b) and (c) cannot co-exist.

(4) NP ('Permission to do X')

(a) cannot co-exist with P ('Do not do X')—for the same reason as in (3) (a);

(b) can co-exist with C ('Do X')—for the same reason as in (3) (b); *or*

(c) with NC ('Permission not to do X')—for the same reason as in (3) (c);

but *not* both together, since (b) and (c) cannot co-exist.

The difficulty of reconciling permissions with an imperative theory, even in the extended sense of mandate, has been mentioned. This weakness, however, is a minor blemish when set against the depth and incisiveness of this demonstration of jural opposition and contradiction, which is more acute than Hohfeld's depiction of it 131 years later[3].

FORCE OF A LAW, SANCTIONAL OR INCITATIVE PART

A law is dependent upon motivations for obedience[4]. The sovereign's wish in respect of a class of acts is a law as long as it is supported by a sanction, even if this is not explicit, though usually, of course, it would be. It includes physical, political, religious and moral motivations[5], comprising threats of punishment (commination, coercion) and rewards (invitations, allurements)[6]. There is, however, a difference which appears to be glossed over. The failure to do, or not do, what a law supported by punishment requires

3 See p 28 ante.

4 *OLG* pp 133 et seq.

5 *OLG* pp 68-70, 248. Cf *An Introduction to the Principles of Morals and Legislation* ch 3.

6 *OLG* pp 134-136.

is illegal; but it is not illegal to do, or not do, what a law supported by reward requires.

Regulation of conduct and stipulation of sanction govern different act-situations, so they require separate laws: one saying 'You shall not murder', and the other 'If you do, you shall be punished'. Non-prohibitions and non-commands are unobligative aspects of the sovereign's will and are supported by sanctions affecting, not the subjects of the laws, but others who are subjects of 'corroborative' laws not to interfere. From the legislator's point of view, actual punishment is a prediction, since it is outside his province to carry out the threat. Accordingly, he issues subsidiary laws, eg that a judge must verify that the accused did murder. The judge in turn is assisted by various officials all of whom are likewise under subsidiary laws. If no one obeys these subsidiary laws, the principal law becomes a dead letter. Now, even though it is true to say, in Bentham's view, that all these subsidiary laws are expressions of sovereign wishes, the inescapable fact is that they add up to no more than a prediction, dependent on probability, of punishment as prescribed in the sanctional part of the principal law. In other words, the functioning of a law is implicitly a part of Bentham's own concept of a law, and this imports many considerations of a social and psychological character[7]. This further dilutes the imperative character of a law. Nevertheless, he should be given credit for an illuminating hint. For yet again he anticipated the twentieth century to a remarkable degree. His analysis of sanction resembles that of Kelsen and the implication that sanction is a prediction based on probabilities foreshadows the views of the American Realists[8]. On the other hand, he differed from both these in separating the regulation of conduct and the stipulation of sanction into two distinct laws. It is a matter of opinion which view is preferable, but it will be submitted in due course that Bentham's is better.

REMEDIAL APPENDAGES

Sanctions are provided by subsidiary laws. They themselves require a further set of subsidiary laws, 'remedial appendages', addressed to judges with a view to curing the evil (compensation), stopping the evil or preventing future evil[9].

EXPRESSION

The ways in which the sovereign's will may be expressed are various[10]. The connection with will immediately raises the problem of discovering the will from the expression, which is a root difficulty encountered by any imperative theory. Expression may be 'complete', ie the matter to be regulated coincides with one law. In all such cases a judge should adopt a literal interpretation. Only where expression is incomplete may he adopt a liberal interpretation. Bentham, the relentless enemy of judge-made law, sought to minimise judicial discretion by trying to ensure that laws were complete, not only in expression, but also in 'connection' and 'design', and this feature of his analysis needs to be considered separately.

7 See p 21 ante.
8 See pp 449 et seq post.
9 *OLG* pp 149 et seq.
10 *OLG* pp 152 et seq.

Individuality of a law

What, then, is a 'complete law', ie 'complete' in a jurisprudential sense? The individuality of a law he says 'results from the *integrality* and the *unity* of it laid together'[11]; and the purpose of individuation 'is to ascertain what a portion of legislative matter must amount to in order on the one hand not to contain less, on the other hand not to contain more than one whole law'[12].

INTEGRALITY. This means that a law should be complete in expression, connection and design. With regard to the first, the standard of reference is whether the actual will of the legislation has been completely expressed. Every law contains an imperative provision which may be qualified or unqualified, further expounded or unexpounded. If it is unqualified and unexpounded, it is complete in expression in itself; if it requires qualification or exposition, it is incomplete without these. Qualifications and expositions cannot, of course, be complete in themselves without the principal provision.

With regard to completeness in connection, Bentham said that more often than not parts of a law 'lie scattered up and down at random, some under one head, some under another, with little or no notice taken of their mutual relations and dependencies'[13]. Moreover, these parts may have been brought into existence by different bodies at different times. Thus, a statutory prohibition of driving while under the influence of liquor includes, *inter alia*, a police force, courts, judges, breathalysers, procedures etc, each of which has been brought into existence by different laws at different times. They need to be co-ordinated before a law can be said to be complete in point of connection. One implication of this is that the individuation of every law imports a temporal dimension.

If the legislator's general idea of the mischief deviates from that which, in the light of the particular case, he should and might have formed, the law in question is incomplete in design. The deviation may be that it does not go far enough, in which case it is incomplete in point of amplitude; or it may go too far, in which case it is incomplete in point of discrimination. All exceptions must therefore be set down[14].

Judicial interpretation of laws is made to depend on their completeness. Interpretation is strict when the will attributed to the legislator is that which he really entertained. Interpretation is liberal when the will attributed by a court is that which he inadvertently failed to entertain, but which he would have entertained had the particular case been presented to him, ie when the law is incomplete in point of design. When it is incomplete in point of amplitude, liberal interpretation has to be 'extensive'; when it is incomplete in point of discrimination, interpretation has to be 'restrictive'. In all such cases incompleteness results from the legislator's inadvertence. If, however, incompleteness is only supposed, ie when what is thought to be a shortcoming or an overstatement was intended, then liberal interpretation ceases to be interpretation and amounts to overruling the legislator. The weakness of all this lies in the assumption that the wish which the legislator 'really' entertained is somehow knowable independently of its expression. To start on the

11 *OLG* p 156; and see pp 59-60 ante.
12 *OLG* 'description of that which is to be looked upon as neither more nor less than one entire law': p 247.
13 *OLG* p 159.
14 *OLG* p 168.

basis that the mode of expression has to be interpreted according to the legislator's will, and then to discover that it is often impossible to discover what this is apart from the mode of expression frustrates the whole exercise. Such is the consequence of any imperative approach, requiring as it does the 'ascertaining of the intention of the legislator'[15].

UNITY. 'The unity of a law' said Bentham 'will depend upon the unity of the species of the act which is the object of it'[16]. The way in which different species of acts are designated is largely a matter of wording dictated by convenience. His point was that each act-situation is the object of a separate law. Here lies the difference between the unity of a law and its integrality[17]. Also, nowhere did he assert that one species of act could give rise to only one offence. Two different laws can create two separate offences out of the same act, as where a criminal offence is also a tort.

If an act-situation is the object of every law, what of the 'laws' of contract or property, which deal with the requirements of a contract and title to property? These neither impose duties nor grant permissions. Bentham's answer was that these are not laws in themselves, but parts of laws. Laws forbid breaches of contracts and interferences with property[18]. Statements as to what a contract is and those determining title to property are 'expository' (amplifying and limiting the acts and sanctions) and 'qualificatory' (limiting the scope of the laws forbidding interference). Such 'parts of laws' are often very complex and pertain to different laws, which is why they are set out on their own for convenience. Ingenious as this explanation is, it is unsatisfying. The point that it cuts across traditional usage and habits of thought might be countered to some extent by the reply that he was trying to straighten out the tangle resulting from traditional thought and that divergences from accepted terminology is only to be expected. Nevertheless, the divergence should not be too great[19]; indeed, Bentham himself at various points did make concessions to convenience. The point is whether such wholesale divergence oversteps the limits of convenience. More serious is the objection that this classification only follows from squeezing the concept of a law into the strait-jacket of an imperative theory: all laws have to be either commands or permissions. It takes no account of powers, eg powers to make contracts, create title etc[20].

Customary laws received short shrift at Bentham's hands. In his view they could never be complete[1].

At the end of his analysis he returned to the question with which he began: 'What is a penal code of laws? What is a civil code?' He concluded that the former consists of laws creating 'offences' (those composed of directive and sanctional or incitative parts), while the latter consists of expository and qualificatory matter. 'Offences' in this context are wider than crimes. The characteristic of criminal offences, as distinct from civil offences, lies not in their intrinsic nature, but in the degree of mischief they occasion, the degree of displeasure they evoke and the degree of punishment meted out. To the

15 See pp 166–168 ante.
16 *OLG* pp 166, 170.
17 *OLG* p 171.
18 *OLG* pp 176–182.
19 Raz *The Concept of a Legal System* pp 115, 142.
20 Cf identifying 'legal material' (not 'laws') with reference to function: pp 11, 23 ante.
1 *OLG* pp 184 et seq.

category of civil offences belong 'such offences as it is not judged necessary to punish with any extraordinary degree or species of punishment: to the criminal, such offences as it is judged necessary to punish with some extraordinary degree or species of punishment'[2]. It may be asked how such a distinction is applicable to the gradations of treatment, penal, reformative and curative, meted out to criminals. It also breaks down in the case of a tort visited by exemplary damages[3], whereas pulling the communication cord in a train needlessly can only be visited by a £50 payment. Why is the former civil and the latter criminal? Or are they both 'civil'? The proposed distinction will lead to a formidable restructuring, which seems scarcely worth the price.

Bentham's ultimate objective was an ideal code. His analysis of a law led him to conclude that such a code should consist of laws analysable jurisprudentially, and its penal and civil branches should be separated[4]. Its advantages would be to minimise the risk of incompleteness of laws and consequently what he termed 'licentiousness' of interpretation; to exhibit a common standard by which different systems might profitably be compared; and to create and improve the method of teaching the art of legislation. Whether, in the light of the difficulties that have been pointed out, this kind of code would indeed be ideal is a matter of opinion. So strong were his feelings as to the merits of a code that he remained a life-long enemy of judge-made law, which he hoped would be largely eliminated, thereby reducing the judicial function. The likelihood of his hopes being realised in present-day Western-type societies may be doubted; but should these be replaced by forms of totalitarianism, in which the judiciary only reflects governmental values, those hopes may well become a reality.

An assessment of his work is not easy. His main interest lay in advocating reforms, but he also examined problems of international law. In fact, it was he who coined that name[5]. The current resurgence of interest in his work is leading to a great deal of re-evaluation, while his remarkable anticipations of modern thought in so many directions make one wonder whether a final judgment is yet possible. Even as it is, the breadth and depth of his analyses and brilliant insights are such that it does not seem too extravagant to say that had all his writings been known, he could well have been the greatest single contributor to European jurisprudence; which makes it all the more regrettable that the world of scholarship lost so much for so long.

AUSTIN

Throughout the nineteenth century Bentham's *Of Laws in General* remained hidden in London University and British positivism came to be dominated by the views of his disciple John Austin (1790–1859) until virtually the outbreak of the 1939–45 war. As will appear, his work is largely derivative and far less satisfying than Bentham's. The first six lectures, the most influential part of his work, were published in 1832 under the title of *The Province of Jurisprudence Determined*, and the rest were published posthumously in 1861[6].

2 *OLG* p 211.
3 Within the limits of *Rookes v Barnard* [1964] AC 1129, [1964] 1 All ER 367.
4 *OLG* pp 183, 232 et seq.
5 Bentham *An Introduction to the Principles of Morals and Legislation* ch 17, para 25.
6 Austin *Lectures in Jurisprudence* (5th edn, ed Campbell).

Austin, in sympathy with Bentham as to law reform, conceived his initial task to be a critical analysis of the law as it is. The time he had spent in Germany preparing for his lectures and his study of Roman law brought home to him the contrast between the orderliness of Roman law and the chaos in England. Commentators on Roman law had Justinian's codification as their starting point, while their British counterparts were groping amidst a thicket of statutes and diverse and often poor law reports. German lawyers had behind them centuries of exegetical work, while Blackstone's *Commentaries* was still the only attempt at a systematic arrangement of English law.

Accordingly Austin set himself the task of making a beginning with the analysis of the principal concepts of English law. Before doing so he felt it necessary to demarcate the province of 'law' and to distinguish it from what it ought to be. In his first six lectures he sought to elucidate 'law' in the light of which its concepts would then be analysed. Although his fame rests on these preliminary lectures, they were only a prologue to the study of jurisprudence which, to him, meant the analysis of concepts. His concept of law is an imperative one influenced by his preparatory studies, which had impressed upon him the powerful position occupied by the sovereign in municipal law. In Roman law the authority of the *Princeps* and later of the Emperor was seen to have been unquestionable. European writers had preached in like vein. Bodin, for instance, said that sovereignty was the absolute and perpetual power within the state and, perhaps most importantly, in the work of Hobbes was to be seen the connection between the law of the state and enforcement by organised power. He had also spoken of law as being grounded in 'natural reason', but that it became 'law' only by virtue of the command of a sovereign. Bentham's approach, too, was an imperative one based on sovereignty. With these influences behind him Austin's adoption of a similar basis is hardly surprising.

Like Bentham, Austin believed that 'law' is only an aggregate of individual laws. In his view, all laws are rules the majority of which regulate behaviour. These are either directives or those imposed by general opinion. Directives have to be laid down 'posited'; and a directive, whether general or particular, is 'the expression or intimation of your wish' that another shall do or forbear, issued in the form of a command. Accordingly, a law in its most comprehensive signification is 'a rule laid down for the guidance of an intelligent being by an intelligent being having power over him'[7]. This can only be accomplished by a determinate person or body, since an indeterminate body cannot express wishes in the form of commands.

Austin proceeded to distinguish between what he called 'laws properly so called' and 'laws improperly so called'[8]. The key to a law 'properly so called' lies in obligation, which was approached as follows. Every wish with regard to conduct is favourable to conduct which is desired, and unfavourable to conduct which is not desired. Such wishes may emanate from directives or from general opinion, but wishes that are directives are distinguishable in that they render conduct obligatory. A person is under an obligation, not simply when consequences harmful to him ensue, for, if so, there would be an obligation not to put one's hand in the fire. An obligation exists when another has the power and purpose of inflicting an evil on any actor, who fails to conform to the desired conduct[9]. This other may be God, or human

7 *Austin* p 86.
8 *Austin* pp 79, 86 et seq. 3 p 89. 4 p 96.
9 *Austin* p 89.

beings acting as political superiors, ie a sovereign person or body of persons in an independent political society, or private persons acting in pursuance of rights conferred upon them by political superiors. General opinion cannot create obligations. Every directive, then, is a command, the threat of evil is a sanction, and the party commanded and threatened is under an obligation or duty. Duty and sanction are correlative and fear of sanction is the motive for obedience.

A command may be particular (addressed to one person or group of persons) or general. General commands are addressed to the community at large and enjoin classes of acts and forbearances[10]; they are also continuing commands. A particular command is effective when the commanded person or group obeys; a general command is effective when the bulk of a political society habitually obeys it. A commander, who receives 'habitual obedience from the bulk of a given society', is sovereign in that society. It is not necessary for general opinion to authorise the issue of commands, since a person can command and threaten without such authority. From all this Austin concluded that a law is a general command of a sovereign backed by a sanction.

He subdivided laws 'properly so called' into laws set by God, Divine laws, and laws set by men to men acting as political superiors or in pursuance of rights conferred by political superiors. To every law set by men to men he applied the term 'positive law' or 'law simply and strictly so called' so as to distinguish them from the laws of God[11]. 'Positive laws' are the subject matter of jurisprudence. Separate from all these are laws set by men to men neither as political superiors, nor in pursuance of rights conferred upon them by such superiors, eg those set by a master to a servant or the rules of a club. They are still laws 'properly so called', because they are commands, but he distinguished them from positive law by giving them the term 'positive morality'.

Under the heading of laws 'improperly so called' he placed, first of all, 'laws by analogy', ie laws set and enforced by mere opinion, such as the laws of fashion, international law and so forth. These also he somewhat confusingly termed 'positive morality'—'positive' so as to distinguish them from the laws of God, 'morality' so as to distinguish them from positive law or law strictly so called. Laws 'improperly so called' also included 'laws by metaphor', which covered expressions of the uniformities of Nature.

Austin's model is open to several comments. The first is that the distinctions which he drew were arbitrary. Not that there is any objection to doing this provided clear indications are given of what they mean; and Austin was scrupulous in this respect. He did, however, commit two errors. Although he did not specifically say so, it is clear that he fashioned his concept out of the material of English law with an occasional sprinkling of Roman law, but he proceeded to use it as a criterion of 'law in general' and so excluded, eg international law. He was also misguided in applying the epithet 'proper' to what was, after all, his own stipulative definition of 'a law'.

Austin was seeking to provide a means of identifying a law for the purposes of the moment, but to link this with the means of securing obedience is to confuse identification with functioning. Obedience is a factor relevant to the latter, and in this context, as has been pointed out, fear of sanction is not the sole, or even principal, motive for obedience[12]. Many objections may also be

10 *Austin* p 96.

11 For this and the subsequent divisions, see *Austin* pp 86 et seq, and Lecture V.

12 See pp 51-52, 248 ante.

levelled at the association of duty and sanction, which have been developed earlier[13]. Another weakness is the fact that he found himself compelled to treat nullity as a sanction in order to accommodate, eg the rule, 'You must make a gratuitous promise under seal', within his command-duty-sanction model[14].

LAWS AS COMMANDS

This idea has encountered the heaviest criticism. Austin's association of duty with command was probably the result of his having been misled by the imperative form in which duties are expressed: 'You must', or 'You shall'. Professor Olivecrona has pointed out that everyone has a store of experiences of actual commands addressed in the imperative form, so that whenever one encounters that form of expression there is a tendency to suppose that it must have emanated from a command. He points out that duties are 'ought' propositions which are phrased imperatively, and it is a *non sequitur* to suppose that such phraseology of itself implies command[15].

With regard to the wider aspects of the command theory, it may well be that the idea at the back of Austin's mind was, in Buckland's words, 'primarily an English criminal statute'[16]. Even so, there is a difference between this sort of law and command. The function of a law is to regulate future conduct indefinitely and to serve as a standard by which to judge deviance; a command is more usually directed to a specified individual or individuals with reference to a particular act or forbearance and does not serve as a general standard of judgment. Apart from this, there are laws which are not commands. Austin himself was somewhat exercised by declaratory statutes, repealing statutes and 'laws of imperfect obligation', which include laws defining, eg what a contract is, or a crime, or a law which says that no action shall succeed after the lapse of a limitation period. He concluded that these were exceptions[17]. In this he was perhaps unduly hesitant, for, as Buckland pointed out, declaratory statutes could have been treated as repeating earlier commands, while repealing statutes may be said to create fresh claims and duties by their cancellation of earlier ones and so be said to command[18]. Nevertheless, Austin's hesitation and the fact that he was driven to admit exceptions betray some uneasiness with the command thesis. The question of custom troubled him not at all. To him customs were laws when commanded either directly by incorporation in statutes, or indirectly in judicial decisions[19].

Command presupposes a commander. Austin perceived clearly that 'no indeterminate party can command expressly or tacitly, or can receive obedience or submission'[20]. The question is whether a determinate person, or body of persons, can be discovered who might be regarded as having commanded the whole *corpus* of the law. Never at any point in history is such a person or

13 See pp 236 et seq.
14 *Austin* p 505. criticised on p 44 ante.
15 See p 231 ante. There is also the duty accompanying all types of legal material that they shall be treated as 'law'.
16 Buckland *Some Reflections on Jurisprudence* p 4.
17 *Austin* pp 98–100.
18 *Austin* pp 49–51.
19 *Austin* pp 101–102, 199.
20 *Austin* Lecture V especially pp 183, 194–195.

group discoverable. Who, for instance, commanded the rule that precedents shall be binding? A sovereign is sovereign within a 'state', and 'state' is a legally defined organisation consisting of territory, population, government and a measure of independence in external relations. Who commanded these requirements? Again, it might be thought that the present monarch and members of both Houses of Parliament can command any law they please. However, as Professor Olivecrona pointed out, the individuals who comprise the sovereign body have attained their positions by virtue of laws. Who, then, commanded these laws? Whoever commanded them in turn owed their authority to command to the observance of other laws. There is no sense in saying that the laws which brought them to their positions were their own commands[1]. Even if the Crown in Parliament as a composite entity is taken to be the uncommanded commander, a study of the events of 1688–1689 shows that this body in no sense commanded the rule that its commands shall be law. It was acceptance of it as the supreme commander, particularly by the judges, that entitled it to command henceforth[2]. Moreover, it is artificial to pretend that any member of Parliament believes that the law of the land has emanated from his commands, for the vast majority of laws existed before he was born. To attribute commands to people, who have neither commanded nor believe that they have done so, is a fantasy.

Although the Crown in Parliament was accepted in 1689 as the Austinian commander, the bulk of the common law and much legislation was already in existence and continued to exist unaffected. Even if it is assumed with Austin that these laws had emanated from earlier commands, the question is why and how commands of a former sovereign continue to be laws under his successor. Austin's reply was that this comes about by virtue of 'tacit command': what the sovereign permits, he commands[3]. This implies that the sovereign knows of the earlier commands and decides not to interfere. When does he so decide? It cannot be when their applicability comes before a judge (who, according to Austin, is the sovereign's delegate), since he has no choice in the matter: a previous enactment, however ancient, is always accepted by a judge as being law already. If so, the decision, assuming that there was one, not to interfere with this prior command, and which thereby invests it with fresh authority, can only be that of the sovereign himself. Professor Hart has demolished the idea of 'tacit command'[4]. (i) A sovereign may consciously permit the continuance of a former law, or (ii) such a law may continue by default simply through not being repealed. Tacit command may superficially fit case (i); though it will be noticed that even an actual decision not to repeal is a decision *not to command*. How, then, can a decision not to repeal impart fresh law-quality to something which never ceased to possess it? Tacit command ceases to be even superficially applicable to case (ii), since non-repeal by default is in no sense 'the expression of a wish', which was Austin's own description of command. The continuance of the majority of the laws of a previous sovereign are instances of (ii). In any case, tacit command fails to explain why the laws and system which continue are the *same* laws and

1 Olivecrona *Law as Fact* (1939) pp 36–37; (1971) pp 67–77. For further objections, see 'The Imperative Element in Law' (1964) 18 Rutgers LR 794.

2 Hart points out that for a successor sovereign's commands to be 'laws' there must have been acceptance of a rule which entitles the successor to succeed: *The Concept of Law* p 54; p 352 post.

3 *Austin* p 102; ch 30.

4 *Hart* ch 2, ss 2–4.

system. If, then, tacit command is rejected, as it must be, what remains is the proposition that laws remain in force until repealed.

Finally, it has been pointed out that even actual commands of a sovereign only acquire the character of laws when certain procedures have been followed[5]. If the Queen, Lords and Commons unanimously assent to a measure at a garden party in Buckingham Palace, it would not become a law, because the appropriate Parliamentary procedures have not been gone through. If these procedures are laws, it is difficult to square them with command (still less with sanction save by way of nullity). If they are not laws, they are indistinguishable from the dictates of etiquette and morals. Yet, distinguished they must be. What all this shows is the inadequacy of the command doctrine.

SOVEREIGNTY

Austin's distinction between positive law and positive morality was that the former was set by a political superior. In elaborating this notion he evolved his theory of sovereignty.

Sovereignty has a 'positive mark' and a 'negative mark'. The former is that a determinate human superior should 'receive habitual obedience from the bulk of a given society', and the latter is that that superior is 'not in the habit of obedience to a like superior'[6]. The reference to 'habitual obedience' touches obliquely on the point that every legal system is ultimately founded on some social fact for which no legal justification can be adduced[7]. The addition of 'the bulk of a given society', however, is arguable, since this is hardly the body that matters. For instance, it was obedience on the part of the judges after 1689 that established the sovereignty of the Crown in Parliament. On the other hand, it has been pointed out that Austin confused the *de facto* sovereign, or the body that receives obedience, with the *de jure* sovereign, or the law-making body[8]. In Britain the Crown receives allegiance from its subjects, while the Crown in Parliament is the supreme law-maker. When Austin talked of the uncommanded commander who makes laws, he was referring to the *de jure* sovereign. Another criticism is that the 'negative mark' is not so much the concern of municipal lawyers as of international lawyers. For the former the question is, Whose enactments constitute 'laws'? It is a matter of indifference to them that the law-maker obeys some other body in the international sphere as long as he can make laws in the municipal sphere. Finally, it has been questioned whether it is necessary to have a sovereign in a state. The answer depends on the meanings of 'necessary' and 'state'. A sovereign may be 'necessary' because definition has made it so. In another sense the question is whether a sovereign is 'necessary' as a practical matter. The word 'state', too, has shades of meaning into which it is not proposed to enter. The short answer to the question is that there is no need for only one law-making body, though in practice this might be convenient.

Austin went on to assert that a sovereign cannot command himself, ie place himself under an obligation. Further, to confer a power on another is to specify the conditions under which other persons may create obligations, subject to sanctions specified by the sovereign. Delegation of authority is thus

5 See pp 52 et seq.
6 *Austin* pp 220–221.
7 Cf acceptance of the Crown in Parliament in 1689: pp 53–54 ante.
8 Bryce *Studies in History and Jurisprudence* II, pp 51–60.

commanding that people shall obey the commands of another. The attributes of sovereignty, which followed from this, are that it is illimitable, indivisible and continuous; and he has encountered criticism in each respect. His denial that the sovereign could be limited[9] relegated substantial areas of constitutional law to positive morality. The sovereign cannot be under a duty, since to be under a duty implies that there is another sovereign above the first who commands the duty and imposes a sanction; in which case the first is not sovereign. Jethro Brown argued that the sovereign could well be bound by a duty; Buckland, supporting Austin, denied it[10]. As to this, it is to be observed, in the first place, that Austin overlooked limitations through disabilities rather than duties[11]. Secondly, the exercise of sovereign powers may be limited by special procedures[12]. Thirdly, Bentham showed how sovereignty may be divided in such a way that each component has a limited power to prescribe for the other, and how this creates legal self-bindingness on a sovereign[13]. Connected with duties is the question whether the sovereign can have claims. Austin again denied it since, in his view, a claim has to be conferred by a sovereign on someone, therefore to say that one sovereign confers a claim on another is to deny the sovereignty of the latter. It may be thought that the sovereign may confer a claim upon itself, to which Austin replied that this would be to confuse 'might with right'. Buckland pointed out that this answer is inconsistent with his concept of claims and duties according to which a person is under a duty if he is subject to an evil, which the party with the claim could cause to be inflicted in the event of disobedience. There is no contradiction in saying that the sovereign could fulfil both roles. Accordingly, Buckland himself suggested that since the situation looks like one in which there is a claim-duty relation, there is no point in denying that the sovereign can have a claim[14]. The question may also be asked whether anything of practical moment turns on the issue. It is also to be noted that in most of these discussions there has been a tendency to refer to the Crown as the Austinian sovereign, which it is not; the Crown in Parliament is the sovereign[15].

The attribute of indivisibility creates other difficulties. The question is whether sovereign authority can be vested in more than one body, not

9 *Austin* p 263.

10 Brown *The Austinian Theory of Law* p 194; *Buckland* pp 107-109.

11 See pp 39, 102 ante.

12 See pp 93 et seq ante.

13 See p 337 ante.

14 *Austin* pp 282 et seq; *Buckland* p 110.

15 It has been contended by Professor Paulson that the rejection by the War Crimes Tribunal at Nuremberg of the defences of act of state, superior orders and *ex post facto* law making was tantamount to a rejection of the Austinian doctrines of sovereignty and of law as command backed by sanction. (1) The defence of act of state presupposes the Austinian thesis that a sovereign cannot be subject to a duty since there is no sovereign superior to a sovereign state. The Tribunal's answer was to point to instances where sovereign states are under duties; which leads to a rejection of the Austinian thesis. (2) The defence of superior orders by the accused is based on the thesis that the validity of a sovereign's order cannot be impugned on moral groundss. The Tribunal rejected this defence on the ground that the test was whether a moral choice was open to the accused persons individually. (3) The defence that the trial amounted to *ex post facto* law making is based on the concept of law as command backed by sanction, the answer to which was that there had been laws forbidding the kind of conduct that was on trial although they lacked effective sanctions. The absence of sanction in no way impugns the quality of 'law'; the Nuremberg Charter did not create offences *ex post facto*, but only provided sanctions: 'Classical Legal Positivism at Nuremberg' (1975) 4 Phil & Pub Affairs 132.

whether it can be exercised by more than one, which Austin would have admitted[16]. Bentham showed how sovereignty could be divided; besides, there are obvious examples, eg the old Roman assemblies, the United States of America and the concurrent powers of a colonial legislature and the Westminster Parliament[17].

Finally, the attribute of continuity may be questioned by asking where sovereignty resides during a dissolution of Parliament. Austin fell into contradiction in trying to anticipate the objection by saying that sovereignty lies with the Queen, Lords and Electorate. This is contrary to his assertion that it lies with the Queen, Lords and Commons, and it also renders the whole concept meaningless[18]. Who, on this view, is the commander, and who the commanded?

In assessing Austin's contribution, it is to be noted that he helped to propagate the positivist doctrine that it is necessary, to some extent at least, to separate the law as it is from what it ought to be. His concept of a law, shorn of its sovereignty, command and sanction attributes, is reducible to a prescription of conduct phrased in imperative form; but this is not a sufficient basis for drawing the distinction he desired between the 'is' and the 'ought'. His method of logical analysis, ie of deducing the nature of legal conceptions from his conception of a law, is, as Julius Stone pointed out, no more than the use of a model to reveal the logical consistency of a system[19]. The value of any such model depends on the degree of correspondence between it and the way in which laws and legal conceptions are actually used. Austin presented his scheme in the belief that, notwithstanding some discrepancies, there was a sufficient measure of correspondence with actuality. In this he was mistaken. Also, he did not reveal the reasoning which led him to his concept of a law; he simply made certain assertions and applied them logically. It is always more interesting to probe and test the reasoning behind premises than to follow out their logical implications. The material of his book consists mainly of contemporary English law with occasional bits of Roman law thrown in. The concept of a law which he fashioned out of these data should have been confined within those limits. Unhappily, he extrapolated them into a test of law in general. Even so, what he was doing was, in effect, to give a stipulative definition of how he proposed using the term 'a law'. By proffering it as 'law properly so called' he assumed that 'law' has a 'proper' meaning and he also utilised the emotive connotation of 'proper'. His exclusion of international law and portions of constitutional law from 'law properly so called' was logical according to his premise; and had he said that he was only doing this because they fell outside the subject as he saw it, it would have been a permissible attitude for him to have adopted. To exclude them, as he did, on the ground that they were not 'law properly so called' was needlessly provocative[20].

16 *Austin* p 238.

17 Eg *Madzimbamuto v Lardner-Burke*, [1969] 1 AC 645, [1968] 3 All ER 561; pp 54–55 ante. Since a colonial legislature can delegate its power to legislate, it is not itself a delegate of Westminster, *delegatus delegare non potest: Powell v Apollo Candle Co* (1885) 10 App Cas 282. Indivisibility of sovereignty was rejected by Lord Evershed MR in *Re Mwenya* [1960] 1 QB 241 at 298, [1959] 3 All ER 525 at 533–534. See too *R v Secretary of State for Foreign and Commonwealth Affairs, ex p Indian Association of Alberta* [1982] QB 892, [1982] 2 All ER 118; *Manuel v A-G* [1983] Ch 77, [1982] 3 All ER 786, 822.

18 *Austin* pp 245–246.

19 Stone *Legal System and Lawyers' Reasonings* ch 2.

20 The international lawyers must shoulder some responsibility for the fruitless controversy which developed: see pp 495–498 post.

Austin paid lip-service to 'general jurisprudence', by which he meant 'the exposition of the principles, notions and distinctions which are common to systems of law; understanding by systems of law, the ampler and maturer systems'[1]. This is unhelpful without a criterion for 'amplitude and maturity', and some indication as to whether the 'common' principles are those which are in fact found to be common, or those which for some reason are 'necessarily' common. Nor did he provide evidence that the notions which he did put into his book are in truth shared by 'ampler and maturer systems', whatever these may be. Indeed, Austin to some extent belied his own thesis by confining his demonstration to English and a little Roman law. Perhaps, he thought that in so far as the legal orders of the Old and New Worlds were based, as far as he knew, on these two systems, they would furnish between them a sufficient basis for general jurisprudence. However, as Buckland observed, Austin and others like him, who profess general jurisprudence, seldom adhere to it[2].

A comparison of Bentham and Austin must lead to the conclusion that the former provided a deeper and more adaptable theory. His concept of sovereignty was flexible in that it avoided the shackles of indivisibility and illimitability. He was thus able to accommodate the division of authority between organs, as in a federation, or division in certain areas, as well as restrictions of authority and self-bindingness. His concept of a law was broader than Austin's and he avoided the absurdity of 'law properly so called'. His sanction was both wider and less important than Austin's: laws are still laws even though supported by moral or religious sanctions, they may even be accompanied by rewards. He thus had no need to resort to 'sanction by nullity'. The imperative foundation is a weakness in his theory, as has been pointed out, but it was so much broader and less uncompromising than Austin's that he was able to accommodate permissions up to a point; and he certainly avoided the 'tacit command' fiction.

Austin's successors in the positivist tradition have abandoned his concept in favour of other formulations. Holland concentrated, not on command, but on 'enforcement by sovereign political authority'[3]. This suffers from all the difficulties concerning enforcement that were previously examined[4]. Salmond spoke of law as consisting of 'the rules recognised and acted on by courts of justice'[5]. The reference to justice is not clear. It may be no more than an embellishment of 'courts', for nowhere does Salmond appear to make justice a criterion of identification. A minor difficulty is that courts often apply, for example, rules of arithmetic in the course of giving their decisions, but these do not thereby become 'law'. What is required is the addition of a rider to the effect that the rules are 'recognised and acted on' as *law* by the courts.

HLA HART

Professor Hart (1907–) may be regarded as the leading contemporary representative of British positivism. In his influential book, *The Concept of Law*, published in 1961, he brought to bear the training of a philosopher, barrister

1 *Austin* p 1073.
2 *Buckland* pp 71–72.
3 Holland *The Elements of Jurisprudence* p 43.
4 See pp 235 et seq ante.
5 Salmond *Jurisprudence* p 36.

and jurist to the elucidation of jurisprudential problems. As a linguistic philosopher he belongs to the school which sees how words are used rather than what they refer to[6], and he subscribes to the view that a word possesses, not a 'proper meaning', but an inner 'core' of agreed applications surrounded by a 'fringe' of unsettled applications. As an analytical jurist, he is keenly appreciative, *inter alia*, of Hohfeld's distinctions, the influence of which is evident throughout his writings.

He approached his concept of law as follows. 'Where there is law', he says, 'there human conduct is made in some sense non-optional or obligatory'[7]. Thus, the idea of obligation is at the core of a rule. He commences his book by taking Austin's command theory to task. The idea of command will explain a coercive order addressed to another in special circumstances, but not why a statute applies generally and also applies to its framers. Secondly, there are other varieties of laws, notably powers. Thirdly, the continuance of pre-existing laws cannot be explained on the basis of command; as pointed out, he was able to demolish completely the 'tacit command' myth[8]. Fourthly, Austin's 'habit of obedience' fails to explain succession to sovereignty because it fails to take account of important differences between 'habit' and 'rule'. Habits only require common behaviour, which is not enough for a rule. A rule has an 'internal aspect', ie people use it as a standard by which to judge and condemn deviations; habits do not function in this way[9]. Professor Hart maintains that the significance of 'rule' has been neglected. Succession to sovereignty occurs by virtue of the acceptance of a rule entitling the successor to succeed, not because of a habit of obedience. He also uses 'rule' to distinguish between 'being obliged' and 'having an obligation'. Austin's command-duty-sanction thesis fails to explain why, if a gunman threatens X with 'Your money or your life', X may be obliged to hand over his purse, but has no obligation to do so. The reason is that one has an obligation only by virtue of a rule.

Rules of obligation are distinguishable from other rules in that they are supported by great social pressure because they are felt to be necessary to maintain society[10]. How, then, do they acquire the character of 'laws'? Regulation of behaviour is by means of what are called 'primary rules'. Societies which possess only these are in a 'pre-legal' condition and suffer from three drawbacks[11]. One is uncertainty as to what these rules are and their scope; but this can be met by having a 'secondary rule of recognition' by which to identify primary rules. Secondly, primary rules are static; but this can be met by having secondary rules providing powers to change primary rules[12]. Thirdly, the maintenance of primary rules is inefficient because of the absence of authoritative arbiters of disputes; but this can be met by having secondary rules of adjudication. Thus, primary rules acquire the character of a legal system through their union with secondary rules, ie the union of rules creating duties and rules creating powers to create, extinguish, modify and adjudge, as well as a rule of recognition with which to

6 Cf his elucidation of 'right': 'Definition and Theory in Jurisprudence' (1954) 70 LQR 49.
7 Hart *The Concept of Law* p 80.
8 See pp 347-348 ante.
9 *Hart* pp 55-56, 99; see p 48 ante.
10 *Hart* p 84; p 228 ante.
11 *Hart* pp 90 et seq.
12 Cf Maine's distinction between 'static' and 'progressive' societies. The latter develop beyond this stage through fiction, equity and legislation: Maine *Ancient Law* (ed Pollock) p 31. See also pp 318 ante.

identify primary rules. Thus 'law' for Professor Hart is equivalent to 'legal system'. Also, the union between primary and secondary rules is more than a plus sign; primary rules acquire the unity of a system through their union with secondary rules[13]. Moreover, there can be primary rules without a rule of recognition, which 'is not a necessity, but a luxury, found in advanced social systems'. His point is that 'in the simpler form of society we must wait and see whether a rule gets accepted as a rule or not; in a system with a basic rule of recognition we can say before a rule is actually made, that it *will* be valid *if* it conforms to the requirements of the rule of recognition'[14]. He also attaches much importance here to the 'internal aspect' of rules, ie their acceptance as standards, since what is crucial is that *officials* should have the internal point of view[15].

The volume of discussion which Professor Hart's concept has evoked is comment in itself on the stimulating quality of his contribution[16]. It is unnecessary to marshal all that has been said about different aspects of his work, but some remarks are needed on those relevant to the purposes of this book. In the first place, it is to be observed that a private club prescribes patterns of behaviour for its members and also possesses machinery whereby such prescriptions are added to, modified, abolished, applied and identified. It would seem, then, that the systems which prevail in a club and in a state exhibit the same characteristics. What is needed is some means of identifying the one as the 'law of the club' and the other as the 'law of the land'. It is not enough simply to incorporate identification by officials into the rule of recognition. A club has officials. What has to be answered is the question: Why is one set of officials 'officials of the state'? In other words, the system of a club can only exist within, and presupposes, a legal system, and Professor Hart does not appear to give an adequate criterion for distinguishing between them. The difference lies in the nature of the institutions, of which his theory takes no account. A club is an institution, so is law and legal system, and it is at the institutional level that the distinction has to be found[17].

Next, it is submitted that the distinction between a legal and a pre-legal state of affairs is not at all clear. If, as is alleged, a rule of recognition is not essential to the validity of primary rules in social systems that have not advanced, what precisely is the criterion? According to Professor Hart, in these societies 'we must wait and see whether a rule gets accepted as a rule or not'; which then raises the question, When do we know the category of a given society, when do we know that there is a rule of recognition? This rule is *not* a hypothesis, but a rule of positive law and, therefore, its own validity cannot relate to itself. The answer to the latter question is that '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'[18]. It is not clear why private persons are included. Since the rule of recognition identifies the rules by which the conduct of private persons is to be judged, it would seem that only courts and officials need be included. Comparison with umpires in a game

13 Summers 'Professor H L A Hart's Concept of Law' (1963) 98 Duke LJ at 638.
14 *Hart* p 229.
15 *Hart* p 113.
16 See Dias *Bibliography*.
17 For a way of distinguishing them, see Raz 'The Institutional Nature of Law' (1975) 38 MLR 489.
18 *Hart* p 98.

(Professor Hart's own analogy) brings out another difficulty. One can indeed discover what rules umpires recognise, but they, and still less the players, are not in a position to choose which rules to recognise. Professor Hart's officials and private persons seem free to do just this. The result, then, is not very different from Austin's 'habitual obedience'. If one knows what the rules are in a given legal system, one can discover what its rule of recognition is; the difficulty is to find the rule of recognition *de novo*.

The rule of recognition is grouped under powers as a secondary rule, but it looks more like the acceptance of a special kind of rule than a power[19]. Besides, there appear to be some rules of recognition which are not powers, such as those which indicate the criteria to be applied, eg constitutive rules of procedure[20]. It has even been suggested that the rule of recognition is not a power, but a duty addressed to officials[1].

Professor Hart's concept is based on the distinction between rules creating duties and rules creating powers, since a legal system is constituted by their union. It is questionable whether so sharp a distinction can be drawn. It has been pointed out, for example, that the same rule may create a power plus a duty to exercise it, or a power plus a duty not to exercise it[2]. Professor Fuller instances a situation where the same rule may confer power and duty, or power or duty according to the circumstances[3]. A trust instrument may give the beneficiary power to transfer the estate to himself on a certain condition. The trustee is of course entitled to reimbursement out of the estate and has the power to reimburse himself, correlative to the liability in the beneficiary to have the estate reduced in this way. If, however, the beneficiary exercises his power on the occurrence of the condition but before the trustee has reimbursed himself, the beneficiary comes under a duty to reimburse him. Which, asks Professor Fuller, is the rule creating the power and which is the rule creating the duty? The distinction lies, not in the rule, but in the circumstances. The rule in *Hedley Byrne*[4] is not one rule imposing a duty not to make careless misstatements and another rule conferring a power to disclaim responsibility; on the contrary, it is one rule which is power and duty-conferring—not to inflict pecuniary loss by careless misstatement, except where there is a disclaimer. Some rules abolish one's duty on an event, eg a contract discharged by frustration[5]. Such a rule is neither power nor duty-conferring. There may even be rules about secondary rules, which may be power or duty-conferring, eg a rule requiring a government to change a law on a referendum, or the duty of a judge to hear a case. If, then, in the light of such examples the distinction between rules creating powers and rules creating duties is as fluid as this, one wonders whether it is a sure enough foundation for Professor Hart's concept. The relation between primary and secondary rules seems to be more complex than would appear from his treatment of it.

Professor Dworkin has pointed out that in unprovided cases what the law

19 See Cohen's criticism that Hart lumps together powers in the sense of capacities enjoyed by large numbers, eg to make contracts, wills etc, and power conferred on persons specially qualified or in special situations: Review in (1962) 71 *Mind* 408.

20 For the difficulty of rules of procedure and evidence see Singer 'Hart's Concept of Law' (1963) 60 J Phil 197, 209.

1 Raz *The Concept of a Legal System* p 199.

2 See pp 36-38 ante.

3 Fuller *The Morality of Law* pp 134-136.

4 [1964] AC 465, [1963] 2 All ER 575.

5 MacCormick 'Law as Institutional Fact' (1974) 90 LQR 118-120.

is has to be determined with reference to doctrines, standards and principles, which do not derive their law-quality from a rule of recognition. To relegate them to 'discretion' is inconsistent with judicial acceptance of them as 'legal'[6]. Also, at this point it might be appropriate to mention again that insufficient allowance appears to be made for 'institutions', ie a legal system consists of particular ways in which rules and clusters of rules operate[7]. These evolve in many ways which cannot be attributed to a rule of recognition.

Professor Hart's avowed positivism in relation to his concept of law is also open to criticism. He says that the acceptance of a rule of recognition rests on social facts[8], but he does not concern himself with the reasons why, or the circumstances in which it comes to be accepted. Social and moral considerations may well set limits on a rule of recognition at the time of acceptance so that it may have built-in limitations that provide safeguards against certain abuses of power[9]. A different point arises in the light of the thesis of the present book that when legal phenomena are considered in a continuum, moral and social factors, which are indispensable to continued existence, are an integral part of any concept of them. Professor Hart has spoken elsewhere of 'the acceptable proposition that *some* shared morality is essential to the existence of any society'[10]. 'Existence of any society' must mean 'continued existence', and he does concede that a 'minimum morality' is an essential part of every community. This minimum morality is rooted in five facts: human vulnerability, approximate equality, limited altruism, limited resources and limited understanding and strength of will[11]. As a positivist, he excludes morality from his concept of law, for he says that positivists are concerned to promote

> 'clarity and honesty in the formulation of the theoretical and moral issues raised by the existence of particular laws which were morally iniquitous but were enacted in proper form, clear in meaning, and satisfied all the acknowledged criteria of validity of a system. Their view was that, in thinking about such laws, both the theorist and the unfortunate official or private citizen who was called on to apply or obey them, could only be confused by an invitation to refuse the title of 'law' or 'valid' to them. They thought that, to confront these problems, simpler, more candid resources were available, which would bring into focus far better, every relevant intellectual and moral consideration: we should say, "This is law; but it is too iniquitous to be applied or obeyed"'[12].

It was pointed out at the beginning of this chapter that the principal call for a positivist concept of law is to identify laws precisely for the practical purposes of the present and that, for this limited purpose, it is desirable to separate the 'is' from the 'ought'. To accomplish this no more would appear to be needed than simply those uses of the word 'law' by courts; which is akin to Salmond's definition alluded to above. Professor Hart's concept, however, is of 'legal system', which is a continuing phenomenon. Indeed, the

6 Dworkin 'Is Law a System of Rules?' in *Essays in Legal Philosophy* (ed Summers) p 25. See also Fitzgerald in *Salmond on Jurisprudence* p 51.

7 See pp 442-443 post. See also articles by Raz and MacCormick referred to above.

8 *Hart* p 107.

9 See ch 5 ante. For a relation of this point to Hart, see *Fuller* pp 137-139.

10 Hart *Law, Liberty and Morality* p 51; p 112 ante.

11 *Hart* pp 190-195.

12 *Hart* p 203. See also 'Positivism and the Separation of Law and Morals' (1958) 71 Harv LR 595. Hart is *not* implying that 'might' (in the form of an unjust enactment) is 'right', but only that 'might' is law'; and to say that it is 'law' does not imply that it has to be obeyed. For difficulties, see pp 114-116 ante.

very union of duties and powers would imply this for, as pointed out earlier, the exercise of a power and the duty created by it can only be brought into focus in a temporal perspective[13]. He concedes also that some morality is essential to the continued existence of society. Is a distinction being drawn between the continued existence of society, for which some morality at least is essential, and the continued existence of a legal system? This cannot be, for while a community (a moral system) could exist without a legal system, a legal system presupposes a community. The relation between morals and a legal system is that the latter only develops within and around the morality of a community. It is submitted that underlying all this is a confusion of time-frames. There is no contradiction in saying that an immoral precept is 'law' here and now and also that its immoral quality is likely to prove fatal to its continuity. When Professor Hart thinks in a continuum, as he does with society, he has to bring in morality; but in order to defend positivism he shifts ground and takes refuge in the present time-frame, for only in this way can he justify the exclusion of morality for the purpose of identifying laws here and now. There would thus appear to be a greater separation between his concept of law and his positivism than ever he alleges between law and morality. For the limited purpose of identifying 'laws' his concept seeks to accomplish more than is necessary; for the purpose of portraying law in a continuum it does not go far enough.

13 See pp 43-44 ante.

READING LIST

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CHAPTER 17

The pure theory

The theory of Hans Kelsen (1881–1973) represents a development in two directions. On the one hand, it marks the most refined development to date of analytical positivism; on the other, it marks a reaction against the welter of different approaches that characterised the opening of the twentieth century. This is not to imply that Kelsen reverted to ideology. Far from it; he sought to expel ideologies of every description and to present a picture of law austere in its abstraction and severe in its logic.

It is necessary to begin with the premise from which he argued. A theory of law, he said, must deal with law as actually laid down, not as it ought to be. In this, as in some other respects, he agreed with Austin, although he was unaware of Austin's work when he first propounded his views. Insistence on this point has earned him the title of 'positivist'.

A theory of law must be distinguished from the law itself. There is no logic in natural phenomena, but a theory of nature, which purports to take account of them, must be logically self-consistent. In the same way, the law itself consists of a mass of heterogeneous rules, and the function of a theory of law is to organise them into a single, ordered pattern. Kelsen obviously did not evolve his theory of law *in vacuo*, but out of a study of legal material as it was actually found. What he did was to proffer it as a way of regarding the entire legal order and to demonstrate the pattern and shape into which it falls when looked at in the way he suggests[1], and the brilliance and organising power of his concept is best appreciated after the substance of the law and its problems have been studied.

A theory of law should be uniform, ie it should be applicable at all times and in all places. Kelsen thus advocated general jurisprudence. So did Austin, who, as will be remembered, only paid lip-service to it. Kelsen, however, carried out his analysis on an undoubtedly general basis. Austin's concept of law was derived from limited material, namely, English and Roman law, and ran into trouble outside that sphere. Kelsen, who had the advantage over Austin of profiting from roughly a century of varied developments, was able to arrive at generalisations which hold good over a very wide area.

A theory of law must be free from ethics, politics, sociology, history etc; it must, in other words, be 'pure' (*rein*)[2]. This follows from the last point, for if a theory is to be general, it needs to be shorn of variable factors such as those mentioned. One suspects at this point a measure of reaction against the modern introduction of these other influences which has enormously widened the scope of jurisprudence. Not that Kelsen denied their value: all he said was that a *theory* of law must keep clear of them.

Finally, laws being 'ought' propositions, knowledge of law means a knowledge of 'oughts', ie 'norms', and a norm is a proposition in hypothetical

1 Philosophically Kelsen is regarded as a neo-Kantian, but in his distinction between 'is' and 'ought' (see p 359 post) he is a descendant of Hume.

2 Kelsen *Pure Theory of Law* p 1.

form: 'if X happens, then Y ought to happen'. The science of law, or what in Anglo-American parlance is called 'jurisprudence', consists of the examination of the nature and organisation of normative propositions as they are found. It includes all norms created in the process of applying some general norm to a specific action. According to Kelsen, a dynamic system is one in which fresh norms are constantly being created on the authority of an original, or basic, norm, a *Grundnorm*; a static system is one which is at rest in that the basic norm determines the content of those derived from it in addition to imparting validity to them.

Around these points Kelsen unfolded his picture of law. It appears as a hierarchy of norms. One should, in his view, distinguish between propositions of law and propositions of science. In his earlier writings the distinction, adapted from Kant, was drawn in a straightforward manner. Propositions of science relate to events which are observed to occur and which do occur. Thus, whenever an apple is parted from a tree, in the absence of support it falls to the ground. If a new fact or event is observed which fails to conform to a scientific 'law', then that 'law' has to be modified to include it. Propositions of science may thus be described as dealing with what does happen, ie what 'is' (*sein*). Propositions of law only deal with what ought to occur, eg if a person commits theft, he ought to be punished. Even though in a given case events may not work out according to the legal 'ought', that does not invalidate it or call for modification. X may commit theft but go unpunished, for he may escape detection, he may bribe the officials who administer the law, or he may die. Even though any of these things may happen, the proposition that 'if a person commits theft, he ought to be punished' remains good. Legal propositions, therefore, deal with what ought to be (*sollen*). 'The principle according to which natural science describes its object is causality', said Kelsen; 'the principle according to which the science of law describes its object is normativity'[3]. It is true that in quantum physics strict causation has been abandoned in favour of the 'principle of indeterminacy', a modified version of causation in terms of probabilities. Accordingly, the Kantian distinction between the 'is' and the 'ought' requires modification too. However, the laws of science, though based on probabilities, remain descriptive of behaviour; juristic laws are not concerned with description, but with imputation of responsibility and are prescriptive of what ought to ensue. So put, Kelsen's distinction can be preserved, for it is a cardinal feature of his theory that laws consist of 'ought' propositions.

Two observations might be made on all this. In the first place, Kelsen in his early writings expressed this distinction rather misleadingly. He said in one place:

> 'The law of nature (meaning causality) runs: If A is, then B must be. The legal rule says: If A is, then B ought to be ... It is evident that this connection is not that of cause and effect. Punishment does not follow upon a delict as effect upon a cause. The legislator relates the two circumstances in a fashion wholly different from causality. Wholly different, yet a connection as unshakeable as causality. For in the legal system the punishment follows always and invariably on the delict even when in fact, for some reason or other, it fails of execution. Even though it does not so fail, it does not stand to the delict in the relation of effect to cause'[4].

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3 Kelsen *General Theory of Law and State* p 46.

4 Kelsen 'The Pure Theory of Law' (1934) 50 LQR 485.

This kind of expression is misleading and may induce others to do less than justice to his thesis[5]. In more recent works he distinguished between causality and imputation without the disturbing touches as above. 'Under certain conditions' he said later 'a certain consequence ought to take place. This is the grammatical form of the principle of imputation'[6].

A second source of misunderstanding is more important. Legal norms are expressions of 'oughts'. The sense in which this is so will shortly be explained. Such 'oughts' should be distinguished from the 'oughts' of valuation. The legal 'ought' is in the form, 'If X happens, then Y ought to happen'; value 'oughts' shape the content of legal propositions, whether or not they are desirable, and with these Kelsen was not concerned. He did not deny that there are such 'oughts' apart from the formal 'oughts' of the law. What he said was that the latter should be kept separate from these others. Nor did he deny that the 'oughts' of the law may have their origin in these other 'oughts'. To formulate a theory of law account need only be taken of the formal 'ought' without reference to origin or content.

Kelsen found the distinction between legal and other 'oughts' in that the former are backed by the force of the state, the preoccupation of law being with the prospect of disobedience rather than obedience. Thus, it is the prescription of sanction that imparts significance to a norm, or putting it in another way, 'Law is the primary norm, which stipulates the sanction'[7]. Only in this way does 'law arrive at its essential function'[8]. It is true that in the statement, 'If a person does X, then Y ought to happen', there is implicit the idea that a person ought not to do X if he wants to avoid Y, ie not doing X is the effective means of avoiding Y. Yet the law is only invoked when X has been done. What matters in law is what should happen then. In this way a legal norm prescribes conduct by attaching a sanction to contrary behaviour[9]. This, it is urged with respect, is a weakness of Kelsen's scheme. It was argued in Chapter 10, (a) that the 'essential function' of law is by no means confined to dealing with wrongdoing, (b) that the form, 'If X, then Y ought to happen', does not necessarily imply that Y is a sanction for the breach of some duty, and (c) that, in any case, sanction is not essential to duty. As to (a), as will be seen presently, Kelsen made the efficacy of the total legal order a condition of the validity of every norm[10], which means that the very existence of a legal system implies that its laws are in the main *obeyed* rather than disobeyed. This suggests that the main function of laws is to give guidance by prescribing how people ought to behave. Further, prescribing behaviour, even in Kelsen's indirect sense, suggests that moral and social values are indispensable despite his effort to exclude them. The use of force in the event of disobedience becomes very much a secondary function. As to (b), it was pointed out earlier that the form, 'If X, then Y ought to happen', would fit the rule that if one earns more than a certain amount, then one ought to be taxed; but taxation is in no sense a sanction, nor is there a duty not to earn more than that amount. As to (c), it was also pointed out that it is erroneous to associate sanction with duty in view of the numerous instances of sanctionless duties. In the light of all this it is submitted that any

5 Eg Olivercrona *Law as Fact* (1939) pp 17-21.
6 Kelsen *What is Justice?* p 349.
7 Kelsen *General Theory of Law and State* pp 29, 61.
8 Kelsen (1934) 50 LQR 487; *Pure Theory of Law* p 33.
9 Kelsen *General Theory of Law and State* p 59; *Pure Theory of Law* pp 33, 115.
10 Kelsen *General Theory of Law and State* p 119; p 363 post.

concept of law which revolves around sanctions is not an accurate reflection of law as it actually is.

To the extent that the provision of sanctions is regarded as crucial, the theories of Austin and Kelsen agree, but they differ in elaboration. For Austin, a law is a command backed by sanction. Kelsen disagreed in two respects. First, he rejected the idea of command, because it introduces a psychological element into a theory of law which should, in his view, be 'pure'[11]. The most that he conceded was that a law is a

> 'de-psychologised command, a command which does not imply a 'will' in a psychological sense of the term ... a rule expressing the fact that somebody ought to act in a certain way, without implying that anybody really 'wants' the person to act in that way'[12].

Secondly, to Austin the sanction was something outside a law imparting validity to it. To Kelsen such a statement is inadequate and confused. For the operation of the sanction supporting a rule resolves itself into the operation of other rules; and further, the validity of a rule has nothing to do with its sanctions. Thus, Austin would have said that the sanction behind the proposition, 'you ought not to steal', is that if you do steal, you will be imprisoned. To Kelsen, the operation of the sanction itself depends on the operation of other rules of law. One rule prescribes that if a man has committed theft, he ought to be arrested; another prescribes that he ought to be brought to trial; others prescribe how the trial ought to be conducted; another rule prescribes that if the jury brings in a verdict of 'guilty', the judge ought to pass sentence; and another prescribes that some official should carry that sentence into execution. In this way the contrast between law and sanction in the Austinian sense disappears.

With reference to the validity of a rule, Kelsen asserted that the validity of an 'ought' is not to be derived from any 'is' of fact outside the law[13], but from some other 'ought' standing behind it and imparting validity to it. The validity of a norm is ascertained with reference to its authorising norm, which confers a power to create it and may also specify conditions for its exercise. A particular norm, therefore, is 'authorised' if it can be subsumed under a more general norm[14]. The conjecture which this opens up is the end of the progression. Kelsen's solution was that in every legal order, no matter with what proposition one may begin, a hierarchy of 'oughts' is traceable back to some initial, fundamental 'ought' on which the validity of all the others ultimately rests. This he called the *Grundnorm*, the basic or fundamental norm. For example, the validity of each of the rules comprising a sanction

11 'The norm is an *ought*, but the act of will is an *is*': Kelsen *Pure Theory of Law* p 5.

12 Kelsen *General Theory of Law and State* p 35.

13 This proposition is traceable to Hume *A Treatise on Human Behaviour* III, I.1.

14 'Authorisation' and 'subsumption' are difficult notions. For a critique of Kelsen, see Harris 'Kelsen's Concept of Authority' (1977) 36 CLJ 353; and Paulson 'Constraints on Legal Norms: Kelsen's View in the *Essays*' (1975) 42 U ChLR 768. In an answer to Harris, Paulson draws distinctions. 'Validity' is looking at the law-quality of the end product; from the point of view of the dynamism of law-creation and application 'validity' is the authorisation of lower-order activities. 'Authorisation' is of two kinds: 'formal', which is given to an organ or institution, eg legislature or courts, to create, apply or validate a norm; and 'material', where a norm has to fall within the limits of the applicability of some higher norm and is derived directly from it. Formal authorisation cannot be questioned by courts, material authorisation can be questioned on judicial review. See Paulson 'Material and Formal Authorisation in Kelsen's Pure Theory' (1980) 39 CLJ 172.

depends on some other rule, which in turn rests on another and so on. Thus, the imprisonment of a person for theft is valid in so far as the prison authorities acted in accordance with the norm 'If a judge so orders, then prison authorities ought to imprison him'. The judge's order is valid in so far as he acted according to rules regulating the competence of the court, rules as to how the legal process ought to be conducted, a rule of law that 'If a person steals, he ought to be punished by imprisonment (or in some other way)'. These rules in their turn are valid in so far as they emanate from certain statutes and precedents. To the question why statutes and precedents are valid no answer can be given in law; they represent the end of the line. The entire legal order in Britain is traceable back to the propositions that statutes and precedents ought to be treated as 'law', with immemorial customs as a possible third. In this way Kelsen's picture of a legal order emerges, not just as a collection of 'oughts', but a hierarchy depending downwards from a *Grundnorm*, or branching upwards from it, whichever way one chooses to depict it.

Kelsen recognised that the *Grundnorm* need not be the same in every legal order, but a *Grundnorm* of some kind there will always be, whether, eg a written constitution or the will of a dictator. The *Grundnorm* is *not* the constitution, it is simply the *presupposition*, demanded by theory, that this constitution ought to be obeyed[15]. Therefore, the *Grundnorm* is always adapted to the prevailing state of affairs. The *Grundnorm* only imparts validity to the constitution and all other norms derived from it, it does not dictate their content. The difference between his positivism and natural law theory is that the latter determines content as well. There is also no reason why there need only be one *Grundnorm*, nor has it to be a written constitution[16]. The fact that in Great Britain the fount of validity rests with statute, precedent and immemorial customs does not contradict Kelsen's thesis, for what he contended was that a system cannot be founded on *conflicting Grundnormen*[17]. In Britain there is no conflict between the authority of the Crown in Parliament, judicial precedent and customs; they take precedence in that order[18].

There are several features about the *Grundnorm* deserving of attention. In the first place, in what sense is the *Grundnorm* a norm? It does not conform to Kelsen's own formulation of a norm: 'If X, then Y ought to happen'; it only empowers and does not impose sanctions. Next, according to Kelsen every rule of law derives its validity from some other rule standing behind it. The *Grundnorm* has no rule behind it. Its validity has therefore to be assumed for the purpose of theory, which is why it is said to be the 'initial hypothesis', 'the postulated ultimate rule according to which the norms of this order are established and annulled, receive or lose their validity'[19]. Put in another way, one cannot account for the validity of the *Grundnorm* by pointing to another *rule of law*. The *Grundnorm* validates the rest of the legal system; one cannot therefore utilise the system, or any part of it, to validate the *Grundnorm*. As

15 Kelsen *Pure Theory of Law* pp 201 et seq; 'Professor Stone and the Pure Theory of Law' (1965) Stanford LR 1128 at 1140–1142.

16 Kelsen *Pure Theory of Law* p 222.

17 *Kelsen* pp 72, 74, 195, where he spoke of 'unity' and 'unified system'; see also *General Theory of Law and State* pp 400, 407.

18 For the formulation of the *Grundnorm* for Britain see Harris 'When and Why does the Grundnorm Change?' [1971] CLJ 103.

19 Kelsen *General Theory of Law and State* p 113. See also pp 115–116, 134, 401; Kelsen *Pure Theory of Law* pp 194–195. Salmond had anticipated this point as early as 1902: *Jurisprudence* (1st edn) p 110.

one writer put it, such an attempt would be like trying to pick oneself up by one's bootlaces. This point has already been considered from another angle, namely, in connection with statute and judicial precedent, where the impossibility of finding a reason in law why these should be able to impart the quality of 'English law' was demonstrated[20].

Kelsen's distinction between validity and effectiveness has only been touched upon. Every norm other than the *Grundnorm* is valid, not because it is, or is likely to be, obeyed by those to whom it is addressed, but by virtue of another norm imparting validity to it. Thus, a norm is valid before it is effective, as is the case with a new statute before it has been applied. Yet, the validity of each norm does depend on the effectiveness of the legal order as a whole. In Kelsen's own words,

> 'It cannot be maintained that, legally, men have to behave in conformity with a certain norm, if the total legal order, of which that norm is an integral part, has lost its efficacy. The principle of legitimacy is restricted by the principle of effectiveness'[1].

He later modified this somewhat to the extent of saying that the legal order has to be 'by and large' effective[2]. It will therefore be seen that, with reference to a given norm, its validity and its effectiveness have to be kept separate. Effectiveness of the order as a whole is a condition, not a reason, of the validity of the *Grundnorm* and of any individual norm: 'a *conditio sine qua non*, but not a *conditio per quem*'[3]. At the level of the *Grundnorm* the question, Why is it valid? is meaningless; what is important is that the *Grundnorm* should secure for itself a minimum of effectiveness, ie a certain number of persons who are willing to abide by it[4]. It is futile to say that the proposition that the will of the Tsar should be accepted as law is the *Grundnorm* in Russia today. On the other hand, the fact that enactments of the Crown in Parliament are in fact disobeyed quite frequently does not render the proposition that the Crown in Parliament is law-constitutive any the less a *Grundnorm* of English law. There must not be a total disregard of the *Grundnorm*, but there need not be universal adherence to it. All that is necessary is that it should command a minimum of effectiveness.

When a *Grundnorm* ceases to derive a minimum of support, it ceases to be the basis of the legal order, and any other proposition which does obtain support will replace it. Such a change in the state of affairs is said to amount to a revolution in law. This is because, as pointed out, the *Grundnorm* is not itself the constitution, but the assumption that this (effective) state of affairs ought to be obeyed, and because, for that reason, the *Grundnorm* is adapted to that state of affairs and not *vice versa*. It follows, therefore, that a change in the situation involves a revolution in the theory adapted to it[5]. This point was demonstrated in Chapter 5, where it was seen that the events of 1688–1689 must be regarded as a revolution in the basis underlying the legal system. It was also illustrated with reference to both the Rhodesian rebellion and the British Commonwealth. The constitutions of the various Dominions derived their validity from statutes of the Crown in Parliament at

20 See chs 5 and 7 ante.

1 Kelsen *General Theory of Law and State* p 119.

2 Kelsen *Pure Theory of Law* especially at pp 212 et seq; Kelsen *What is Justice?* p 262; 'Professor Stone and the Pure Theory of Law' (1965) 17 Stanford LR 1128 at 1142; *Harris* at p 124.

3 Kelsen *General Theory of Law and State* p 119.

4 Cf Austin's criterion of sovereignty as habitual obedience of the bulk of a given society: p 348 ante.

5 Kelsen *General Theory of Law and State* p 117; *Pure Theory of Law* p 200.

Westminster, from which it would seem to follow that the *Grundnorm* of the Commonwealth legal order is that enactments of the Crown in Parliament at Westminster are law *ipso jure* for the Commonwealth. The Dominions, however, have discarded that doctrine, and their acquisitiom of independence has amounted to a revolution in the legal order of the Commonwealth[6].

The *Grundnorm* is thus a key concept in Kelsen's theory, but it raises many difficulties. The change effected in the British *Grundnorm* in 1689 amounted, according to his thesis, to a revolution in the system, but why did it remain the 'same system'? Kelsen would probably have denied that it is the same; which is not the way lawyers and jurists actually regard the position. It would only be a suggestion as to how they ought to regard it. The point can be illustrated in another way. British courts might abandon *stare decisis* tomorrow, ie the *Grundnorm* that 'precedents ought to be binding', but it would be odd to say that a new system comes into being thereafter[7]. All this, however, harks back to the earlier question: 'What exactly is the *Grundnorm* in Britain[8]?

Some writers have pointed out, with a hint of criticism, that in whatever way effectiveness of the *Grundnorm* is measured, Kelsen's theory has ceased to be 'pure' at this point. For, effectiveness would seem to depend on those very sociological factors which he so vehemently excluded from his theory of law. If, then, the *Grundnorm* upon which the validity of all other norms depends is tainted with impurity, it is arguable that the others are similarly tainted. Another attack on the claim to purity is that Kelsen's scheme is an *a priori* one dependent on empirical observation for confirmation. He offered it as a 'theory of interpretation'[9], which implies that it is not a description but a model and thus evaluative in function. It is possible to make too much of this, for Kelsen's analysis of the structure of the legal system is in no way impaired by these comments. The criticism touches, not the theory, but his claim to its purity. He admits that the *Grundnorm* is founded on factors outside the law[10]. That being the case, whether his theory is said to be pure only from the *Grundnorm* onwards, or partially pure because of its initial impurity, is not very material. The fact is, as the words of Kelsen indicate, that the effectiveness of the legal order as a whole is prerequisite to the validity of each single rule in it.

The objection, though verbal, carries more serious implications. If, as seems clear, some inquiry into political and sociological factors has to precede, or at least is implicit in, the adoption of a particular *Grundnorm* as the criterion of validity, and if the validity of every part of the system is dependent upon the continued effectiveness of the whole, then on his own showing the study of jurisprudence should include the study of the social environment. It might also be pointed out that Kelsen's picture is that of a legal order viewed at any given moment of time showing how the validity of every norm is derived from a *Grundnorm*. This explains his exclusion of moral, sociological and other considerations from the question of the validity of any rule at this or that moment. Yet, he could not avoid having to make some

6 Cross objects to the word 'revolution': *Precedent in English Law* pp 206–207. This is scarcely an objection to Kelsen's point, but rather to his choice of words. The real point is whether the system would still be the 'same'.

7 See n 6 supra.

8 On which, see *Harris*.

9 Kelsen *Pure Theory of Law* p 1.

10 Kelsen *What is Justice?* p 294.

measure of effectiveness a decisive attribute of the *Grundnorm* and of the legal order as a whole. It was pointed out in Chapter 5 that effectiveness is only *one* reason why courts will in time accept a *Grundnorm*, ie it is a factor operative in a continuum[11]. If, then, he was prepared to accept one such factor, why did he exclude others, eg morality? The force of this point may be seen when one asks why a particular *Grundnorm* was accepted, especially if this followed on a revolution? Might it not be that the new criterion of validity was able to command a 'minimum of effectiveness' because it was thought to guarantee that measure of justice and morality, which the previous criterion did not[12]? Why could it not be argued that the supremacy of the Crown in Parliament was accepted in 1689 in order that tyrannous and arbitrary acts should no longer be valid as they had been by virtue of the supremacy of the prerogative? On this line of argument the *Grundnorm* is effective, and *continues* to be effective, in so far as an element of morality is built in as part of the criterion of validity[13]. If so, the continued validity of every proposition of law derived from the validating source has an ultimate ethical basis and a total separation of law from morality is untenable. Moreover, apart from the *Grundnorm*, if, in Kelsen's own thesis, a norm in the form, 'If X, then Y ought to happen', is an indirect way of *prescribing* the behaviour needed to avoid Y (assuming Y to be a sanction), then the values that prompted the prescription in this indirect way must also underlie the form; and the same applies to every other such norm. All this amounts to an argument levelled not merely at Kelsen, but at positivism in general. It is sufficient here to observe that it would strike at the foundation of his separation of 'is' and 'ought'.

Kelsen gave no criterion by which the minimum of effectiveness is to be measured. All he maintained was that the *Grundnorm* imparts validity as long as the 'total legal order' remains effective, or, as he later put it, 'by and large' effective. As to this it may be asked, in the first place, what is the measure of 'total' and 'by and large'? The Rhodesian case *Madzimbamuto v Lardner-Burke*[14], exposes the weakness here, for as one judge pointed out, an effective order cannot be said to be totally, or even by and large, effective as long as its judiciary refuses to accept the legality of its basis[15]; which the Rhodesian judiciary did for over two years after the illegal declaration of independence by the Smith regime. Secondly, for how long must effectiveness be maintained for the requirement to be satisfied? In *The State v Dosso*[16] the Supreme Court of Pakistan had held a usurper to be effectively in power and hence lawful on Kelsenian grounds (even though, incidentally, he himself was deposed the day after the judgment was published). Later in *Jilani v Government of Punjab*[17] the Supreme Court declared both the first and second usurpers illegal, repudiated Kelsen *in toto* and overruled *Dosso*, which relied on him so heavily and because of which, as one judge quoted approvingly, 'a perfectly good country was made into a laughing stock'[18]. The court was not saying that the usurping regimes were lawful while they lasted, but

11 See pp 54-55 ante; *Jilani v Government of Punjab* Pak LD (1972) SC 139 at 159, per Hamoodur Rahman CJ and at 232-233, 242, per Yaqub Ali J.

12 Ibid at p 182.

13 See pp 55 et seq ante.

14 1968 (2) SA 284.

15 Ibid at pp 427-428, per Fieldsend AJA.

16 Pak LD (1958) SC 533.

17 Pak LD (1972) SC 139.

18 Ibid at 219, per Yaqub Ali J, who also regarded *Madzimbamuto*'s case, as far as it went, as the maximum success of Kelsen's theory: at p 244.

that they were unlawful *ab initio* notwithstanding effectiveness. It is to be noted that by the time of the later decision the usurpers had been overthrown, and it may well be that such pronouncements will nearly always be retrospective, since judges sitting under the power of a regime may have little alternative but to accept it as legal; those who refuse will be replaced, or their judgments will be nullified[19]. Against this must be set the independent stand of the Rhodesian judiciary after UDI and also of some Pakistani judges who, while under the illegal regime, not only voiced doubts but even held particular measures void[20]. Finally, what does 'effectiveness' itself mean? Kelsen drew no distinction between effectiveness, which makes people obliged to obey, and effectiveness which makes them feel under an obligation to do so. A usurper may by force and fear achieve the former, but not the latter, which, as judicially acknowledged, is the kind of effectiveness required by Kelsen. A judge of the Supreme Court of Pakistan, examining the position of the deposed usurper President, said in words reminiscent of Professor Hart, 'He obligated the people to obey his behests, but in law they incurred no obligation to obey him'[1].

Effectiveness is not necessarily a condition of validity even in the context of the here and now. For instance, in the lacuna that exists during a revolution, when the old basis has been overthrown and something has still to replace it, there is no longer a *Grundnorm*, but tribunals may continue to apply 'laws' identified as such by means of some criterion which *they* still recognise, albeit provisionally. It does not matter that that criterion belongs to the order that has gone; as long as it is accepted by the judges as imparting the quality of 'law' to the proposition before them that is all that is needed. This was indorsed in the test case of *Madzimbamuto v Lardner-Burke*[2], which was brought during the Rhodesian rebellion. Here the revolutionary 1965 Constitution was acknowledged to be effective, yet for over two years the Rhodesian courts refused to accept it as 'legal'. During that period the Rhodesian courts were none the less prepared to uphold at least some measures of the illegal regime as 'laws', and the displaced 1961 Constitution, which had ceased to be effective, was still held to possess controlling force to the extent that the laws of the illegal authority had to conform to it. The case is inexplicable on Kelsenian theory. It shows, firstly, that effectiveness is not the criterion of the *Grundnorm*, but what courts are prepared to accept as the fount of validity; and, secondly, that the validity of a law does not necessarily derive from an effective *Grundnorm*, but that this, too, depends on what courts accept as valid. A third point, which emerged since is that validity itself has a temporal dimension. In *The State v Dosso*[3] the Supreme Court of Pakistan accepted the régime, which had usurped power unconstitutionally, as legal on grounds of effectiveness; but later in *Jilani v Government of Punjab*[4] the same court declared it to have been illegal *ab initio* notwith-

19 The decision in *Mir Hassan v The State* Pak LD (1969) Lah 786, invalidating a Martial Law Regulation was promptly nullified by an Order retrospectively depriving the courts of jurisdiction in a number of matters.

20 Eg the bold decision in *Mir Hassan*'s case (see n 19 supra).

1 *Jilani*'s case (see n 17 supra) at p 229, per Yaqub Ali J. Also: 'the temporary silencing of the people and the courts is not enough': at p 243.

2 1968 (2) SA 284 at 351, 421; and see p 54 ante. For comment, see Brookfield 'The Courts, Kelsen and the Rhodesian Revolution' (1969) 19 UTLJ 326, 345-346.

3 Pak LD (1958) SC 533.

4 Pak LD (1972) SC 139.

standing effectiveness, and overruled *Dosso*. All this boils down to the fact that validity is a matter to be determined in the context of a given point of time and depends on what judges are prepared to accept at *that* moment as imparting law-quality; which seems a more useful way of regarding the matter than a *Grundnorm* enjoying a minimum of effectiveness.

In the result it would seem that Kelsen's theory does not apply in revolutionary situations, in which case it ceases to be a 'general theory'; or, if general, it ceases to be true. In settled conditions it teaches nothing new; in revolutionary conditions, where guidance is needed, it is useless, for the choice of a *Grundnorm* is not dictated inflexibly by effectiveness but is a political decision, as Kelsen has admitted[5].

It is not clear what is connoted by the description of the *Grundnorm* as a 'hypothesis' or 'postulate' or 'presupposed'. There is no analogy here, be it noted, with scientific hypotheses, which are assumptions used to account for the totality of known facts. It is sometimes the case that two alternative scientific hypotheses may be equally apt to explain the phenomena in question[6], but there is no room for alternative *Grundnormen* as postulates of a given legal system. There must be only one *Grundnorm*, which is supreme and uncontradicted; otherwise there can be no unified theory. As to this, the requirement of effectiveness suggests, on the one hand, that the *Grundnorm* is a fact and not a pretence or asumption[7]. On the other hand, it is not itself the constitution but the presupposition, required by theory, that this constitution ought to be obeyed. As such it is not a social reality and does not march happily under Kelsen's positivist banner[8]. There is a further difficulty. An effective constitution is a fact upon which the *Grundnorm* posits an 'ought'. It has been axiomatic since Hume that an 'ought' cannot be derived from an 'is' without the interposition of a value-judgment that the 'is' is desirable and for that reason ought to be. It looks, therefore, as if Kelsen's theory conceals an ideology that might is right and hence ought to be; which is no different after all from the adoption of *a priori* assumptions by naturalists, besides being an open invitation to revolt and crude force[9]. Many of these difficulties would be avoided if what was said earlier is borne in mind. The criterion of validity refers to the medium or media which impart to a rule the quality of 'law', 'valid' here meaning 'legal'. The 'minimum of effectiveness' refers to the acceptance of such media by those in charge of administering 'law'. This is all that would have been needed for Kelsen's

5 *What is Justice?* pp 366, 368. The policy reasons behind judicial choice were amply demonstrated in the Rhodesian test case, as to which see Dias 'Legal Politics: Norms Behind the *Grundnorm*' [1968] CLJ especially at 254. The personal choice of the judges was admitted by Beadle CJ in *R v Ndhlovu* 1968 (4) SA 525 at 532. As to the alleged disclosure after retirement by Munir CJ, who presided over *Dosso*'s case, that his acceptance of Kelsen's theory had not been based on judicial considerations, see Yaqub Ali J in *Jilani*'s case (see n 4 supra) at 277. 4 supra) at 277.

6 Eg the 'corpuscular' and 'wave' theories of light. It used to be said that scientists applied the one theory on Mondays, Wednesdays and Fridays, the other on Tuesdays, Thursdays and Saturdays.

7 Hart *The Concept of Law* p 246; Stone 'Mystery and Mystique in the Basic Norm' (1963) 26 MLR 34 at 47-48. For judicial comment on its vagueness see Hamoodur Rahman CJ in *Jilani v Government of Pakistan* Pak LD (1972) SC 139 at 179-180.

8 'It is, therefore, only a 'thought norm' which could hardly be recognised as a legal norm furnishing a criteria (*sic*) of validity in any legal system. To give it the status of a legal norm or legal rule was thus, in my opinion, unjustified': ibid per Hamoodur Rahman CJ at 180.

9 So Fieldsend AJA in *Madzimbamuto v Lardner-Burke* 1968 (2) SA 248 at 430; *Jilani*'s case at 172 per Hamoodur Rahman CJ, at 259 per Sajjad Ahmad J.

demonstration, but by using the notion of *Grundnorm* he seems to have inflated a pedestrian simplicity into something misleadingly large.

From all this it will be evident that the *Grundnorm* is a weak point in the theory. Yet such as it is, it provides the start of Kelsen's demonstration. The rest of the system is pictured as broadening down in gradations from it and becoming progressively more and more detailed and specific. The entire process is one of the gradual concretisation of the basic norm and the focussing of it to specific situations (*Stufentheorie*)[10]. It is a dynamic process, for the application of a higher norm involves the creation of new lower norms[11]. Thus, the practical manifestation of the acceptance of a *Grundnorm* as a basis is that it validates the creation of certain general norms, which may be described as propositions of substantive law, as well as the machinery and procedure for the application of these general norms. The application of general norms by this machinery, as represented by a judge or other official, to a particular situation in turn involves a creative element in so far as the judge by his decision creates a specific norm addressed to one or other of the parties. The final stage is the carrying out of the compulsive act. At the end of the progression, therefore, sanction is a permission to someone to execute the coercive act. This means that 'ought' here covers 'may' and 'can'[12]. It is to be noted that in the application of the general norm the judge may be left with an element of discretion, or he may consciously choose between alternative interpretations which the norm permits. The doctrine leaves room for value-judgments in the course of the decisional process. Their exclusion from the theory is not intended to diminish the actual parts they play. Again, the application of a general norm may depend upon the act of the parties, eg an agreement or some form of wrongdoing.

Several implications follow from such a view of a legal system. In the first place, the traditional distinction between 'public' and 'private' law is seen to be one of degree, while at times it disappears. They are both part of the process of concretisation and both are norm-creating. The distinction between them lies sometimes in the fact that they operate at different levels of the structure, and at others in the organs which apply them. With criminal law, for example, the distinction would seem to disappear altogether. Secondly, in a similar way the distinction between legislative, executive and judicial processes appears in a new light. They are all norm-creating agencies, the executive and judiciary being but steps in the concretisation of norms in particular cases. Thirdly, the distinction between substantive law and procedure is relative, procedure assuming greater importance. It is the organs and process of concretisation that constitute the legal system. Fourthly, the distinction between questions of law and fact also become relative. The 'facts' are part of the condition contained in the 'if X' part of the formula, 'If X, then Y ought to happen'. The application of a norm concretises every part of it, including the 'If X' part. Therefore, the finding of fact by a judge is not necessarily what actually happened but what he regards as having happened for the purpose of applying the particular norm.

Fifthly, the legal order is a normative structure which operates so as to culminate in the application of sanctions for certain forms of human

10 Adapted by Kelsen from Merkl *Die Lehr von der Rechtskraft; Allgemeines Verwaltungsrecht*; Kelsen *General Theory of Law and State* pp 123-153; *Pure Theory of Law* ch 5.

11 'Creation of law is always application of law': Kelsen *General Theory of Law and State* p 133; *What is Justice?* p 280.

12 Kelsen *Pure Theory of Law* pp 5, 16, 134.

behaviour. It follows that the idea of duty is of its essence, which is evident in the 'ought'. Kelsen made no specific allowance for powers, while liberty, in his view, 'is an extra-legal phenomenon'[13]. Liberty is the jural opposite of duty, but Kelsen's stand in the matter reflects a wider issue, namely, between an 'open' and a 'closed' concept of law. The former is one in which law concerns only specific regulation so that anything as yet unregulated falls outside law. The latter is one in which all aspects of behaviour are within law, whether positively through specific regulation or negatively through liberties; in short, liberty and duty are two sides of the same coin. Kelsen's theory is an 'open' one[14].

On the other hand, when he turned to the concept of claim, he stood on firmer ground. This, he maintained, is not essential. It appears when

> 'the putting into effect of the consequence of the disregard of the legal rule is made dependent upon the will of the person who has an interest in the sanction of the law being applied'[15].

Claim is only a by-product, as it were, of the law. Kelsen showed how modern criminal law has for the most part discarded ancient ideas of the law being set in motion by the injured person and is now enforced directly by officials, ie the idea of individual claims is no longer the foundation of the criminal law. It is still the basis of the law of property and contract and so on, but in Kelsen's view there is no reason why it need be, and may well be dispensed with in the future.

Sixthly, to Kelsen the concept of 'person' was simply a step in the process of concretisation. This has been previously discussed[16], and it was seen that by 'person' he meant only a totality of claims etc. 'Person' is a legal conception, and he therefore rejected the traditional distinction between 'natural' and 'juristic' persons. The former are biological entities, which lie outside the province of legal theory. They are only the concern of the law in so far as they focus duties and claims etc.

Lastly, a significant feature of Kelsen's doctrine is that the state is viewed as a system of human behaviour and an order of social compulsion. Law is likewise a normative ordering of human behaviour backed by force, which 'makes the use of force a monopoly of the community'[17]. Moreover, a state is constituted by territory, independent government, population and ability to enter into relations with other states, and each of these requirements is legally determined. The inescapable conclusion is that state and law are identical. This is not to say that every legal order is automatically a state, eg highly decentralised orders like primitive communities; only relatively centralised legal orders are states. Kelsen further rejected any attempt to set the state apart from law or to say that law is the 'will of the state'.

Kelsen also applied his theory to the system known commonly as 'international law'. His earliest work did not touch on this field, and it was only after Verdross, one of his disciples, had started to adapt his approach to international law, that Kelsen himself took an interest in it. When applied in this field his theory does reveal some limitations. However assured his

13 *Das Problem der Souveränität* p 247.

14 As to this, see pp 31-32 ante.

15 Lauterpacht 'Kelsen's Pure Science of Law', in *Modern Theories of Law* at p 112; Kelsen *Pure Theory of Law* pp 126-127.

16 See pp 267-268 ante.

17 Kelsen *General Theory of Law and State* p 21.

thesis appears when demonstrated with reference to long established and settled municipal systems of law[18], in the palpitating condition of international relations it has shortcomings. The Pure Theory demands that a *Grundnorm* be discovered. If there are conflicting possibilities, then, as Kelsen himself admitted, his theory provides no guidance in choosing between them. All he said was that the *Grundnorm* should command a minimum of support. In the international sphere there are two possible *Grundnormen*, the supremacy of each municipal system or the supremacy of international law. The argument based on the former, as pictured by Kelsen, would run as follows. Every national legal order cannot *ex hypothesi* recognise any norm superior to its own *Grundnorm*. The English legal order does not apply in France, nor *vice versa*. Nevertheless, the English legal order recognises the validity of the French legal order in France; and if the only *Grundnorm* known to English law is its own, it follows that the English legal order regards the validity of the French legal order in France as being in some way a delegated normative order from the English *Grundnorm*. Similarly, approaching the matter from the French side, the French legal order can only recognise the validity of the English legal order in England as being derived from the French *Grundnorm*. Such is the outcome of the doctrine of national sovereignty and it tends to a state of anarchy in which each national order recognises only its own *Grundnorm* and endures other legal orders as subsidiary to it.

Kelsen would have none of this[19]. He argued instead for a monist view of the relationship between international and municipal law, and declared that the *Grundnorm* of the international system postulates the primacy of international law[20]. Nations in practice, he argued, recognise the equality of each other's legal orders, and the doctrine of equality must mean that they recognise the existence of a *Grundnorm* superior to the *Grundnormen* of their own particular legal orders. The equal force of national systems is an impossible notion unless there is some higher authority, which bestows equality. The same conclusion is arrived at in a different way. Much of international law rests on custom, which consists in rationalisations of the actual practice of states. When a description of the conduct of states is transmuted into a prescription of how they ought to behave, it becomes international law. Now, Kelsen's insistent contention was that the validity of an 'ought' cannot be derived from an 'is', but only from a superior norm. He also maintained that a legal norm is distinguishable from norms of morality, ethics and the like in that it is backed by force. In the international sphere he found the element of force in war and reprisals[1].

All this is questionable. The first thing which his theory requires, is the *Grundnorm* of the international order. This is by no means clear: it may be the principle *pacta sunt servanda*, or 'coercion of state against state ought to be exercised under the conditions and in the manner, that conforms with the custom constituted by the actual behaviour of the states'[2]; but other suggestions have been offered by other writers. As Stone has commented,

18 Kelsen admitted that his theory of municipal law applies only to advanced systems: Kelsen *What is Justice?* p 246.

19 *Kelsen* pp 284-285.

20 *Kelsen* pp 283 et seq; *General Theory of Law and State* pp 328 et seq; *Pure Theory of Law* ch 7; 'Sovereignty and International Law' (1960) 48 Georgetown LJ 627.

1 Kelsen *General Theory of Law and State* pp 328 et seq.

2 Kelsen *Pure Theory of Law* p 216. For comment see Hart *The Concept of Law* p 230.

> 'It is difficult to see what the pure theory of law can contribute to a system which it assumes to be law, but which it derives from a basic norm which it cannot find'[3].

It looks as if Kelsen shifted the meaning of *Grundnorm*. With reference to municipal law it was pointed out that the *Grundnorm* has to possess some basis in fact, namely, a minimum of effectiveness. It would seem that with reference to international law the *Grundnorm* is a pure supposition lacking even this basis. Assuming that a monist legal theory has to be offered to account for the present state of international society, then one way of explaining the assertion of equality by states would be by hypothesising a norm superior to that of each national order from which equality might be said to derive. It is open to doubt, however, whether even an attempt at a monist explanation is worth while, for one is entitled to question whether there is any *Grundnorm* which commands the necessary minimum of effectiveness demanded by Kelsen's theory. States recognise such doctrines as *pacta sunt servanda* or equality only in the sense of paying lip-service to them; they talk about them, but are only too ready to ignore them when it suits their convenience to do so. Indeed, an alternative, and as plausible, a hypothesis to explain equality is that it springs from a sense of mutual forbearance inspired by fear. Indeed, it has been asserted judicially that 'in International Law there is no "legal order" as such'[4]. So the hypothesis of a superior norm of the international order is no more than one possible assumption, and unreal at that. With reference to municipal law, on the other hand, Kelsen's theory is meaningless unless the *Grundnorm* commands a minimum of effectiveness in action and not just in words. *Post hoc* is not *propter hoc*.

It is not easy to accept a monist theory of the primacy of international over municipal law in the face of the conflicts between the two. Kelsen's general theory does allow, it is true, for limited conflicts within a given order, but those between international and municipal law are too extensive to ignore. The case of *Jilani v Government of Punjab*[5] is an illustration, not just of conflict, but of the categorical rejection by a municipal court of Kelsen's monism. An attempt had been made to buttress the effectiveness of a revolutionary regime, and hence its legality, with the fact that it had received recognition at international law. The Supreme Court said that to do this would be to assume the primacy of international law over municipal law, a doctrine which it emphatically repudiated. With reference to the emergence of a new government as well as a new state, it was pointed out that their recognition at international law is irrelevant to their legality at municipal law. 'The validity of a new government is governed by the law of the state', said the Chief Justice[6]. Even when a new state comes into being through secession, the courts of the parent state are not bound by international recognition accorded to it. The creation of the State of Bangla Desh out of East Pakistan was precisely in point, and as to this a judge of West Pakistan said: 'While under International Law, East Pakistan has become an independent state, the municipal courts of Pakistan will not confer recognition on it or act upon the legal order set up by the rebel Government'; and he

3 Stone *Legal System and Lawyers' Reasonings* p 130.
4 *Jilani v Government of Punjab* Pak LD (1972) SC 139 at 181, per Hamoodur Rahman CJ.
5 See ibid.
6 Ibid at 181.

added that Kelsen's monistic theory is 'wholly inapplicable to municipal courts'[7].

In view of the absence of a minimum of effectiveness in support of any *Grundnorm* for the international order, there is no reason to prefer a monist explanation to a dualist one, as indeed Kelsen seemed ready to concede. It appears then, that in postulating the primacy of international law Kelsen was making an assumption as to what ought to be the case rather than what actually is. Little wonder that Sir Hersch Lauterpacht, one of Kelsen's own pupils, was moved to question whether he was not here reverting to natural law ideology[8].

These difficulties will be avoided if the idea of a *Grundnorm* is replaced by that of an identifying criterion, accepted by courts, which would regulate the use of the label 'international law'. Propositions concerning the conduct of states would then be 'international law' because the appropriate tribunals accept them as such whenever they satisfy the criterion. It is true that different types of tribunals might view the criterion differently, or might even accept different criteria. Notwithstanding this, there might be here a sufficient basis for constructing a more realistic theory of international law than a monist one.

Finally, to treat war and reprisals as providing the element of force would be acceptable only if resort to them was permitted by the international legal order and forbidden as instruments of national policy. It is true that international law does not forbid war and reprisals entirely as instruments of national policy, not even after the Briand-Kellogg Pact 1928, or the Charter of the United Nations, but the object of international law is to try to prevent these. War represents the breakdown of international law.

In the light of all this, as Professor Friedmann observed:

> 'Logically Kelsen should have been led to deny the character of law to international law in present international society'[9].

In any case, in view of the differences between the connotation and function of the word 'law' as applied to international and municipal legal orders, it is questionable whether the attempt to construct a unifying theory is feasible.

The conclusion of many writers is that, notwithstanding the logical coherence of Kelsen's structure, he provided no guidance in the actual application of the law. Thus, he showed how, in the process of concretising the general norms it may be necessary to make a choice either in decision or interpretation. The judge or the official concerned is already aware of that necessity; his need is for some guidance as to how he should make his choice. The answer is not to be found in Kelsen's teachings, but in value considerations of one sort or another, which Kelsen sedulously eschewed[10]. One should not level this point as a criticism against Kelsen, who insisted that he was not concerned with that aspect. To criticise him for not having done something which he expressly disclaimed would be unfair. He set out to achieve a limited objective, namely, to present a formal picture of the legal structure, and what he set out to do, he did do. To say that he should have aspired to do more is not a criticism of what he has done, but a comment on his limited objective.

7 Ibid at 230, per Yaqub Ali J.

8 Lauterpacht 'Kelsen's Pure Science of Law' in *Modern Theories of Law* at pp 129-131.

9 Friedmann *Legal Theory* p 279.

10 Laski commented on his theory as 'an exercise in logic and not in life': *Grammar of Politics* p vi.

Another more serious aspect is that a legal order is not merely the sum total of laws, but includes doctrines, principles and standards, all of which are accepted as 'legal' and which operate by influencing the application of rules[11]. Their validity is not traceable to the *Grundnorm* of the order. Are these, then, to be lumped with values and banished from a theory of law, even though they are admitted to be 'legal'? If so, it is a weakness in any such theory.

Finally, although Kelsen has been hailed as having provided the outstanding theory of the twentieth century from a positivist point of view, it has to be remembered that Bentham's *Of Laws in General* only saw daylight after Kelsen had made his contribution. Some differences between them are significant. Kelsen avoided the weakness of Bentham's imperative basis, but in some other respects Bentham's analysis is preferable to Kelsen's. The most important of these is that Kelsen's method individuating a norm, 'If X, then Y ought to happen', minimises the regulatory function of law. This, as has been pointed out, stems from his obsession with sanctions: conduct is only a condition which brings them into play or avoids them. Bentham took full account of the regulatory function and perceived that one law prescribes behaviour and another prescribes a sanction: they are two different act-situations. Bentham kept them apart, while Kelsen rolled them into one. Kelsen was also driven to the difficult conclusion that laws are ultimately permissions to apply sanctions and that 'ought' thus includes 'may' and 'can'; which Bentham avoided. Bentham gave sanction a much broader meaning than Kelsen. On the other hand, both of them perceived that 'constitutional law' is a part of every law as ordinarily formulated, the linkage for Bentham being that such laws are compounded of other laws enacted at other times and in other contexts, while for Kelsen the linkage being their validity traceable through to the *Grundnorm*.

11 See pp 45-46 ante. Cf *Jilani v Government of Punjab* Pak LD (1972) SC 139 at 232-233.

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CHAPTER 18

Historical and anthropological approaches

The theories hitherto considered have sought to depict the formal structure of law and to elucidate the criterion of validity of the legal 'ought'. The theories about to be dealt with in this and the following two chapters are concerned with content and application. These also come under the umbrella of positivism so far as they accept laws as they are found. The difference between these and theories previously considered is one of emphasis, for they are concerned with the analysis of those factors, historical, economic and social excluded by analysis of only form and structure. As will appear, therefore, a conception of law, viewed in this perspective, assumes a material and functional aspect.

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 'oughts' 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 in 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 was to regard the *Corpus Juris* more or less as a simultaneous product, rather than as 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[1]. 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 Napoléon[2]. This was immediately answered by von Savigny (1779–1861) in an essay entitled *On the Vocation of our Age for Legislation and Jurisprudence*[3], 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

1 Summarised by Windscheid in *Lehrbuch des Pandektenrechts*.

2 For review of the events of 1814 leading to Savigny's publication, see Stammler 'Fundamental Tendencies in Modern Jurisprudence' (1923) 21 Mich LR 623.

3 Savigny *Vom Beruf unserer Zeit für Gesetzgebung und Rechtswissenschaft*, hereafter referred to as '*On the Vocation*'.

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[4]. 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*), which was considered in Chapter 13, in the last section of which Savigny's distinctive method became apparent. 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 mediaeval 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[5]. 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 prerequisite 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 none the less clearly:

4 *Reflections on the Revolution in France* 1790.
5 Savigny was Prussian Minister of Legislation.

> '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'[6].

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'[7].

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[8].

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 the *Volksgeist* several comments should be made.

(1) There is an element of truth in it, for there is a stream of continuity and tradition[9]; the difficulty lies in fixing it with precision. Savigny,

6 Savigny Introduction to *The System of Modern Roman Law*.

7 Puchta *Outlines of the Science of Jurisprudence* (trans Hastie).

8 For American parallels see Sumner *Folkways*, on which see Sawer *Law in Society;* Carter *Law: Its Origin, Growth and Function*; 'The Ideal and the Actual in Law' (1890) 24 Am LR 752.

9 It is interesting to note that the Soviet Union, which claimed to make as complete a break with the past as it is possible to conceive, has found itself unable to slough off its traditions: see p 415 post.

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, considered in Chapter 12, 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[10]. 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[11].

(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[12]. 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.

10 See pp 52 et seq ante; p 465 post.

11 Some of the criticisms that follow have been adapted from chs 1 and 2 of Allen *Law in the Making*.

12 Walton 'The Historical School of Jurisprudence and Transplantation of Law' (1927) 9 JCL (3rd series) 183. Cf Pound 'Comparative Law and History as Bases for Chinese Law' (1947-48) 61 Harv LR 749.

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[13].

(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[14]. 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 new 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 new law[15]. 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, ie 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[16]; 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

13 Ehrlich *Fundamental Principles of the Sociology of Law* (trans Moll) ch 19. Cf Weyrauch *The Personality of Lawyers*; Pound *Interpretations of Legal History* ch 6.

14 See Lipstein 'The Reception of Western Law in Turkey' (1956) 6 Annales de la Faculté de Droit d'Istanbul 10, 225; 'The Reception of Western Law in a Country of a Different Social and Economic Background: India' (1957-58) 8-9 Revista del Instituto de Derecho Comparado 69, 213.

15 *Lipstein.*

16 Eg in India, on which see Stone *Social Dimensions of Law and Justice*, pp 112-114.

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[17].

(6) Many institutions have originated, not in a *Volksgeist*, but in the convenience of a ruling oligarchy, eg 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, eg 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, eg 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, eg 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[18]. 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

17 *Reichshaftpflichtgesetz* 1871.

18 On this see Walton 'The Historical School of Jurisprudence and the Transplantation of Law' (1927) 9 JCL (3rd series) 183.

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, ie 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'[19]. 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 it 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*[20]. 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[1]. 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

19 Savigny *Obligationenrecht* II, p 101.
20 Cf Carter *Law: Its Origin, Growth and Function*.
1 *Allen* pp 114–115.

generally one of pessimism[2]. 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 law', 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 enterprise'[3]. 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)[4], who was profoundly interested in the 'association', which has always exercised a peculiar fascination for German thinkers. Associations have significance in law, and are sometimes treated as persons. As seen in Chapter 12, 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 (*Genossenchaften*) 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

2 For a parallel development in America, see Field 'Codification' (1886) 20 Am LR 1; opposed by Carter 'The Province of the Written and the Unwritten Law' (1890) 24 Am LR 1. See further Field (1800) 24 Am LR 255; Williston 'Written and Unwritten Law' (1931) 17 Am BAJ 39; Gray *The Nature and Sources of the Law* (2nd edn) pp 89-93, 233-239, 291.

3 *Allen* p 17.

4 *Natural Law and the Theory of Society 1500-1800* (trans Barker) and Barker's 'introduction'.

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.

THE DIALECTIC INTERPRETATION

Savigny and his followers did not face the question of how the *Volksgeist* is formed. His theory therefore appeared to be somewhat incomplete and this opened the way for the reintroduction of a naturalist explanation; it became possible to posit again an immutable ideal behind evolution. Variations in historical development emerge in the course of progress towards the realisation of an ideal. If there is some unchanging ideal at the root of it all, then all systems, notwithstanding their evolutionary variations, should share certain common features; which, according to this view, they do. This is the explanation of such resemblances, not so much conscious borrowing and analogy. Such an idealised historical interpretation of law is associated with the name of Hegel (1770-1831)[5]. It is so abstract as to bear little relation to fact and is far removed from the work of men like Savigny and Gierke[6].

Hegel distinguished between laws of nature and positive laws. The former are outside human consciousness and can neither be improved nor assisted by men; they have to be accepted because they exist. Positive laws, on the other hand, are man-made and, as such, do not have to be accepted because they exist. This would seem to be approaching the distinction between the 'is' and the 'ought', but with Hegel that distinction tends to be blurred. He also proceeded to distinguish between the philosophy of law, which concerns the rationality of law, and the study of the positive law itself. Thought is the rational process of synthesising contradictions and of reconciling the general with the particular, the abstract with the concrete. Legal philosophy, being rational, should conceive of law in a rational way. Philosophy is only concerned with reality so far as this is rational, ie so far as it is the rational reconciliation of appearance and essence. So, mere factual existence is not

5 Hegel *Philosophy of Right* (trans Knox). See also Stace *The Philosophy of Hegel.*

6 In particular, it is noteworthy that Hegel did not share Savigny's hostility to legislation, and denounced such an attitude: *The Philosophy of Right* §211.

'real' in this sense, since it might be the product of fortuitous (irrational) factors. When therefore Hegel asserted, 'That which is rational is real and that which is real is rational', this remark should be understood in the context of his approach and the fact that he was only concerned with ideas.

Hegel sought to explain history on an abstract, evolutionary plane[7]. The idea of evolution as expounded biologically by Darwin was shortly to influence human thinking profoundly. Hegel, however, a little earlier saw it unfolding as a process of action and reaction between opposites, thesis and anti-thesis, which results in their synthesis, the whole broadening slowly towards the realisation of freedom. The 'idea', says Hegel, has as its antithesis the 'idea outside itself', which is nature. The synthesis is 'spirit' (of which Savigny's *Volksgeist* is possibly an aspect). The subjective spirit (thought and consciousness) and its anti-thesis, the objective spirit (legal and social institutions) are synthesised in the absolute spirit. Law comes into the category of objective spirit. Law and other social institutions are the result of free subjective will endeavouring to realise freedom objectively. In this development the starting-point is the idea of freedom, which implies will. Freedom and will are complementary. Personality arises when the will becomes individualised. The idea of freedom has a three-fold sphere of operation. There is, first, the freedom of the individual in relation to himself, which concerns his proprietary rights. Secondly, there is the perception of freedom in others in conformity with the common will of all, which brings in contract. Thirdly, the freedom of the individual opposes itself to the common will, which is wrongdoing. Taken in turn, and stated baldly, the explanations are as follows. As to property, the free will of a person is imposed on a thing, which is unfree and impersonal. A thing has no end in itself and only acquires one from the will of the individual. The right of property is therefore the first manifestation of freedom. Contract is approached from the angle of property. Not only may property be the subject of one person's will, but it may also come within the purview of another person's will. When a thing is held by virtue of the individual's conformity with their mutual will, the matter falls into the sphere of contract. Wrongdoing occurs when the will of the individual is opposed to the general will. The conflict then brings about morality, which is the anti-thesis of freedom. Social ethics is the synthesis between these two. Social ethics starts at the level of the family. When members of the family become independent, society comes into being with its attendant institutions of law etc. Society is then the anti-thesis of family. The synthesis is the state, which combines freedom and social co-existence. In the state Hegel found the highest achievement of human endeavour, and to be a member of the state was to him the supreme objective. The individual is the product of his culture and age, which are realised only through the state. Law and state are thus concrete manifestations of the national spirit, which together with others are in turn a manifestation of a world spirit.

On all this it might be remarked that one seeks in vain for the facts to which these formidable abstractions relate. For the purpose of his demonstration of conflict Hegel attributed objective existence to values and natural phenomena. It should be pointed out that the conflict between thesis and anti-thesis is a logical contradiction, which is not the case with natural phenomena. If he had confined his attention to the action and reaction of

7 For a critique of the inevitability of historical development, see Popper *The Open Society and its Enemies*, especially vol II. See also *The Poverty of Historicism*.

ideas as evidenced by historical fact, he might well have been led to other, though less imposing, conclusions. Besides, to treat values as having objective existence is to make an 'is' out of 'ought'. All in all, his highly abstract scheme is nothing but a verbal juggle into which divergent interpretations can be fitted. It is therefore not surprising to find it being utilised in support of two such dissimilar ideologies as Nazism and Marxism[8].

THE BIOLOGICAL INTERPRETATION

A variant of the historical interpretation and one which also sought to find the clue to the nature of contemporary law in evolutionary processes is the so-called Biological approach. The publication of Darwin's *On the Origin of Species* in 1859 was destined to affect human thought profoundly in many directions. Side by side with this there was the rise of psychology as a new fashion in thinking with a concomitant preoccupation with group psychology. Its effect in legal theory is to be seen in the interpretation of law as the product of evolutionary forces in connection with which the work of Herbert Spencer (1820–1903) is characteristic[9].

Darwin's thesis was that evolution was a struggle for existence in which those creatures that are able to adapt themselves to changing conditions survive. In human beings the survival of the fittest called for the development of the social instinct. Spencer also adopted the idea that a collection of individuals form a community. He promulgated three fundamental laws of society, the principles of persistence of force, the indestructibility of matter, and the continuity of motion. The combination of these principles with other laws[10] results in the process of evolution, which is that process by which an amorphous, homogeneous mass evolves into a series of distinct, orderly bodies. Spencer then proceeded to draw parallels between the social organism and biological organisms.

The adaptation of the individual to social conditions is due to heredity. He inherits a social instinct from his ancestors, including ideas of morality, obligation, right and justice. In this way different sociological groups evolve differently and so, too, do their laws and institutions.

There are two stages in the progress of civilisation. In the first, which is primitive, war and compulsion figure prominently; in the second, which is advanced, peace and freedom are prominent. Spencer, however, was a strong individualist with a *laissez-faire* approach to government. He denied the complete absorption of the individual in the state and maintained that the duty of government was to secure the greatest possible amount of individual freedom. He abhorred any form of welfare activities by the state. Each person may do what he likes, provided he does not infringe the equal freedom of others. His theory of evolution together with his *laissez-faire* idea of government led him to a reactionary position with regard to legislative reform. He held that all conscious legislative attempts to improve social organisations were doomed to failure and that Man must await the working out of evolutionary laws.

Whatever may have been left of Spencer's theory has disappeared with the

8 For this perversion, see Friedrich *The Philosophy of Law in Historical Perspective* ch 15.

9 *Social Statics* (1850); *Justice* (1891). See also Sabine *A History of Political Theory* ch 32.

10 The law of the persistence of the relations among forces, the law that force is never lost but only transformed, the law that everything moves along the line of least resistance or greatest attraction, and the law of rhythm or alternation of motion.

advent of the welfare state; his biology would now be dismissed as crude. The objections to his theory were epitomised by Mr Justice Holmes, who said:

> 'The liberty of the citizen to do as he likes so long as he does not interfere with the liberty of others to do the same, which has been a shibboleth for some well-known writers, is interfered with by school laws, by the Post Office, by every state and municipal institution which takes his money for purposes thought desirable, whether he likes it or not. The Fourteenth Amendment does not enact Mr Herbert Spencer's Social Statics'[11].

Spencer's work does represent, however, the transition from the historical approach to the sociological.

THE RACIAL THEORY OF LAW

This was the theory of law that prevailed in National Socialist Germany under Hitler. It was nothing more than an emotional and militant adaptation of theories and ideas in support of the quest for power. From the biological interpretation was derived the idea that law was inherited by blood. The Historical School was made to lend its support in seeking the roots of the law in the past and for the nationalistic flavour that was imparted to it. The writings of Hegel, who showed how the individual could be integrated into society, were utilised so as to suppress individual rights.

The National Socialist theory of law revolved round two cardinal principles, the 'leadership principle' and the 'racial principle'. The application of the first was as follows. The state is a group and a group has no strength or unity without a leader. The leader, therefore, becomes the mystical personification of national unity. Law and state mean the same thing, and since the leader is the embodiment of the state, law is what the leader commands. This had three implications. (a) Unquestioning obedience was demanded. (b) Law should serve political ends. (c) Nothing, not even reverence for statutes, should stand in the way of implementing the will of the leader. According to the 'racial principle' law was inherited by blood. It should (i) serve the ends of the state and its policies. (ii) It should help to preserve racial purity, for the state cannot be strong unless it is racially pure. This was the justification for the persecution of the Jews. (iii) The Code of 1900 was attacked on the ground that its basis was Justinian's Byzantine version of Roman law. Therefore, besides being an alien system, it was condemned as being 'oriental' and 'Jewish' in origin. (iv) The only international system which could be tolerated was a Nordic one, ie one based on a blood tie. The League of Nations could therefore command no respect. Every state has a natural privilege and power to prevail over other states and to take their land as room for its people. Any treaty which attempted to restrict this privilege could rightly be ignored.

It is no longer necessary to dwell on the details of this perverted conception of law, nor to enter into a refutation of it. The answer of a sort that did come at the end of a world shattering war was effective enough.

11 *Lochner v New York* 178 US 45 at 75 (1904).

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[12]. 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[13].

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, eg 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, eg 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, eg 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 pre-eminently 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 *Volksgeist*.

12 The opinion is ventured that neither Maitland nor Holdsworth has made the contributions to legal theory that were made by Maine.

13 Maine *Ancient Law* (Pollock's edn). At the time of its publication his knowledge of Hindu law was not as profound as it became later, for he only took up his Indian appointment in the following year.

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, ie his claims, duties, liberties etc are determined by law[14]. 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*'[15].

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[16].

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

14 Those societies which remain governed by status are 'static'. Note the etymological connection between 'status and 'static'.

15 Maine (Pollock's edn) p 182; but see Graveson *Status in the Common Law* ch 3.

16 Dicey *Law and Public Opinion in England during the 19th Century* chs 7–8; *Law and Opinion in England in the 20th Century* (ed Ginsberg) ch 1.

bear some correspondence with the degree of economic development[17]. 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[18]. 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 make allowance for good and bad harvests, or take due account of an excess of generosity on the part of individuals[19]. 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[1]. 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 end precedes the adaptation of human behaviour, and the adaptation of behaviour is followed by adaptation of the structure of social organisation[2].

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[3]. Hoebel, on the other hand, defends Maine on this point[4]. Hocart believed that the dualism between religion and the secular authority (the state) originated in a division of function 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[5]. 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

17 Hobhouse, Wheeler and Ginsberg *The Material Culture and Social Institutions of the Simpler Peoples.*

18 For criticism of Maine's idea of rigidity, see Hoebel *The Law of Primitive Man.*

19 Malinowski *Crime and Custom in Savage Society* pp 1-68.

1 Gluckman *The Judicial Process among the Barotse of Northern Rhodesia; Politics, Law and Ritual in Tribal Society.* Cf Gulliver *Social Control in an African Society.* On the importance of maintaining social equilibrium, see Driberg 'The African Conception of Law' (1934) 16 JCL (3rd series) 230.

2 Malinowski 'A New Instrument for the Interpretation of Law—especially Primitive' (1941-42) 51 Yale LJ 1237.

3 Diamond *Primitive Law; The Evolution of Law and Order*; Lloyd *The Idea of Law* pp 231-239.

4 *The Law of Primitive Man.*

5 Hocart *Kings and Councillors.*

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[6]. These concern mainly the relations of individuals *inter se* and of groups, ie 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[7]. It was a cardinal point of Malinowski's thesis, supported by Hogbin, that obedience to customs rests on the reciprocity of services[8]. 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[9]. 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[10]. 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 the 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 compulsorily 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[11]. 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.

6 Bohannan 'The Differing Realms of the Law' (1965) 67 American Anthropologist 6, Part II, p 35.

7 Gluckman *The Judicial Process among the Barotse of Northern Rhodesia.*

8 Malinowski *Crime and Custom in Savage Society;* Hogbin *Law and Order in Polynesia* and Malinowski's 'Introduction'.

9 For this criticism, and for changes in his thinking, see Schapera 'Malinowski's Theories of Law' in *Man and Culture* (ed Firth) 139.

10 For the handling of 'trouble cases' by the Cheyenne Indians, see Llewellyn and Hoebel *The Cheyenne Way.*

11 Lowie 'Incorporeal Rights in Primitive Society' (1927-28) 37 Yale LJ 551.

So far not much has been said, save indirectly, of the organisation of government. In this connection the oustanding contribution of Hocart deserves mention, especially as his name is insufficiently known among jurists[12]. 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 roles 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, eg 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 accomplished by the 'word', 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 govern-

12 Hocart *Kings and Councillors; Kingship; The Northern States of Fiji; Social Origins.*

ment, 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 indorsed is the prescriptive nature and function of primitive law.

CONCLUSION

Too much attention on those factors of the past that have shaped the content of the 'oughts' of the law of today should not be allowed to throw other factors out of focus. Historical factors are not nearly so important as those factors of today, for it is not so much what shaped an 'ought' in the past that matters as the factors that combine to keep it alive. It is suggested that historical approaches would find their appropriate setting as part of a general sociological approach. Another weakness is the mystical, nationalistic flavour which it imparted to theories about law, but this has not penetrated through to this country. Again, historical interpretation can so easily be made to lend its support to the particular ideology of the interpreter. Savigny's teaching evolved out of his strongly conservative, anti-revolutionary, Civil law bias. Spencer's biological parallels could just as easily have led him to conceive of the state as an unifying organism in which the individual loses his identity; in fact, it was only his individualist outlook that led him to other conclusions. Of the manner in which historical interpretation was used in support of the Nazi ideology it is not necessary to speak.

Against all this, some of the practical contributions of the Historical School, leaving aside its more extreme manifestations, have had lasting effect. It provided the great stimulus to the historical study of law and legal institutions, which has ingrained a sense of historical perspective in the outlook of lawyers. In England it inspired men like Maine, Maitland and Holdsworth and others scarcely less famous. It has demonstrated the perils of over-hasty legislative experiment and has taught the cautionary lesson that development should flow, in some spheres at any rate, within the channels of tradition. As to the nature of law, it has demonstrated the connection between some parts of law and cultural evolution, and the need to delve into the past sometimes in order to obtain a full understanding of the law as it is at present. Above all, it awakened new confidence in convictions relating to the content of law by insisting that formal criteria of validity are of subordinate importance. In this way it may have had an indirect result in paving the way for the resurgence of natural law in this century, which seeks to base even the validity of law on its moral content.

On the question what kind of a concept of law would be apt for historical investigation, it would seem that so far as the study seeks to uncover the factors that have shaped the institutions of today what is needed is a concept which not only identifies the 'oughts' of the law, but also includes the dynamic forces that have shaped and developed them. So far as the investigation is anthropological, a formal criterion of identification does not appear to be appropriate or applicable. A broader conception is needed and one that will distinguish institutions according to function, the scale of their social operation and the social reaction to them. It is clear from what has been said that anthropological inquiries have given to the 'ought' fascinating new interpretations.

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CHAPTER 19

Economic approach

The discussion of this approach will proceed mainly with reference to the doctrines of Karl Marx and Friedrich Engels with which it is usually associated. It might be regarded as a variant of the historical approach in so far as it has sought to unfold a pattern of evolution; but it also concerns the part which law has played and is playing in society and as such is sociological. This approach, like these others, concerns the content of law, the nature of which is regarded as being but a reflex of an economic substrate. Another point is that the original Marxist interpretation challenged the indispensability of law and foreshadowed its eventual disappearance. 'Law' in Marxist theory lumps together laws and their administration and it is in this sense that the term will be employed herein.

Many factors contributed to the rise of the movement under review. The critical spirit of positivism had accustomed people to challenge existing standards. Advances in contemporary science shed their influence in the same direction. The failure of religious ideals to stand up to critical inquiry led to the substitution of materialist ideals in their place. The new movement had as its object the improvement of the condition of poor and working people, who found in it new hope and encouragement. Formal positivism was largely indifferent to the justice or injustice of existing conditions of life. Although Bentham was more concerned with reform than with formal analysis, his successors in the analytical tradition, notably the Austinians, concerned themselves increasingly with the law as laid down and not with efforts to improve it. In consequence, positivism fell into disfavour with those who were dissatisfied with existing conditions, and was regarded as casting a cloak of legality around injustices. The new movement was iconoclastic and exposed the injustices concealed behind traditional façades. It appealed to a certain type of mind, which for the first time felt enlightened and emancipated. Unfortunately, the enthusiasm which it aroused prevented its own assumptions from being subjected to similar scrutiny. It called for action and change and was revolutionary in purpose and appealed to all who felt inclined to rebel against complacency and monotony.

The interpretation of law as part of an economic interpretation of social evolution is a by-product of the social and political theories of Marx and Engels, which have since been put into practice by Soviet Russia and certain other countries. Russia was the first to do so, and for over twenty years until after the 1939–45 war remained the only one. Other countries have largely copied her, so the ensuing discussion will proceed with reference to Russia. One difficulty in the way of its presentation is the absence of a theory of law worked out on this basis. Neither Marx nor Engels elaborated one for reasons that will shortly become clear. What they say about law is incidental to their views on society generally. Jurists in Russia today, however, are having to work out a theory of law, but as yet none of them has said a great deal that is new: each plays a variation on the basic theme derived from Marx and

Engels. It is therefore to their works that attention should first be paid. The practical application of their doctrines since their day has necessitated certain changes and adaptations, which leads to the next difficulty, namely, deciding into what periods the narrative should fall. On this there is no unanimity[1]. For present purposes it is sufficient to adhere to the following scheme. (1) The period of 'war communism', including the 'theoretical' period from Marx to 1920, ie the establishment of the proletarian dictatorship in Russia. (2) The period from 1921 to 1937, which could be subdivided into the period of the New Economic Policy, the NEP, from 1921 to 1929; and from 1930 to 1937, the 'construction of socialism', during which the NEP was abandoned. (3) The period from 1938 to the present day, which could be subdivided into the period from 1938 until the death of Stalin in 1953, which may be called 'consolidation of socialism'; and the post-Stalin era, which may be called 'construction of communism', at least since 1961.

THE PERIOD FROM MARX TO 1920

The views about law of Karl Marx (1818–1883) and of his great friend, Friedrich Engels (1820–1895), are to be gleaned from their various works. Marx was influenced, so Lenin insisted, by developments in contemporary science, in particular the prevalent belief that the physical world was governed by a universal principle of causation. He believed that social phenomena were likewise governed by some universal principle, namely, the economic principle. In this respect he was a social scientist in that he sought descriptive propositions about social evolution. He was also influenced by the dialectic philosophy of Hegel, but differed from him over the notion that reality and, indeed, history was the unfolding of an 'idea'. On the contrary, said Marx, the 'idea' is a reflection of reality, otherwise the idea is only a distortion or 'ideology"; and this is what he meant when he said of Hegel's dialectics that 'with him it is standing on its head. It must be turned right side up again'[2]. Marx and Engels insisted on being 'scientific'. Although, like Hegel, they visualised history as unfolding according to the recurrent conflict between a thesis and an anti-thesis[3], in place of his ideals they substituted material and economic forces as the determinant factors of development. 'Scientific socialism', so they preached, must replace 'utopian socialism'.

The primitive tribal society, in their view, contained no anti-thesis within itself as long as there was equal distribution of commodities. It was a communist order, an Eden, before it was perverted through selfishness and greed. When distribution became unequal, the society was destroyed and split into classes patterned by the division of capital and labour[4]. Man became avaricious and self-centred with no thought of the common weal[5]. The value of commodities then came to be governed by the cost of the labour required to produce them. The place of the tribal society was taken by the state, which became the instrument of the stronger class, whether this is described as a slave-owner's state, a feudal state, or bourgeois state. The modern capitalist

1 See on this Hazard Introduction to *Soviet Legal Philosophy* (20th Century Legal Philosophy Society v) pp xix-xx.
2 Preface to the second German edition of Marx *Capital* vol I.
3 See p 385 ante.
4 For Renner's analysis as to how this came about, see p 302 ante.
5 Engels *The Origin of the Family, Private Property and the State.*

state necessarily involves the domination of the labouring majority by a minority, which controls the economic resources of the country; law is an instrument by which this minority exploits the workers. The tension between capital and labour will eventually break into conflict, a revolt of the majority against the minority, and the majority will gain control of the economic resources and will seek to eliminate the minority. The state thus established is the proletarian dictatorship.

> 'After the proletariat has grasped power, the class struggle does not cease. It continues in new forms, and with ever greater frenzy and ferocity, for the reason that the resistance of the exploiters to the fact of socialism is more savage than before'[6].

The dictatorship of the proletariat is said to represent 'the highest form of democracy possible in a class society'[7], and is also 'substantially the dictatorship of the Party, as the force which effectively guides the proletariat'[8]. The term 'democracy' is here used in a sense different from that in the West. The proletarian dictatorship is indeed a dictatorship, but in so far as it has been formed by the masses and acts in their interests it is a democracy[9]. The distribution of commodities at this stage of development will follow the maxim, 'From each according to his ability, to each according to his work'[10]. Inequality inevitably persists and state organisation continues to be necessary.

Out of this conflict will eventually emerge communism or the classless society. Domination will cease, inequalities will vanish, and with them the state and law will disappear as well. It is not altogether clear when Marx and Engels expected the advent of utopia. It may be when production has reached such a point that all people can be supplied with their needs without having to compel them to work, in short, when the maxim, 'From each according to his ability, to each according to his needs', can be applied. Or it may be when crime and other forms of wrongdoing have been eliminated, for as long as these continue the machinery for their repression will continue to be needed. Lenin believed that after the removal of the economic causes of crime, a great part of, if not all, wrongdoing will disappear. Recent Soviet jurists have tended to postpone the disappearance of the state until capitalism disappears in all, or most other countries, in other words, when the danger of capitalist encirclement disappears[11].

Marx supposed that the defects and inequalities in human society were due to factors that lay in production and economic conditions and outside the nature of Man. This assumes that Man is by nature equal and free, and that only in the communist society would he be able to realise his true self. For, as both Lenin and Stalin asserted, the individual will only be liberated when the mass is liberated. 'Everything' said Stalin 'for the mass'[12].

From all this the following doctrines are deducible as to the nature of law.

6 Vyshinsky *The Law of the Soviet State* p 39; see also p 3.
7 *Vyshinsky* p 41.
8 Stalin *Questions of Leninism* I p 33.
9 Civil rights are restricted on class lines: first Constitution 1918 arts 9, 23, 65.
10 Constitution of 1977, Art 13; on the 1936 Constitution see *Vyshinsky* pp 77, 204 et seq.
11 *Vyshinsky* pp 59-62, 65-70; Golunskii and Strogovitch 'The Theory of the State and Law' in *Soviet Legal Philosophy* pp 353, 400.
12 Stalin 'Anarchism or Socialism' 1 *Collected Works* (1946) p 295; Lenin 24 *Collected Works* (4th edn 1935) p 241.

DOCTRINE OF THE ECONOMIC DETERMINATION OF LAW. Ideas, according to Marx, are reflections of reality; and in this respect he differed, as pointed out, from Hegel, who maintained that reality was but a reflection of an idea. A false or distorted appreciation of reality was to Marx an 'ideology' in a derogatory sense. The bourgeois picture of society is an ideology distorted to suit the situation of those who present it, namely, the ruling class, in whose interest it is to give a false picture and quieten the masses and further their own ends. Law is a superstructure on an economic system; economic facts are independent of and antecedent to law. The notion that law is a reflex of an economic substrate is not an ideology, for it accords with reality. Bourgeois *theories* of law, however, which present it as something other than this, are distortions. There may be other superstructures and other ideologies, eg religion, but they all have their ultimate reality in the economic background.

DOCTRINE OF THE CLASS CHARACTER OF LAW. Law is an instrument used by the economic rulers to keep the masses in subjection. Even after the establishment of the proletarian dictatorship law will continue to be used as the instrument by which the working-class majority can crush and eliminate the capitalist minority. There will still be the need to force people to work, to punish wrongdoing, to stamp out 'counter-revolutionary' and other subversive activities, and to maintain some inequality of distribution, which is still unavoidable. Law is thus an instrument of domination.

DOCTRINE OF THE IDENTITY OF LAW AND STATE. The state came into existence as soon as there was unequal distribution of commodities and class distinctions developed. Law was one of the means whereby the capitalist minority sought to preserve and increase its power, while those who had property sought to protect it against those who had not. So law and the state in capitalist societies together form an apparatus of compulsion wielded by the minority to oppress and exploit the working majority. Even in the proletarian dictatorship these will remain as instruments of compulsion and domination. The state, therefore, reflects an essentially unequal condition of affairs. The depiction of it as a just and fair institution is again a distorted ideology. It will be noticed that this doctrine of the identity of law and the state corresponds with that of Kelsen, but for different reasons.

DOCTRINE OF THE WITHERING AWAY OF LAW AND STATE. When the communist or classless society arrives, there will no longer be any domination or inequality. Therefore, the instruments of domination, ie law and the state, will, in the words of Engels, 'wither away' and be replaced by 'an administration of things'. If it is asked how criminality and wrongdoing will be dealt with, Lenin replied that, in the first place, no special machinery will be needed:

> 'this will be done by the armed people itself as simply and readily as any crowd of civilised people, even in modern society, parts a pair of combatants or does not allow a woman to be outraged': secondly, 'we know that the fundamental social cause of excesses which consist in violating the rules of social life is the exploitation of the masses, their want and their poverty. With the removal of this chief cause, excesses will inevitably begin to 'wither away''[13].

[13] Lenin *State and Revolution* p 70.

This doctrine of the withering away of the state is an uncomplimentary comment on the dialectics of Hegel. It was observed in the last chapter that his abstractions were such that they can be used to support even two such irreconcilable doctrines as Nazism and Marxism. It is now worth noticing that, whereas to Hegel the state was the highest achievement of human endeavour, Marx used his method of reasoning to arrive at the extinction of the state. It should also be noted in this connection that what will wither away is the proletarian dictatorship, which is, as it were, a step towards the classless society. The bourgeois state will not wither away; this has to be smashed and destroyed.

The reason why neither Marx nor Engels elaborated a theory of law is obvious. Law, in their view, is an instrument of domination, to be done away with, not developed and elaborated. Although they regarded law as reflecting economic conditions, it would not be fair to suggest that they thereby deprived it of all its creative force. It can play, and has played, a creative part, but always conditioned by its economic substrate. In the proletarian dictatorship law should be a means to an end, namely, to prepare the way for the classless society. It is thus in instrument of governmental policy[14]. There is certainly rule *by* law; there cannot be a rule *of* law, for reverence of the law for its own sake is a 'bourgeois fetish'. Since law is but a means to an end, it should on no account hamper the work of the proletarian state. There should be no division between 'public' and 'private' law, because (a) law being a reflection of an economic substrate, there will be no public and private spheres of interests in the economy, and (b) law being an instrument of domination, only the proletarian government will dominate and there is thus only governmental law. Nor will there be any separation of powers. Judicial independence as traditionally understood must go. Judges, like law itself, are instruments of policy and must give effect to this, to which end they have to be strongly indoctrinated before they can be fit for office. Thus, in the early days of the proletarian dictatorship in Russia judges had to apply their 'socialist consciousness' of justice and such Tsarist laws that were useful guides[15] in the absence of decrees of the Soviet government. Even so, they did not have to apply a provision which they considered unsuited to the new conditions[16]. In criminal cases severer penalties were to be inflicted on enemies of the régime than on those who interfered with their fellow citizens from purely personal motives[17]. It was left originally to the judge to decide whether a given act was prejudicial to the régime or was purely personal in character. This was the notorious 'principle of analogy' according to which all socially harmful conduct could be treated as criminal[18]. This doctrine went into decline[19], but it did carry the interesting corollary that conduct which, although technically criminal, was not socially harmful should not be treated as such. Equally drastic was 'guilt by association' whereby members of the family of a person convicted of certain offences

14 'Law is a political measure, it is politics': Lenin 1916; 23 *Collected Works* (4th edn) p 36.

15 Decree No 1 (Courts) 27 November 1917 [1917] 1 Sob Uzak RSFSR, No 4, item 50; also Statute of the People's Court November 30 1918, art 22.

16 Civil Code RSFSR, Decree of 31 October 1922, art 1.

17 Civil Code 1922, art 5.

18 Art 10, Criminal Code RSFSR, operative 1 June 1922 [1922] 1 Sob Uzak RSFSR, No 15, item 153; Decree of November 22 1926 [1926] 1 Sob Uzak RSFSR No 80, item 600, art 16.

19 Excluded in the Criminal Code RSFSR, 1 January 1961; (1961) Sovestskaia Iustitsiia, No 17, pp 5 et seq, art 3.

against the state, who knew of his activities but did not denounce him, were punishable. This, too, has gone. Finally, although it would not be true to aver that individuals should enjoy no liberties other than those expressly conferred upon them, there has to be nevertheless a strict regulation of these, especially in regard to property, according to governmental policy.

The principal difficulty in the way of assessing the doctrines of Marx and Engels lies in sifting the parts that are valuable from irrelevancies. In the first place, causation is no longer the inexorable principle governing the material world. This is similar to the erroneous assumption made by the Historical School. In social phenomena Marx and Engels sought to discover in the economic principle the counterpart of causation. Towards the end of his life Engels admitted that both he and Marx had exaggerated the economic influence and that it was not the *sole* motivating factor in human society[20]. What they would say, then, is that it is the ultimate or most important factor. That depends on the criterion of 'ultimate' and 'most important'. It ceases to be objective and becomes a matter of personal evaluation. The economic factor is undoubtedly important, but other factors have also to be reckoned with. Traffic law, for example, and large parts of criminal law are not based on economics. Indeed, the law which has to deal with violence to the person has been brought about by weaknesses in human nature. It is a wishful pretence to say that impulses such as anger, lust, revenge and jealousy, to mention but a few, are always rooted in economics. Today, the second and later generations of Soviet youth, which never knew capitalism, exhibit the same tendencies as youth elsewhere, and the Russians have started somewhat belatedly to develop criminology. Cupidity is not rooted exclusively in the economics of capitalism, but in human nature; increased availability of the good things of life whets the appetite for more. It has previously been pointed out that Marx's analysis of ownership is outdated in many respects; and although he foresaw the 'managerial revolution', he treated it as part of the dialectic of capitalist development and did not appear to have grasped its implications[1]. Modern economists have long since abandoned Marx's labour theory of value, which has become inapplicable to conditions of mass production and still more so to 'automation'. There can be no other conclusion than that an explanation of history in terms of some single determinant factor will inevitably fail, for it is bound to be an over-simplification.

This leads to another point. Both Marx and Engels purported to be 'scientific' and to expel ideologies. They found the cause of existing ills in economic conditions and suggested that the cure lies in a rectification of the economic system. So far as the economic factor is not the only one underlying law and society, the picture they drew of these in the light of the economic factor alone is incomplete; it is, in other words, a distortion of 'ideology' in Marx's own sense of that term. The degree of distortion is proportionate to the importance of the factors omitted. Marx seems to have confused legal theory, which may be described as an 'idology' in his sense of the term in that it reflects 'reality', and actual laws, which are an integral part of the economic infrastructure of society, ie part of the 'reality' itself. The classless society which he envisaged is the end which he wanted to bring about, and in this is a distortion of another kind, the introduction of a teleological consideration,

20 Engels, Letter to J Bloch, September 21-22 1890, and to H Starkenburg, January 25 1894: Marx-Engels *Selected Correspondence*.

1 See p 303 ante.

of politics into science, carrying with it a moral obligation to further this end; which is why Marxists try to force the pace of events, said to be evolutionary, by fostering revolutions in other countries. The ideological character of Marxism is likewise evidenced by the fact that the Soviet authorities dare not admit that there are flaws in the basic thesis. Their attitude has been that the 'truth' is there if only the correct interpretation can be found, or else to ignore or minimise awkward facts, thereby making the doctrine a religion.

Marx explained the evolution of society on the basis of the class struggle, the struggle between capitalists and workers. It is undeniable that there has been considerable friction between them, but generalisations should only be made with the utmost circumspection. 'The' class struggle is an abstract and misleading expression. 'The' class struggle, or any class struggle, should always be related to the place where it occurred, the period, the persons involved, and other circumstances[2]. It is a shortcoming in this respect that leaves Marx's handling of historical facts open to doubt. There have been many class struggles in the course of human history, all of which have influenced the development of law and society, eg religious struggles and not least between Trotskyists, Leninists and Chinese communists. It is also not clear why 'the class struggle' has to culminate in violence[3]. It may be that human nature being what it is, capitalists will not relinquish their position without force. Against that, Great Britain and the Scandinavian countries have shown a peaceful road to socialism. Although a recurrent pattern of conflict between workers and capitalists can be detected, the danger of erecting it into a principle and of arguing mechanically from it can be seen in the following fact. According to Marx, the tension between workers and capitalists grows more acute with the development of capital. This will tend to become more and more international, and hence the famous call to the workers of the world to unite. This led to the conclusion that the conflict will be precipitated in those countries where capitalism is most developed. Instead, it occurred in Russia, which was at that date semi-feudal and had only the rudiments of capitalism. This was why some orthodox Marxists at the time wondered whether they would not be better engaged in promoting a capitalist revolution instead. For a quarter of a century Russia remained alone, and the next country in which the conflict occurred was China, another backward state, and Cuba. The countries of Eastern Europe, which turned over to socialism at the end of the 1939–45 war, are scarcely examples, since, with the possible exception of Yugoslavia, the presence in those countries of the Russian armed forces at the critical time was no small factor. The other prediction that capitalism will become more and more international has been fulfilled up to a point. It fails, however, to take account of the strong sentiments of nationalism aroused by two world wars. It will thus be evident that there are dangers in erecting 'the class struggle' into a principle for the purpose of drawing the sweeping deductions that Marx sought to make.

Marx and Engels were strictly materialistic and the 'scientific method' figured prominently in their discussions and in those of their followers. Yet

2 See Corbin's appreciation of this in 'Jural Relations and their Classification (1920-21) 30 Yale Law Journal at 227 n 2, quoted p 6 ante.

3 'Evolutionists' maintain that socialism would evolve without the need for a violent revolution, eg the views of the French and Italian delegations to the XXV Communist Party Congress, February 1976; Solzhenitskyn *August 1914*.

they themselves could not escape from *a priori* assumptions in their nature as unscientific as those of the 'ideologists' whom they condemned. The adoption of Hegelian dialectics is one. Hegel treated values and natural phenomena as enjoying objective existence; but to treat values in this way is to derive 'is' from 'ought'. Further, conflicts in natural phenomena are not logical contradictions as required by the dialectic method. Marx would have been better advised not to have linked his 'class struggle' with this, since it is no more than an abstract juggle of words into which almost anything might be fitted[4]. Implicit in his adoption of it are the following assumptions: (a) that the dialectic interpretation of history is correct; (b) that the conflict between 'thesis' and 'anti-thesis' is identifiable with 'capital' and 'labour'; and (c) that the 'synthesis' will be the classless society. All three are open to question. The first two are insufficiently supported by evidence, the third has no evidence at all. Besides, why stop there? Why should not the classless society in turn become a thesis with its own anti-thesis, evolving into some other synthesis? Equally serious is the assumption that primitive society was happy, containing no anti-thesis within itself, communism without state and law; and that Man is so intrinsically nice that once the corrupting influence of economic maladjustment is done away with he will become a paragon of virtue. This looks like a reversion to a natural law theory, and by saying that primitive society had no anti-thesis within itself and that corruption set in with the unequal distribution of commodities, it would seem that the legend of the Fall of Man has been given a new meaning[5]. Besides, as pointed out at the end of the last chapter, this view of primitive society, especially its communist character and the absence of private property, is wholly suppositious. Again, though there is some truth in the assumption that the wickedness of men is prompted, perhaps in large measure, by economic conditions, it is no justification for Lenin's generalisation that all criminality stems from unequal economic conditions.

Actual legal systems usually precede theory. Russian Marxists, however, claim that their philosophical theory came first and that the legal system was modelled on that. This makes reality a reflection of an idea as Hegel had propounded, but whose thesis needed to be turned upside down according to Marx. Be that as it may, while the claim of Russian Marxists is true up to a point it should be noted that from the start, and increasingly since about 1920, legislators and judges were forced to proceed according to social needs, and jurists had to struggle to provide theoretical support[6]. So theory could not help having to follow actual law after all.

The characteristic feature of law in the Marxist picture of things is that it is an instrument of domination and exploitation wielded by capitalists against workers. In this there is a further erroneous inference. Whatever truth there might be in the statement that law has been used as an instrument for the repression of one class by another, it does not follow that this is, or need necessarily be, its sole function. For (a) regulation, and even coercion, is unavoidable to enable the intricate concatenation of interests and activities that make up any society to function efficiently. Engels said that after the advent of communism there will be an 'administration of things', which

4 In this respect there is force in Duhring's comment on which Engels pours such ridicule: *Anti-Dühring* Part I, ch 13.

5 For Kelsen's comment on the illusion of the basic virtue of Man, see *What is Justice?* pp 231 et seq.

6 Eg Pashukanis: see pp 407-408 post.

implies that regulation and judging of conduct will continue, perhaps more through executive than judicial machinery. What is this but 'law' under another name? (b) Law is a means of preserving security and moral standards. Not only is it necessary to set standards, but also to maintain them. This remains true in the proletarian dictatorship, which has to educate the masses in the values of communism, and also in the communist society where each new generation needs education[7]. In the execution of so huge a task law is indispensable. Therefore, it is implicit even in Marx's own teachings that law possesses an educative function other than exploitation and domination. (c) Law also serves to *restrain* oppression by classes or individuals. Rule by law inevitably leads to abuses, which could hamper the task of educating the masses by weakening people's respect and confidence in law. On the contrary, the educational task will be greatly aided if people see in law a bulwark. So, even for Marxist purposes, ideas of 'rule of law' and 'due process' are not so absurd after all. (d) Law gives practical expression to the balance that has to be struck between competing interests; and this is true even in Russia today where there are no classes. Judges no longer simply reflect governmental values, since all values are governmental. Law, then, ceases to be merely an instrument of domination and becomes a means of adjusting interests, and, more important, a measure of judicial independence becomes necessary. Above all (e) law satisfies the ineradicable human craving for justice, ie like treatment in like cases, and certainty; both of which require rules and precedents. Marx it would seem, failed to distinguish sufficiently between the various uses to which law can be put and has sometimes been put; and, in any case, his observations should be limited to the purpose which law was being made to serve, as he saw it, in some countries in his day.

When the proletarian dictatorship was established in Russia the repressive use of law reached greater heights than before, but this was explained as a temporary phase and a means of achieving utopia to which this period of travail would give birth. For there was still a capitalist minority, which the working-class majority had to dominate and eventually eliminate. By the mid-1930s, however, there was no longer a minority left, but law continued to flourish even more vigorously[8]. Indeed, it was possible to say in 1935 that all minorities had been eliminated[9]. The continued need for law, then, was to provide the economic organisation for the new society, which is of slow development; and to discipline the social conscience of people. It is easy to lead the ignorant. Education inevitably teaches people to think, and the more they are taught to do this, the harder it is to keep the power of thought within channels. Precisely for these reasons legal enforcement had to become increasingly ruthless. The state cannot wither by degrees, but has to remain strong until communism is achieved. It was also emphasised that the state is a defence mechanism, which is necessary as long as the Soviet Union is surrounded by enemies. All this was summed up in the Stalinist dialectic: 'The dying out of the State will come not through weakening State authority, but through intensifying that authority to the utmost'[10]. (Stalin did not

7 1977 Constitution, Preamble.

8 For Stalin's creation of 'Special Boards' within the Commissariat of Internal Affairs, see Decree of 5 November 1934 [1935] 1 Sob Uzak SSSR, No 11, item 84.

9 Sidney and Beatrice Webb *Soviet Communism: A New Civilisation?* I, p 83.

10 'Political Report of the Central Committee to the XVI Congress' 1930. This speech was attacked by Krushchev in his speech to the XX Communist Party Congress, 25 February 1956.

regard himself as bound by any law.) It may be that this aggrandisement of the state also lies behind the oft-stated need for a perpetual state of revolution. However, the point remains that law is not necessarily bound up with exploitation. What is left is a picture of law as an instrument of coercion no different from the concept familiar to the West. Modern Soviet disquisitions on the subject now seek to draw distinctions between 'bourgeois' and 'socialist' law and tend, on the whole, to avoid reference to domination and exploitation[11].

The state, according to Marx, is an engine of compulsion by which the economic rulers keep workers in subjection. So the idea of a 'classless state', which developed under Stalin after about 1938 and has become prominent since, undermines the Marxist foundation of state in class conflict. Krushchev adopted the policy of 'peaceful co-existence', which meant that other states were not to be treated as constant enemies[12]. This weakened further the Stalinist justification of the continued existence of the state as a defence mechanism. Krushchev also took the line that the 'classless state' is an intermediate stage, 'a state of the whole people', interposed between the proletarian dictatorship and communism, which might even be called the 'first stage of communism'[13]. This is another contradiction of Marxist doctrine according to which the state is solely an institution of class inequality and oppression. It also contradicts Stalin's thesis of the state as a defence mechanism. The Communist Party has become the 'party of the whole people', which, on the face of it, is a Marxist absurdity, since the party is that part of a class which is organised to serve as its spearhead and guide in the struggle. What was now meant, as explained by Krushchev, was that the Communist Party is one of two 'friendly classes' in an 'all-people's state'. In these circumstances the continued existence of the Party can only be a return to a new ruling class[14]. The 1977 Constitution openly acknowledges the elitist character of the Party in its Preamble and in Art 6. Art 99 confers the power of nominating candidates for election on the Party and other public organisations; but the Party remains the guiding force as Art 6 lays down. The contradiction of Marxist dogma that state and class-conflict are synonymous remains glaringly obvious.

It was predicted that with the arrival of the classless society law will 'wither away', but that there will remain 'an administration of things'. This follows from the thesis that law is but the reflection of an oppressive economic system: once oppression is removed, there will be an economic system without law. As was admitted, however, there will still have to be some regulation of behaviour, which is what Engels referred to as 'an administration of things', and the point has been increasingly recognised in later Programmes of the Soviet Communist Party. According to Krushchev 'Under communism, too, there will remain certain public functions similar to those now performed by the state, but their nature and the methods by which they will be accomplished will differ from those existing in the present stage'[15]. In other words, there will probably be a tendency to deal with more and more areas by

11 Golunskii and Strogovitch 'The Theory of the State and Law' in *Soviet Legal Philosophy* (trans Babb) pp 385-386, 392.

12 Now enshrined in the 1977 Constitution, art 28.

13 'A state of the whole people' is in the Preamble to the 1977 Constitution.

14 Cf Djilas *The New Class*.

15 Report to the XXI Extraordinary Congress of the Communist Party of the Soviet Union, reported in *Pravda* 28 January 1959.

ministerial decree than by courts: transfer, not abolition, from the category of private law to public or administrative law. This would appear to be a verbal point: the regulation of conduct which will remain is not to be *called* 'law'. For, if 'law' is defined with reference to domination and oppression, when these have disappeared what remains will not be 'law'. There may be a deeper reason. To Marxists the word 'law' carries a strong pejorative connotation, and because it is so associated in their minds with everything unjust and oppressive, they cannot bring themselves to continue to apply so odious a word once perfection has been reached. Despite all this, it is obvious that a large sphere of human regulation will have to remain even after the arrival of the classless society. Whether this is to be called 'law' or not is immaterial. A similar obsession with the pejorative connotation of 'state' led Lenin to deny that the proletarian dictatorship was anything more than a 'semi-state' or 'commune' state. It has also subsequently been conceded, that there can indeed be 'law' without a state, and in this way it was sought to uphold international law. On the other hand, there developed the theory, which Stalin found convenient, that the state is superior to law. All these are not just deviations from Marx, but denials of the class character of law, its identity with state and its use solely as an instrument of exploitation. One should be chary of levelling accusations of contradiction in a philosophy which is rooted in the Hegelian logic of contradictions; but even so there are contradictions and contradictions.

Finally, the maxim, which embodies the goal towards which all this endeavour is directed, namely, 'from each according to his capacity, to each according to his needs', suffers from the weakness that it is difficult to see how needs are to be measured and what checks there will be on exorbitant demands. One wonders whether there ever will be abundance, for the more people have the more are their appetites likely to be whetted[16].

The theories of Marx and Engels have been dealt with at length because they have dominated subsequent theorising in Russia. Immediately after the Bolsheviks seized power on 7 November 1917 (October 25 according to the Julian calendar which prevailed in Russia), the tendency was to leap into communism without the transitional period. This was due, not just to enthusiasm, but doubts among the Bolsheviks themselves of their permanence. When, however, their reign was assured, they began to appreciate the immensities of the tasks ahead and a more realistic approach set in.

THE PERIOD FROM 1921-1937

After the revolution in Russia, the proletarian dictatorship was established along Marxist lines between the years 1918 and 1920. The period from 1921 to 1937, as already pointed out, can be divided into two parts. The first, which lasted till about 1929, may conveniently be described as the period of the New Economic Policy, the NEP, while the second from 1930 onwards, marks a departure from the NEP and the construction of socialism.

The establishment of the proletarian dictatorship required a 'revolutionary legality' by means of which the victorious majority could dominate and eventually exterminate the capitalist minority. This period did not prove to be as short-lived as had been hoped. So codes were introduced, and

16 See p 67 ante.

professional judges appointed. Whereas in 1918 and 1920 judges had been enjoined to rely on their 'socialist consciousness of justice'[17], they had now to abide by 'the general principles of the Soviet legislation and the general policy of the government of the Workers and Peasants'[18]. Having won freedom from the power of the Tsars, the revolutionaries set up an even more ruthless power-structure to prevent opposition to themselves. The cohesion of the state would be wrecked if divisive values were allowed to develop and people were allowed freedom to act in pursuance of them. Accordingly, severe repression was introduced, which included one of the most effective ways of nipping in the bud the growth of unwelcome values, namely, a secret police to inhibit people from expressing views other than orthodox among themselves. Without communication ideas cannot spread.

There was also what Berman felicitously styles the 'parental' function of law[19]. The Party had to guide the masses to communism by educating and training them rather like children for the part they would have to play in the future[20]. All this was reflected in the administration of law, for it was recognised early that law enforcement had a decisive role to play in this process. The need to educate and train the populace justified virtually unlimited activities by the secret police, trials in secret and the like, and enabled these to flourish notwithstanding constitutional guarantees of free speech and respect for the individual. Side by side with this was an exclusive and ceaseless propaganda campaign coupled with a jealous exclusion of foreign influence and contact. The latter has only been relaxed slightly in very recent times. The work of educating the people for a communist society would be gravely impaired, if not undone, if they were allowed to see that conditions elsewhere were at least not worse, and in some respects perhaps better, than in Russia.

The wave of nationalisation that followed in the wake of the initial revolutionary ardour proved to have been premature. The Soviet state was faced with crises of the first magnitude in the spheres of production and distribution. The only way out was to re-introduce private enterprise and capital to a certain extent. A drastic revision of ideas was called for, and the New Economic Policy was decided on at the Tenth Communist Party Congress in March 1921.

The feature of the NEP was that it constituted a partial compromise between Marxist ideas and capitalism under the strict supervision of the state. The NEP has been happily described as 'state-controlled private enterprise'. It was necessary in the interests of the nation to give scope to private enterprise and at the same time to prevent an abuse of it. Private enterprise and private rights were subordinate to the national interest, and were deemed to be forbidden unless expressly permitted. Alongside this, in the interests of efficiency, Lenin introduced the concept of 'one man management'[1].

Another characteristic of the period was the feeling of tension that pervaded

17 Statute of the People's Court, November 30 1918, art 22.

18 Constitution of 1925, art 2. See also Draft of a New Criminal Code of the RSFSR 1930; and Draft of the Fundamental Bases of the Criminal Code of the RSFSR 1930.

19 *Justice in Russia* Part II.

20 To mould the citizen of communist society is one of the 'principal tasks of the state': 1977 Constitution, Preamble.

1 First Decree on the Trusts, 10 April 1923 [1923] 1 Sob Uzak RSFSR, No 29, item 336; followed by the Second Decree on the Trusts, 29 June 1927 [1927] 1 Sob Uzak RSFSR, No 39, item 392.

the nation, which had just emerged from the throes of an unprecedented upheaval, and was faced with internal crises and surrounded by enemies. Little wonder that a state of emergency was felt to exist, and an attitude of the utmost severity was adopted towards political deviations.

To meet the new situation a theory of law was evolved. The principal contribution of this period was that of Pashukanis (1891-1937)[2] who was strongly influenced by two German writers, Jellinek and Laband. He developed what is known as the 'commodity-exchange theory'. All law, he maintained, was built up of relations between individuals. He followed Marx in believing that law was a reflection of economic conditions, but departed from Marx in supposing it to consist of the exchange of commodities between individuals[3]. Commodity-exchange calls for individual rights and legal relationships. The various aspects of law reflect these relationships. The thesis that commodity-exchange is the basis of law has been challenged by Dr Schlesinger as being historically untrue. He quotes primitive blood-feuds and the payment of *wergild* and asks in what sense these relationships reflect commodity-exchange[4]. Pashukanis also maintained that law presupposes theoretical equality, not subjection. Law is the peaceful means of settling conflicting interests of persons, who are treated as being on an equal footing however much they may be unequal in fact. In the ultimate perfect society individual interests will not conflict, for there will then be unity of purpose. Therefore, there will be no need for law. As Dr Schlesinger points out, Pashukanis's contention leaves unexplained why there cannot be individual relationships apart from commodity-exchange, and the relationships entered into in the course of *production* of commodities as distinct from their distribution[5]. Following from the last point, Pashukanis maintained that once the perfect society is reached the national economy will pass wholly into the hands of the state. Law, however, which presupposes conflict of individual interests, will come to an end. The implications of this are that law and state are distinct, which is a departure from Marx, and that law will wither away before the state. Finally, Pashukanis asserted that 'bourgeois law' had ceased to exist in Russia as far as production was concerned, but that so far as capitalism, and hence the conflict of private interests, was allowed to survive, Russian law still bore characteristics of it.

It is obvious that this theory was adapted only to the peculiar situation during the NEP. By about 1930 the position had altered. The concession made of necessity to private enterprise was withdrawn. The Second Revolution took place to eliminate the capitalists, a 'revolution from above' this time, ie by those in power to exterminate the minority whom they had hitherto permitted to exist. Private capital and private enterprise now became illegal, and the change was justified on the ground that the ultimate interest of the proletarian dictatorship rose superior to the sanctity of its own prior laws. Moreover, it was clear by 1930 that the long-awaited revolutions in other countries would not materialise and that Russia would have to wait a long time in the midst of her enemies. The state and its apparatus were a guarantee of defence and were necessary until all, or most, other countries had turned socialist. The withering away of the state was postponed until the remote future and less and less was said about it. Finally, in December

2 Pashukanis 'General Theory of Law and Marxism' in *Soviet Legal Philosophy* p 111.
3 Anthropologically the commodity-exchange idea is only partially true of primitive societies.
4 Schlesinger *Soviet Legal Philosophy* p 157.
5 *Schlesinger* p 152.

1936 a new Constitution was promulgated and acclaimed as the triumph of socialism. Strict observance of laws was insisted on. 'We need the stability of laws now more than ever' said Stalin[6].

Once the special conditions which had brought the NEP into being had passed, the theory of Pashukanis was outdated. His views were subjected to attacks, both fair and unfair. There was its obvious weakness that law was based on exchange and not on production. Marx himself had laid emphasis on production. There was, moreover, another deviation from Marx in that law was represented as regulating conflicting interests of equals and not as an instrument of domination. Next, law on his doctrine was destined to wither away before the state. By the 1930s law had become a firmly established institution in Russia, which necessitated three important changes in ideas. (a) The essentially sociological concept of Marx, Engels and Pashukanis, which viewed law as the product of the economic structure of society, was beginning to give way to a normative concept. (b) Since there was no longer a capitalist minority left, the idea of law as an instrument of domination began to be replaced by one that identified it with the wishes of the people themselves. (c) Though law was still viewed as an instrument of policy, it was also the means of providing security for expectations as determined by policy. Although law was still viewed as 'a political category ... Nevertheless law can no more be reduced simply to policy than cause be identified with effect'[7]. So law was seen to have an important task to perform and its withering away was something that should be indefinitely postponed, if not forgotten. Pashukanis's doctrine was attacked on the ground that it encouraged 'a nihilistic attitude' towards Soviet law. Some people went so far as to distort what he had said and alleged that he preached the withering away of the state as well, which it was pointed out was dangerous and inexpedient in the face of a hostile world. In view of the fact that law had become an important institution in Russia, it was necessary now to propagate the idea that Soviet law was somehow better and different from capitalist law. It is not surprising in consequence that Pashukanis's statement that Soviet law partook of the character of 'bourgeois law' grew increasingly unpopular. In the result Pashukanis was impeached and disappeared in 1937[8].

THE PERIOD FROM 1938 TO THE PRESENT

This period falls into two parts, from 1938 until the death of Stalin in 1953, and the post-Stalin era from 1953 onwards.

The first part witnessed the consolidation of socialism in the form of a monolithic state with complete subordination of legal theory to political expediency. This was also the period of the 'personality cult', fostered by Stalin. The doctrine of the 'classless state', previously mentioned, was propounded, and the state, represented by the Supreme Soviet, was held to be

6 Stalin 'On the Draft Constitution of the USSR 1936' *Leninism* p 402.

7 Vyshinsky 'The Fundamental Tasks of Soviet Law' 1938; Schlesinger *Soviet Legal Philosophy* 329.

8 It is interesting to note the violence of the language with reference to Pashukanis throughout Vyshinsky *The Law of the Soviet State*, especially at pp 54 et seq. Even making allowances for Vyshinsky's volatile nature one suspects that the succession of panegyric and abuse throughout the book is a smoke-screen for an official change of front.

superior to all its laws. A more interesting development was the Yugoslav attack on the Stalinist régime as a counter-revolutionary dictatorship. While differences in the conditions prevailing in different countries must inevitably yield different *applications* of Marxist doctrines, it was accounted 'deviation' to adopt any *interpretation* of them other than that of the USSR. In 1948 Yugoslavia, under Marshal Tito, insisted that each country should be left to interpret Marxism in its own way, and denounced the Soviet model under Stalin as a betrayal of Marxist-Leninism. It was alleged to be nothing but a form of capitalism exploited by a new ruling class of bureaucrats, who have merely substituted a bureaucratic state in place of a bourgeois state[9]. Whereas Russia postponed the decline of state power and law to some distant epoch, Yugoslavia was prepared to phase it into immediate effect as and when it proved feasible. This is the approach which was termed 'Titoism'. It called for new methods: for instance, in place of state ownership there should be 'social ownership' by free associations of producers; and workers should take as much part as possible in economic management. Such 'industrial self-management' is achieved by allowing each enterprise to be run by a workers' council, a measure of overall control and co-ordination being maintained by the appointment of a director by the People's Committee of the Commune[10]. The state as such is still responsible for order and national defence, but its other aspects could well be allowed to wither away. Law and state are not synonymous; the state may go, but law must remain.

After the death of Stalin there was a relaxation of centralisation; Stalin had been a firm believer in it. Krushchev introduced decentralisation in his administrative reforms of 1957, which were criticised as too localised and unco-ordinated. Accordingly, in 1965 centralisation was reintroduced with minor modifications towards giving state enterprises wider powers.

At the Twentieth Party Congress the image of Stalin was dethroned by Krushchev, who denounced him as a criminal and for fostering a 'personality cult'[11]. This made the Russians rather more inclined to self-criticism than they would otherwise have been and readier to admit, to themselves though not openly, that there might be some truth in the Yugoslav gibes after all. Accordingly, the breach with Yugoslavia was patched up by the admission that there could be 'several roads to socialism', although there has been a renewal of differences from time to time. There was also relaxation of some of the other rigid controls. In Russia this had no marked effect, probably because the controls had never been felt to be unduly oppressive by the mass of people, who had no tradition of freedom. In Hungary, on the other hand, the result of de-control was the uprising in 1956, which had to be crushed by massive Russian intervention, and controls were re-imposed. Later in 1968 the doctrine of 'several roads to socialism' was forgotten when Czechoslovakia attempted to introduce a relaxed form of 'communism with a human face'. This, too, was crushed by massive intervention by Russia with somewhat half-hearted support from her Warsaw Pact partners. A different

9 Cf Djilas *The New Class*.

10 One-man management was introduced in Russia by Lenin: see p 406 ante. Under Stalin the 'triangle' doctrine was introduced in the early 1930s whereby the manager had to be guided by the Party secretary and the shop steward. In 1937 this system was abolished and the manager became all-powerful. It was this managerial class which was the principal target for Djilas's attack. Krushchev restored the 'triangle' principle, but after 1965 there was a return to the all-powerful manager. See the Statute on the Socialist State Production Enterprise *Ekonomicheskaia Gazeta* 20 October 1965, p 24, Part V.

11 Speech to the XX Communist Party Congress 25 February 1956.

breach has occurred between Russia and Albania, supported by China, and between Russia and China. The Chinese, too, insist on their own interpretation of Marxism and accuse the Russians of having betrayed socialism. This clash is more than just ideological; it is a bid for leadership of the communist world, the outcome of which remains to be seen.

It has already been pointed out that Krushchev emphasised the classless character of Soviet society where there is now a 'state of the whole people', that the Communist Party is a 'party of the whole people' and one of two friendly partners in the 'all-people's state'[12]. These are all contrary to strict Marxism and only reconcilable with a revised version of it to the effect that a state, differing from the bourgeois state, can and should survive under socialism as the 'first stage of communism'. This is the period of the 'construction of communism'[13], for although socialism has won in Russia, the goal of communism is still afar. Three conditions remain to be fulfilled before its advent. (a) The menace of 'capitalist encirclement' has to be removed, which calls for strict protective measures, within and without; (b) the masses need to be completely re-educated; and (c) economic abundance has to be secured, which necessitates experiments. 1980 was set as a vague, tentative date for the dawn of the New Age; but nothing has happened. The problem is to know who decides, and on what criteria, that the time has arrived. Unless some clear indication of this is forthcoming, the vision of a state-free and law-free society must remain no more than a vision. After the fall of Krushchev, there was a return to severer treatment, but the doctrine of the state of the whole people remains[14].

Soviet jurists are now increasingly confronted with problems similar to those facing lawyers in other countries. Socialist legality is openly proclaimed and the need for theory is increasingly felt. In so far as laws serve the socialist economy they are just and deserve obedience from all bodies and persons; but they are still only instruments of policy, not objects of veneration in doctrine such as the 'rule of law' is still incomprehensible to Soviet jurists. One danger is that this attitude opens the way for an unscrupulous abuse of power by the rulers, as indeed happened under Stalin; another is that the patent association of law with expediency weakens respect for it and may well hamper the task of re-education. So 'due process' now tends to be insisted on[15]. Moreover, it was felt to be expedient to incorporate in the 1936

12 1977 Constitution, Preamble, art 1; and see *Program of the Communist Party of the Soviet Union* October 31 1961, II § 3. For the function of law and administration: 'Theses of the Central Committee of the Communist Party on the 50th Anniversary of the Great October Socialist Revolution', June 21 1967, Spravochnik Partunogo Rabotnika (1967) Vyp vii, Thesis 12; *The Theory of the State and Law* (ed Denisov) 247.

13 1977 Constitution, Preamble.

14 1977 Constitution, Preamble; Kanet 'The Rise and Fall of The "All-People's State": Recent Changes in Soviet Theory of the State' (1968) 20 Soviet Studies 81.

15 There were no procedural rules in the early decrees on courts: 24 November 1917 and 15 February 1918 [1917-18] 1 Sob Uzak RSFSR, No 4, item 50; No 28, item 366. The first procedural instruction was issued on 23 July 1918: No 53, item 597, although immediately prior to it judges were told not to let procedure hamper justice: No 52, item 589. The first statute, People's Court Act, was passed on 30 November 1918: No 85, item 889. Principles of civil procedure were enacted in 1922, and principles of criminal procedure were enacted on 31 October 1924 [1924] 1 Sob 1 Zak SSSR, No 24, item 204. General principles were enacted in the Constitution of 1936, arts 103, 110, 111, 127. Stalin's erosions of these were repealed on 19 April 1956 [1956] Vedomosti Verkhovnogo Soveta SSSR, No 9 (851), item 193. See now the Code of Criminal Procedure RSFSR 1961, and of Civil Procedure of the USSR and Union Republics 1962. For substantive criminal law, see the Code of 1922 [1922] 1 Sob Uzak RSFSR, No 15, item 153; replaced by the Code of 1926 [1926] 1 Sob Uzak

Constitution, which was hailed as the final victory of socialism in Russia, and in the 1977 Constitution a bill of fundamental rights[16]. Whether these are likely to have any practical effect may be doubted, for they are subject to the provision that 'Exercise by citizens of rights and freedoms must not injure the interests of society and the state and the rights of other citizens'[17]. Who decides?

There are important differences between the structure of the Soviet state and capitalist states, and these have wrought some changes in the Soviet concept of law. The guiding principle of Soviet law was floridly described as follows:

> 'In Soviet law such a single and general principle is that of socialism—the principle of a socialist economic and social system resting on socialist property, annihilation of exploitation and social inequality, distribution in proportion to labour, a guarantee to each member of society of the complete and the manifold development of all his (spiritual and physical) creative forces, and true human freedom and personal independence'[18].

The practical working of this principle has resulted in the following broad characteristics. In the first place, a distinction is drawn between ownership of the means of production and ownership of consumer goods. The former is wholly in the state[19], and only the latter is open to individuals, 'the home, garden and a cow'[20], the land belongs to the state, but the individual has title to his house[1]. The resale of consumer goods is subject to strict scrutiny. Some problem remains with producers who employ no labour and with individual artisans[2]. Apart from consumer goods purchased by means of income from labour, there is inheritance. This was forbidden in the *Communist Manifesto* as a method of perpetuating private ownership in means of production[3]; but inheritance has been increasingly recognised over the years[4]. There is another distinction between state ownership and ownership by co-operatives (*kolkhozes*), and there is also ownership by public and social organisations, eg trade unions[5]. Ownership by co-operatives facilitates the performance of functions and tasks. For instance, land is nationalised and

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RSFSR, No 80, item 600; and see now the Fundamental Principles of Criminal Law of the USSR and of the Union Republics, 25 December 1968.

16 1936 Constitution, arts 122–135. The 1977 Constitution has a new 'Section II. The State and the Individual', setting out the 'rights', 'freedoms' and 'duties' of citizens.

17 1977 Constitution, art 39.

18 *Vyshinsky* p 77.

19 1977 Constitution, arts 9–10; Fundamental Principles of Civil Law of the USSR and of the Union Republics, 8 December 1961 ([1962] Vedomosti Verkhovnogo Soveta SSSR, No 50 (1085), item 525), art 21; Stalin *Economic Problems of Socialism in the USSR* (1952).

20 1977 Constitution, art 12; Fundamental Principles of Civil Law of the USSR and of the Union Republics, arts 19, 25.

1 Decrees of 19 February 1918 [1918] 1 Sob Uzak RSFSR, No 20, item 346, and of 20 August 1918, No 62, item 674.

2 1977 Constitution, art 17; Rules for Registration of Artisans and Handicraftsmen who are not members of co-operatives 1949 (Annotation to art 54 of the Civil Code 1961); Criminal Code of the RSFSR 1966, arts 153, 162; Decree of the Council of Ministers of the RSFSR, 4 August 1965.

3 Given effect in the Decree of 27 April 1918 [1918] 1 Sob Uzak RSFSR, No 34, item 456.

4 Civil Code 1922, arts 416–418; 1977 Constitution, art 12; Decree of 14 March 1945, 3 Sbornik Zak SSSR, 1945–1947 (1947) p 163; Fundamental Principles of Civil Law of the USSR and of the Union Republics 8 December 1961 [1962] Vedomosti Verkhovnogo Soveta SSSR, No 50 (1085), item 525, arts 117–119.

belongs to the state; *kolkhozes* have the use of it in perpetuity for the purpose of management and cultivation in strict conformity with state planning. This is a new form of ownership. The promise of abundance requires a centrally directed national economy, which has entailed not only a vast mass of regulations but also severe regimentation of the populace. Whether this helps or hinders the achievement of the ultimate objective is open to argument[6].

Secondly, in the sphere of production, economic and business relationships, eg between transport, producing and manufacturing concerns, are essentially transactions between state organs *inter se*. State organs are of two kinds, those that are subsidised by the state and those that have been made into autonomous bodies known as State Trusts. The latter are legal persons and correspond with the public corporations in other countries. Their property is, as it were, conceded to them by the state. The regulation of relations between these agencies, eg a manufacturing and a transport concern, is conducted on the basis that they are individual bodies.

Thirdly, there are the relations between the state and the individuals, eg between a State Trust and its employees; but these do not present any novel ideas.

Fourthly, industrial contracts are subject to the national economic plan[7]. Sometimes the plan directs that certain 'contracts of supply' shall be entered into and outlines the pattern of the nature, scope and timing of the obligations, leaving only details to be arranged by the contracting enterprises, who know best their own particular needs[8]. To meet the situation where they are unable to agree, a system of state arbitration (*Gosarbitrazh*) has developed, its function being not merely to deal expeditiously with disputes, but also to assist in negotiating the terms of proposed agreements[9]. At other times the plan only posits the goal to be attained and the enterprises are left to decide what contracts, if any, should be entered into and with whom. This leaves greater freedom of contract, though it is bounded by the task fixed by the plan for each enterprise. The freedom to select one's contracting partner promotes competitive efficiency, since an inefficient enterprise will not secure contracts. The achievement of a plan, and not profit, being the basis of contracts, it follows that specific performance, reinforced by penalties, and not compensation, is the accepted remedy. At the other end of the scale, contracts with the consumer public and between private individuals are no different from contracts in Western countries[10]. As consumer goods become increasingly available, these kinds of contracts increase too.

Fifthly, the admission of individual ownership in consumer goods involves a recognition of private rights, albeit to a restricted extent.

Sixthly, the regulation of all these relations, and particularly disputes between parties, have of necessity to be entrusted to tribunals, the courts, which have to be impartial and independent. The familiar doctrine of judicial independence and impartiality has thus gained ground. 'Judges and people's assessors shall be independent and subject only to the law': so runs

6 Cf *The Soviet Legal System* (eds Hazard, Shapiro and Maggs) p 180, where the editors suggest that it has actually hindered rational planning.

7 The Plan was treated as law after 1927 and the Second Decree on the Trusts 29 June 1927 [1927] 1 Sob Uzak RSFSR, No 39, item 392.

8 Decree of 18 February 1931 [1931] 1 Sob Uzak SSSR, No 10, item 102.

9 Decree of 3 May 1931 [1931] 1 Sob Uzak SSSR, No 26, item 203.

10 *Soviet Civil Law* (1959) I, pp 390 et seq; Fundamental Principles of Civil Law of the USSR and of the Union Republics 8 December 1961 [1962] Vedomosti Verkhovnogo Soveta SSSR, No 50 (1085), item 525, arts 14, 33-34, 36-37.

art 154 of the Constitution[11]. In this connection a tribute should be paid to the Soviet Supreme Court, a conscientious and fair-minded body of men, whose restraint and care have done much to raise the standard of the Soviet administration of justice[12]. If the law is to be administered with firmness, it must be certain and predictable.

Finally, observance of legislation is strictly enforced. Even so, the Constitution is not treated as a fundamental law. Both the Praesidium and the Council of Ministers have legislated contrary to it[13].

All this introduces new ideas in some respects, but only a redistribution of emphasis in others. Not only are Soviet jurists now facing the same sort of problems as those in other countries, but many laws themselves have approximated more and more to those obtaining elsewhere. Such has been the case with criminal law, family law, private rights and many other branches. Perhaps the biggest retreats have been in criminal and family law. The abandonment of the idea that crime is only the reflection of capitalist economy has induced a revised approach to the problem of criminality[14]. The vital influence of a stable family background on children has also been recognised[15]. Apart from these the following points may be noted:

(1) The emphasis has shifted from the protection of the interest of the individual in himself and his property to the state's interest in the individual. This does away with the distinction between 'public' and 'private' law; all law is 'public'[16].

(2) The safeguarding of 'socialist legality' and protection against abuses and oppression is entrusted to a body known as the *Prokuratura*, which may be compared with the Ombudsman[17].

(3) The task of counsel in courts is primarily to further the cause of socialism, and this circumscribes his duty towards his client[18].

(4) Since law is a superstructure on an economic foundation, its material sources lie in collectivisation and the presence of a People's State. Its formal source is legislation[19]. There is no doctrine of the separation of powers. Interpretation of legislation has to be in accordance with the principles of 'socialist legality', ie judges are bound to reflect official policy; which is difficult with the bulk, complexity and

11 For disciplining of judges, see Statute on Disciplinary Responsibility of Judges of the Courts of the RSFSR, 12 June 1965.

12 Statute of the Supreme Court of the USSR 1957, amended 30 September 1967.

13 Cf Stalin's declaration of the need to 'put an end to a situation in which not one but a number of bodies legislate', see *Leninism: Selected Writings* p 402. For the function of a constitution in a socialist state, see Farber and Rzhevskii *Questions of the Theory of Soviet Constitutional Law* (1967); Kalinychev 'The Principal Distinctive Characteristics of the Soviet Socialist Constitution', Soveskoe Gosudarstvo i Pravo 1967, No 11, p 48.

14 See p 400 ante. For recognition of inheritance, see p 411 ante.

15 Fundamental Principles of Legislation of the USSR and of the Union Republics on Marriage and the Family, 3 July 1968 [1968] Vedomosti Verkhovnogo Soveta SSSR, No 27, item 241, p 401. For the early liberalisation of divorce, see Decrees of 18 and 19 December 1917 [1917] 1 Sob Uzak RSFSR, No 10, item 152; No 11, item 160; Family Code 1926. For reversal of this policy, see Decree of 8 July 1944 [1944] Vedomosti Verkhovnogo Soveta SSSR, No 37, and now the Fundamental Principles 1968. For parental responsibility for crimes committed by children: Decree of 25 November 1935 [1935] 1 Sob Uzak RSFSR, No 1, item 1, ss 4, 6.

16 Lenin 29 *Collected Works* (3rd edn) 419.

17 Statute on the Procurator's Audit in the USSR 24 May 1955, No 9, item 222.

18 Sukharev 'Defend but do not excuse' (1967) Sovetskaia Iustitsiia, No 18, p 15.

19 Shebanov 'Sources of Law' *Encyclopaedia of Legal Knowledge* (1965) 171.

technicality of modern statutes. In this climate the question whether judges should adopt a creative attitude or merely abide by the letter of the law involves a delicate balance of considerations. Since state policy is paramount, it might be said that they are limited to interpeting, not to creating rules. As pointed out earlier, however, this is not possible owing to the very nature of the judicial process. So what happens is that the judicial authorities, especially the Supreme Court, help to develop law by publishing instructions as to how laws should be applied for the guidance of other courts; and the *Prokuratura* is at hand to guard against aberrations of the courts. This is a new form of precedent in its broad sense and it has a creative function[20].

(5) The educational function is an important aspect of law. Not only must the parties be made to feel that socialist laws are best and just, but legal administration as a whole has to assist in a thorough-going re-education of social conscience in preparation for communism[1]. Thus, there tends to be more sermonising in Soviet courts than in Western courts; and criminal courts especially are very much courts of morals[2].

(6) At present custom plays a very minor role, as an occasional aid in the interpretation or application of legislation. Perhaps, in the future truly communist society, when people will have been socially re-educated, custom will come into its own as the principal source of socialist conscience.

All these developments, whether approximating to Western ideas or evolving new ones, should show how far the Russians have gone in legal theory. The only way to reconcile them with traditional Marxism is to say that law will have to flourish before it will disappear. From at least one source orthodox Marxists may derive comfort and hope. This is the intervention on behalf of, or against, an accused or suspect person, and the performance of various legalistic and preventive functions by representatives of the group to which he belongs, be it a factory or garage (*obschestvennost*)[3]. The Comrades' (People's) Courts were revived by Krushchev in 1959 wherever there are at least fifty persons living or employed, eg farms, factories, apartment blocks and even schools[4]. They deal with minor matters, such as foul language, drunkenness, lateness for work and some kinds of civil disputes. Use has also been made of the 'public meeting' to denounce 'parasites', ie those living off unearned income[5]. These institutions might be thought to foreshadow a time when law and courts will have vanished and the people themselves deal with problems as they arise. The rationale behind them is that a state advancing

20 Other forms of interpretation are: *Authentic* interpretation by the Praesidium, which is authoritative (Constitution, art 49 (c)); *Doctrinal interpretation*, which is unofficial.

1 Bratus and Samoshchenko *The General Theory of Soviet Law* (1966) pp 86–90; Elivanov 'Our People's University of Legal Knowledge' Sovetskaia Iustitsiia 1966, No 18, p 1; Ryskalina *Radio Lecture Courses* Sotsialisticheskaia Zakonnost 1966, No 12 p 73; *The Theory of the State and Law* (ed Makichev) 497 et seq; Ioffe and Shargorodsky *Soviet Law and Government* 11 No 2 p 3 (who stress the importance of law 'in the field of ideological education').

2 Fundamental Principles of Criminal Legislation of the USSR and of the Union Republics 25 December 1958, No 1, item 6; Fundamental Principles of Civil Legislation of the USSR and of the Union Republics 8 December 1961, No 50, item 525.

3 1977 Constitution, art 161; see Feifer *Justice in Moscow* ch 4.

4 Statute on Comrades' Courts of 3 July 1961 and 23 October 1963; first introduced into the Red Army by Decree of 3 December 1917 [1917] 1 Sob Uzak RSFSR, No 5, item 87.

5 Beerman 'The Parasites Law' (1961) 13 Soviet Studies 191.

towards communism has to start creating institutions for keeping order according to healthy public morality, which are not those of the state.

Despite the claim that Russia has made a revolutionary break with her past, many aspects of the system reflect a stream of continuity[6]. It has been pointed out that the Tsars had repeatedly inaugurated industrial enterprises, which were sold or leased to individuals. Nationalisation, therefore, in effect restored to the state what had been its property[7]. The diversity of ethnic and cultural groups in Russia is connected with their age-old resistance to 'Russification'. Lenin had encouraged such resistance in order to weaken the Tsarist régime, but later found himself forced to accept them as separate states. Amidst these divergences the Orthodox Church used formerly to function as a unifying spiritual force, and its mantle has now descended on the Communist Party. The fact that communism has become a substitute faith would explain why political dissenters are visited with the same sort of repression and ridicule as that which used to be meted out to religious dissenters. The Tsars had inherited the Mogul tradition of absolute autocracy. There never had been a 'rule of law'; there always was a tradition of 'rule by law'. The traditional identification of crime with sin made criminal courts into courts of morals; which remains very much the case. Equality before the law was unknown, and the tradition was continued into the proletarian dictatorship while class distinctions remained. Even after the disappearance of such distinctions, equality before law could not sprout like a mushroom overnight. Offences against the state had always been specially dealt with; and that is still so. Even the *Prokuratura* is the descendant of an institution of Peter the Great.

In the light of all this it may be asked: How far has the Soviet system achieved justice? With regard to justice in the allocation of benefits and burdens, there is undoubtedly a more even distribution than before, and this might be regarded as its greatest achievement. The amounts of burdens and benefits that have been distributed has been strictly controlled by government policy[8], but the more detailed problem of evaluating different kinds of work and needs is no easier in Russia than elsewhere. With regard to justice in preventing the abuse of power, this has not been achieved at all. As pointed out, the removal of Tsarist power was only succeeded by an even more ruthless power-structure. Further, a centrally directed economy entails a vast bureaucracy and red-tape. With regard to justice in preventing the abuse of liberty, it is true to say that this has been achieved, but only at the cost of allowing very few liberties. With regard to justice in deciding disputes, it would appear from what has been said that the Soviet Union is moving more and more towards the position in Western countries. Finally, with regard to justice in adapting to change, there is no difference between the Soviet Union and other countries in adapting to technological advances. Indeed, it might even be easier in Russia where there can be no strikes against the introduction of new methods and machinery. On the other hand, any move which even hints of political change will receive short shrift. The rigid orthodoxy, which the Soviet Union seeks to impose even on other

6 See especially Johnson *An Introduction to the Soviet Legal System* ch 2. Cf Savigny's *Volksgeist*: pp 378 et seq ante.

7 See p 304 ante.

8 Eg Stalinist policy laid emphasis on heavy industry at the expense of consumer goods. Krushchev relaxed that somewhat, but there has been a return to heavy industry since.

countries under her wing, makes the possibility of this kind of change within her own territory extremely unlikely.

A word might also be said about the Soviet attitude towards international law. The capitalist threat from abroad is not only an explanation of the severity of the measures adopted internally, but also a clue to Russia's insistence on the sovereignty of states and her policy in international affairs. There was an initial theoretical difficulty as to how the idea of law, which was viewed as the product of an economic structure, could apply as between states with widely differing economic systems. This led at first to confusing attempts to introduce the class concept into international relations, which were replaced by the view that international law is simply an instrument of policy. The result has been a highly eclectic selection of principles and interpretations. Thus, while Russia was still militarily weak she made use of international law for protection. To this end she put forward and persisted in claims that were designed to make denials of them by other states appear as aggression; she rejected the League of Nations as a tool of capitalism, but found no difficulty in joining it in the face of the growing German threat in 1934. After the 1939-45 war, by which time she had achieved a position of power, the continued furtherance of her own interests led to the reversal of attitudes previously adopted. During the Korean War in 1950, for instance, in order to support the North Koreans it was found necessary to reject the very definition of aggression which she herself had insisted on in 1933; nor could she bring herself to support the International Declaration of Human Rights. She is a party to the Helsinki accord, but its internal implementation leaves much to be desired.

Two developments are worth noting. The first is that with the establishment of a number of communist states since the 1939-45 war there is increasing talk of a new 'socialist international law'[9]. The economic structures of these countries being more or less alike, the possibility of an international law, between them at any rate, which is not simply an instrument of policy, is now more real. The invasion of Czechoslovakia in 1968 by the Warsaw Pact countries was prompted by Russian fears of 'deviation'. The Brezhnev doctrine of the 'limited sovereignty' of other communist countries, which was propounded to justify the invasion, raises questions as to what the sovereignty of states now means in the communist world. It is an almost open avowal of the satellite status of these other countries. Moreover, this event, even if it stood alone, makes one wonder what is to be made of the familiar and apparently serious charges continuing to be made of Western 'imperialism' and 'aggression'. Secondly, even in relation to capitalist countries, the policy of 'peaceful co-existence'[10], if seriously pursued, should bring about a different attitude towards international law, accentuated perhaps by the realisation of the economic and political inter-dependence of states. Instead of two systems of international law, one for socialist states and another for non-socialist states, there may be only one system after all; but the ingrained Marxist dialectic sees this as a kind of synthesis produced by the economic and political competition between all states. Whatever the type of international law, the underlying question is: Does the Soviet Union regard it as binding and, if so, on what basis? The answer that seems to be given is:

9 Butler '"Socialist International Law" or "Socialist Principles of International Relations"' (1971) 65 AJIL 796. The 1977 Constitution has for the first time a special chapter on 'Foreign Policy': see ch 4.

10 1977 Constitution, art 28.

agreement. This cannot stand up to analysis, but since it is part of a wider question concerning international law in general, it will be postponed until later[11].

CONCLUSION

When considering the nature of law from an economic point of view two questions have to be distinguished. One is the extent of the economic influence on the content of the law. In so far as it has been demonstrated that a great many rules have been shaped by economic factors, perhaps more than had been suspected, this can be accommodated within traditional concepts of law. The other question is what kind of a concept of law would be appropriate for Marxism as practised in contemporary Russia. This would have to be a functional concept, but one that would need to be sharpened with reference to the re-education of the people and the ushering in of a better society. As such, it would be an instrument of executive, rather than class, policy and would centre on the executive rather than on the courts. A concept focused on the latter will unfold a far from satisfactory picture of law as it operates in Russia. For the decisions of Soviet courts can never be fully understood except in the light of the theoretical and ideological background of the principles that are being applied: all of which are dictated by policy. However, at bottom the idea of law still remains very much the expression of an 'ought'.

Apart from this the contribution of the economic approach is varied. The significant point that has emerged is the indispensability of law. The Marxist approach was a thorough-going attempt to do away with it, but the practical experience of Russia has only demonstrated its importance. It may be that the final stage of development, according to Marxist predictions, has not been reached, but it is clear that even if it is reached the prescription of behaviour and a measure of coercion will continue to exist. There is no reason, apart from an emotional one, for refusing to call all this 'law'. The significant difference from Western societies is that law will not serve as a watch-dog on the government—a rule by law rather than a rule of law. How far an effective safeguard against an abuse of governmental power will be evolved remains to be seen.

Marx and Engels painted a confident picture of evolution, 'the' class struggle reaching a point when conflict arises and results in the establishment of the proletarian dictatorship, which in turn develops into communism. Their followers, both in and out of the Soviet Union, have sometimes tried to force the pace of events. These tactics have been somewhat exaggerated by opponents of Marxism, but they do, even in themselves, reflect unfavourably on the doctrines. While it is true that over-enthusiasm of disciples should not discredit the teachings of the prophets, yet to have to force the occurrence of events, which are supposed to follow an evolutionary plan, can only raise doubts as to its correctness. The policy of 'peaceful co-existence', so prominent in Soviet pronouncements in the last two decades, may well be inspired by an appreciation that the events will nevertheless take time.

The Marxist doctrines in their practical content come to this. For reasons good or bad, the existing structure in capitalist countries needs to be altered.

11 See pp 497-498 post.

In Russia it is a fact that the structure was changed and the Russians are seeking to improve upon it still further. This great and praiseworthy experiment is independent of any question as to the nature of law, as the Russians are beginning to perceive. Unfortunately, questions as to the nature of law were unnecessarily dragged into the social experiment at its theoretical stage and were coloured by a strongly emotional element. This intrusion of emotion is nowhere more evident than in the loading of such words as 'law', 'state', 'bourgeois' and some others. Although they approve of the term 'science', it should be realised that there cannot be a 'scientific' discussion of any topic until the emotional element has been expelled[12].

There is no reason to suppose that communism is the universal social panacea. It might well prove to be the answer for some types of societies, but not others. Two points appear to stand out in this connection. The first was well summed up by Dr Schlesinger, who said:

> 'Socialism of the Russian type may be a historical expedient by which nations held back under a capitalist régime may catch up with those more advanced'[13].

Nor is there any reason to suppose that communism will work in the same way, or at all, in countries which have reached a high state of development under a capitalist system. Secondly, the Russian type of communism requires a degree of regimentation of the masses, the success of which inevitably depends on the nature and temper of the people concerned: the more ignorant and traditionally inclined to subservience the better the chance of success, the more educated and independent the greater the difficulty. The Russian peoples throughout their history never knew emancipation in the sense that inhabitants of Western countries have known it. Indeed, the boast of the Revolution was that it freed them from serfdom, which is true; but it is a relative kind of freedom compared with the traditions of certain other countries, which have long been schooled in the pursuit of independence and resistance to dictatorship. Such countries are less likely to embrace a communist régime than those which have long been oppressed or have remained largely ignorant, and they are likely to fare badly for a long time under one. This is one reason why communism succeeds with oppressed peoples; another is the hope which it holds out to them. Even with these an unremitting process of education is needed; how much re-education would be needed for some races of the West can only be guessed. The Hungarians in 1956 and the Czechs in 1968 demonstrated to their cost the reaction of peoples to an uncongenial régime as soon as control was slightly relaxed, while a similar relaxation in Russia evoked no reaction.

The attack on religion and its ideals has only succeeded in substituting one kind of religion for another. It is doubtful if Marx or Engels foresaw, or would have welcomed, the worship they now receive. The adherence to what one wit has described as the 'gospel according to St Marx' has involved Soviet jurists in some strange mental feats in trying to maintain his doctrines as the official creed and at the same time to take account of developments inconsistent with it. The official attitude seems to be that the 'truth' is in Marx if only the right interpretation can be found; but in the very nature of

12 It is in this respect, if for no other, that so authoritative a treatise as Vyshinsky's *The Law of the Soviet State* comes as a disappointment. Even those who read it with the best will in the world cannot but feel that the case is hardly advanced by the vividly emotional tone which is adopted in it.

13 *Schlesinger* p 260.

things, departures from his teachings have proved to be inevitable. As long as these are officially countenanced, they are 'interpretations'; when they cease to have official support, they are denounced as 'deviations'. Even from a Soviet point of view, why should it not be admitted that the teachings of Marx have obvious limitations and have also in some respects become out of date? In 1956 the 'personality cult' was denounced with regard to Stalin. Whether its rejection will extend to Marx, Engels and Lenin and, if so, to what degree, remains to be seen. Indeed, outside religion, the adherence to the belief in the infallibility of one man would be a mark of an immature mentality. One explanation might be that, having erected the whole of their structure on Marx, the Russians are afraid to risk the consequences of admitting the existence of flaws in the foundations. It is also difficult to escape the suspicion that there is in their attitude elements of immaturity and religious fervour, as borne out, for example, by the genuine desire to convert the whole world, the refusal to see or believe that anyone can be right but themselves, and the faith in the inevitability of a communist triumph. In the face of such sturdy and militant enthusiasm it is not easy to sift what is solid and sound from the emotional admixture of eulogy and abuse. Indeed, in contemporary Marxism is to be seen the twentieth-century version of the Crusades.

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CHAPTER 20

Sociological approaches

A common feature of a number of approaches, which have gained increasing popularity in this century, is that in one way or another they concern law in relation to society. This outlook is the product of many factors. In the nineteenth century the focus of attention began to swing away from individual rights towards social duties, and carried with it an emphasis on the function of law in communal existence. The rapid increase in population, inequalities engendered by the industrial revolution on a scale hitherto unprecedented, were factors which, together with others, created new problems. The Historical School had shown an essential connection between law and the social environment in which it develops. Prior to the nineteenth century such matters as health, welfare, education, economics, were not the concern of the state. Now the state came increasingly to concern itself with them. This implied regulation through law, which compelled legal theory to readjust itself so as to take account of such preoccupations. Towards the latter half of that century the shortcomings of purely formal analysis were being felt. The increasing number of social activities with which the law had to deal produced a host of new problems for the solution of which guidance was needed. Traditional approaches, analytical positivism in particular, were forced into confessions of mental bankruptcy in meeting these demands. Finally, revolutions and social unsettlement not only upset any complacency about social stability, but also provoked anxiety about the shortcomings of law.

The diverse character of the various types of inquiries that are styled 'sociological' invites comment. Sociology means, broadly, the study of society of which law is but a part. The founder of sociology, in a sense, is Comte (1798–1857), because he was the first to employ the term 'sociology' to connote an independent discipline, and he also unified the work of earlier men. Comte insisted that advancement of knowledge comes only through observation and experiment and he proceeded to construct a hierarchical classification of the sciences, from mathematics, through physics, chemistry and biology to what he called sociology. Even though it was more difficult to apply the scientific method to sociology, it was still, in his view, the most fruitful. Sociology he defined as the science of social order and progress. It includes two compartments, social statics and social dynamics, the former being the theory of social order and the latter the theory of social progress. Society is a developing organism, whose progress is marked by the specialisation of functions within it. Its distinctive feature is its capacity for improvement and development if guided by proper scientific principles. The task of sociology is to discover and work out these principles. Earlier Montesquieu (1689–1755) in his *L'Esprit des Lois* had endeavoured to trace the effect of social environment on law. He busied himself with legal institutions with the object of offering explanations for them. He stressed the influence of geographical and climatic conditions on law which, in his view, could operate

only through the medium of society[1]. He perceived the importance of history as a means of understanding the structure of society and also drew attention to the part played by economic factors. In all this might be seen anticipations of what later developed into the Historical, Economic and Sociological Schools. In his own work, however, they appear as pointers to such studies rather than as studies in themselves.

As a subject sociology is still young and in search of respectability[2]. One step towards this would be to win for its methods the dignity of being able to invoke the magic word 'scientific'. The following are the main resemblances and differences between sociological and scientific methods[3].

(1) Sociology, like science, proceeds from observation to hypothesis, and deductions therefrom are in turn checked back with 'reality'. In this respect the difference between them is largely one of degree, for sociology is still very much at the stage of observation, which indeed is being conducted on a massive scale with all modern techniques, but with as yet only exploratory hypotheses, classifications, models and tentative laws of probabilities[4].

(2) It is theoretical and aims at synthesising other disciplines, some of which are long established, such as history, economics, law etc.

(3) It progresses cumulatively in that new hypotheses are evolved as much out of the correction, extension and refinement of earlier ones as out of new data.

(4) It is non-ethical, ie impartial in evaluation. Just as a scientist puts aside his own values when observing his data, so too the sociologist excludes his own preferences and prejudices when observing his data, which include current values and opinions. Put in another way, the values of a sociologist *qua* sociologist are the same as those of a scientist, namely neutrality and scrupulousness. There are, however, two qualifications. The social observer cannot avoid being personally involved in the society or group which he is observing, of which he is a part and in which he has a role to play *towards* his data. The scientist is not involved with his data in this way. Secondly, social behaviour has causal as well as purposive explanations, ie the questions to be answered are not only 'How?' but also 'What for?' Sociological explanations are therefore sometimes termed 'structural-functional', the structural side being explanatory and descriptive, the functional side being both heuristic and teleological.

(5) It seeks to describe, explain and predict, in short to derive descriptive laws which will predict, as opposed to prescribe, social behaviour:

1 Montesquieu *L'Esprit des Lois* especially Books XIV et seq, and XVIII.

2 Selznick *The Sociology of Law*, distinguished between three stages in the sociology of law: (i) outlining broad strategy and perspectives and programs of attack; (ii) evolving methods and techniques; (iii) in the fullness of 'intellectual autonomy and maturity' a return to the problems posed at the outset. A professor of sociology admitted that 'Sociology is still to a large extent in the classifying, ordering and descriptive stage, because we are still not sure what is relevant and what is not. The result is that a great deal of sociologising is more like a kind of random botanising, a collecting of data, ie statistics, personal case histories and the like, uncontrolled by the purpose of verification. This is inevitable, and certainly provides material on which the theorist can build, but at the same time it must be admitted that, while unbased and unverified hypotheses are empty, a mere collection of data is blind': Sprott *Sociology* p 39.

3 For the first four, see Johnson *Sociology: A Systematic Introduction* p 2.

4 Sprott p 39: see n 2 supra.

that which 'is', not that which 'ought to be'. The material out of which such descriptive laws are derived includes (a) social morphology: which concerns the form of social structure as affected by such factors as the quantity and distribution of population, geography, climate etc. (b) Social change: which may in turn inspire conscious or unconscious efforts to resist, adapt to or alter it. So-called 'short-term' theories of social change confine themselves to changes that have occurred and the influences behind them without extrapolating these into some general law of change, whereas 'long-term' theories aim to do precisely that[5]. (c) Social pathology: which concerns social disturbance and maladjustment. Criminology is a well-known aspect of this. (d) Social controls: which include laws, morals, religion, public opinion, fashions and so on. (e) Group behaviour: which deals with the problems of the interaction between individuals *inter se* and groups. Something more about group behaviour will be said towards the end of this chapter, but social controls raise points which may be dealt with immediately.

Laws are not the only instruments of control; others, such as morals, religion etc are at least as effective, if not more so, with the result that they all figure prominently in sociological study. No less important is the relation between public opinion, its unifying and divisive power, and the various sorts of issues on which opinions are held. The point is that all forms of control are in their nature 'ought' propositions, prescriptive not descriptive. The concern of sociology is not with prescriptions as such, but with the phenomenon that when such prescriptions are regularly followed, they produce uniformities of behaviour which recur with such a degree of probability that they may then be described in terms of the 'is', ie patterns which do occur as a matter of observation. It might seem from this that sociologists are here deriving 'is' from 'ought', but this is not so. The sociologist is primarily concerned with descriptions of social behaviour and only concerned with prescriptions in so far as these happen to produce regularities which can be observed. In no sense is he *logically* deriving the one from the other.

This reveals a crucial difference between the point of view of the sociologist looking at law as the sum-total of legal administration and as a given phenomenon of society ('legal sociologist'), and that of the lawyer looking at the operation of laws and the conceptual tools of a lawyer's equipment in their social and functional setting ('sociological jurist'). The former regards society as a whole, including the part played by legal administration in bringing about observable patterns of behaviour. He is interested in the fact of the regular application of force and the fact of the regular use of guides for determining disputes (norms of decision), both of which help to shape patterns of social behaviour (norms of conduct). Thus, his concept of law tends to be that of an ideal type, a model of the totality of legal administration, which can be fitted into a model of society[6]. On the other hand, the sociological jurist is primarily concerned with laws and the tools of a lawyer's trade; he accepts the former as being prescriptive in their nature and considers their function and functioning in society. The present chapter will be concerned mainly with the point of view of the sociological jurist, not of the

5 Eg Hegel and Marx; contra Popper *The Open Society and its Enemies* especially vol II.

6 For an attempt to construct one, see King 'The Concept of a Lawyer's Jurisprudence' (1953) 11 CLJ at 236, 418; 'The Basic Concept of Professor Hart's Jurisprudence' [1963] CLJ 270.

legal sociologist, though works of the latter type cannot be excluded altogether. Needless to say, the authors, whose works will be dealt with, have not themselves maintained any such rigid distinction and in some cases it is arguable into which category they fall. Whether any further distinction is to be drawn between 'sociology of law' and 'sociological jurisprudence' is doubtful. If 'sociology of law' is thought to be concerned with the manner in which laws work in society, there is, it is submitted, no difference between it and sociological jurisprudence: if it is concerned with society and how legal administration as a whole fits into it, then it is synonymous with legal sociology.

The social study of laws has assumed four forms (1) There are inquiries which seek the social origins of laws and legal institutions. They are concerned with the content of the 'oughts' and the factors that have and are shaping them. (2) There are also examinations of the impact of laws on various aspects of society. (3) There are other inquiries which deal with the task which laws should perform in society. The results of these studies generally take the form of prescriptions addressed to persons who make and administer laws and not to members of society at large. Such 'prescriptions for administration' are in a different category from the 'prescriptive oughts' of laws themselves. Lastly (4) there is the attempt to find some social criterion by which to test the validity of laws. So wide is the field that is covered by these categories that it will not be possible to do more than consider the work of some representative writer or writers.

SOCIAL ORIGINS OF LAWS AND LEGAL INSTITUTIONS

The theories which deal with origins fall into three categories. Two of these, namely, the Historical interpretation and the Economic interpretation, have been considered in the last two chapters, where it was pointed out that they are but versions of the sociological approach. Something has still to be said of the theory of Ihering, which sought to explain the origin of laws without resorting to a metaphysical concept like the *Volksgeist* or a single evolutionary principle as Marx had done.

IHERING

Ihering (1818–1892) passed the early part of his juristic career as an orthodox member of the German Historical School, during which time he intensively studied Roman law and published four volumes of a work, *The Spirit of Roman Law*. This he left unfinished, for its execution had convinced him that the origin of laws lay in sociological factors, a thesis which he proceeded to urge for the rest of his life. In the third volume of *The Spirit of Roman Law* he concluded that the basis of a 'right' was an interest, which led him to consider more closely how laws dealt with conflicting interests. His ideas came to fruition in his major work, *Der Zweck im Recht* ('Purpose in Law'), which has been translated into English as *Law as a Means to an End*[7]. The dominant notion to be found in the exercise of human will is that of purpose. Causality in the natural world is governed by a 'because'. A stone falls because, without support, it must fall.

7 By Husik *Modern Legal Philosophy Series* v.

> 'The stone does not fall in order to fall, but because it must fall, because its support is taken away; whilst the man who acts does so, not *because* of anything, but *in order* to attain to something. This purpose is as indispensable for the will as cause is for the stone. As there can be no motion of the stone without a cause, so can there be no movement of the will without a purpose'[8].

Law is but a part of human conduct, and in the idea of purpose Ihering found the mainspring of laws, which are only instruments for serving the needs of society. Their purpose is to further and protect the interests of society. Purpose should also guide juridical thinking, of which his analysis of possession was an example[9].

The problem of society is to reconcile selfish with unselfish purposes, and to suppress the former when they clash with the latter. Ihering stressed that law does not exist for the individual as an end in himself, but serves his interest with the good of society in view. Man, as a social animal, whether as a member of the state, Church etc, stands on a superior plane to Man simply as an animal[10]. Property, for example, is both a social and individual institution, which justifies expropriation and limitation of the individual's rights[11]. In order to reconcile the individual with society, it is necessary to balance various interests, which he grouped into three categories: individual, state and social[12]. The social activities of people need to be encouraged, and this is accomplished by means of the 'principle of the levers of social motion'. There are four, the first two being the principles of Reward and Coercion. These seek to identify the selfish interest of the individual with some larger social interest. To give an example, since the economic wants of Man need satisfaction trade is instituted to fulfil this need, thus achieving a social purpose by pandering to the selfish profit motive. This is an example of Reward being employed. Coercion is a feature of that part of the social machinery which is called legal administration, namely, coercion organised in a set form by the state. By its side there is also unorganised coercion in the form of social conventions and etiquette. In addition to these there are two altruistic principles, Duty and Love, which also direct men towards social ends.

The point which emerges from Ihering's analysis is that laws are only one type of means of achieving an end, namely social control. There is a distinction between society and state; laws are a feature of the latter. He insisted that laws should be treated from the angle of purpose and convincingly demonstrated the inadequacy of what he called the 'jurisprudence of concepts', that is, mechanical deduction from given premises[13]. He insisted also on the interdependence of all factors that obtain in society, which include (a) extra-legal conditions, ie those under the control of nature, such as the climate and the fertility of the soil; (b) mixed legal conditions, those in which laws do not play a prominent part, such as self-preservation, reproduction, commerce and labour; and (c) purely legal conditions, those interests which are secured solely by legal regulation, such as the raising of revenue. Finally, he stressed the coercive character of legal regulation[14]. His analysis led him to a definition in the following terms:

8 Ihering Law as a *Means to an End* p 2.

9 See pp 276–277 ante.

10 *Ihering* pp 63, 68, 397. Cf his *Kampf ums Recht.*

11 *Ihering* p 391.

12 Cf *Pound*, pp 431 et seq post.

13 He parodied a heaven in which legal conceptions enjoyed a blissful existence: *Im Juristischen Begriffshimmel* in *Sherz und Ernst in der Jurisprudenz* (11th edn 1912) p 245.

14 Ihering *Law as a Means to an End* p 241.

'Law is the sum of the conditions of social life in the widest sense of the term, as secured by the power of the State through the means of external compulsion'[15].

In his approach Ihering was building upon the work of the English thinkers, Bentham and Mill, whose utilitarianism may be said to have influenced his theory of purpose[16]. Ihering, however, insisted on the need to reconcile competing social and individual interests. In this respect he merits the title of 'father of modern sociological jurisprudence', for, as will presently be seen, the problem of the harmonisation of interests plays a prominent part in the theories of some modern writers. Ihering himself did not indicate how this was to be resolved. His social utiilitarianism, as it is usually called, stops short of this question and only draws attention to it. His concern, as stated at the beginning, was to examine the origin of laws, not their application. He was also rightly convinced of the futility of *a priori* theories of justice; a law may be bad today and good tomorrow if the social background has shifted in the meantime.

IMPACT OF LAWS ON SOCIETY

EHRLICH

Ehrlich's (1862–1922) thesis[17] was that laws found in formal legal sources, such as statutes and decided cases, give only an inadequate picture of what really goes on in a community, for the norms which in fact govern life are only imperfectly and partially reflected in them. He drew a distinction between norms of decision, which correspond to that which is traditionally understood to be laws, and norms of conduct, which govern life in society[18]. There is often a considerable divergence between them. Thus, a commercial usage may develop, but it is only after the lapse of some time that courts will acknowledge it and import it into contracts. Eventually it may become embodied in a statute, but by this time modifications of it and fresh usages may have developed. So the process goes on. There will always be an inevitable gap between the norms of formal law and of actual behaviour. The point that Ehrlich was seeking to make was that the 'living law' of society has to be sought outside the confines of formal legal material, in other words, in society itself. One learns little of the living law in factories, for example, by reading only the Factory Acts, the enactments and the common law relating to master and servant, trade unions etc. One needs to go into a factory to observe how far the formal law is followed, modified, ignored and supplemented. Only a minute fraction of social life comes before courts, and even then it usually represents some form of breakdown of social life. The task of formal law-makers is to keep it as nearly abreast of the living law as possible.

The existence of a social order ante-dates formal legal provisions and, moreover, certain facts underlie all laws. These are usage, domination, possession and declaration of will. Propositions of law with reference to them arise in three ways, by endeavouring to give effect to the relations they create, by controlling or invalidating them, or by attaching consequences to

15 *Ihering* p 380.
16 See pp 427–429 post.
17 Ehrlich *Fundamental Principles of the Sociology of Law* (trans Moll).
18 *Ehrlich* p 37.

them. A formal concept of law consists of the synthesis of generalisations constructed from the various propositions of law. If it is asked how the living law, as distinct from the formal law, is to be discovered, Ehrlich's answer was: from (a) judicial decisions, which are only evidentiary; (b) modern business documents against which judicial decisions need to be checked; and above all (c) observation of people, by living among them and noting their behaviour.

It follows from all this that state organisation plays but a subsidiary part. The norms emanating from the state and its organs are only one factor of social control and should be considered in conjunction with others such as customs, morality and the practices of groups and associations. When looked at in the context of living law, there is no difference between formal legal norms and those of customs etc, for it is social pressure that ensures obedience to both types in practice. So, to Ehrlish a statute which is habitually disregarded is no part of the living law. Enforcement by the state is not the distinction between formal and living law; the difference resides in social psychology. Some types of rules evoke different feelings from others. So there are many reasons why a person obeys even a legal rule other than fear of state enforced sanction[19]. The characteristic of formal rules lies in the kind of feelings they arouse by virtue of their generality and social significance. It is a fact that different societies, and even the same society at different times, have had different feelings about what is socially important, so the line between legal, on the one hand, and moral and social rules, on the other, has constantly shifted. There is in all this some parallel with the views of Savigny, but Ehrlich's approach is infinitely more practical than Savigny's mystical *Volksgeist*. Such regard for the living law requires that the scope of jurisprudence should be enlarged. It should concern itself with an observational study of society, since formal laws are only an adjunct of the living law.

Ehrlich's work was a powerful influence in inducing jurists to abandon purely abstract preoccupations and to concern themselves with the problems and facts of social life. While acknowledging his beneficial stimulation in this direction, one should not overlook some drawbacks in his theory. While the distinction between formal and living law is necessary and important, there is some danger of a verbal discussion as to whether both should be called 'law', or only one, and if so which. He deprived formal law of any creative activity and gave it too much the appearance of trailing in the wake of social developments. It is true that reforming legislation is sometimes the formal expression of a tide of public feeling, but it is also true that many norms of behaviour have been given shape and direction by the constant enforcement of laws. Ehrlich's distinction between norms of decision and norms of behaviour is important; but he failed to emphasise sufficiently their mutual interaction. Ehrlich's contentions were also somewhat outmoded even when he propounded them. State organisation is now, and has been for a long time, playing an ever-increasing part in the regulation of social life. It is by no means merely ancillary to the living law; it has come to be of transcendent importance. The picture which Ehrlich drew was truer of the past than of today, but it was ceasing to be true even in his own day. He was ready to admit the increasingly important part that was being played by state organisation, but he failed to absorb its implications into his theory. Finally,

19 *Ehrlich* p 21; pp 49 et seq ante.

Ehrlich's conception of jurisprudence could make it unwieldly and amorphous. To urge that laws should be studied in the context of society is proper and beneficial, but the way in which Ehrlich proposed to conduct the study of society would all but submerge the significance of laws and might very well lead to the death of jurisprudence as a subject.

THE TASK OF LAWS IN SOCIETY

No account of the function which laws should perform in society would be complete without some mention of the pioneer contribution of Bentham.

BENTHAM

Jeremy Bentham's (1748-1832) contribution to analytical jurisprudence has already been dealt with[20]. What will be considered now is his social philosophy. He was without doubt a stout individualist who approached the problems of society on that basis. His moral philosophy, social sense and juristic insight cannot be separated, but if there was one theme which ran through his many writings it was his utilitarian outlook on life. Man, in his view, was governed by pleasure and pain[1]. In this one is tempted to detect the influence of Hobbes, who based his philosophy on the innate selfishness of men. The function of laws, according to Bentham, should be the promotion of the greatest happiness of the greatest number[2]. This was only one application of the Principle of Utility, which approves or disapproves of action according as it increases or diminishes happiness[3]. Bentham, be it noted, did not invent the utility principle; he took it from others, notably Hume, and developed it in the minutest detail[4]. It is also worth remembering that his 'pleasure' has a somewhat large signification, including altruistic and obligatory conduct, the 'principle of benevolence'; while his idea of 'interest' was anything promoting pleasure[5]. The task of laws should be to bring about the maximum happiness of each individual, for the happiness of each will result in happiness for all[6]. There is in this the age-old problem of reconciling interests of the individual with those of the community, but it amounts almost to a contradiction to try to harness a selfish pursuit of pleasure and avoidance of pain to the unselfish service of the common weal. One way of avoiding contradiction would be to suppose that individual pleasure-pain motivations by and large would not run counter to those of the community. Perhaps Bentham did believe this, at least when he wrote his *Introduction to the Principles of Morals and Legislation*. It has also been suggested that he may have embraced dual standards, that of community interest in the public and political sphere, and self-interest in private matters[7]. However this may be, as an unremitting reformer, he favoured legislation on a drastic scale to

20 See pp 335-343 ante.

1 Bentham *An Introduction to the Principles of Morals and Legislation* (eds Burns and Hart) I, para 1.

2 Bentham *A Fragment on Government* (ed Harrison).

3 Bentham *An Introduction to the Principles of Morals and Legislation*, paras 2-3.

4 In one place he ascribed credit to Priestley: Bentham *Works* (ed Bowring) X, p 142; in another to Beccaria: Bentham *A Fragment on Government*, p xx.

5 Bentham *An Introduction to the Principles of Morals and Legislation* para 5.

6 Bentham *An Introduction to the Principles of Morals and Legislation* para 6.

7 Lyons *In the Interest of the Governed* p 20.

remedy the evils which he saw around him, but once these had been eradicated legislation should aim at providing subsistence, abundance, equality of opportunity and security for all. His individualist leaning manifested itself in his insistence that individual and private property were essential. This was necessary, he argued, to ensure the fulfilment of settled expectations.

The utility principle has been subjected to searching examination. In the first place, it is not easy to see how a subjective criterion such as pleasure and pain can be transmuted into an objective one. Pleasure connotes an emotional attitude of approval, pain of disapproval. To judge an action according to the pleasure-pain criterion is to judge it subjectively. To say of a given course of conduct 'I prefer it because it is conducive to pleasure' is no more informative than just 'I prefer it'. For conduct is not loaded with pleasure- or pain-giving qualities; these are dependent on individual reaction. The problem then is: whose reaction should be the criterion? It is true that some types of conduct are generally thought of as conducive to pleasure and others to pain, but the problems arise with reference to conduct as to which feelings are equivocal or divided. This leads to another objection. The consequences of pleasure or pain of an action may well be indefinite in time or unforeseeable; it may give rise to immediate pain with a promise of pleasure or *vice versa*. These factors of time and uncertainty render assessment virtually impossible. Nor is it easy to see how the happiness of the majority increases the happiness of society as a whole. Much will depend on the issue, for on some issues it might well be the case that the happiness of the majority will embitter the minority to the point of provoking disharmony. The converse proposition has also been advanced that by promoting the happiness of others one promotes one's own happiness as well. As a general proposition this, too, is in need of support. Apart from all this, the root difficulty of the principle of ensuring the happiness of the greatest number is how this can be used to apportion three houses, for instance, among four people. Above all, the pleasure-pain categories are too simple in themselves. It led Bentham into artificialities in forcing some very complex problems into these two strait-jackets. It was also naïve to imagine that Man is motivated simply by reaction to pleasure and pain. Bentham appeared to have assumed that there is such a thing as an 'average man'. In truth many actions are done unthinkingly, or from habit; and pleasure and pain come as often as incidents to other actions. It may be that he confused causes of action and reasons for action[8]. He seems also to have assumed that laws could be made to operate on some single principle, which, as is evident in modern times, is an unfounded belief. Lastly, he ignored history and tradition altogether. They should not be exaggerated, but neither should they be excluded.

It is in the light of the limitations of the utility principle, which pervaded his thought, that Bentham's jurisprudential contributions should be assessed. His work in the analytical (expositary) field has been examined[9]. This was preliminary to his main interest, which was reform (censorial jurisprudence), and it is to this aspect that the following remarks refer. The utilitarian justification for having laws at all is that they are an important means of ensuring the happiness of the members of the community generally[10]. Hence, the sovereign power of making laws should be wielded, not to guarantee the

8 Milne 'Bentham's Principle of Utility and Legal Philosophy' in *Bentham and Legal Theory* (ed James) p 19.

selfish desires of individuals, but consciously to secure the common good. 'The public good' said Bentham 'ought to be the object of the legislator; general utility ought to be the foundation of his reasoning'[11]. In order to do this there has to be a balancing of individual interests with communal welfare; he called this the 'felicific calculus'[12]. This idea of the balancing of interests was destined to play an important part in more modern theories[13]. Bentham himself did not solve satisfactorily the problem of how such balancing can be achieved. The pleasure-pain motivation, as has been pointed out, is too simple to explain conduct; so any attempt to work out a calculus of interests on that basis was doomed. The 'weight' accorded to interests differs according to the values of different individuals, and the policies of different countries will yield different results, eg Soviet Russia. Another contribution was his insistence on law-making to achieve social ends. The conscience of the people has to be trained so that they learn to find pleasure in ways that are not anti-social. To this end laws should be made which would make anti-social behaviour unprofitable, in other words, a source of pain to the doer rather than pleasure. On this basis he proceeded to consider punishment, and his views are still of absorbing interest[14]. It will be noted that Bentham, although he would not have gone as far as the Soviet Communist Party in mass re-education, seems to have leaned in that direction. Lastly, he preached that laws should be judged by their consequences. For all these reasons it is clear that this aspect of his work entitles him to rank as a pioneer of functional jurisprudence in addition to his many other pioneering contributions. A very great deal of what has been done since is only development along his lines.

THE TÜBINGEN SCHOOL

It was mentioned earlier in this chapter that Ihering had detected the origins of laws in purpose, namely, the resolution of conflicting social and individual interests. He stopped short of the point of suggesting how such reconciliation is to be effected. Bentham, as just indicated, had previously advanced a pleasure-pain criterion and his views had been introduced into Germany by Edward Beneke, though they only came to be well known through Ihering[15]. A number of practitioners, known as the Tübingen School, attempted to evolve a 'jurisprudence of interests' on the line suggested by Ihering, but stopped short of Bentham's principle of the greatest happiness of the greatest number[16]. Instead, they were content to say simply that laws protect some, but not all, interests. A legal rule is, therefore, in a sense a decision on a prospective dispute and, as such, contains in itself a balance between competing interests. To understand a rule one has to see which social interests gave rise to it and how they were adjusted by the rule. Its interpretation and

11 Bentham *Principles of Legislation* I, p 1; Bentham *An Introduction to the Principles of Morals and Legislation* 1, para 7.

12 Bentham *An Introduction to the Principles of Morals and Legislation* 1, paras 4, 5.

13 Eg his influence on Ihering: see 425 ante.

14 Eg his 'Panopticon' scheme for prison reform; and the recent publication of his views on torture: W L and P E Twining 'Bentham on Torture' in *Bentham and Legal Theory* (ed James) p 39.

15 For the influence of Bentham on Beneke, see Coing 'Bentham's Influence on the Development of *Interessenjurisprudenz* and General Jurisprudence' (1967) 2 Ir Jur (NS) 336.

16 A convenient selection of writings is *The Jurisprudence of Interests* (trans Schoch; *20th Century Legal Philosophy Series* vol II).

application should seek to ensure that those interests, which the law-maker preferred, shall prevail. A number of rules may be unified into a concept and concepts and rules into a system of law. Concepts so unified are useful for the purpose of systematic exposition, but for the purpose of applying and interpreting laws other and different concepts are required. These are 'concepts of guidance' for those who have to administer laws. Unhappily, these functional concepts were never evolved. The reason for this lay in the lack of interest on the part of the Tübingen School in the goal which laws should seek to achieve; for the way in which interests are viewed and assessed is dependent on the end to be achieved. Here Bentham might have given them a lead. Despite the disappointing nature of their work, the problem which they failed to resolve is worthy of mention if only as a prelude to the contribution of Roscoe Pound, the American.

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[17].

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[18], (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

17 Perhaps the most convenient references are Pound 'A Survey of Social Interests' (1943-44) 57 Harvard LR 1, and *Jurisprudence* III.

18 Cf Ihering, p 424 ante.

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[19]. 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, expectations) which men assert *de facto*, about which the law must do something if organised societies are to endure'[20]. 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

(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'[1].

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

19 Pound *Interpretations of Legal History* p 156; Pound *Social Control Through Law* p 65.

20 Pound *Jurisprudence* III, p 15. Cf the earlier definition: 'claims or demands or desires which human beings, either individually or in groups or associations or relations, seek to satisfy, of which, therefore, the adjustment of relations and ordering of human behaviour through the force of a politically organised society must take account': 'A Survey of Social Interests' (1943-44) 57 Harvard LR 1.

1 Pound *Jurisprudence* III, pp 235-236.

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 civilised society and through the social group, to be secure against those forms of action and courses of conduct which threaten its existence'[2].

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'[3].

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 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'[4].

This covers 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 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'[5].

Thus this social interest clashes to some extent with the individual interest in dealing with one's own property as one pleases. It covers

2 *Pound* III p 291.
3 *Pound* III p 296.
4 *Pound* III p 303.
5 *Pound* III p 305.

(a) conservation of natural resources, and (b) protection and training of dependants and defectives, ie 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 development of human powers and of human control over nature for the satisfaction of human wants go forward; the demand that social engineering be increasingly and continually improved; as it were, the self-assertion of the social group towards higher and more complete development of human powers'[6].

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 (iii) 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 association; 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'[7].

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

6 *Pound* III p 311.
7 *Pound* III p 316.

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 interdependent 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, eg those that have resulted from welfare legislation[8]. 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[9].

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

8 See p 67 ante.

9 For the attitude of a British and the European Court, see *Schmidt v Secretary of State for Home Affairs* [1969] 2 Ch 149, [1969] 1 All ER 904; *Van Duyn v Home Office (No 2)* 41/74 [1975] Ch 358, [1975] 3 All ER 190, [1974] ECR 1337 (European Court).

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 than social interest; 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 these 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[10]. 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

10 Pound's disciple, Julius Stone, has abandoned it: Stone *Social Dimensions of Law and Justice* pp 171–175.

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[11]. 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'[12]. As early as 1919 Pound did offer a set of postulates as underlying contemporary society, but these are far from sufficient today and they have, both in Great Britain and America, been outmoded by the march of events[13]. 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.

SOCIAL CRITERION OF THE VALIDITY OF LAW

DUGUIT

Duguit (1859–1928) was a professor of Constitutional Law in the University of Bordeaux. He attacked traditional conceptions of state, sovereignty and

11 Stone 'The Golden Age of Pound' (1962) 4 Sydney Law Review 1. Harvey 'A Value Analysis of Ghanaian Legal Development since Independence' (1964) 1 UGLJ 4, points out that in Ghana the need to promote a sense of nationhood has played a paramount role.

12 Pound 'Natural Natural Law and Positive Law' (1952) 68 LQR 330, (1960) Nat LF 70.

13 Men should be able to assume (1) that others will not commit intentional aggressions upon them; (2) that they may control for beneficial purposes what they have discovered, appropriated to their own use, created and acquired; (3) that those with whom they deal will act in good faith, ie carry out promises, carry out undertakings according to the expectations which the moral sentiment of the community attaches thereto, and restore unjust enrichment; (4) that others will act with due care and not create unreasonable risk of injury; and (5) that others will keep under proper control property that is likely to inflict damage if it escapes: Pound *Introduction to American Law* (1919) reproduced in *Outlines of Jurisprudence* (1943). Pound subsequently foreshadowed the emergence of three other principles: (a) assurance of security of employment to employees, (b) responsibility of industrial concerns to make compensation for human wear and tear, and (c) the shouldering of responsibility to compensate misfortune to individuals by society as a whole: *Social Control Through Law*. But the admission of these three will involve important modifications of the previous five.

law and sought to fashion a new approach to these matters from the angle of society.

Social life should be viewed, he insisted, as it is lived, so as to be able to extract the most accurate generalisations. The outstanding fact of society is the interdependence of men. This has always existed and becomes more and more widespread as life grows more complex and as Man's mastery of the world increases. People have common needs, which require concerted effort; they have also dissimilar needs, which require mutual adjustment and accommodation. No one can live at the present time without depending on a far-reaching web of services provided by his fellow-men. Water, food, housing, clothing, recreation, entertainment and so on are dependent on other people. This social interdependence is not a conjecture, but an inescapable fact of human existence. All organisation, therefore, should be directed towards smoother and fuller co-operation between people. This Duguit called the principle of social solidarity[14].

From this platform he launched his assault on traditional conceptions of the state, sovereignty and law. All institutions are to be judged according to how they contribute towards social solidarity. The state can therefore claim no special position or privilege. It is not some mystical entity, but an organisation of men, which can only be justified so far as it furthers social solidarity. When it ceases to do this there is a duty to revolt against it. It is worth pointing out that at no stage did Duguit deny the existence of an organised unity known as the state. This is very much a fact and to deny it would be unreal. What he said was that it is not essential nor entitled to special reverence.

The doctrine of sovereignty has likewise become meaningless. It used to be the personal attribute of a monarch, so such ideas as 'sovereignty of the people' and the like are inappropriate and empty. The idea is, moreover, inadequate for composite and heterogeneous unities such as federal states or the British Commonwealth. Decentralisation makes it difficult to locate sovereignty. The use of the notion of delegation does not alter the fact that parts of sovereignty have been ceded. Nor can sovereignty be reconciled with the increasing responsibilities attaching to the state. For these reasons sovereignty fails to explain the kind of authority that governors now wield over the governed. A better way of looking at it is that all power and organisation are subject to the test of social solidarity. Their existence is functional and does not extend beyond the functions they perform in society. At this point, however, it might be noted that sovereignty is a term with many meanings, and cannot be wholly expelled in this way. There has to be some ultimate source of authority, especially law-making authority, in every society.

In Duguit's view, with the disappearance of sovereignty there disappears also the authority traditionally ascribed to laws, for the basis on which these were thought to rest is then sapped of vitality. If sovereignty is mythical, so too are the notions that a law is (a) the command of a sovereign, single and indivisible, (b) unchallengeable, and (c) the product of a single creative act.

Such is the core of Duguit's thesis. It contains some interesting implications. The first and most obvious is that the state is not indispensable. He drew particular attention to the move towards decentralisation and away from a central machinery of authority in view of the increasingly complex

14 Cf Malinowski's doctrine of reciprocity among primitive peoples: p 391 ante.

structure of modern society. A vague parallel might here be detected with the Marxist conception of the 'withering away of the state', though Duguit's approach was different. Against this, it can be argued that totalitarian states of recent times have shown how power can be vested in decentralised groups in such a way as to enhance the power of the central authority.

The state is a useful, though not an essential, organisation, but its power is restricted by social solidarity. Whether such a state of affairs is achieved through a constitution or a judiciary, it is akin to the advocacy of a rule of law. The objection is simply that this is far from being the state of affairs in all countries. It will be remembered that Duguit's own initial contention was that life in society should be viewed as it actually is, so it would seem that his argument is only a plea for what it ought to be. Duguit proceeded to assert that when the state ceased to promote social solidarity there is a duty to revolt against it. Apart from the unreality of basing so drastic an action on a matter of personal evaluation, the point at which disobedience becomes justified is by no means as simple as this[15].

The interdependence of men is a fact, but 'social solidarity' is an ideal. For, in the first place, in practice it becomes a matter of personal evaluation when the question to be decided is whether a given course of conduct is conducive to social solidarity or not. Does a law imposing or forbidding racial segregation promote social solidarity? It is difficult to see how this can be answered objectively and otherwise than in the light of political, religious and moral evaluations. Secondly, whose evaluation of social solidarity is to prevail? There is evidence that the forces of social disruption are as potent as those of solidarity. It would appear that Duguit has unfortunately fallen into the error of enlarging a limited truth into an absolute.

The most significant feature is the way in which Duguit used social solidarity as a criterion of the validity of laws. He asserted that a precept which does not further social solidarity is not law, and denied that statutes and decisions make law in themselves. There are three formative laws, namely, respect for property, freedom of contract, and liability only for fault. The precepts of positive law should conform to these formative laws and they only achieve validity when received and approved by the mass of public opinion. 'A rule of law exists whenever the mass of individuals composing the group understands and admits that a reaction against the violation of the rule can be socially organised'[16]. Public opinion is thus the expression of the social solidarity principle, by which the validity of laws should be judged. This is open to objection. What is this mass opinion? Its vagueness and unsatisfactory nature are obvious. By what means is it discoverable? Situations frequently arise with regard to which no particular feeling exists and others with regard to which opinion is divided. It is unrealistic to suggest that a court will, or will be allowed to, decline to receive an enactment as 'law' because it can be shown that public opinion does not subscribe to it. Once more, it is clear that this is no more than what, in Duguit's opinion, should be the position.

Duguit avoided all imagery of the state as a person with organs and will of its own. The state is nothing more than an organisation of individuals and it is they who issue commands and carry out decisions. He likewise denied the personality of corporations and similar groups. The coherence of all such associations lies, not in some mystic personality, but in social solidarity. It is

15 See pp 313 et seq ante.
16 Duguit 'Objective Law' (1921) 21 Columbia Law Review 22.

ironic that Duguit, who foresaw how personification of the state could lead to totalitarianism, which he abhorred, should have had his own theory used for that very end. Thus, national socialist jurists seized on his minimisation of conflict within society as a justification for the suppression of trade unions and strikes. Employers and workers were pictured as comrades united in their own particular factory or local organisation, which in turn was absorbed in the unity of the state. This created a romantic bond of loyalty to the state and any act against it was treachery. Such a perversion of his doctrines to support the aggrandisement of the state would have horrified Duguit.

His view of the function of government led Duguit to deny the distinction between public and private law. All laws are only means of serving the end of social solidarity and should be judged by that criterion. In the distinction between public and private law Duguit suspected a method of elevating the state above the rest of society and he would have none of it.

Duguit also denied the existence of rights. 'Natural rights' he treated as myths, since modern research has shown that Man has always lived in society and was never entirely independent. The core of the law lies in duty, which is the means of securing that each one fulfils his part in the furtherance of social solidarity. 'The only right which any man can possess, he said, 'is the right always to do his duty'. What are commonly called 'rights' are only incidental to the relations with other people which arise in the course of performing one's social duty. The reality is thus not the right, but the duty. This aspect of Duguit's theory is not only unnecessary, but also verbalistic. He admits, as indeed he could hardly avoid doing, that relationships do arise between individuals. These are commonly described in the language of duties as well as of rights. His objection is merely to the use of the word 'right'.

Finally, Duguit would banish the ethical element from law. All he did, however, was to substitute one ideal in place of others.

Duguit's views have had considerable influence. Their adaptation by Nazi and Fascist jurists has been alluded to. Soviet jurists, too, found parts of his work congenial. His functional approach to laws, his denial of the distinction between public and private law and his advocacy of a form of the 'withering away' of centralised authority and its replacement by a decentralised 'administration of things' had some attraction to Marxist interpreters. His work had influence in another direction as well. The emphasis that he placed on the importance of the group, coupled with advances in later sociological thought, shifted the focus of attention to group behaviour, about which something must now be said.

GROUPS AND INSTITUTIONS

Modern society presents a confusing pattern of different values, which exert different pressures of greater or lesser intensity and of varying application and concern. It is relevant in this connection to have some idea of the influence of groups, roles and institutions.

All groups have some unity. For a start, attention should be paid to the phenomenon known as stratification, which refers to the divisions and cross-divisions of people into degrees of compactness, fluidity, distinctness and separability. They may be temporary or permanent, closed or open (depending upon the ease with which people can pass in and out), occupational

(eg teachers, miners), functional (eg income groups), feature (eg racial, religious, caste), and so forth. Stratification influences the social set-up, as where status differences structured feudal society, and racial, religious, or functional differences shape modern societies. It also facilitates social control, as when classifications according to income, race, religion or caste become decisive in the moulding and application of certain types of laws. Other kinds of groups result from co-operative effort on the part of a number of persons to achieve a common purpose, coupled with a sense of belonging to that group. These range from giant, permanent organisations to *ad hoc* and localised bodies, such as a union of residents in a town to oppose a threatened curtailment of some amenity.

Groups and values

A point of jurisprudential interest lies in the intimate connection between group phenomena and values and moral pressures. The values of society are closely connected with power-groups. The aims and ideals of such a group are in the first instance matters of evaluation by its members, but the degree of pressure brought to bear behind the aims and ideals depends on the strength of the group. The stronger the group, the more likely is it that what it stands for will in time begin to prevail outside itself. Powerful economic groups, for instance, have had decisive influence throughout the whole of society, as Marx demonstrated. Once the aims and ideals of a group have become socially accepted in due course of time they cease to be dependent on power, and acquire a life of their own. They in their turn become supports for power and factors *sine quibus non* in the continuance of power or the establishment of new power. Governments, for instance, are generally anxious to associate themselves with accepted values of certain groups, especially those of religion, because they transcend the present power-wielders; which is why the régime in South Africa is anxious to justify *apartheid* by pointing to the support of the influential Dutch Reformed Church. The close association between power-structures and values is also seen in the fact that rebellion against one is often rebellion against the other. Another point is that values evolve slowly and are changed as slowly. In this way they serve as a brake on the exercise of power. This may be illustrated once more with reference to South Africa where the government has found that convictions about *apartheid* now run so deep that they hamper the introduction of any policy which smacks of liberalism.

The pressure on an individual to submit to a group derives, among other things, from his knowledge that others also submit. This generates the feeling of being bound, which the individual either accepts or rejects. Among those who accept, there is the further feeling that there has to be some measure of discipline to preserve the group; while even among those who glory in rejecting it, there is the feeling that non-conformity is rebellion.

Roles

Whenever a person's conduct towards others has some measure of permanence his behaviour becomes, as it were, institutionalised, ie a 'role'. Roles evolve as solutions to problems of interaction between individuals and groups and have been described as 'recognised and established usages governing the

relations between individuals and groups'[17]. What becomes institutionalised is a way of going about things and it is, thus, an idea. Not only human beings, but ideas also count, said Renard[18]. The institution may take the form of a role, such as that of chairman, which results from the fact that every group has to have someone to control proceedings; or even a place occupied by a person, such as 'father's place' at table, which may simply be the most convenient place to seat him so that he will not be in the way of those serving the meal. These are very simple examples, but what is common to all forms of institutionalised behaviour is that there has to be general and continuous acceptance of a way of doing things, which comes to serve as a standard of behaviour. This is because roles exert pressure to act in certain ways and carry directions for behaviour. A role may involve a number of relationships ('role-set'), and different roles may overlap. Both social roles and strata tend to have built-in values, so that they are more than just factual situations. Hume illustrated this with an example of the difference between a sapling, which destroys the parent tree, and parricide. In both situations, he said, the factual position is the same, namely, destruction of the parent by its offspring. The difference lies in the disapproval attaching to the one and not to the other, and this comes through regarding the human relationship as a role[19]. Roles exert pressure on performers in various ways. One is the pressure to conform to the traditions and standards of the given role, eg of judge or legal adviser. Likewise certain types of strata influence people to live up to the values, which are part of them, in order to win acceptance or retain acceptability and prestige in them.

While it is true that an 'ought' cannot be derived from an 'is', behaviour-patterns do become so interlocked and inter-dependent that if one person fails to conform, he disrupts the whole to a greater or lesser extent. The structure of society consists of interrelationships between numberless roles and groupings, which are often more durable than human beings. The 'ought' behind 'you ought to conform' to these roles does not express an emotional attitude towards the conduct in question, so much as a condition *sine qua non* of social existence; things being as they are, conformity is the effective way of carrying on together[20]. At this point language takes a hand. Conformity tends to be labelled 'right', 'proper', or 'correct' because it fulfils expectations and is convenient; non-conformity tends to be labelled 'wrong', 'improper', or 'incorrect' because it frustrates other people's expectations and is inconvenient. These words already have powerful moral connotations, and so it comes about that through language there occurs a shift in the meaning from 'right' or 'wrong' behaviour in the sense of being effective or ineffective in achieving an end to such behaviour being thought to be 'morally right' or 'morally wrong'. It should not be forgotten that it is through language that people learn huge numbers of values, which are inherited and propagated by means of verbal symbols. To take an example, in the present social structure in southern Africa *apartheid*, in the opinion of the white races, is the 'right' (ie the only effective) way to preserve stability, since integration with Africans is likely to prove very unsettling; but this has generated the conviction that it must also mean that *apartheid* is 'morally right'. In primitive

17 Ginsberg *Sociology* p 42.
18 Renard *Théorie de l'Institution* p 92.
19 Hume *Treatise on Human Nature* III, 1.1. See also Melden *Rights and Right Conduct*; Emmet

societies the roles performed in religious ritual patterned social structure. The effective way of achieving certain ends (inducing intervention or non-intervention of the gods) was by performing certain ritual actions. So, as Hocart taught, society was organised on the basis of ritual[1], and the various roles were assigned to different individuals, usually heads of important families. Here, too, the 'ought' behind conformity was that this was a condition *sine qua non* of achieving the desired ends rather than that of obligation. The latter evolved out of the former.

Groups as institutions

Society abounds in institutions of many kinds. An important distinction is that between organised institutions, groupings of people, eg Church, family etc, and conceptual institutions, eg property, ownership etc. Institutions, such as courts, police and the like, perform legal functions, but they consist of persons. Group institutions evolve slowly, for however they come into being, perhaps even by force initially, it takes time for them to become accepted. Such evolution is a social, not a juridical, phenomenon. A sociological theory of institutions is one which explains such data as found in society and is, in effect, an analysis of society; a sociological theory of the law of institutions is concerned with the manner in which laws take account of them.

The pioneer institutionalist was Hauriou (1856-1929), who spoke of an institution as 'an idea of an undertaking which is realised and which persists in a social environment'[2]. To achieve this an authority with organs is called into being; and manifestations of a communion among the members of the social group, who are interested in realising the idea, are directed by the organs and regulated by procedures. Hauriou distinguished between *institutions-personnes*, groups of human beings, and *institutions-choses*, 'institution-things' (eg rules of law, marriage); but the latter he largely ignored. One feature about his theory is that he only took account of those ideas which are innate in men as social animals and in the very nature of social life, ie principles of constitution and regulation without which no kind of group activity would be possible. He further limited his treatment to groups which have achieved a certain degree of development. These features, coupled with an avowed Catholic orientation, gave his theory a natural law tinge, which has been noted by several writers[3]. An Italian, Romano, adopted a more positivist approach and paid attention to 'institution-things'[4]. There are, he said, many more *de facto* institutions in society than enter into Hauriou's analysis. In so far as he tried in this way to take account of all institutions as facts found in any given society, his theory may be said to be empirical and more truly sociological than Hauriou's.

Hauriou's theory is not a theory of group personality, but rather a theory of groups, ie of their social reality; and it is also to be noticed that institutionalism does require the subordination of the individual, to some extent at least, to the institution. There is in this a danger that such a theory may

1 See pp 392-393 ante.

2 Hauriou 'La théorie de l'institution et de la fondation' in *La cité moderne et les tranformations du droit* p 10.

3 Renard *La Théorie de l'Institution*; Jennings 'The Institutional Theory' in *Modern Theories of Law* (ed Jennings) p 68; Stone *Social Dimensions of Law and Justice* p 519.

4 Romano *Ordinamento*.

easily be utilised so as to demand unquestioning obedience to a totalitarian régime in the same way as Duguit's theory was used.

Conceptual institutions

Interest has recently grown in legal concepts and even law itself as institutions. Professor MacCormick[5] has drawn attention to the distinction between an 'institution of law', eg contract, and a particular contract, which is an instance of it. An 'institution of law', according to him, depends on whether there is (a) a set of institutive rules, namely, those specifying what constitutes, eg a contract. Such rules include, but are not co-extensive with, power-conferring rules, since an event may bring a conceptual institution into play. (b) Consequential rules, which specify that when a particular institution exists, then certain jural relations follow in consequence. (c) Terminative rules, which specify how institutions shall end. These, too, include, but are not co-extensive with, power-conferring rules. The important point about institutive rules is that they only indicate the conditions which are 'ordinarily necessary and presumptively sufficient' for the existence or creation of a particular instance of the institution. The qualification leaves flexibility and room for value considerations to play their part. In this way it would seem that there is a return to a study of legal concepts via the treatment of them as institutions.

The institutional nature of laws has been approached by Professor Honoré through the group[6]. To say that something is law is to strike an attitude towards disobedience, and a theory of law is, among other things, a theory about such attitudes. To understand laws one has to begin with a group, since every law is a law of some group, and 'law' is a group structure designed to secure obedience to certain group prescriptions. A 'group' is 'a collection of individuals who share a definite understanding of what is to be done by one or more of themselves in given circumstances, or how the question what is to be done in those circumstances is to be decided'[7]. The 'shared understanding' requires communication of prescriptions, no professed rejection of them, and the prescriptions have to curtail liberty. Further, the prescriptions need to be effective, which requires the interlocking of different types: (i) initial and remedial prescriptions ('Everyone is to do X'—initial; 'If not, Y is to happen'—remedial); (ii) genetic and derivative prescriptions ('Do what X says'—genetic; X says 'All sharpen their knives'—derivative). Such prescriptions need to be institutionalised in the sense that they apply to all members of the group, or in specified circumstances, and there must be group understanding about a rule determining how the group officers are to be appointed and how they function. Nothing is to count as a law which is not an interlocking prescription, or derived from interlocking prescriptions. When, therefore, 'we find prescriptions which are reinforced by genetic or remedial rules of an institutional character (ie supported by group understandings as to the jurisdiction and appointment of the relevant officials) we can speak of the prescriptions and rules that support them as laws'[8].

The above description would fit the arrangements of different kinds of

5 MacCormick 'Law as Institutional Fact' (1974) 90 LQR 102.
6 Honoré 'Groups, Laws and Obedience' in *Oxford Essays in Jurisprudence (second series)* (ed Simpson) ch 1.
7 *Honoré* pp 3, 4.
8 *Honoré* p 18.

groups, eg Church, clubs etc. Professor Honoré finds the special status enjoyed by the laws of territorial groups, such as the state, to derive from the fact that such groups are able to institutionalise to a greater extent than other groups the use of force in remedial situations[9].

A different analysis of a legal system as an institution comes from Dr Raz[10]. According to him, the distinctive feature lies in the working of courts. Their decisions are binding even when wrong; but they themselves are bound to apply certain norms prescribing the behaviour of individuals when giving decisions as to whether actual behaviour complies with those norms. So far, the description would fit the institution of a private club as well as the legal system of a state. The distinctive features of the latter are that it is comprehensive, in that it claims authority to regulate every type of behaviour; it is supreme, in that it claims authority over all other institutions and organisations; and it is 'open' in that it provides binding force to certain norms which are not part of it, eg private agreements or foreign laws.

CONCLUSION

Summing up, one might say that the greatest practical contribution of various sociological approaches has been field-work in examining the interaction between law and its social *milieu*. In this respect the position in Great Britain still lags behind that in other countries, but a good deal is now being done[11]. Another outcome is likely to be a pointer to the evolution of ideals on an empirical basis. It has been abundantly demonstrated that laws play a significant and creative role in society, and such a dynamic function presupposes the existence of ideals, even unavowed, to provide directing force. The transcendental idealism of the past suffered a blow at the hands of positivism from which it could never hope to recover; positivism in turn faltered in the face of the problems that confronted it. The rise of sociological study has made possible a synthesis between the two by restoring ideals in a way that could satisfy and give life to the exacting positivist discipline. It is no coincidence that the functional approach has heralded the revival of natural law in this century; it was, indeed, a necessary precursor.

What is it that lawyers, who engage in a social study of their subject, seek to accomplish? To answer this the previous distinction between sociological jurists and legal sociologists is relevant. The former term is convenient to describe those concerned with laws in their social context. They inquire (a) into the circumstances in which laws arise and become differentiated from morality and the like; (b) how the administration of laws is related to justice; (c) what influences are mutually exerted by laws and other types of social phenomena and changes in them. The first of these is essentially a historical type of inquiry and nothing need be added to what has previously been said. The emphasis is very much on the prescriptive content of law. The second question, (b), has two aspects. There is, on the one hand, the question of the criteria which should govern the application of laws. What is needed is a theory for the guidance of administrators. Laws are means for achieving

9 *Honoré* p 20.

10 Raz 'The Institutional Nature of Law' (1975) 38 MLR 489; on which see comment by Reid and Schiff (1976) 39 MLR 118.

11 Eg in the Department of Criminal Science at Cambridge since 1941, which was absorbed into the Institute of Criminology in 1961.

certain ends, and there are thus two sets of 'oughts': those of laws themselves which prescribe the conduct of people in society and by which their actions are judged, and a functional set which prescribes how judges and other administrators should apply the general prescriptive norms so as to achieve certain ends, whatever these might be. In addition to this, there is the question of the social criteria which are thought to govern the very validity of the general prescriptive norms. In connection with the third question, (c), Ehrlich's distinction between norms of decision, which correspond to prescriptive rules by which conduct is judged, and norms of conduct according to which people actually behave, is of signal importance. The latter are shaped by the gradual acceptance of the former, but there is also the reverse process whereby the behaviour of people brings about changes in prescriptive rules.

In contrast to all this, the term 'legal sociologist' has been used to refer to those whose main interest is the analysis of society and who seek to fit legal administration as a whole into a concept of society. In this enterprise the differentiation of legal administration from the operation of other forms of social control becomes necessary. It brings in at once the distinctive character of legal enforcement, namely the machinery of sanction, as an important social fact. A caution which must be uttered is that no inferences should be drawn from any such concept of law outside its frame of reference. In brief, one should be wary of deducing from it the nature of laws and legal concepts. It has been pointed out, for example, that the provision of sanctions is part of a concept of 'law in society', but that a misleading picture is presented when inferences are drawn from this as to the nature of the concept of legal duty[12]. The sociologist is concerned with what 'is', ie the totality of legal administration as an observable social phenomenon; but from such an 'is' cannot be derived assertions about the prescriptive 'oughts' behind laws, for the two spheres of discourse are distinct. It would be as erroneous as trying to deduce propositions about actual social behaviour from the prescriptive content of laws. These points may seem obvious enough, but there is a tendency to overlook them.

12 See pp 245-246 ante.

READING LIST

J Bentham *An Introduction to the Principles of Morals and Legislation* (eds J H Burns and H L A Hart).
J Bentham *The Theory of Legislation* (ed C K Ogden).
L Duguit *Law in the Modern State* (trans F and H J Laski). See also H J Laski's 'Introduction'; pp xvi–xxxiv.
E Ehrlich *Fundamental Principles of the Sociology of Law* (trans W L Moll) especially
pp 489–506.
G Gurvitch *Sociology of Law.*
A M Honoré 'Groups, Laws and Obedience' in *Oxford Essays in Jurisprudence (second series)* (ed A W B Simpson) ch 1.
R von Ihering *Law as a Means to an End* (trans I Husik *The Modern Legal Philosophy* series V).
H J Laski 'M Duguit's Conception of the State' in *Modern Theories of Law* (ed W I Jennings) 52.
D N MacCormick 'Law as Institutional Fact' (1974) 90 Law Quarterly Review 102.
E W Patterson 'Pound's Theory of Social Interests' in *Interpretations of Modern Legal Philosophies* (ed P Sayre) ch 26.
R Pound 'The Scope and Purpose of Sociological Jurisprudence' (1910–11) 24 Harvard Law Review 591; (1911–12) 25 Harvard Law Review 140, 489.
R Pound 'A Survey of Social Interests' (1943–44) 57 Harvard Law Review 1.
R Pound 'Sociology of Law and Sociological Jurisprudence' (1943–44) 5 University of Toronto Law Journal 1.
R Pound *Jurisprudence* I, ch 6; III, pp 79 et seq; 186 et seq; 272 et seq.
J Raz 'The Institutional Nature of Law' (1975) 38 Modern Law Review 489.
A Ross *On Law and Justice* chs 12, 17.
D Schiff 'N S Timasheff's Sociology of Law' (1981) 44 Modern Law Review 422.
J Stone 'The Golden Age of Pound' (1962) 4 Sydney Law Review 1.
J Stone *Social Dimensions of Law and Justice.*
N S Timasheff *An Introduction to the Sociology of Law.*

CHAPTER 21

Modern realism

The two movements in thought dealt with in this chapter are of American and Scandinavian origin respectively. They share the desire to introduce a commonsense approach to problems of and about law, and with that end in view concentrate on 'facts'. Unlike Kelsen, they do not eschew sociology and psychology. On the contrary, these play a prominent part in their interpretations. Not only are they positivist, but also some, at any rate, appear to carry their devotion to facts, and nothing but facts, to extremes. Nevertheless, realism cannot be left out of account; it is a Procrustean term covering various kinds of inquiry which have provided interesting, novel and vigorous stimuli in contemporary legal thought.

AMERICAN REALISTS

A warning is needed against imagining that there is anything like a 'school' of American Realists. The difficulty in the way of a coherent presentation of their views is that there are varying versions of realism as well as changes of front; positions formerly defended have since been forgotten or abandoned. Although the descriptions 'realism' and 'legal realists' are commonly used, this terminology is abandoned in more recent writings. Judge Jerome Frank (1889–1957), a leading exponent, preferred the phrases 'experimentalists' or 'constructive skeptics', and has described his own attitude as one of 'constructive skepticism'. He repudiated the charge that 'the 'realist school' embraced fantastically inconsistent ideas' by pointing out that 'actually no such 'school' existed'. The common bond is, in his words,

> 'skepticism as to some of the conventional legal theories, a skepticism stimulated by a zeal to reform, in the interests of justice, some courthouse ways'[1].

It is this lack of homogeneity that makes presentation difficult. All that will be attempted in these pages is to outline some of the assertions made at various times under the realist label with reference to a few outstanding jurists.

American Realism is a combination of the analytical positivist and sociological approaches. It is positivist in that it first considers the law as it is. Reform is the ultimate aim, but a prerequisite to reform is, in positivist thinking, an understanding of law as it is. On the other hand, the law as it stands is the product of many factors. Inasmuch as the realists are interested in sociological and other factors that influence the law, their approach may also be described as being in part sociological. Their concern, however, is with law rather than with society. They share with sociologists an interest in

1 Frank *Law and the Modern Mind* (first English edn 1949) Preface pp vii–viii. It has been pointed out that since the so-called 'realist split' in 1928 'the realist movement lost such coherence as it ever had': Twining *Karl Llewellyn and the Realist Movement* p 67, chs 3–4.

the effects of social conditions on law as well as the effect of law on society, but they emphasise the need for a prior revelation of the actual behaviour of lawyers. Julius Stone calls the realist movement a 'gloss' on the sociological approach[2]. It is part of that aspect of sociology, dealt with in the last chapter, which treats law as a given social phenomenon. Its distinctive feature is the stress that it lays on studies of the behaviour of judges[3].

'Theory' is a means towards understanding, and the test of scientific theory lies in predictability. To understand what 'law' is, one should be able to predict how judges decide cases. Many factors contributed to this spot-lighting of the American judiciary. One is the check imposed upon legislative power by the American Constitution. The judges interpret the Constitution and have power to quash legislation in conflict with it. It is also true that American judges have not enjoyed quite that degree of trust and confidence as their British counterparts. A possible reason is that judges in the lower courts are elected, which opens the door to political influence[4]. Again, American legal institutions are young compared with those in Great Britain. The days when judges were consciously building up the law are still fresh in the minds of American jurists. It is therefore less easy for them than for British jurists to think of the judicial function as being a mechanical application of rules. Also, the divergent and separate common law systems in the different states are evidence of the creative function of the judges. How could these systems have developed along different lines from a common starting point were it not for the creative faculties of judges[5]?

At one time there was a tendency to regard the movement as a thorough-going attempt to dispense with the 'oughts' of the law. Only the 'reality' of law matters in fact, and 'reality' is what actually happens and no more. Ideas of 'ought' and such like were not allowed to distort the perception of clear, simple fact.

The realist approach is highly empirical. Law, ie the decisions of judges, is the product of ascertainable factors. Included among these are their personalities, their social environment, the economic conditions in which they have been brought up, business interests, trends and movements of thought, emotions, psychology and so forth. The importance of the personal element was not new[6], and attention has previously been drawn to the part played by value factors underlying the application of law. Ihering's conversion from his unfinished *Geist* to interests was the truly radical reaction in this direction; and the same might even be said of Pound. The realists gave these, especially the personal element, decisive significance.

Among the techniques, which opened up a new vista in the study of law, the following are the most important. (a) The realists introduced studies of case law from a point of view which distinguished between rationalisation by a judge in conventional legal terminology of a decision already reached, and the motivations behind the decision itself. Unfortunately, the way in which in their early writings they expressed their interest in what judges

2 Stone *Social Dimension of Law and Justice* p 62.

3 For the difference in emphasis, see Radbruch 'Anglo-American Jurisprudence Through Continental Eyes (1936) 52 LQR 530 at 541-542.

4 See Dienstein *Are You Guilty?*, and Vanderbilt CJ 'Court System Reform: a Pressing Problem' *Time* February 21 1955.

5 For an account of these factors, see Goodhart 'Some American Interpretations of Law' in *Modern Theories of Law* 1.

6 See eg Gray *The Nature and Sources of the Law* p 226. and p 221 et seq ante.

actually do (decisions), rather than in what they say they do (reasoning), did create the impression that they were stressing the latter to the exclusion of the former. (b) The inquiry into the motivation behind decisions opened up further lines of investigation. So, the study of the personalities, upbringing and psychology of judges and jurymen assumed significance. (c) The realists also study the different results reached by courts within the framework of the same rule or concept in relation to variations in the facts of the cases, and the extent to which courts are influenced in their application of rules by the procedural machinery which exists for the administration of the law.

'Paper rules' do not produce certainty

This assertion was hardly new, but the way in which it was presented in the early days created an impression that realists were seeking to expel rules altogether.

The seeds were sown in a paper by Mr Justice Holmes (1841–1935) in 1897, in which he put forward a novel way of looking at law. If one wishes to know what law is, he said, one should view it through the eyes of a bad man, who is only concerned with what will happen to him if he does certain things. The traditional description of law is that it consists of rules from which deductions are made.

> 'But if we take the view of our friend, the bad man, we shall find that he does not care two straws for the action or deduction, but that he does want to know what Massachusetts or English courts are likely to do in fact. I am much of his mind. The prophecies of what the courts will do in fact and nothing more pretentious are what I mean by the law'[7].

Mr Justice Holmes was in no sense purporting to give a final definition of law, or do more than give a description suitable for the context in which he was writing. The statement that law is only what courts do is iconoclastic, and suggests that ethics, ideals and even rules should be put on one side. Holmes himself had no such intention, for in the same paper he proceeded to insist on the need to restrict the area of uncertainty and on the need for more theory. 'We have too little theory in the law' he said 'rather than too much'[8]. Nor did he, at the time when he wrote, have any suspicion that he would be hailed as the prophet of a new faith. Yet such was his fate. Another pioneer of the new fashion in thinking was Gray (1839–1915), who drew a distinction between law and source of law. The former is what the judges decide. Everything else, including statute, are only sources of law until interpreted by a court[9]. Pushed to its logical conclusion, the obvious implication of this is that even a judicial decision is 'law' only for the parties in the instant dispute and thereafter becomes a 'source of law', since everything will depend on the interpretation that is put upon it in a later decision.

Frank's *Law and the Modern Mind* (1930)[10] is perhaps as typical of early

7 Holmes 'The Path of the Law' in *Collected Legal Papers* at p 173.

8 *Holmes* at p 198.

9 He defined 'the law' as follows: 'The law of the state or of any organised body of men is composed of the rules which the courts, that is, the judicial organs of that body lay down for the determination of legal rights and duties': Gray *The Nature and Sources of the Law* p 84. He said of statute that 'the courts put life into the dead words of the statute': p 125. Other 'sources' include expert opinion, customs and public policy.

10 By the time of the British edition in 1949 his views had undergone some modification. Accordingly, while leaving the original text intact, he included a lengthy Preface indicating his revised opinions.

realism as any other work of that period. His main attack was originally directed at the myth of achieving certainty through legal rules. The traditional picture of a legal order is that rules impart to it at least some measure of certainty and uniformity. There is a difference, pointed out by Beale, a great American jurist, between rules and judicial decisions. The 'law' consists of rules; a judicial decision is in no sense the only law, because it is given by virtue of a rule. Frank was vehement in attacking this notion. In the first place, if judgments were so easy to forecast, no one but litigious maniacs would ever go to court. It is quite untrue to suggest that uncertainty stems from uncertainty in rules. In the majority of cases, even where there is some rule which can be applied, two opposite conclusions are perfectly possible. He gave two examples to contradict Beale's thesis that law is distinct from judicial decisions[11]. The Supreme Court in 1917 was equally divided on the question of the validity of a certain statute. In 1923 the Court by a majority declared it to be invalid. In the meantime the personnel of the Court had varied several times, and had the matter come up between November 1921 and June 1922 the decision would have gone the other way. What, then, was the law during the period from 1917 to 1923? The answer would surely have varied according to the date when the question was asked, and according to guesses as to the personnel of the Supreme Court. His other example was where the Kentucky State Court took one view of the law of Kentucky on a particular point, while the Supreme Court took a different view of the law of Kentucky on the same point. The question What was the law? depended on whether it was asked of the Supreme Court or the Court of Kentucky. Law, therefore, cannot be divorced from judicial decisions; it is not, in the words of Holmes, 'a brooding omnipresence in the sky'. Frank rejected such objectifications of the law, which he despised as 'Bealism'[12].

Frank suggested that this craving for certainty and guidance, which men seek in rules, may stem, in part at any rate, from the yearning for security and safety which is an inescapable legacy of childhood. The child puts his trust in the power and wisdom of his father to provide an atmosphere of security. In the adult the counterpart of this feeling is the trust reposed in the stability and immutability of human institutions. Frank suggested that the quest for certainty in law is in effect a search for a 'Father-symbol' to provide an aura of security, and although he attributed great prominence to this factor, he offered it only as a 'partial explanation' of what he called the 'basic myth', and listed fourteen other explanations as well[13]. He called on lawyers to outgrow these childish longings for a 'father controlled world', and to follow the example of Mr Justice Holmes, the 'completely adult jurist'.

Rules, then, are merely word-formulae. If they are to have any meaning at all, such meaning has to be sought in the facts of real life to which they correspond. Frank adopted a quotation from Holmes:

> 'We must think things not words, or at least, we must constantly translate our words into the facts for which they stand if we are to keep to the real and the true'.

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11 Frank *Law and the Modern Mind* pp 50, 51.

12 Frank p 55.

13 *Frank* Preface pp xxi-xxii, Part I, ch 2, and Appendix I, p 263. The other explanations are: the religious impulse, the aesthetic impulse, professional habits, protection of vested interests, instinct to seek security and certainty, interest in peace and quiet, imitation, devotion to custom, inertia, laziness, stupidity, mental structure, language and word-magic, the Barry-Watson theory.

If the 'facts' in the world which correspond to talk about law are actual decisions this yields a simple picture of law. Frank's original view was that 'law on any point is either (a) actual law, ie a specific past decision as to that situation, or (b) probable law, ie a guess as to a specific future decision'[14]. Later he showed a reluctance to use the word 'law'.

> 'Instead', he said, 'I would state directly—without an intervening definition of that term—what I was writing about, namely (1) specific court decisions, (2) how little they are predictable and uniform, (3) the process by which they are made, and (4) how far, in the interest of justice to citizens that process can and should be improved'[15].

The above passage, taken from the Preface added nineteen years after the original version, represents a modification of Frank's position, or, alternatively, an attempt to dispel misconceptions about it. Shortly after the first publication, however, statements such as the distinction between 'actual' and 'probable' law not unnaturally created a certain impression, which touched off controversy. In reply to Roscoe Pound's attack Llewellyn protested that his criticism was beside the point as it was not founded on what the realists had actually said, but on what they were supposed to have said[16]. The realists were at least guilty of over-statement; and whether misconceived or not, the polemic is a fact of history, which had the merit of inducing some healthy re-thinking and clarification by both sides. Much of the heaviest fire was brought to bear in defence of rules against a real or imagined onslaught on their existence.

Did the early realists reject rules? It is not clear how many did, if any[17]. The importance of rules may be questioned, but that is a matter of degree. To assert that a judge's 'hunch' determines the way in which he manipulates 'paper rules' and guides the logic of justifying it is unexceptionable; but to assert or imply that 'paper rules' are illusory and that the 'hunch' reigns supreme, is too strong a statement. Judges are largely bound by rules and have little choice, whatever their sympathies; and even when they circumvent rules, they do so in a manner which conceals the fact that they are doing so. In other words, the 'hunch' only operates within the framework of the rules. In another sense, the assertion that the 'hunch' is supreme goes scarcely far enough, for the 'hunch' is itself the product of standards, patterns of behaviour, concepts and rules. Suppose that X rides off on the first bicycle which he finds parked in the street, and which Y had placed there a short while before. There can be no doubt that in an action by Y against X the 'hunch' would come down in favour of Y, because it is born of ideas about ownership, rights of possession and so on. The importance of rules can be demonstrated in another way by asking, How does one know who is a 'judge'? The point is that the position of a judge and, indeed, of every other official is defined by rules. The realists properly drew attention to many factors that influence the judges apart from rules. They rightly indicated that it is fallacious to regard what the judges *say* as an infallible guide to what

14 *Frank* p 46.

15 *Frank* Preface p vi.

16 Pound 'The Call for a Realist Jurisprudence' (1931) 44 Harv LR 697, answered by Llewellyn 'Some Realism about Realism: Responding to Dean Pound' (1931) 44 Harv LR 1222 (reprinted in *Jurisprudence: Realism in Theory and Practice* ch 2). Llewellyn charged Pound with failing to identify the individuals who held the views that he attacked.

17 Llewellyn did not, even in the early days. This is now clear from his later *The Common Law Tradition*, and an unfinished book, *The Theory of Rules*. See *Twining* App B p 488.

they *do*. Yet, it is equally fallacious to assert that what judges say can *never* be a guide to what they do; they sometimes say that they are bound by rules because their decisions have in fact been so governed. The point is that the reasons which particular judges give for doing certain things are very much a part of what they do. To be realist in the full sense of the word would require that allowance be made for the way in which non-realist judges behave, which includes their adherence to rules. So, if anyone were to reject rules, he would be more unrealistic than 'traditionalists'. Much of the trouble seems to stem from misleading impressions created by the way in which some realists expressed themselves, especially in their earlier works. Perhaps, what they were doing was to illustrate the tension between what judges do (pronounce decisions) and who they are (people with human responses).

Preoccupation with the hunches of individual judges tended to obscure the fact that judges do agree by and large on certain yardsticks of evaluation, and also the fact that they consciously strive to put aside personal considerations. Shared values produce an extensive and impersonal background against which instances of personal prediliction are few. Again, a quirk may manifest itself on some occasions and not others and it would be misleading to exaggerate its significance. The point is that rules do act as a brake on caprice. The realists succeeded in filling a minute fraction of the picture of judicial action by looking only at personal and environmental factors; the pressure of rules and other impersonal factors also play a decisive part[18].

A rule is more abstract than a judicial decision and to that extent may be thought to be farther from 'reality'; but both are the concern of lawyers. In cases which never come before the courts they have to advise their clients as to the law. It is true that here, too, much of what is stated to be law has been the subject of previous judicial decisions; but immediately after a new statute comes into force, and before it comes before the courts, it would be possible for a lawyer to advise his client that a new rule of law has superseded the old rule. To argue that it is only a statement as to 'probable law' is unrealistic. A great many daily transactions go forward and are governed by what everyone takes to be 'law' even though few of them ever reach the tribunals.

The contention that 'laws' are only what judges and officials do is a somewhat unusual meaning of the word. Statutes and precedents are followed *because* they are 'laws' already. When it is stated that statutes are accepted by the courts as capable of imparting to propositions the quality of 'law', this implies that a statutory rule *will* be accepted by them as 'law'. Gray and Frank appeared to say that the stamp of 'law' is only applicable after the judge has actually decided; which is not the accepted usage. The fact that judges interpret statutes and precedents and keep shaping and reshaping their contents does not mean that they are not 'laws' until interpreted. Clay is clay before, during and after it has been moulded. Moreover, why is it 'realistic' to apply the word 'law' at the point of interpretation and no other? A decision is no more 'real' in providing the damages, property, or whatever else is sought, than a rule. For the decision has still to be carried out and the officials charged with that task may be bribed, the defendant may be bankrupt etc. Another difficulty is that it may be abundantly clear in advance that because of the insufficiency of evidence the court is certain to acquit, for example a thief, and in fact does acquit him. If law is what a

18 See pp 213–215, 221–222 ante.

court does, or prediction of what it will do in fact, would it be said in a case such as this that there is no law forbidding theft? If it is said that a court *might have* convicted had there been sufficient evidence, that immediately implies the presence of some rule, independent of the decision, on the basis of which a conviction could have been obtained. To say that the actual decision alone becomes 'law' necessarily means that it forthwith ceases to be 'law' for the future, since it will in its turn be subjected to interpretation and be embodied in another decision. 'Law' then, in the words of one critic, 'never *is*, but is always about to be. It is realised only when embodied in a judgment, and in being realised expires'[19].

Any interpretation based only on things which have come before tribunals overlooks the point that law is very much concerned with regulating future behaviour. Such regulation is guided by policies formulated in prescriptive propositions, accepted as 'laws' by courts. This being the case, the expulsion of the 'ought' from a concept of law is impossible. As pointed out, even the idea of law as what judges do should include the reasons for their actions, which would bring in their acceptance of prescriptive rules. It may be that some realists, at any rate, were seeking to derive *descriptive* rules of judicial behaviour, in which case they and the 'traditionalists' were talking about different things.

Whatever merit there was in Frank's assertion that devotion to rules is a manifestation of a childish craving for certainty and fixity, it would seem that it was only he who craved for a 'Father-symbol' in wanting to pin the word 'law' to something definite and fixed, namely, actual decisions. Few, if any, 'traditionalists' asserted that rules can guarantee certainty; on the contrary, they avow the unavoidability and indeed necessity for some measure of flexibility and discretion. To say that law should aspire towards economy of thought and precision is one thing; to say that nothing is law which is not fixed and precise has no basis whatever. A denial that certainty in law can be achieved through rules is no reason why these may not be *called* 'law'. The point would not be worth mentioning were it not for another misleading impression. Frank's statement, quoted earlier and echoing Gray, that until a court has pronounced on a matter there is only 'probable law', suggested that even a statutory rule is not 'actual law' until it has been the subject of a judicial decision. To change the accepted meaning of the word 'law' in this way would involve rewriting textbooks and reports to no purpose. For rules would still remain, though not called 'law'. In one place Frank was driven to admit the existence of rules, though he deemed it a mistake to call them 'law'[20], thereby reducing the matter to a verbal level. In fairness to Frank, it must be pointed out that this was, at worst, a misleading way of expressing himself. In his later thoughts he forcibly reaffirmed the importance of rules, and in his own words, 'backed out of that silly word battle'[1] which is an admission that he had created a misleading impression.

To look at law solely from the point of view of one who is concerned with predicting judicial reactions is too narrow. If, eg one were to regard law as a judge, it would be futile to say that it consists of predictions as to how he himself will decide and, moreover, his own past decisions and those of other judges would only comprise a fraction of the law in his view. From the point of view of a legislator law will appear, not so much as what judges do, but

19 Cardozo *The Nature of the Judicial Process* p 126.

20 *Frank* pp 130–131.

1 *Frank* Preface pp vi and xxiv.

what they are made to do. Further, the realist viewpoint is helpful in a system which leaves considerable independence to the judiciary. In a system in which judges are strictly controlled and in which their discretion is greatly reduced, the focus of attention will inevitably shift away from the judges to those who do wield power and discretion.

From all this it should be clear that up to this point the realists said nothing about law which would be denied by 'traditionalists'. That might have been the case had they been able to expel the 'ought' or rules from the law, but they did not succeed in doing either. They denied that certainty can ever be completely achieved through rules, which no 'traditionalist' will controvert.

Once the rule controversy is put on one side, there is a better chance of assessing the solid contribution of the realists, which was to furnish a valuable extension to the work of sociologists. They were seeking the factual bases of decisions with a view to sociological description, which investigates the values and forces that provide the motive power for the working of rules as instruments of social regulation. A study of values alone will not explain the view which particular judges are likely to take of them, nor the degree of importance they may individually attach to one value or another. It is here that the realists were able to uncover innumerable personal and other factors that on occasions determine judicial choice and gave them prominence. In the end, however, the 'is' and the 'ought', the open texture of rules, values, morality, sociology and psychology have all become part of the realist cosmos. As someone remarked, 'We're all realists now'. It is not that all these other aspects have quietly been crowding in under the realist umbrella, but that the realists have been enlarging their umbrella to cover them.

No account of realism can be complete without some mention of Karl N Llewellyn (1893–1962), whose work spanned the movement from its beginnings in the 1930s until his death in 1962. Some of his early writings, too, lent themselves to misinterpretation, but these should be viewed as part of the whole development of his thought[2]. He outlined the principal features of the realist approach as follows[3].

(1) There has to be a conception of law in flux and of the judicial creation of law.

(2) Law is a means to social ends; and every part of it has constantly to be examined for its purpose and effect, and to be judged in the light of both and their relation to each other.

(3) Society changes faster than law, and so there is a constant need to examine how law meets contemporary social problems.

(4) There has to be a temporary divorce of 'is' and 'ought' for purposes of study. This is necessary in order to clarify the level of discourse and to show how each figures in the judicial process and, indeed, to show ultimately how pervasive is the role of the 'ought'. Perhaps, Llewellyn was also reacting against the belief in a transcendent morality inherent in law. Ideas of justice and teleology are not expelled altogether, but should be put on one side while investigating what the law is and how it works. By this divorce both processes will be

2 On this see Twining 'Two Works of Karl Llewellyn' (1967) 30 MLR 514; (1968) 31 MLR 165, and in more detail in *Karl Llewellyn and the Realist Movement*.

3 Llewellyn 'Some Realism About Realism—Responding to Dean Pound' (1930–31) 44 Harvard LR 1222, reprinted in *Jurisprudence* ch 2.

improved. The realists are interested in the aims and ends of the law, and it was precisely a desire to improve the law that brought the movement into being. Adequate reform, however, has to be preceded by an examination of how the law in fact operates. Such an investigation will be imperfect and clouded if done with 'an intrusion of Ought-spectacles during the investigation of the facts'.

(5) The realists distrust the sufficiency of legal rules and concepts as descriptive of what courts do. This was always a cardinal point in their approach to law.

(6) Coupled with this is a distrust of the traditional theory that rules of law are the principal factors in deciding cases. The realists have drawn attention to many other influences which, in their view, play a decisive part. To define law solely in terms of legal rules is therefore absurd.

(7) The realists believe in studying the law in narrower categories than has been the practice in the past. Different results can be reached within the framework of the same rule or concept in different branches. They feel that part of the distortion produced by viewing the law in terms of legal rules is that rules cover hosts of dissimilar situations, where in practice utterly different considerations apply. So, in the law of contract, topics such as mistake and frustration must be studied in small fields according to their application in different types of transactions. Possession would be another good example[4].

(8) They also insist on the 'evaluation of any part of the law in terms of its effects' and on 'the worthwhileness of trying to find these effects'.

(9) Finally, there must be a sustained and programmatic attack on the problems of the law along the lines indicated above.

As Llewellyn admitted, these points were not new. The first three furnished an obvious foundation for any sociological approach to jurisprudence. Perhaps, the main characteristics of realism lay first, in the prominence ascribed to the fourth, fifth, sixth, seventh and eighth points; and, secondly, in the amalgamation of all nine points into a working programme and the actual carrying out of research along these lines.

Improving fact-finding processes in trial courts

Frank urged that too much attention has traditionally been devoted to the processes in appellate courts to the neglect of lower courts. Accordingly, some realists have urged that research be broadened so as to include the activities of lower courts and the relation between their work and those of upper courts. Knowledge of what goes on in the lower courts is needed in order to know what law 'means to persons in the lower income brackets'. Frank thought that there is as much of a contrast between the picture of the law that one gets by studying the work of appellate courts to the exclusion of a study of trial courts as there is between an account of manners in Buckingham Palace and in a New York subway. His comment on Cardozo's account of the nature of the judicial process is:

4 See ch 13 ante.

> 'Cardozo, most of his days an appellate court lawyer or appellate court judge, suffered from a sort of occupational disease, appellate-court-itis'[5].

Frank accordingly divided realists into two camps, described as 'rule skeptics' and 'fact skeptics'. The 'rule skeptics' rejected legal rules as providing uniformity in law, and tried instead to find uniformity in rules evolved out of psychology, anthropology, sociology, economics, politics etc[6]. Kelsen, it will be remembered, maintained that it is not possible to derive an 'ought' from an 'is'. The 'rule skeptics' avoided that criticism by saying that they were not deriving purposive 'oughts', but only predictions of judicial behaviour analogous to the laws of science. Frank called this brand of realism the left-wing adherents of a right-wing tradition, namely, the tradition of trying to find uniformity in rules. They, too, had to account for uncertainty in the law on the basis of rule-uncertainty. The 'fact skeptics', among them Frank, rejected even this aspiration towards uniformity. It savoured of 'Bealism'. So he abandoned all attempts to seek rule-certainty and pointed to the uncertainty of establishing even the facts in trial courts. These have to be established largely by witnesses, who are fallible and who may be lying. It is impossible to predict with any degree of certainty how fallible a particular witness is likely to be, or how persuasively he will lie. All persons, judges and jurymen alike, form different impressions of the dramas unfolded before them; an inflexion or a cough may awaken subconscious predilictions, varied idiosyncrasies and prejudices. Eternal verities are not to be erected on such a basis. Frank alleged that all those who write on legal certainty, not excepting the 'rule skeptics', overlook these difficulties.

> 'They often call their writings 'jurisprudence'; but, as they almost never consider juries and jury trials, one might chide them for forgetting 'juriesprudence''[7].

Frank, in his later writings, notably *Courts on Trial*, summed up his objective as being the demonstration, not of the nature of law, but of the difficulties and problems that beset trial rather than appellate judges, and of the inadequacy of existing methods of trial[8]. Not only have the realists given an insight into the judicial process, but they have encouraged and enlisted the aid of statistical inquiries. By all means let the illusion, if indeed it persists, that rules can secure certainty be dispelled, and let daylight be shed on those factors that make for flexibility and variation with a view to the removal of caprice and prejudice; but nothing in all this impairs the prestige of rules or the prescriptive function of law.

Realism as a technology

A decisive stage in the development of Llewellyn's thought came with his notable anthropological investigation in collaboration with Hoebel into the 'law-ways' of the Cheyenne Indians[9], which broke fresh ground in

5 Frank *Law and the Modern Mind* Preface p xxvi. He would have levelled a similar charge against Llewellyn, another realist, who in *The Common Law Tradition. Deciding Appeals*, concentrated exclusively on appellate courts.

6 Twining speaks of a distinction between 'textbook formulations of legal rules and scepticism about the very existence of any rules or principles', and that Frank's phrase 'rule-skepticism' obscures this: pp 32, 408.

7 *Frank* Preface p xi.

8 *Frank* Preface p xxv, and *Courts on Trial*. The *Sacco-Vanzetti* affair 1921-1927, provided an early and powerful stimulus to inquiries into the fairness of trial processes.

9 Llewellyn, Hoebel *The Cheyenne Way* (1941).

anthropology by introducing the case-method of approach. The direction of field-work for this undertaking grew out of his early realism, while his later realism was much influenced by the conclusions that were reached. In particular, the 'law-jobs' theory was evolved side by side with this project[10]. It can be explained as follows. Certain needs have to be met if a group is to survive and achieve its purpose, namely (a) adjustment of trouble-cases, which gives off new material for doing other law jobs. This job is comparable to running 'garage-repair' work. (b) Preventive channelling of conduct and expectations so as to avoid trouble. (c) Preventive rechannelling of conduct and expectations so as to adjust to change. The importance of both these is to be seen in the resistance to certain types of new legislation, eg racial integration. Such legislation introduces 'law' by which trouble-cases are to be decided, but it may fail to channel conduct in advance in accordance with it and so prevent future trouble-cases. (d) Allocation of authority and arranging procedures, ie arranging the 'say' and the manner of its saying (authorities and procedures for decision-making). (e) Providing incentive and direction within the group, ie the 'whither' of the group as a whole. (f) Ways of handling legal tools in these various law-jobs and their upkeep and improvement—the job of juristic method[11]. There can never be one hundred per cent fulfilment of each job, so one difficulty is in knowing at what point shortcoming amounts to failure. Does 'groupness' cease if there is failure in any one or more of the jobs, and, if not, at what point does it cease? Llewellyn became increasingly preoccupied with the problem of method and never ceased to reiterate that realism was not a 'philosophy' but a 'technology'; 'see it fresh. See it as it works'.

He stressed the concept of 'institution', which is 'in the first instance an organised activity built around the doing of a job, or cluster of jobs'[12]. Law-jobs are done by institutions. This makes behaviour the focal point of his jurisprudence, and he probably meant no more than this when he said early on:

> 'This doing of something about disputes, this doing of it reasonably, is the business of law. And the people who have the doing in charge, whether they be judges or sheriffs or clerks or jailers or lawyers, are officials of the law. *What these officials do about disputes is, to my mind, the law itself*'[13].

This was not offered as a credo and was no more than a reaction against what went before. An institution always has a job to do and to do it well. There is, he says, a leeway to *be* wrong or right, but a leeway to *do right* is never a leeway to *do wrong*. Performance of law-jobs is one aspect of the task of law-government in society. There must then be some distinction between law and other social institutions. This lies in the fact that law requires specialists and procedure, supremacy within the group, effectiveness and regularity[14].

10 Llewellyn 'The Normative, the Legal and the Law-jobs: the Problem of Juristic Method (1939-40) 49 Yale LJ 1355; *Law in our Society*.

11 Llewellyn set this to verse: *Jurisprudence* p 214.

12 Llewellyn *Law in our Society* p 21.

13 Llewellyn *The Bramble Bush* (1930) p 3. He later modified this saying that this was 'a very partial statement of the whole truth': 2nd edn p 9. For the continuity of his thought from *The Bramble Bush* to his final position, see Llewellyn *The Common Law Tradition. Deciding Appeals* Appendix B.

14 Llewellyn 'The Normative, the Legal and the Law-jobs' (1939-40) 49 Yale LJ 1355 at 1364; *Law in our Society* p 21.

Predicting judicial decisions

Towards the end Llewellyn was concerned with what he saw as a growing loss of confidence in appellate courts because of the unpredictability of their decisions. This, he thought, was unjustified, so in *The Common Law Tradition. Deciding Appeals*, he sought to restore confidence by showing that there is a 'reckonable' quality about appellate court work. He agreed with Frank to the extent of distinguishing between work in trial courts and appellate courts, but whereas Frank scorned the latter, he concentrated on them. Craftsmanship, he maintained, is possible in litigation. 'A craft is a minor institution. A *major* institution differs in that its job-cluster is fundamental to the continuance of the society (or group) with typical resulting complexities'[15]. Crafts evolve around such major institutions. Craftsmanship in law includes not only the various skills of lawyers, but also tradition, ethos, training etc; and the way in which legal craftsmen use their skills determines their 'style'. There are various ways of dealing with precedents, such as following, distinguishing, expanding and re-directing[16]. A judge's handling of them is not capricious or arbitrary, but is guided by his 'situation-sense', which is a key-concept as well as being the most obscure. It is more than just 'the view taken of the facts'. It seems to include stating the facts in categories which are as close to the actual facts giving rise to the dispute, together with an understanding of the whole background, ie the trade, standard practices etc, and the prevailing opinions and values[17]. The doubt about this is that, whatever it means, a situation-sense may be forthcoming in some types of disputes, but not in others. Apart from situation-sense, a check on arbitrariness and caprice is also maintained by fourteen steadying factors, relating to the whole ethos of the procession, tradition, training and techniques[18]. 'Reckonability' is said to depend on three laws, of which the first is the 'Law of Compatibility', where the application of an appropriate rule is compatible with sense. This increases 'reckonability' of the decision and the direction of its *ratio*. Secondly, there is the 'Law of Incompatibility', where the above does not obtain and where the ground of decision lies outside the rule. Thirdly, there is the 'Law of Singing Reason', where there is a rule with a right 'situation-sense' and clear scope and thus gives maximum 'reckonability'. The judicial craft which results from a right situation-sense, reason and justice is called the 'Grand Style', which is overtly functional and purpose orientated, as opposed to 'Formal Style', which is overtly concerned only with the logical application of 'paper' rules. The 'Grand Style' is one of the fourteen major steadying factors alluded to above, and Llewellyn relied heavily on it to produce 'reckonability'.

From all this it will be evident that Llewellyn's position was far removed from that of Frank. It has been doubted whether there was in fact a crisis of confidence and, if so, whether he succeeded in restoring confidence by

15 Llewellyn *Law in our Society* p 21.

16 Llewellyn gave sixteen distinguishing techniques and sixteen for providing 'a fresh start'; and thirty-two techniques of following and applying: *The Common Law Tradition* pp 77–91.

17 *Turning* pp 226–227.

18 (1) Law-conditioned officials, (2) legal doctrine, (3) known doctrinal techniques, (4) responsibility for justice, (5) one single right answer, (6) an opinion of the court, (7) a frozen record from below, (8) issues limited, sharpened and phrased in advance, (9) adversary argument by counsel, (10) group decision, (11) judicial security and honesty, (12) a known Bench, (13) the general period-style and its promise, (14) professional judicial office: *The Common Law Tradition* pp 19 et seq.

re-establishing the 'reckonability' of appellate decisions. The case law material used in the book consists of a small percentage of appeals. It has been estimated that 70–90 per cent of appeals are 'foredoomed' and 'not worth appealing'. This fact alone, it has been pointed out, 'would have disposed more satisfactorily of the alleged crisis of confidence than his attempts to show that the Grand Style promotes reckonability'[19]. Further, the 'situation-sense', which appears to be basic to this thesis, is too vague, being in every case the product of a shifting balance. Be that as it may, long before the publication of this work, Llewellyn had given practical demonstration of his jurisprudence in the great and successful Uniform Commercial Code of which he was one of the chief architects from 1937 to 1952. His biographer points out that in it may be seen how 'Grand Style' thinking can be utilised, not only in judicial opinions, but also in legislation[20]. Perhaps, one may best sum up by saying that *The Common Law Tradition* is Llewellyn's *magnum opus*, but that the Uniform Commercial Code is his monument.

Mechanical prediction: jurimetrics

In recent years attempts to predict judicial behaviour have taken a mechanical turn for which the term 'jurimetrics' has been invented[1]. It takes the form of different kinds of investigations into legal phenomena by using symbolic logic, behavioural models and mechanical aids[2]. Boolean algebra is used to analyse complex sets of facts, prediction of behaviour has moved away from that of the individual to that of groups, and the use of computers is being explored increasingly. These new directions are not necessarily dependent on realism, but may be regarded as developments along its line.

THE GROUP APPROACH[3]. A group, eg the American Supreme Court, has group reactions. It is difficult to predict the behaviour of an individual, but that of a mass of people is easier. Student groups have been used as models of actual social groups. It is not enough merely to take account of the way in which the members of a group vote; it is necessary to consider the influence of personalities and of reasoned argument. In this connection two types of leadership are thought to be significant: task-leadership, which is directed towards solving a given problem efficiently, and social-leadership, which provides a friendly atmosphere conducive to solving it.

This kind of inquiry can only work so long as there is a constant membership within the group. If this varies, as with the Court of Appeal or House of Lords, and there is no knowledge in advance of the precise composition of the group in a given case, there is no basis for prediction. There is also the difficulty of obtaining adequate information about the inner workings of a group. What is available tends to be fragmentary at most, eg memoirs and biographies, and these, in any case, are not available until after death. Even if it can be discovered who is the task- or social-leader, it is not clear how

19 *Twining* p 250.

20 *Twining* ch 12 and p 340.

1 By Loevinger 'Jurimetrics—the Next Step Forward' (1949) 33 Minn LR 455.

2 Kayton 'Can Jurimetrics be of Value to Jurisprudence?' (1964-65) 33 Geo Wash LR 287; Meyer 'Jurimetrics: the Scientific Method in Legal Research' (1966) 44 Can BR 1; Beutel *Experimental Jurisprudence: Jurimetrics* (ed Baade).

3 Murphy 'Courts as Small Groups' (1965-66) 79 Harv LR 1565; Synder 'The Supreme Court as a Small Group' (1958) 36 Social Forces 232; Schubert *Judicial Behaviour* (1966) Geo Wash LR 593.

one could tell whether these tasks have in fact been performed as well as they should, or performed at all. The use of models could be misleading. When using scientific models, which are simplified abstractions of fixed phenomena, the corrections that have to be made are fixed too. Where, however, the phenomena fluctuate, as with human beings and social phenomena generally, it is impossible to know what corrections need to be made. For this purpose models are useless.

COMPUTER PREDICTION. It has also been suggested that in so far as there is consistency in decision and attitude, the prediction of judicial opinions by computers becomes possible. Computer techniques in this connection have been of fact studies (correlation between the circumstances in particular cases and decisions given in them) and attitude studies (correlation between personal attitudes to policies and decisions given). With regard to the former, it is said that the acceptance of a fact by an appellate court rests on identifiable conditions surrounding the way in which it was presented to the trial court[4]. Further, if the accepted facts are combined in certain ways, the decisions will go one way. Personal attitudes are also said to be capable of being scaled by means of scalogram analysis[5]. The basis of this is that a person who reacts positively to a weak stimulus will react similarly to any stronger stimulus, while a person who reacts negatively to a strong stimulus will react similarly to any weaker stimulus. If a line of cases can be made to scale in this way, this would show that a set of values is shared by members of that court. The future behaviour of that court then becomes predictable, as well as the probable effects of a change in composition.

It is submitted that such attempts at prediction seem destined to fail. The personal element just cannot be eliminated from judicial decisions. (a) Everything depends on how facts are viewed and stated. The same set of facts can be stated in different combinations and at different levels of generality. No mechanical aid can predict which combination or level is likely to be chosen. (b) Different *rationes* can be extracted from a decision depending on whether the later court wishes to see resemblances or differences. If it is known which way a judge is going to regard a rule, a computer is not needed; if it is not known, a computer is useless[6]. Another consideration is that the predictability of judicial decisions depends upon consistency in judges' attitudes to values; but people's attitudes change with age and experience[7]. Moreover, computer prediction can only work on the basis of reported decisions, the majority of which, especially those of lower courts, are unreported. This means that the bulk of a judge's early decisions are unlikely to be available, so the basis for predicting his reactions is woefully inadequate. Prediction also requires constant working material; it cannot operate when new matter

4 Kort 'Quantitative Analysis of Fact-patterns in Cases and their Impact on Judicial Decision' (1965-66) 79 Harv LR 1595; Nagel 'Predicting Court Cases Quantitatively' (1965) 63 Mich LR 1411; Schubert *Quantitative Analysis of Judicial Behaviour; Judicial Decision-making* (ed Schubert): Becker *Political Behaviouralism and Modern Jurisprudence.*

5 Tannenhaus 'The Cumulative Scaling of Judicial Decisions' (1965-66) 79 Harv LR 1583.

6 'It is the judge's view of the past and the needs of the present which determine his decision, and neither a study of broad attitudes derived from his decision pattern by external observers, nor a characterisation of 'facts' projected into the decision by observers can hope to correspond closely enough either with his view of the past, or still less with his view of the needs of the future': Tapper *Computers and the Law* p 251.

7 Schmidhauser 'The Justices of the Supreme Court: a Collective Portrait' (1959) 3 Midwest J of Pol Sc 1.

is being introduced, whether by legislation or creative decisions. Computers are of no help here. Finally, even if computer prediction were possible, a by-product may well be what is known as the 'Heisenburg feed-back effect'[8]. Where computer analysis has indicated that a judge's decision will be such and such in a particular case, or type of case, that very fact could induce him either to decide accordingly as if in submission to fate, or else to decide the opposite deliberately so as not to be dictated to by a machine. To produce either reaction detracts from the judicial function.

Even the possibility of trial by computer has been canvassed, the choice being given to the defendant[9]. All that needs to be said on this is that the data programmed into a computer will reflect the personal quirks of the programmer, which will be substituted for the quirks of the judge. At least, the judge works in the open, whereas the programmer works behind the scenes.

SCANDINAVIAN REALISTS

The American Realists were practising lawyers or law teachers, who sought to approximate legal theory to legal practice. In Scandinavia the group of jurists known as realists approached their tasks on a more abstract plane and with the training of philosophers.

HÄGERSTRÖM

Hägerström (1868–1939), who may be regarded as the founder of the movement in Sweden[10], has written at length, especially on Roman law, but much of his work is not available in English[11]. His basic position was as follows. He denied the existence of objective values. There are no such things as 'goodness' and 'badness' in the world. The words represent simply emotional attitudes of approval and disapproval respectively towards certain facts and situations. It is only language form that has erected them into absolutes and has created an illusion of objectivity. So, too, the word 'duty' only expresses an idea, the association of a feeling of compulsion with regard to a desired course of conduct. Language form again gives objectivity, eg 'it

8 Heisenberg *Physics and Philosophy* pp 47 et seq. and on the same line Ross *On Law and Justice* p 47.

9 Lawlor (1967) 13, Practical Lawyer 3, 10.

10 For possible earlier origin, see Illum 'Some Reflections on the Method of Legal Science and on Legal Reasoning' (1968) 12 Scand Studies in Law 51, 57 (referring to the influence of Ørsted (1778–1860)). The work of Petrazhitsky anticipated to a remarkable degree the approach of the Scandinavians, but there is no evidence that the latter were influenced by, or were originally aware of his work. This makes the correspondence of their views all the more striking. For his work, see Petrazhitsky *Law and Morality* (trans Babb in 20th Century Legal Philosophy Series vii); Meyendorff 'Leo Petrazhitsky' in *Modern Theories of Law* p 21; Timasheff 'Petrazhitsky's Philosophy of Law' in *Interpretations of Modern Legal Philosophies* p 736, Sorokin 'The Organised Group (Institution) and Law Norms', at p 668, and Laserson "Positive' and 'Natural' Law and their Correlation' at p 434; Northrop 'Petrazhitsky's Psychological Jurisprudence: its Originality and Importance' (1955–56) 104 University of Pennsylvania Law Review 651. For a short critique from a Marxist point of view, see Golunskii and Strogovitch 'The Theory of the State and Law' in *Soviet Legal Philosophy* (trans Babb in 20th Century Legal Philosophy Series v) pp 415–419.

11 A selection of his writings has now been translated into English by Professor Broad and edited by Professor Olivecrona: Hägerström *Inquiries into the Nature of Law and Morals.*

is my duty to do so and so'. Similarly, the idea of 'right' has no factual basis, but derives from a feeling of power associated with it, which has a psychological explanation[12]. This led Hägerström to deny the possibility of any science of the 'ought'. All questions of justice, aims and purposes of law are matters of personal evaluation and not susceptible to any scientific process of examination. In this way many of the traditional problems of legal philosophy become illusory, and must be replaced by an examination of the actual use of legal terms and a psychological analysis of the mental attitudes involved.

Hägerström applied this technique to the study of Roman law[13]. He examined the concepts of Classical Roman law and set forth the thesis that they were rooted in magical beliefs, ie that they were developments of the primitive belief in the power of words to affect happenings in the world of fact. The conception of *obligatio* was, he said, a magical bond, the '*vinculum juris*', giving power to the creditor over the debtor. This power could only be created in special ways, by the use of magic recitations, such as *stipulatio*, and the debtor could free himself from it by performance or by uttering with the creditor's consent another magic formula. Power over property, *dominium* or ownership, was also a magic power. The archaic mode of conveyance, *mancipatio*, with its formal acts and formula asserting title before its acquisition was a ceremony based on magic. Law starts in religion, eg Mosaic Law, and the monopoly enjoyed by the priestly class, the pontiffs, in early law is also evidence of this idea that law is based on magic.

It is possible that Hägerström was making too much of a point which has some substance. It is probably true that adherence to form and ritual is rooted in word-magic, but how far Roman law in the Classical period should be interpreted along such lines is a matter on which opinion should be reserved. Adherence to ritual was not peculiar to Roman law; it is true that in Classical Roman law some of the early forms of law survived, but whatever their origin, the interpretation of Classical law on the basis purely of word-magic is questionable[14]. Professor Olivecrona, a follower of Hägerström, accepts his leader's explanations of Roman law, but he does say *a propos* of modern law generally that people still retain the outer form of word-magic although the inner belief in it disappeared long ago[15]. That remark might well be applied to Classical Roman law.

As with the American Realists, there is hardly a 'school' of Scandinavian realism. Individuals, who are thought to belong to the group, exhibit important differences among themselves. Notwithstanding these, however, they would in the main agree in denying the possibility of a science of justice or values. To them, these are purely subjective reactions, or else reflective of class or political ideology, and it is not possible to construct a science on such a basis.

LUNDSTEDT

Vilhelm Lundstedt (1882–1955) might be regarded as the most extreme of the Scandinavians. Law is simply the fact of social existence in organised groups and the conditions which make possible the co-existence of masses of

12 *Hägerström* p 5.

13 Hägerström *Der römische Obligationsbegriff im Lichte der allgemeinen römischen Rechtsanschauung.*

14 MacCormack 'Haegerstroem's Magical Interpretation of Roman Law' (1969) 4 Ir Jur (NS) 153.

15 See p 50 ante.

people. He attacked metaphysical ideas in every form. Nothing exists which cannot be proved as fact, and he was particularly ruthless in dismissing traditional concepts as being emotive responses or mirages of language. To say that a person is under a duty 'is only a *feeling* or *sentiment* that he *ought* to conduct himself in a certain manner, consequently something quite *subjective*. This subjective element legal writers have been forced to turn into the exact opposite, into the monstrous contradiction: an *objective duty*!'[16]. To say that a person has broken a duty is a farrago of words for the plain fact that he is likely to be punished, or made to pay a sum of money[17]. Similarly, a 'right' is a term for the favourable position enjoyed by a person in consequence of the functioning of legal machinery. Law simply consists of rules about the application of organised force.

The idea of law as a means of achieving justice is chimerical. It is not founded on justice, but on social needs and pressures. Indeed, 'the feelings of justice are guided and directed by the laws as enforced, ie as maintained'[18]. In place of justice Lundstedt substituted the method of 'social welfare', which is 'a guiding motive for legal activities', namely, 'the encouragement in the best possible way of that ... which people in general actually strive to attain'[19]. Judges should think in terms of social aims, not 'rights'[20]. He insisted that these are not aims for which people ought to strive, but those which they are observed to be seeking. They include decent food, clothing, shelter, security of life, limb and property, freedom of action and protection of spiritual interests. The method of social welfare strives to attain the best balance between these and other competing interests without the intrusion of values.

Lundstedt's iconoclasm is extreme. However true it may be that concepts such as duty and right have no verifiable content, they are convenient tools of thought and are used in deciding cases. The wholesale rejection of them, as he advocated, would only distort what actually goes on. Thus, an answer to his view that a right is only a word for the favourable position enjoyed by a person in consequence of the functioning of legal machinery is that everything depends on why a court viewed his position favourably. This is because success in the action depended on the idea of a right[1]. It happens, too, that a person may enjoy a favourable position by virtue of a right even though it is socially undesirable that he should do so[2].

If, as he so vehemently insisted, all conceptual thought is nonsensical, the same must apply to his own concept of 'social welfare'. However, leaving that aside, it is not clear how far the method of social welfare represents the observable pattern of administration and how far it is what Lundstedt himself would have liked to see. Nor does this method seem very different from what other writers have said. In any case, as has been pointed out, balancing interests is just not possible except with reference to yardsticks of evaluation[3].

16 Lundstedt *Legal Thinking Revised* p 62.
17 *Lundstedt* pp 34, 38.
18 *Lundstedt* p 144.
19 *Lundstedt* pp 140 et seq.
20 Lundstedt *Superstition of Rationality in Action for Peace?* p 118.
1 Olivecrona *Law as Fact* (1939) pp 85–86. For a different objection, see pp 91–93; and 'Law as Fact' in *Interpretations of Modern Legal Philosophies* (ed Sayre) ch 25.
2 Eg *Bradford Corpn v Pickles* [1895] AC 587. For a criticism of Lundstedt which seems to miss the point, see G L Williams 'Language and the Law' (1946) 62 LQR 398.
3 See p 435 ante. Cf Lundstedt's own allusion to useful arrangements 'actually evaluated as a social interest' within a given society at a given time: *Legal Thinking Revised* p 137.

The very concept of social welfare is a product of political or socio-moral evaluation. If the actual interests of people are allowed to proliferate to the point of complete social fragmentation and anarchy, that would spell the end of legal activity and, indeed, of social welfare. If this is not to be allowed, then the point at which legal activity has to step in is a matter for decision as to where the line should be drawn, not of observation. Moreover, is a small, but enlightened minority, agitating for reform, to remain outside the endeavour of the social welfare method until, presumably, it attains large enough proportions?

Other Scandinavians have not gone as far as Lundstedt. Even Professor Olivecrona, who perhaps came nearest to his views, does not do so[4]. Indeed, some have reacted sharply against his uncompromising condemnation of any appeal to justice and morality[5].

OLIVECRONA

A less extreme and more acceptable form of scepticism comes from Professor Olivecrona (b. 1897). He expressly refrains from defining law. 'I do not regard it as necessary to formulate a definition of law', he says[6]. 'A description and an analysis of the facts is all that will be attempted'. If one seeks to investigate the nature of law, it begs the question to begin by assuming what it is, and he insists that the facts must be examined first. The method of identifying these 'will be simply to take up such facts as are covered by the expression rules of law'[7].

The question of the validity of law is a matter of much concern to the Scandinavians. Olivecrona approaches it from the angle of bindingness[8]. Law has 'binding force' in so far as it is valid; an invalid law is not binding. This question of the binding force behind law has been a perennial puzzle and is, expressly or impliedly, the foundation of many theories. There is no such thing, says he, as 'the' binding force behind law. Many attempts have been made to find where it resides. Natural lawyers have asserted that it lies in natural law; but if asked why natural law is binding, the answer is a confession of faith. Natural law, whether conceived as an expression of the will of God or as a set of principles based on reason, is said to be binding *per se*. Morality cannot be substituted in place of natural law, for law is treated as binding whether or not it is consistent with morality.

Others have tried to discover the binding force of law in the consent of the governed. This is not wholly true because at no time are the subjects of a system of law asked whether they consent to be bound. Also, it would follow that once consent is withdrawn law ceases to bind, which is not the case.

Another attempt to unravel the binding force is to attribute it to the 'will of the state'. This, too, is imaginary since the 'will of the state' as distinct from the wills of individuals is a myth. The question is whether any individual, or group of individuals, is discoverable in whose will the binding force of law may be said to reside. The answer must be in the negative because,

4 He and Hägerström are the only two jurists who escaped Lundstedt's censure.
5 Vinding Kruse *The Foundations of Human Thought*; Castberg *Problems of Legal Philosophy* pp 110 et seq.
6 Olivecrona *Law as Fact* (1939) p 26.
7 *Olivecrona* p 25, and (2nd edn 1971) pp 3-5; and pp 11-12 ante.
8 *Olivecrona* (1939) Introduction.

in the first place, there never has been and never will be any person or group of persons who can be regarded as having 'willed' the whole law, let alone its binding force. Secondly, it is equally fictitious to imagine that the binding force rests in the wills of legislators or citizens collectively. Such persons have other matters to think of than willing laws or their binding force[9].

It is not meaningful to say that the binding force of law is derived from unpleasant consequences that ensue if law is broken. For unpleasant consequences ensue in a host of situations which have nothing to do with law. A person gets burnt if he puts his hands in the fire, but this does not lead to a binding rule that he should not put his hands in the fire. Conversely, there are occasions when law is treated as binding although unpleasant consequences do not ensue. A person may commit a breach of the law and go undetected, but no one would say that the law is therefore not binding on him. Nor is it satisfactory to say that the binding force is derived from the unpleasant consequences that ought to ensue, for, as Kelsen has shown, the reality of 'ought to ensue' consists of the operation of other rules of law and the binding force of these will in turn have to be sought.

Professor Olivecrona accordingly rejects the idea of 'the' binding force of law as illusory and meaningless. It is not an observable fact in the *milieu* of society. 'The' binding force of law is a mirage of language; it 'exists' only as an idea in individual minds[10]. Laws, too, 'exist' in the form of printed or written words or else in memory. Their importance lies, not in where or how they are stored, but in the fact that they produce behaviour. This results from the fact that most people have a feeling of being bound by law, which is quite different from saying that there is some impalpable binding force existing somewhere outside the mind. It is this feeling of being bound that has to be explained.

Olivecrona accordingly approaches his inquiry by examining the idea of duty, which has been dealt with and need not be repeated[11]. His conclusion, in substance, is that duty involves the idea of action and an imperative mode of expression, and that the feeling of being bound stems from the psychological associations connected with this mode of expression by certain agencies. The picture of law which emerges is of patterns of conduct in imperative form, which are distinguishable from other imperatives by virtue of the nature of the feeling of being bound that is associated with them. This feeling is not the same with regard to any other kind of imperative, eg that one must wear black at funerals. The feeling of being bound by 'law' is psychologically associated with certain agencies when they follow certain procedures, together with the publication of law-texts through certain media, which are assumed to give a true account of them[12]. Law, therefore, is a set of 'independent imperatives' prescribed by these agencies. It is thought, however, that Olivecrona would admit that law prescribes models of conduct. He would, therefore, not deny that it consists of 'ought' propositions.

Nor does he dismiss the idea of rights altogether. He emphasises that it does not correspond with an ascertainable 'thing', that it is, in short, a 'hollow' word[13]. A court could pronounce on a factual situation without

9 *Olivecrona* (1939) pp 22 et seq; (1971) pp 73 et seq. The most powerful attack on 'will theories' was by *Hägerström* pp 1-55, 74-126.

10 *Olivecrona* (1939) p 17.

11 See p 248 ante.

12 See pp 52 et seq ante.

13 Olivecrona 'Legal Language and Reality' in *Essays in Jurisprudence in Honor of Roscoe Pound* (ed Newman) p 157.

calling 'right' in aid. Thus, proof of a right is accomplished by proving certain facts or events whose effects are determined by law. These facts are called 'title'. In a court nothing stands between proof of the facts and judgment; the one is the direct cause of the other. Even in matters which never come before courts, as soon as the facts constituting the title are in existence, the person concerned may do certain things and other persons must not and cannot do certain other things with regard to him. Yet, between the facts and the judgment and between the facts and the behaviour the idea of a 'right' is invariably interposed, and it is said that the favourable decision or the behaviour proceeds *from* the right, which has been *created by* the title. In truth, the idea of a 'right' connotes a multitude of other ideas relating to behaviour patterns, not only for the 'possessor of the right', but also of other persons. It implies directives as to how the right-bearer and others can and should act, it informs people about legal situations, it is purposive in achieving or maintaining a state of affairs, and it is a means of harnessing the force of the state. This analysis, together with that of duty and the feeling of being bound, leads him to conclude that 'law is nothing but a set of social facts'[14] based on the application of organised force.

By way of a general observation, it might be remarked that some people are left with a feeling of dissatisfaction after reading Olivecrona's exposition. Its very simplicity raises a doubt as to whether he may have overlooked some deeper truth. It is submitted, however, that the common sense which he brings to bear in his discussions is the best feature of his work. Obscurity has passed for profundity too often. It is a useful working rule that clarity of expression is an index to clarity of thought. Obscurantist jargon earns much unmerited respect from those who hesitate to condemn as nonsense that which they cannot understand. The clear pages of Olivecrona's presentation are preferable to the turgid complexities of many another. Apart from that, however, one who searches his book for guidance in the solution of legal problems will search in vain. Nowhere is there a hint of values or other such considerations from which the law draws its vitality. It would be unfair to level this as a criticism, for a person should not be criticised for not having said something which he never set out to say and which, in any case, he would not have denied. Olivecrona's object, like Kelsen's, was limited to a formal analysis of law as it is. The picture of law which emerges is that it consists largely of propositions phrased in an imperative form and emanating from certain agencies. It might be said that there is nothing very new in that. Finally, although he repeatedly insists that law is nothing but a set of social facts, nowhere in his book does he explain what he means by 'fact'. Law also provides a model of behaviour which, too, presumably is a social fact. Perhaps, an explanation of the crucial term 'fact' would have been instructive.

The chief merit of his work may perhaps be summed up as follows. He destroyed many traditional myths concerning law, eg 'binding force' and command. He has given a moderate, sane and commonsense approach to some highly abstract problems of legal philosophy. His approach should not be regarded as self-sufficient, but it is an invaluable corrective to some others.

ROSS

The Danish jurist, Alf Ross (b. 1899), also admits the normative character of law (as did Kelsen by whom he was influenced). He distinguished between

14 Olivecrona *Law as Fact* (1939) p 127.

laws, which are normative, and statements about laws in books, which are descriptive. Unlike Kelsen, he confines his attention to particular legal orders. Like Olivecrona, he maintains that laws need to be interpreted in the light of social facts and he, too, is concerned with the problem of validity. Like the American Realists he tends to highlight the position of courts.

'*A norm*' says Ross '*is a directive which stands in a relation of correspondence to social facts*'[15]. To say that a norm exists means that a certain social fact exists; and this in turn means that the directive is followed in the majority of cases by people who feel bound to do so[16]. The principal feature of legal norms is that they are directives addressed to courts. A norm may derive from a past decision, but it follows from this view that all norms, including those of legislation, should be viewed as directives to courts[17]. The judgment or order of the court then forms the basis for action by the state, which is a 'monopoly of the exercise of force'[18]. It follows from this point of view that norms directed at individuals with regard to behaviour are only 'derived and figurative'[19]. In his later work, however, he concedes that 'from a psychological point of view' there is another set of norms directed to individuals, which are followed by them and felt to be binding[20]. Strictly speaking, he adds, there is no need for the latter: to know the former 'is to know everything about the existence and content of the law'[1]. Norms of the law may be further divided into 'norms of conduct', which deal with behaviour, and 'norms of competence or procedure', which direct that norms brought into existence according to a declared mode of procedure shall be regarded as norms of conduct. Thus, norms of competence are indirectly expressed norms of conduct[2].

The crucial concept is 'valid law'[3]. Ross approaches this from the point of view of an observer, ie validity as a describable phenomenon. It can be established in terms of social facts by employing empirical methods of observation and verification. Observation has to show that a rule is effectively followed, and that rule has also to be felt to be binding by those who follow it, just as the validity of the rules of chess is established by showing that they are adhered to by players, who feel bound to do so[4]. Legal norms consist of past decisions and other normative propositions followed by courts and by which they feel bound. The test of their validity is the predictability of decisions.

> 'Valid law', he says 'means the abstract set of normative ideas which serve as a scheme of interpretation for the phenomena of law in action, which again means that these norms are effectively followed, and followed because they are experienced and felt to be socially binding by the judge and other legal authorities applying the law ... The test of validity is that on this hypothesis—that

15 Ross *Directives and Norms* p 82.
16 *Ross* p 83.
17 Ross prefers 'directive' to Olivecrona's 'independent imperative', since it is difficult to see how an imperative, which is independent of command, can command a judge; also there are many legal directives which are not imperative: *Ross* p 37.
18 Ross *On Law and Justice* p 34.
19 *Ross* p 33.
20 Ross *Directives and Norms* p 92.
1 *Ross* p 91. This is reminiscent of Kelsen's view: see p 360 ante.
2 Ross *On Law and Justice* p 32.
3 Ross protested against the translation into 'valid law' of what is in Danish 'existing law', or 'law in force': Review in (1961) Yale LJ 1962.
4 Ross *On Law and Justice* pp 14-15.

> is, accepting the system of norms as a scheme of interpretation—we can comprehend the actions of the judge (the decisions of the courts) as meaningful responses to given conditions and within certain limits predict them'[5].

Norms are thus operative 'because they are felt by (the judge) to be socially binding and therefore obeyed'[6]. A norm, then, is 'valid' if a prediction can be made that a court will apply it'[7]. At this point Ross puts forward an interesting contention. Validity is not an 'all or nothing' concept as it is with other writers; the degree of predictability that a norm will be applied determines the degree of its validity. 'This degree of probability depends on the material of experience on which the prediction is built (sources of law)'[8]. Where the probability is high because the basis is a statute or an established precedent, the degree of validity of a rule is high; where the probability is low because there is no decisive authority, the degree of validity is low.

The criticism originally levelled at Ross that he ignored the regulative function of norms by saying that they are only addressed to courts was partially met by his later modification that, from a psychological point of view, norms are also addressed to individuals. However, his continued insistence that only the former matter still underplays the regulative function. On the other hand, to admit, as he now does, that norms directed at individuals also exist, thereby implying that they, too, are social facts, loosens the foundation of his structure. The thesis that there can be degrees of validity follows from an identification of validity with eventuality, what actually happens. Is this legitimate? The closely related point is his adoption of an exclusively descriptive point of view. As pointed out in connection with American Realism, however, the resulting picture is unsuited to the point of view of a legislator or judge. What does validity signify to them? A judge, for instance, can hardly be predicting his own feelings or behaviour, but it would be quite unrealistic to suggest that validity has no significance for him.

5 *Ross* pp 18, 35. Cf the American Realist position.
6 *Ross* p 35. Cf Hart's 'internal aspect' of rules. Hart points out that his 'internal aspect' is not a matter of 'feelings', but the acceptance of the norm as a standard: 'Scandinavian Realism' [1959] CLJ at 237–238; and pp 48 et seq ante.
7 *Ross* p 49.
8 *Ross* p 45.

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