JUSTICE AND THE LAW

A DISCUSSION BETWEEN LAWYERS AND PHILOSOPHERS[1]

PART I

> " The tendency to identify law and justice is the tendency to justify a given social order. It is a political not a scientific tendency." Kelsen.[2]

When Jurgen went to the master philologist, he discovered to his horror that the word 'justice' did not appear in the master philologist's books. Jurgen later said :—

> " There is no weapon like words, no armour against words, and with words the master philologist has competence. It is not at all equitable; but the man showed me a huge book wherein the names of everything in the world, and justice was not among them. It develops that, instead, 'justice' is merely a common noun, vaguely denoting an equitable idea of conduct, proper to the circumstances, whether of individuals or community. It is, you observe, just a grammarian's notion."

In the digests, in the legal dictionaries, in the legal encyclopaedias of the English common law world, you will not find the word 'justice.' Not only is it not defined, it simply does not appear. The encyclopaedias move without pause from the heading "Juries" to the heading "Justices of the Peace." Perhaps this merely confirms Jurgen's rather bitter comment.[2a] It is true that some of the encyclopaedias prepared by the exceedingly active publishers in the United States of America do not leave this rather startling gap in their entries. *Corpus Juris Secundum* has an entry of about a page in length under the heading of Justice.[3] On

1. This paper is an attempt to summarize a series of discussions on "Justice" held in the University of Melbourne in 1956 between lawyers and philosophers, during which a number of cases drawn from the Law Reports (some of them referred to herein) were critically analysed. Professor Derham is responsible for the First Part, and Professor Falk is responsible for the Second Part.

2. *General Theory of Law and the State,* p. 5.

2a. It is, perhaps, not without interest to note that Dike, the Second of the Horae, was a late addition by the Greeks to the heavens. Her scales were first attributed to her mother Themis. She is colourless and without personality and little was created by way of personal history for her before she was permanently placed among the stars other than that she was the second child of her mother by Zeus.

3. The relevant part of the entry reads as follows: "The dictate of right according to the consent of mankind generally, or of that portion of mankind who may be associated in one government, or who may be governed by the same principles and morals; the constant and perpetual disposition to render every man his due; the conformity of our actions and our will to the law; that end

the other hand *Corpus Juris* and *American Jurisprudence* jump their headings from "Juries" to "Justices of the Peace," just as the English encyclopaedias do.

This does not mean that the English courts and English judges do not use the word 'justice.' They use it constantly. It is used in arguments. It is used in justification. But it is seldom taken apart, examined, given specific content, or defined.

The English judicial practice, with some very notable exceptions, has been to follow doctrines from case to case but not to follow *words* from case to case. Only occasionally are English judges found looking to the precise words used by judges in previous cases, so as to decide the cases before them by verbal reasoning based upon precisely those previous words. They are usually found taking from the words used by judges in previous cases, a more or less general notion, doctrine, or principle, or rule, or concept or standard, and putting that principle or rule, etc., to work in their own words in determining the case before them.

When an English judge has before him for application an Act of Parliament, however, the very words of Parliament are more important to him, and his approach to that authority is different. When the English Parliament speaks, it speaks with authority which binds absolutely. And when it speaks, it speaks with the personal anonymity which can only be found at its extreme when a body of some hundreds of people speaks. It speaks formally, and if it would have its way with the English judges it must speak precisely. For the English judge will take the words of an Act, assume that they have a definite and objective meaning, and, after discovering that meaning, he will purport to apply Parliament's words to the matter before him more or less automatically unless the results achieved by doing so are absurd. He will not have much tenderness for what may have been the subjective intention of the framers of the Act concerned.

It is because of that attitude that the attempts to give content to such phrases and words as 'just and equitable,' 'just and reasonable,' 'reasonable,' etc., are occasionally to be found in the law books. With some exceptions, the cases which discuss phrases and words such as those as though they provided a meaningful direction to judges, are cases

> which ought to be reached in a case by the regular administration of the principles of law involved as applied to the facts. In a judicial sense it is defined as exacting conformity to some obligatory law."
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> And all those propositions are drawn from and are supported by United States cases cited to the text.
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> It is perhaps to be noted that under the same heading "Natural Justice" is given the following entry, "The attempt of honourable men to do that which is fair, and what is fair is a question of standards and conduct, about which man may differ." *Ralli* v. *Societa Anonima di Navigazione a Vapore* "Gl Preminda", D.C.N.Y. 222F 994, 1000.

which concern the words of statutes or the words of private documents which are interpreted much as statutes are. A few cases selected at random will illustrate this.

[a] Section 7 of the *Railway and Canal Traffic Act 1854,* provided that railway companies could limit their liability, for injuries or damage caused to goods being carried, by conditions in contracts of carriage; but that the conditions were subject to judicial determination that they were "just and reasonable." In *Sutcliffe* v. *Great Western Railway Company,* [4] Kennedy L.J. said, "A railway company cannot restrict its liability in regard to damage to goods arising from its neglect or default except by such conditions in the form of a written contract signed by the consignor as it can satisfy the Court or judge before whom any question relating thereto shall be tried are just and reasonable . . ." "The question of 'justice and reasonableness', within the meaning of Section 7 of the *Railway and Canal Traffic Act, 1854,* has given rise to judicial exposition in many reported cases depending upon written contracts signed by the customer, and in some of them, and notably in the leading case of *Peek* v. *North Staffordshire Railway, (* (1863) 10 H.L. Cas. 473) to difference of opinion between very eminent judges upon the same state of facts. Certain points, however, I take to have been by this time established for our guidance: First, the general rule that there is no fixed criterion, but that the validity of the contract in each case must be considered according to the circumstances of that case. Secondly, that a condition exempting the carriers *wholly* from liability for the neglect and default of their servants is *prima facie* unreasonable, but is not necessarily in every case unreasonable and void: see *per* Blackburn J., *Peek* v. *North Staffordshire Railway.* Thirdly, that the existence or the absence of a fair and reasonable alternative rate is an important element in considering the justice and reasonableness of a contract which wholly or in part relieves a railway company from liability for negligence and default: See *Peek* v. *North Staffordshire Railway;* .... Fourthly, that the retention in the contract of the company's liability for loss or damage proved to have been caused by the wilful misconduct on the part of the company's servants is a material element in considering the justice and reasonableness of the contract."

[b] In *Daniel* v. *Rickett, Cockerell & Co. Ltd.* v. *Raymond,*[5] Hilbery J. discussed the meaning of the phrase "just and equitable" as it appeared in subsection 2 of Section 6 of the Law Reform (Married Women and Tortfeasers) Act, 1935. He said, *inter alia,* "I am told that nobody, up to the present, has decided what is the proper interpretation to put upon the words 'just and equitable,' appearing in that subsection. We are not unaccustomed to finding the word 'just' in a statute. 'Just and convenient' is an association of words which occurs in another very well known statute, and has received judicial interpretation, and as a result of that judicial interpretation, has had certain limits placed on it. I must, therefore, do what I can to construe those words, 'just and equitable,' having regard to the context in which I find them, and I cannot believe that they are intended to be used here strictly as terms of art. When I see those words are coupled with 'having regard to the extent of the person's responsibility,' I think the meaning of the subsection is that exercising a judicial discretion in the matter I am intended to do that which I think is right between the parties, having regard to what I think, on the true facts of the case, is the fair division of responsibility between them."

4. [1910], 1 K.B. 478, at pp. 500-503.

5. [1938] 2 K.B. 322, at p. 326.

[c] In a New Zealand case[6] the phrase "just and proper" received interpretation. Section 35 of the Divorce and Matrimonial Causes Act, 1867 had given the court power, in a suit for judicial separation, to make such interim orders as it may deem "just and proper" with respect to the custody of the children of the marriage. Conolly J. said, "As to the meaning of the words 'just and proper,' in Section 35, the cases show that what is meant that the Judge is to make the order more with reference to the circumstances of the case than in accordance with the ordinary rules."

[d] In an Australian case,[7] Lukin J. had to decide an argument about the meaning of the word "just" appearing in a clause of a building contract which provided "the architect during the progress of the works, shall be the sole judge of all matters arising out of the contract . . .; and against his decision, providing it be just and impartial, there shall be no appeal." "I cannot accept," said Lukin J.,[8] "the plaintiff's interpretation of the word 'just' in this clause as meaning simply honesty in the architect. What is required is that the decision shall be just, which I take to mean that his decision shall be right and fair, having reasonable and adequate grounds to support it, well founded and conformable to a standard of what is proper and right."

[e] In another Australian case,[9] the word "reasonable" as it appeared in an adjustment clause in a lease had to be interpreted. The lessee had covenanted to pay a certain fixed rent, and also that he would pay "as and by way of additional rent sums equal in amount to the interest payable by the lessor on the moneys now about to be borrowed by him on mortgage of the said lands to be applied towards the cost and expenses of erecting" certain buildings, "such interest during the then currency of the said mortgage to be at the rate of four per centum per annum and after the expiration of the said mortgage to be at such higher or lower rate of interest as the lessor may reasonably contract to pay on the said moneys." The lessor could have renewed the mortgage at 4½% but in fact, because of other business interests which he had, he borrowed a much larger sum at the best rate he could obtain — *i.e.,* 4½%. The lessee argued that the lessor had not contracted "reasonably" because he had not taken into account the interests of him, the lessee, and if he had he would have renewed the mortgage at 4¼%.

Latham C.J.,[10] said: "The word 'reasonable' has often been declared to mean 'reasonable in all the circumstances of the case.' The real question, in my opinion, is to determine what circumstances are relevant. In determining this question regard must be paid to the nature of the transaction. A circumstance which had no relation to the property which was the subject matter of the transaction but which depended entirely upon the personal position or personal desires of the owner of the property, would not, in my opinion, be a relevant circumstance in determining what was reasonable." In the judgment of Evatt J., in the same case, a distinction is drawn between acting "reasonably" and acting "justly"; and His Honour quoted from the case of *Viscount Tredegar* v. *Harwood*[11] as follows: "If it be a question whether a man is acting reasonably,

6. *Atkinson* v. *Atkinson* (1890) 8. N.Z.L.R. 442, at p. 451.
7. *Loxton* v. *Ryan* [1921] St. R. Qd. 79.
8. At p. 88.
9. *Opera, House Investment Pty. Ltd.* v. *Devon Buildings Pty. Ltd.* (1936) 55 C.L.R. 110.
10. At p. 116.
11. [1929] A.C. 72.

> as distinguished from justly, fairly, or kindly, you are to take into consideration the motives of convenience and interest which affect him, not those which affect someone else."

It will be seen that, in those illustrative cases anyway, little more content has been given to the word 'just' or 'just and equitable' or 'just and proper' than a direction to do what is right or fair or reasonable in the circumstances of the particular case.

One aspect of any Western legal system, the aspect with which lawyers have been most concerned, is concerned with the formulation and the operation of rules which, in matters of human choice and of human dispute, will provide predictable answers to questions as they arise. Perhaps the most prominent aspect of the work of lawyer legislators, or of lawyer judges, or of lawyer practitioners, concerns the formulation and the operation of rules which will reduce to order and predictability the infinite variety of human affairs and human disputes. It is not surprising, therefore, that lawyers have in the recent past concentrated perhaps too much on that aspect of law and legal theory which is concerned with the nature of the rules which help to provide such predictability.

A rule which requires a summons to be served within ten days of the date of its issue, is quite clear as an instrument of predictability and as a decisional device, if a dispute arises over the issuance of a summons. That is, it is clear once the meaning of 'summons,' of 'service,' of 'day,' and of 'issue,' have been assigned precisely by reference to objective criteria. Without giving further examples, it can be asserted that very large areas which fall within the ordinary responsibilities of the lawyer have been reduced to control by rules of similar precision. One of the great tasks of the law is to order human affairs in terms of rules capable of such precision, and, at the same time, by rules which will operate to produce particular results which can be accepted as 'just,' or at least as not unjust.

But there are many areas of human dispute where it may not be possible, or where at least it has not yet been found possible, to affirm in advance a rule which will provide both certainty and a fair result at the same time. In such areas it is usual to leave to the discretion of some tribunal the decision of particular cases. The nature of the discretion may be wide or narrow, but within the area left to discretion the tribunal will have to decide, to some degree on its own assessment, what will be just in the particular case.

Such discretions are found where, by statute, a court has been directed to do what it considers to be 'just and equitable' or 'just and reasonable.' Sometimes the discretion is even more directly conferred in that it is framed as empowering a judge to do what in the circumstances he 'deems fit.' Where the common law is concerned, however,

such express reservation of discretion is less frequently encountered. Discretions left to the courts to decide particular cases, or particular issues, are usually hidden in a word contained in a rule which at first glance appears to provide a fairly clear direction of law. For example, it is said, in some jurisdictions, to be the law that a tortfeasor is liable 'for all the direct consequences of his tortious act.' That rule appears to provide a test by which the damages for which a tortfeasor will be made liable may be assessed in any particular case.

A little thought will make it clear that the word 'direct' [without referring to any other words in that proposition of law] suggests a certainty which does not exist and which perhaps would be undesirable.

In fact, the decision in any particular case of what are the direct and what are the indirect consequences of an act will have to be decided by the tribunal in the light of its own judgment of what is a reasonable amount of responsibility to be placed upon the defendant. In coming to its conclusions, the tribunal may be assisted by reports of what other tribunals in similar cases have concluded. In the last resort, however, its decision must be its own, and it is a decision made within a considerable area of discretion.

Professor Prosser, on this question of remoteness of damage, has recently given up the task of attempting to formulate a rule which will remove or limit that area of discretion. He wrote:—

> For this purpose, I doubt that all the manifold theories of the Professors really have improved at all upon the old words 'proximate' and 'remote', with the idea they convey of some reasonable connection between the original negligence and its consequences, between the harm threatened and the harm done.[12]

In spite of the lawyers' attempts to frame rules so as to limit or eliminate the subjective reaction of courts, every time a rule has an element in it of the kind exemplified by the word 'direct,' it is much as though the courts were told that they must, in each particular case, do what they consider to be just and equitable, having regard to the context and the general thrust of the rule.

Without labouring the material further, it is suggested that phrases like 'just and equitable,' 'reasonable,' 'just and fair,' perform the function of declaring that the legislator has decided it is best not to, or has found it impossible to, lay down a rule for the specific guidance or control either of the magistrate or of the citizen in particular situations, and has conferred on some body or tribunal the power to declare from case to case what the correct answer should be. Can it be that justice has no meaning as a general concept, other than to refer to the desirable, or reasonable, or fair, or right assessment of, a particular situation, or

12. 'Palsgraf Revisited', (1953), 52 *Mich. L. Rev.* 1 at p. 32.

of a particular decision in the light of all the circumstances which the viewer considers to be relevant in making that particular decision or assessment ?

Clearly many jurists and many philosophers have not taken that view. Salmond in the second edition of his *Jurisprudence,* after defining law in terms of the administration of justice, met an objection that his reasoning was circular by saying:—

> This objection is based on an erroneous conception of the essential nature of the administration of justice. The primary purpose of this function of the state is that which its name implies — to maintain right, to uphold justice, to protect rights, to redress wrongs. Law is secondary and unessential. It consists of the fixed principles in accordance with which this function is exercised. It consists of the pre-established and authoritative principles which judges apply in the administration of justice, to the exclusion of their own free will and discretion.

A little later he said:—

> What a litigant obtains in the tribunals of a modern and civilized state is doubtless justice according to law, but it is essentially and primarily justice and not law. Judges are appointed, in the words of the judicial oath, 'to do right to all manner of people, after the laws and usages of this realm.' Justice is the end, law is merely the instrument and the means; and the instrument must be defined by reference to its end.

Salmond is at pains, further, to point out that what he is calling law is not the only instrument by which justice and right are or may be upheld in the community. Quite apart from the Utopian possibility that a tribunal might administer justice not in accordance with law but in accordance with the unfettered discretion of the judge, he points out that other methods of control are exercised over men and are to be found in the opinion of society in which men live, and in the systems of coercion established within the society of States for the enforcement of the principles of international justice. Salmond it would appear, therefore, supposes justice to mean something which can be aimed for and to have a general *á priori* content, and is not a mere word used to describe particular decisions in the light of the circumstances existing.

Many philosophical systems have been built on an *á priori* ideal or concept of justice. Thus Kant's universal maxim of equal freedom was an *á priori* ideal from which the principles and rules of justice might be deduced. It was not drawn from observed phenomena. It had its place in the realm of the 'ought' and not in the realm of 'is.'

The Thomist and neo-Thomist natural law position with respect to absolute principles of justice is just as much based upon an *á priori* ideal. These philosophers seek for answers by applying their reasoning faculties to an idea *á priori* postulate with respect to 'the nature of man.' The 'nature of man' is an absolute and is not the result of exhaustive observation of man himself. But once the nature of man is stated ideally and absolutely, then the principles of justice may be deduced.

Stone, in his *Province and Function of Law,* says, "The inconclusiveness of such systems divorced from the existential universe has been observed, as has also the failure of attempts, like that of Stammler, to remedy the fault by bringing the facts of existence half-way to meet the *á priori* principle." [13]

The attempt to formulate criteria of justice from the observed facts of life seem to have had no greater success. " This in effect was what Duguit did when he insisted that his criterion, 'the objective law' or 'la regie de droit,' emerged spontaneously from the social solidarity manifested in the facts of social life. More covertly a similar enthroning of the facts is to be seen in the social utilitarianism of von Ihering, and perhaps even in Bentham's utilitarianism. Both of them assumed that once the facts are analysed and catalogued, the just solution will emerge as the dictate of 'utility.' Ihering certainly did not succeed in giving any further precision or in showing how it could issue from the facts." [14]

No one of the theories of justice which postulate an absolute from which all other questions may be answered by deductive reasoning has stood the test of time and criticism. Bertrand Russell described the *á priori* demonstration of ethics as one by which "the philosopher first invents a false theory as to the nature of things, and then deduces that wicked actions are those which show that his theory is false."[15] In spite of their many adherents, such theories of justice earn the attacks of the Kelsens and the Ross's and the Lundstedts of the legal world as being the formulation of irrational ideas with their emotional or political bases merely masked by a veneer of dispassionate objectivity.

But what of the beginnings of such theories in the Western tradition? Plato, at one stage of his life at least, concluded to his own satisfaction what the conditions for justice were and he described those conditions in terms of harmony.[16] His conclusions, however, did not go to the nature of justice as an *á priori* concept as he thought, but merely to assert that just results would be achieved in particular cases if the structure of society he advocated were achieved. Much more important was Aristotle's

13. At page 372; and see pages 372-377 for a brief discussion of the various theories of justice.

14. Stone, *ibid.* at p. 372, and see generally Roscoe Pound, *Jurisprudence* Vol. 1, pages 363-547 and Vol. 2, pages 349-466 for a general survey; and also Stone, *The Province and Function of Law,* pp. 372-377; Spencer, *Justice* (1891) Chapters 5 and 6; Stammler, *The Theory of Justice* (translated by Isaac Husik 1925); Ross, *On Law and Justice,* particularly Chapter 12; Friedmann, *Legal Theory* (3rd ed.); Cairns, *Legal Philosophy from Plato to Hegel* (1949); Kelsen, "The Metamorphosis of the Idea of Justice" in *Interpretations of Modern Legal Philosophies,* p. 390.

15. Quoted by Stone, in *Province and Function of Law,* p. 373 as being from Russell's *Sceptical Essays* (1928) 91.

16. *The Republic.*

analysis which is the basis for much later thinking. It is not proposed here to discuss that analysis further than to suggest that it does not go to the nature of justice either. What Aristotle did, as is well known, was to classify justice into a number of categories: distributive and corrective justice, legal and natural justice, abstract justice and equity.[17] As to the first distinction, the classification does little more than divide into two broad categories the types of problems to which just answers should be given. This then may be the material to which justice may be applied, it says little or nothing about justice itself. So far as the second and third paired categories are concerned no further comment is necessary. They are infected with the difficulties attending the *á priori* already mentioned, and are subject to the comments about the justice of a rule of law which follow.

Before casting these more or less random thoughts and speculations over to the philosophers, two important but subsidiary questions should be asked. What is the significance of the use of the word 'just' when not a particular decision is said to be just or unjust, but a rule of law is said to be just or unjust? It is suggested that the right answer is to say that we are in danger of confusion when we describe a rule of law as being just or unjust. We may describe it accurately enough as being unwise, undesirable, harsh, unworkable, and perhaps a number of other things; but when it is described as being 'unjust,' all that is really meant is that it is likely to produce, or according to experience it has produced, results in particular cases which could be described as 'unjust results.'

Secondly, what should be said about certain basic rules accepted at least by common-law systems of jurisprudence which are described as rules of 'natural justice'? Two such rules are basic to the common-law system; one is, that in any dispute the judge must hear both sides to the dispute, and he should hear them in a situation where they can hear each other's cases and arguments, and have a chance to answer them. The second rule is that the judge himself must be unbiased and must not be involved in, or influenced directly by, any of the issues which are between the parties to the dispute.

It is suggested that to say that those rules are just or to say that those rules are fundamental principles of justice (as is frequently said) means no more than to say that, in the experience of common lawyers, in the absence of rules of that kind particular decisions are made and are likely to be made which we would call 'unjust.' Further, it perhaps amounts to this, that our experience is such that it can be predicted that over a multitude of cases the only way to prevent abuse of power by

17. Aristotle, *The Nichomachian Ethics* (Everyman ed.); *Politics* (trans. Jowett) O.U.P. 1926.

human beings is to restrict the human beings on whom power is conferred, by absolute rules of this kind, and to permit no exceptions. It would appear that the Frenchman's experience is somewhat different. The French judicial system does not follow the strict common law rules about the parties' 'day in court.' It has not been suggested that the French produce many more particular cases of clear injustice in their courts than occur in England.

Perhaps this invitation to the modern philosophers should be concluded by suggesting that it may be that there is more profit in the thesis of Edmond Cahn than any thesis which seeks to explore the nature of justice as an abstract *á priori* concept. Cahn called his book in which he examined the nature of justice, *The Sense of Injustice.* It may be that it is much easier to obtain agreement among people as to the injustice of a particular situation or a particular decision, than it is to obtain agreement as to what might be a just result. If the word "justice" carries with it nothing more than a notion about an ultimate and inherently (in part at least) subjective judgment, to be made case by case, of an infinite number of particular situations or questions, then might it not be that an exploration of a sense of injustice will be more fruitful than an armchair examination of some general notion of justice, whatever justice may be?

PART II

The question raised in the first part of this article comes to this: *Of what importance to the practice of the law today is the notion of justice ?* I think, that in part of what has been said there is the trailing of a coat in order to goad the philosophers. Salmond is quoted as defining 'law' in terms of 'the administration of justice,' and as defending this view by saying: "Of course, the 'law' as administered by the judges is the law as laid down by statute or precedent; but 'law' in this sense is only an instrument, *and the instrument must be defined in terms of its end,* which is the upholding of justice, the protection of rights, the redress of wrongs." I take it as an implication of this view that 'law proper' is more than just an authoritatively fixed rule, namely one which is also a good, a just rule, and that therefore the concept of justice is indispensable to any talk about law at all.

The argument then goes on to contrast this view with the meagreness of the part which the notion of justice plays in actual legal practice: its absence from the legal encyclopaedias, its vagueness on those occasions where it is mentioned in statutes or referred to by the Courts. And it is suggested that perhaps 'justice' has no meaning as a special concept, but that the injunction 'do what is just (or reasonable)' comes to something like 'do what is best, most desirable in all the relevant circumstances of the case.'

Now, in saying that, in quoting Salmond, there is a little coat-trailing, I mean this: If it is said that 'law' has essentially something to do with 'justice,' then this is a view not usually popular with practitioners of the law today. But it is a view with a long tradition ('ius quia justum, non quiaiussum'), a view which appeals to the ordinary man, and a view which philosophers have not infrequently a desire to defend or to resurrect. So I suspect that what is being said to the philosopher is: 'Come out with it, what have you got up your sleeves?'

First, some pretty obvious comments on this general issue. There may well be point in saying that positive law *ought* to serve the administration of justice, and of allied ends; that laws can be assessed and criticised in terms of the extent to which they do; that the citizens' duty to respect the law may, in some circumstances, be thought to depend on his judgment of whether they do or not. But, for the most part, it breeds confusion to insist on including the 'justice' of a rule into the definition of the rule as being 'law.' In this way, one makes the conscientious objector say that he will *disobey a law when it is not a 'law'* (rather than when he judges a law to be crucially different from what it ought to be); and this is unnecessary hankering after paradox.

Two further points may be added. The one, that if we restrict the word 'law' to 'positive law,' then 'justice' (or 'reasonableness') will for the most part be terms used in *assessing legal rules,* and not terms relevant to *legal decisions.* They are, therefore, for the most part, *meta-legal,* and not *legal* terms, terms which belong to critical talk about the law, and not to talk *within* the law, terms not providing a basis for legal decisions, but a basis for decisions about what laws to make, or to what laws to accord moral force.

The second point is, that it seems characteristic of the whole drive and intention of a *legal system* to substitute decisions on the basis *of given rules* for decisions on the basis of considerations of *justice* (or reasonableness), and to leave the 'upholding of justice' (except in the sense of the impartial administration of rules) to law-reformers, Parliaments, and the public conscience. And this on account of the obvious merits of exercising jurisdiction by settled rules, like uniformity, predictability, exclusion of the personal idiosyncrasies of the judge. There are chinks in the best legal system where the judge cannot be given a rule, but is instructed to use the wisdom of Solomon. But every time that this is inevitable, it seems that this is also in some way the denial of what a legal system specifically stands for.

It then looks as if the question about the role played by the term justice within the law reduces itself to the question of its role where the legal system has its chinks, where the judge is no longer given the guidance of a *rule,* but instead is asked to do what is *just or reasonable.* Most of our discussion was spent in considering the function of the term

in this context. And here certain suggestions were made by some of the philosophers which I shall first turn to consider.

It was said that what it comes to to say that the judge is instructed to decide by what is *just or reasonable* is that he is placed in a position in which he may, and should decide the issue in accordance with *'principles of natural justice' or of 'natural law.'* The discretion of the judge, it was said, 'allows the law of nature to filter through.' The issue before the judge is to apply principles of natural law to the facts.

This suggestion may be taken to come to the following: According to the traditional doctrine, there are certain rules for conduct and the settlement of issues which are defensible by 'right reason'; that is, one can make a case for saying that adherence to them would be desirable by having just and beneficial consequences. These were thought to be the rules which a good system of positive law ought to sanction, or to which the judges ought to resort in the absence of a positive ruling.

Such rules were 'pacts should be kept,' 'goods entrusted to another should be restored to their owner,' 'no man ought to gain by another's loss.' And there were compendious books, like Pufendorf's two hundred and fifty page folio, trying to show in great detail what rules of law could be given the blessings of 'reason' in this way. The kind of arguments and propositions contained in these books can for the most part today be of no concern to the courts, but at best only to those interested in the critical assessment of positive law. But I take it that the real suggestion favoured by some philosophers is this: Where the judge is left to use his discretion to do what is just or reasonable, he is to fall back on *rules* of this kind in the absence of positive rules. He is, as it were, to take his Pufendorf from the shelves, or perhaps, to consult the inner Pufendorf.

In subsequent discussions this suggestion was tested by reference to the practices and conventions of the courts in actually following the instruction to do what is just or reasonable. *Can this be said to be an instruction to apply principles of 'natural law' to the case, or if not this then what ?* The impression which was gained did little to support the suggestion. But before I go on to say what lesson the facts did teach, I want to make a point of principle relating to the 'natural law' view; a point to show why it is unlikely that such a view should be reflected in the practice of the law.

It is a presupposition of the doctrine of natural law that a reasonable case can be made for its principles. A rule is naturally acceptable if there are enough natural reasons in its favour; and the basic and ultimate reasons which make things acceptable or unacceptable to humans 'from their very nature' are the promotion of good or harm. The valid rule was the one defensible by this canon of judgment, a canon of judgment going behind *convention* by relating to criteria of acceptability in

terms of which convention itself could be judged. Aquinas elevated this canon of judgment itself to the first and basic 'law of nature': that is, 'bring into being what will do good and avoid harm,' what will be acceptable for natural reasons.

Now the point relevant to our discussion is this: If one *wants* to say that the judge who decides by what is 'just and reasonable' must fall back on the 'law of nature,' then one may mean either of two things: *one,* that he is to fall back on the kind of *reasoning* by which any rule or ruling, is properly defended as being naturally acceptable, or tolerable; or *two,* that he is to fall back on particular *principles or rules* already established by someone by this kind of reasoning. In short, that the judge is to decide either by *applying principles of which he reads in Aquinas, or by using the canon of judgment by which Aquinas got to his principles.*

Now, the nature of the situation in which the modern judge finds himself when he is without the aid of positive rules (and this may have been different before the days of modern legal systems) is such that one must assume that his task is the second of these two: to use a certain natural canon of judgment rather than to apply principles already arrived at by such judgments. Because if there were in the case any plausible rules which could be given, the modern legislator would no doubt have put them in; and the judge is given discretion precisely in so far as it is thought not to be feasible to specify any further rule or principle. So what the law is bound to say here is not: 'use principles or rules of natural reason'; but 'use natural reason in the absence of any principles or rules.'

I think that this reasoning is confirmed by what emerged from the real part played by the terms 'just and reasonable.' Broadly they serve as an instruction to the judges to make a naturally acceptable decision in the absence of principles to govern it. This is borne out by the persistent refusal to lay down principles for the use of 'just and reasonable,' to put a tight legal construction on these expressions; and by the insistence that the just and reasonable decision should simply be one which would recommend itself on the strength of a true survey of the relevant circumstances. This is in some respects still too wide, and I shall come back to qualify it. But, broadly, the instruction to decide by what is just and reasonable seems to say: *'Make a decision which you can support in the circumstances by enough reasons of a sort to recommend themselves to ordinary humans as natural reasons for accepting or tolerating the state of affairs created by it.* And the refusal to lay down rules at this point is consistent with this. Because any artificial ruling on when a circumstance ought to count as a supporting reason would be self-defeating by prejudicing the issue: the decision would then no longer be based on the principle that it should be the most naturally acceptable no matter which, but on some other principle laid down by law.

Some more detailed comment on the way in which the words 'just and reasonable' can be said to express this idea as necessary; and this especially as I am still not happy about the suggestion that 'do what is just' comes, or need come, to the *same* as 'do what is reasonable.' The two words do of course often occur together without the one seemingly adding anything to the other, and when they occur singly one may always take it that the other might have been added as well. But this would be understandable enough if for no other reason than that no-one would desire a decision which was not both just *and* reasonable.

If one is puzzled by the place of the word 'just' in all this, one must bear in mind a disturbing feature of this term, as old as its unhappy use in Plato's Republic. 'Do what is just' may be taken to mean: 'do whatever is right, proper, reasonable, defensible by naturally acceptable reasons.' But, one may also say: 'this would be just'; and offer this as a special natural reason for the rightness, or reasonableness or acceptability of a decision. In the first use, 'just' is used as a term for arriving at the formally correct decision; in the second, as the term for a special consideration relevant to arriving at a formally correct decision. Much confusion about the function of the word 'just' comes from the fact that language tends to conceal this distinction in use. Because, in this way, language conceals that, in saying 'do what is just' one is giving two, although naturally connected, instructions in one: 'Do what is defensible by good natural reasons'; and 'take account (or even primary account) of the justice or injustice involved as one good natural reason.'

And let us note here, that from this latter point of view the justice or injustice created by a decision would only be one among other possible natural reasons which might tell for or against it. There is also the benefit or damage to one party or the other, or to the public at large, which might result from a decision in other ways than through its justice or injustice; and these are factors which might have to be considered as well before a decision could count as defensible by good reasons all-round. 'The most just' need not always be one with 'the most beneficial all-round,' because 'justice' tends to be related to the idea of a certain type of distribution of benefits rather than to that of their total. Dreyfus would have been treated *unjustly* in a good ordinary sense, even if, as some claimed, his treatment in the later states of the case had been overridingly justified by considerations of national security. And 'fiat justitia, pereat mundus' is a paradoxical challenge only because 'justice' is only one among other ingredients of a desirable state of affairs.

This raises the question of the definability of 'just' and 'unjust' as special *descriptive terms* relating to a certain kind of possible implication of rules, or rulings. The lawyers have complained that they knew of no satisfactory attempt at this job; and they have mentioned Aristotle as having failed like everyone else by offering at best *illustrations* rather than a *definition.* They concluded from this that 'just' is the equivalent

of 'desirable' or 'reasonable,' and nothing more, that is, that it only has the first of the two uses indicated above.

But I think that what is at fault in the complaint about Aristotle is not as much Aristotle as the complaint itself. There is a common thread which runs through the ordinary uses of the words 'just' and 'unjust.' Aristotle referred to it when he called the 'just' a 'species of the proportionate'; and I should say that the plain root idea is the simple one of an equal balance where the lack of such balance as such can be viewed as an injury. In the ordinary references to what is unjust there is always this reference to an intrinsically injurious lack of balance or equality between one thing and another; between what one man owns, or receives, and what another owns or receives; between one man's treatment before the law and another's; between a man's effort and his reward; between the seriousness of the crime and the seriousness of the penalty; between responsibility and liability; between the power of determination in the hands of one group and another, etc.

In this idea of 'holding an equal balance' is the descriptive core of the term, and this although strict equality and justice may not always be considered the same. The reason for the last is that 'holding an equal balance' in one respect may have to be reconciled with holding an equal balance in others ('equality in living conditions' versus 'equal ratios between effort and reward'), or that 'holding an equal balance' may have to be reconciled with other worthwhile considerations. There is a slide in the notion of 'justice' from 'strict justice' in one respect or another, to 'strict justice tempered by reasonableness' (that is, other worthwhile considerations).

It is not hard to see from this why it would be vacuous to offer a *definition* of justice, if by this one means a definition purely in terms of its root-idea. Because the root-idea taken by itself is too vague and indeterminate for this. It is more like an uninterpreted symbol, which has no concrete meaning before a definite value is given to it. 'Don't do whatever would imply a lack of equal balance between one thing and another' has no *bite* by itself, that is, before it has been inserted into a human situation which could be said to exemplify this idea in a definite way. Nor would it be possible, in the nature of the case, to stipulate beforehand in what circumstances and in what different ways the root-idea in justice may acquire a bite, may be found applicable in some special way to a human situation.

This is why the best that anyone can do is to illustrate the use by offering examples of 'kinds,' and preferably in quite a loose way, with-

out even Aristotle's attempt at systematisation. I think that these observations should also throw light on the justified reluctance of the Law to *give* an interpretation of what 'just' or 'unjust' should come to: for this would be to prejudice the issue of what they *might* come to in any given case. Nevertheless, when it is said: 'do what is just' a more definite instruction is given than if it were merely said 'do what is reasonable'; and this although *a fortiori* 'do what is reasonable' will also have implicit reference to 'do what is just,' and although 'justice' if not tempered by reasonableness will, in a sense, not be 'justice' either.

In conclusion, some further points which appear to have emerged from the discussion, must be mentioned, though more briefly than they deserve.

It is clear from what has been said that 'do what is just or reasonable' is an instruction which is still extremely wide if taken as meaning: 'do what the balance of considerations would make naturally acceptable in all the circumstances of the case.' This might include both justice between the parties, considerations relating to all sorts of other benefits or injuries to the parties, and the whole question of public interest as it might be involved in the case. Taken seriously, this would place the judge in the position of a guardian angel of a world that would be most worth having by his lights. Such powers given to a judge would once again be contrary to the whole drive and intention of any legal system. Hence it is interesting to see *how* the legal system protects its own objectives in cases where it gives discretion to the judge by keeping his powers within bounds consistent with itself.

This came out clearly in all the cases that were discussed. It came out in the convention to regard the instruction as relating in the first place to the interests of the parties involved alone, and not to that of the public at large, in the fact that any extension of this had to be sanctioned by the highest authority; in Sir John Latham's emphasis on the concept of 'relevant circumstances'; in the general practice of consulting the general purposes of the Act where the Act does not, as often it does in any case, make it specifically clear what *kind of interest* was to be safeguarded by the provision; and, finally, in the possibility of appealing to a Higher Court on the ground that the discretion had not been exercised in the manner intended by the law.

Further, the logical point of the restrictions which are operative may be stressed. The law will not regard as legally defined, or definable, what a reasonable consideration is, or to what circumstances the words 'just' or 'unjust' apply. *And behind this is a sound logical instinct.*

But this does not prevent the law from defining, or regarding as definable, what manner of considerations should be taken as relevant in the case to make up the balance sheet for the decision. *And behind this is a sound legal instinct.* Without the last, 'be just and reasonable' would give the court the licence of having a moralist's busman's honeymoon. And this would be for the courts to usurp the functions of the legislature.

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