The Owl of Minerva

Essays on Human Rights

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Preface

At the end of his exercise, if an intelligent Martian were to attempt to find out what are "human rights" and if he were to set out and read the whole eclectic *acquis* of the European Court of Human Rights, he would most certainly not be enlightened. To a large extent, human rights are legal issues which surface on the international level because they were not – for whatever reason – resolved at home. The *legitimatio activa ad causam*, the *ratione materiae* substantive sieve of these issues is not too impassable and is mostly determined by the Court's own case-law. The environmental issues, for example, fall under Article 8 as in *Hutton v. the United Kingdom*. The resulting human rights are simply the internationalist's constitutional rights. This is easy to prove. If the European Court of Human Rights in Strasbourg were to become the European Constitutional Court, its jurisdiction based on a Charter rather than on an international Convention, "human rights" would metamorphose into "constitutional rights." There is, in other words, nothing inherently "human" about human rights.

In turn, is there something inherently "constitutional" about constitutional rights? Constitutional courts, too, are the courts of last resort. The issues which surface, if they respond to individual complaints (constitutional complaints, *amparo*, *Verfassungsbeschwerde*, *certiorari*), are empirically selected in much the same way as they are in Strasbourg.

The American Supreme Court, on the other hand, has developed a fundamentality doctrine, which, *via* the XIVth Amendment, sifts through constitutional imperatives to be dictated to the federal States. The European Court of Human Rights is jealous of the American "pick and choose doctrine" but mostly for case-management reasons; it says it is a victim of its own success. Other European constitutional courts are, much like Strasbourg, snowed under an ever rising number of constitutional complaints.

An honest assessment cannot maintain that the Western civilisation compels its categorical imperatives through these random processes of selection. For example, if human rights are about categorical imperatives at this critical stage in the development of the civilisation and of its discontents, why is it

that the environmental issues that ought to be at the centre of adjudication do not even arise? It is too late now and it will be much more late when they do arise. Thus the title of the book: at best, the legal essays constituting this book are the virtual restore points. They are located somewhere in the past. *Ils sont déjà dépassés par les événements.* Only a breakdown will make them practically relevant. In turn, it was precisely such a breakdown – the World War II – which brought human rights to the surface of social conscience in the first place.

This may sound pessimistic but the point I am making is more basic.

Lawyers think that the obedience to the norm is simply the impact of the sanction attached to the norm's own disposition. Legal scholars have little understanding of the fact that normative integration – the opposite of Durkheim's *anomie* and disorganisation – is a contingent socio-psychological process. Judges, for example, speak the prose but they are unaware that their own sense of justice is neither mere logic nor Oliver Wendell Holmes' "experience." Yet this sense of justice is at the root of what simple people intuitively and correctly understand as human rights. To perceive a situation as unjust is to perceive its absurdity, to be outraged by it. The sincerity of this perception is measured when it happens to others. A judge, therefore, is literally constituted by his own sense of justice. True, this sense of justice must be cognitively sustained by knowledge, by experience and by logic. A judge without a deeply rooted common sense perceiving a situation as unjust is simply not a judge. In other words, "unjust" and "illogical" is not the same thing. The judge, to paraphrase Holmes, must *experience* injustice. It follows logically that the experience of absurdity, which is at the core of the "sense of justice" is not simply a cognitive experience. Where does it come from?

> Men think that acting unjustly is in their power, and therefore that being just is easy. But it is not; to lie with one's neighbour's wife, to wound another, to deliver a bribe, is easy and in our power, but to do these things as a result of a certain state of character is neither easy nor in our power. Similarly to know what is just and what is unjust requires, men think, no great wisdom, because it is not hard to understand the matters dealt with by the laws (though these are not the things that are just, except incidentally); but how actions must be done and distributions effected in order to be just, to know this is a greater achievement than knowing what is good for the health.[1]

It is surprising to see Aristotle treat the above two subject-matters together. On the one hand, he understands that "being unjust" is not a matter of choice, i.e. we possess a "certain state of character," which inhibits us from doing certain things; on the other hand, he makes it clear that the sense of justice is cognitively and otherwise demanding. In fact, both states are connected to

[1] Aristotle, *Nicomachean Ethics*, Book V, Chapter 9.

what in psychoanalysis is called oedipalisation. The first state of mind, that of "being unjust," is pre-oedipal in which there is no identification with the "name of the father." The second state of mind, that of "being just," lends itself to different levels of moral development.

I have written about this more than thirty years ago in a paper entitled *Criminal Law and its Influence upon Normative Integration*.[2] Here I would add that the process of oedipalisation has now been massively thwarted at a pre-oedipal stage. The cult book of the Critical Legal Studies movement was *Anti-Oedipus: Capitalism and Schizophrenia* by Deleuze and Guattari. The book was an attempt to make an ideology out of the then-already-happening pre-oedipal arrest. This, too, was thirty years ago. One has to observe the progression from film directors Pier Paolo Pasolini (*Mamma Roma*, 1962) to Scott Ridley (*Blade Runner*, 1982) and some of the films in which Brad Pitt is the protagonist (e.g. *Meet Joe Black*, 1998 and *Fight Club*, 1999), to arrive at a very clear impression that what was a bizarre psychoanalytical attempt then has become a colossal market today. Christopher Lash had announced the problem in 1979, C. Fred Alford[3] developed the analytical connections and there may be many others who see the problem.

For us, however, the issue is narrow. Pathological narcissism is the mortal enemy not only of the sense of justice but of justice itself. Its subversive impact was felt in law by virtue of the impact of the Critical Legal Studies movement, but that was only a symptom of an incomparably larger problem. In his own time, Robert Merton would speak of the "internalisation of anomie;" he saw this as a criminological issue. Little did he know that the impact of xenoestrogens, because they warp the hitherto universal oedipal triangle and impede the identification with the father, will be across cultures and will result in an epidemic of pathological narcissism far more insidious than the merely elevated crime rates. In one of the essays, I deal with the question whether human rights are universal. Hannah Arendt would say that human rights means that one has access to court, i.e. that one can initiate legal processes. Technically, this is true and can be proved by reference to the first rule of the Roman Law's Twelve Tables (*Leges Duodecim Tabularum*): *Si in ius vocat ito!* (If you are called into the Court of Law, you must go!) Still, the court of law means nothing if those who adjudicate "know not what is just and what is unjust."

In other words, it is the sense of justice, and end product of oedipalisation, which is universal. Legal mechanisms and their processes are merely the consequence on the nth remove of something that is deeply, as Merton would

[2] To be found at http://www.erudit.org/revue/ac/1974/v7/n1/017031ar.pdf.
[3] Alford, *Narcissism: Socrates, the Frankfurt School and Psychoanalytic Theory*.

say, internalised. It is so deep, as Aristotle already understood, that it is not easy to act against it. Unfortunately, the fact that oedipalisation is deeply ingrained in the human psyche does not mean that it is not contingent.

Does the fact that there are 100,000 pending applications in the European Court of Human Rights testify to something? Is it a proof of the fact that people no longer share values? Does it indicate that domestic jurisdictions lack a sense of justice? Do people still believe in justice or do they simply litigate? Has the sense of justice been flushed out of society?

I am afraid these are the real questions. The book says nothing apropos of these problems, hence the reference to Hegel's owl of Minerva which begins its flight only at dusk. It is my hope, however, that the restore points, the essays, will become useful when the need to restore will become apparent. In the meanwhile, they may be interesting to those who are jurists because they retain a sense of justice, as opposed to Ridley Scott's replicants who merely litigate and act like lawyers.

SECTION I:

Human Rights in the Context of Constitutional Criminal Procedure

CHAPTER ONE

Introduction

The purpose of this section is to deconstruct the contradictions inherent in certain aspects of adjudication. In academic legal circles, especially in the United States, the word 'deconstruction' has acquired a semantic overload of ideological proportions.[1] Still, we use the word, thus engaging this ambiguous surplus in order to make the reader aware of the risks involved. However, we cannot understand the aspects of adjudication we wish to submit to a fundamental critique without first unmasking the premises in which they are entailed.

These premises are indistinct and obscure. The unconscious presuppositions inherent in the premises usually surface when, often for its rhetorical effect, we use the so-called *argumentum ad absurdum*. For instance, when three of the nine judges of the most powerful Supreme Court insist that mentally retarded convicts should be executed, as in the case of *Atkins v. Virginia*, this in itself *is* the absurd.[2] The path to this absurd commenced a few decades ago with the insistent emphasis on 'truthfinding' as the essential aspect of criminal

[1] Originally, the concept of 'deconstruction' is philosophical and derives from Heidegger's concept of 'destruction' and secondarily from Derrida's general theory of textuality and meaning. See generally, Carlshamre, *Language and Time*.

[2] In *Atkins v Virginia*, the United States Supreme Court decided that mentally retarded criminals could not be executed because that would amount to cruel and unusual punishment prohibited by the Eighth Amendment to the Constitution. Justice Scalia dissented, complaining that "seldom has an opinion of this court rested so obviously upon nothing but the personal views of its members." The majority judgment was "embarrassingly feeble," involving "an arrogant assumption of power" that treated the issues as "a game." […] Justice Scalia awarded this reference [to world opinion contrary to death penalty] his "Prize for the Court's most Feeble Effort" and observed that the standards of justice in other countries "are thankfully not always those of our people." Chief Justice Rehnquist also dissented, stating that "the viewpoints of other countries simply are not relevant to determining the standards to be applied in the United States."

procedure, which led to violations of procedural, constitutional and human rights of criminal suspects and defendents. In the process, it also became obvious that this 'truth,' in turn, is consubstantial with 'law and order,' repression and the unmistakable authoritarian attitudes of the protagonists.[3]

To expose this ideological nature of truth, especially in the wake of 11 September 2001 events – before it leads again into the collective madness of burning the witches – has grown to be an urgent matter. Therefore, the premises of adjudication we shall 'deconstruct' here *are* ideological, i.e. their ideological impact is the one to be deconstructed. These premises of adjudication have to do with the insistent emphasis on truthfinding and the arbitrary exercise of state power, in the name of crime prevention.

Deconstruction, according to the adherents of the so-called Critical Legal Studies Movement means 'pointing to internal contradictions' in particular legal doctrines. Pointing out these internal contradictions inherent in a legal doctrine or a social reality running on a series of powerful myths requires a distancing or a psychological dissociation from that myth. Such a distancing becomes necessary because the dominant social consciousness together with its myths – today we would perhaps call them 'virtual realities' – are true self-fulfilling prophecies. Consciousness, individual or collective, of self, of others and of the world as a whole, is a 'construction' in both the sense that it 'construes' ('interprets') the world as well as in the sense that it is a complex system ('structure') of these interpretations. One does not have to be a Kantian to understand that objective 'reality' is not directly accessible to us, i.e. that from the inception, we 'construe' it – more or less arbitrarily.[4] Therefore, the dominant social myths are not only statically circular and self-referential; often, they are dynamic, positive-feedback spirals capable of evolving into a collective *folie à million*. Recognising internal contradictions within such 'virtual realities' would therefore require the ability of dissociation.

However, to 'deconstruct' these 'myths' from inside requires more than a dissociated existentialist attitude with a sceptical distance to what others take for real and for granted. Deconstructing the antinomies[5] inherent in these

Panick, *Legal Ideas do not Stop at Passport Control*. See also Greenhouse, *William Rehnquist, Moving the Court, Triumphal Year for Chief Justice*.

[3] See generally Adorno et al, *infra* n. 58 to Chapter 4.

[4] This view is no longer exclusive to the 'soft' Hegelian branch of modern philosophy where it is taken for granted. (Hegel's experience of *'Selbstbewustsein'* on the occasion of the battle of Jena on 14 October 1806, represents a radical break with the 'reality as usual.' It was an equivalent of 'satori' that commences to be described scientifically. See Austin, *Zen and the Brain*. With Wittgenstein's *On Certainty*, the 'hard' analytical branch of philosophy, too, arrived close to this realisation: "At certain periods men find reasonable what at other periods they found unreasonable. And vice versa."

[5] "An antinomy is a contradiction among conclusions derived from the same or from equally plausible premises." Unger, *Knowledge and Politics*, at p. 5-7.

spirals requires both scholarship as well as penetrating logical critique. Kafka, for instance, in his *The Trial* succeeded in inducing the recognition of the absurd because as a lawyer he had noted – this is the essence of its absurdity! – the self-referential certainty of the inquisitorial 'truth.' Camus, on the other hand, who in *The Stranger* tried his hand at the same issue, did not accomplish the same recognition. He failed to appreciate the specifics of the underlying illogicality.

Here, we shall tackle the same quandary. Yet, for several reasons, we lay no general claim to 'deconstruction.' First, we are not preoccupied with the dissociated 'existentialist' apprehension about the unreality of 'truth.' Second, we do believe that 'deconstruction' perhaps unmasks the logical contradictions whereas the actual problem exists in the contradictions of real interests. For example, it was the real interests of the Catholic Church, which had godfathered the birth and all the consequent deformations, torture among them, of the inquisitorial criminal procedure.[6] The way to change this is through changing the realities of power, not through euphemistic references to 'political events.'[7] Most importantly, third, our own views are sufficiently 'deterministic' for us to expect that the historical realities must run their course. In this course, Unger's antinomies are no real obstacle.[8]

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[6] For procedural implications of the circularity in 17th century witch trials, see Bayer, *Ugovor s ðavlom (The Contract with the Devil)*: Ugovor s ðavlom: procesi protiv èarobnjaka u Evropi a napose u Hrvatskoj / *uvodne studije napisao, dokumente priredio i tumaèenjima popratio*. (Professor Bayer was the leading criminal procedure theorist in former Yugoslavia).

[7] The ambition of the adherents of the Critical Legal Studies Movement, according to a programme specified by Unger in *Knowledge and Politics*, has been to subert bit by bit and as a whole "liberalism, which must be seen all of apiece, not just as a set of doctrines about the disposition of power and wealth, but as a metaphysical conception of the mind and society." Furthermore, according to Unger, "*The political event* [necessary for the conception of shared values to solve the problems of freedom and order] would be the transformation of the conditions of social life, particularly the circumstances of domination, that produce the contingency and arbitrariness of values. […] It appears that to escape from the premise of subjective value *one must already have changed the reality of domination*." (Emphasis added.) Since 'the reality of domination' in Unger's own context – see his *Theory of Organic Groups, op. cit.,* p. 236-295 – is clearly the 'private ownership of the means of production,' in turn 'the political event' must obviously be the 'revolution.' Intellectually, Sartre's frank Stalinism is perhaps preferable to Unger's crypto-Marxism. In the end, Unger's followers in the so-called 'Critical Legal Studies' movement succeeded only in immunising the political right against *any* change 'in the reality of domination.' Still, theoretically, Unger is right in maintaining that the change in the *reality* of domination precedes the concrete understanding of the new values *in action*. Unfortunately, his appreciation of the profundity of the difference remained distant and abstract: *idem*, his reference to 'workers councils,' on p. 272 and n. 8 on p. 232. In the end, this illustrates the objective limits of an outsider social theorist's political imagination. For an insider's view, see for example Bahro, *The Alternative in Eastern Europe*.

[8] It is true, however, that these 'internal contradictions' – or sociologically speaking anomie

While pointing out the internal contradictions inherent in various aspects of adjudication, however, we must also remember the statement "that things, 'though mutually opposed, at the same time are mutually indispensable,' may also be interpreted as an illustration of Hegelian dialectic, if one likes to read it into the *Chuang-tzu Commentary*."[9] The Hegelian dialectic regards the 'internal contradictions' to be the vehicle of development and the locomotive of progress. The incongruity between conflict resolution and truthfinding in criminal adjudication, as we shall endeavour to demonstrate, is an example of such a dynamic-and-guiding internal contradiction.

True, this antinomy between 'law and order' on the one hand and the 'rule of law' on the other has not led, say in the last twenty-five years, to any

– do get psychologically introjected and internalised. Then they lead to existentialist-schizoid state of mind, i.e. alienation. See Laing, *The Divided Self*. They produce the kind of metaphysical proletariat of which Unger was the ideological principal.

For the question of the internalisation of anomie, see generally Merton, *Anomie*. Also, see Merton, *Continuities in the Theory of Social Structure*. According to Merton, there are three basic responses (the three Rs) to anomie in any particular society, whatever the reasons for which anomie itself develops. Normlessness can be attacked by rebellion whereby a particular group in a society attacks the dominant social consciousness and its corresponding socio-political structure and tries to impose its own values on the rest of the society. Such a group will only succeed if its values are more functional, more appropriate and more adequate for that society at that particular stage of development. However, rebellion is not the prevalent mode of response to anomie simply because it is not the line of least resistance and besides, rebellion itself presupposes the model alternative of values which, in conditions of really acute anomie, is impossible to have. The other two responses to an anomie are, on the one hand resignation, which is simply an escape mechanism whereby passivity prevails over active rebellion and the concomitant frustrations are rationalised and intellectualised in the best possible manner. The last response is the response called ritualisation. Ritualisation is a resort to ritual, to form, despite the belief that there is no underlying substance. The less the individual or the society believes something is true, correct, adequate or appropriate, the more he iterates and reiterates the form that conceals that lack of substance. The ritual creates, even though its existence is sociologically speaking 'a myth,' an institutionalised lie because it is far from doing what it pretends to do, a basis for the deontological tension between what is and what ought to be. This tension, without a false transcendental reference, cannot exist. Various religions often not only manifest the beliefs, but also conceal the disbelief. Ritualisation could be called an over-compensation of the lack of substance by the surplus of form. An individual, for example, who does not believe in what he does for his living, will, in order to maintain his ability to perform what he does, do it with compulsive punctuality. Anthropologist Dr. Grace Goodell, a Harvard anthropologist, once said that societies generally try to overcompensate in language and lip service what they lack in reality. This applies, *mutatis mutandis*, to normative hypertrophy in non-democratic legal systems where the regime tries to achieve on the virtual normative level what it cannot on the real one. Former Yugoslavia was a typical example of that.

[9] Feng, *A History of Chinese Philosophy*, at p. 212. Note the definition of an antimony in the last sentence!

particularly obvious 'progress.' In our post-ideological and seemingly pragmatic world, the unresolved antagonism between the inquisitorial and the adversarial types of adjudication – the matter of intense debate in the 1960s and 1970s – no longer even receives much theoretical attention. Yet the preponderantly inquisitorial, the so-called 'mixed' Continental procedure continues to violate the human and constitutional rights of criminal suspects and defendants,[10] whereas the inefficiency of Anglo-Saxon adversary procedure still yields the moral ludicrousness of plea-bargaining. Criminal procedure continues what it has been for centuries: an abnormal mutant of the private law adversary adjudication, which performs naturally in both Anglo-Saxon and Continental legal systems.

No doubt, there is the need for repressive containment of crime as an individual occurrence (special prevention) where the direct deterrence has an immediate effect. But when it comes to general prevention and when one deals with the crime as a statistical phenomenon,[11] the repressive use of state power continues to induce the impression of Kafkaesque absurdity, i.e. the contradictions Kafka pointed out in his *The Trial* are, quite simply, still there.[12] In other words, while conflict resolution is necessary at the individual and short-term level, general prevention of crime does require substantive criteria.

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[10] One fractional and minimalist legislative attempt to correct the inquisitorial undertow of the so-called 'mixed' criminal procedure was the French Law No. 2000-516 of 15 June 2000. See, especially art. 1(I): 'La procédure pénale doit être équitable et contradictoire et préserver l'équilibre des droits des parties. Elle doit garantir la séparation des autorités chargées de l'action publique et des autorités de jugement.' Loi no 2000-516 du 15 juin 2000 renforçant la protection de la présomption d'innocence et les droits des victimes (1), available at http://www.adminet.com/jo/20000616/JUSX9800048L.html.

[11] By 'crime as a statistical phenomenon' we are referring to stable crime rates and to Quételet's law of great numbers. *Sur l'homme et le développement de ses facultés, essai d'une physique sociale* (1835). The Belgian mathematician Quételet (1796 -1874) made it clear that in large numbers, such as dealt with by statistics, universal regularities will surface because the particular accidentalities will cancel out one another. Because crime rates are statistically stable, the inference is that there are underlying 'regularities' pointing to social, i.e. not individual (!), causes of crime. The latter is, in that case, a social phenomenon. In criminology, these causes are attributed to anomie. See, *supra* n. 8.

[12] Kafka, *The Trial*. To men of literature, such as André Gide, Albert Camus, Hermann Hesse, Kafka's text "states the problem of the absurd in its entirety" (Camus). However, Kafka was also a jurist. He immediately recognised, as many a law student today still do, the obvious contradictions in the inquisitorial administration of criminal justice. Incidentally, the relative backwardness of the Austrian setting is revealed by *Constitutio Criminalis Theresiana* (1769) – the only code illustrated with the implements of torture. *Theresiana* was the last thoroughly inquisitorial code of criminal procedure. Eighteen years later, under the influence of her minister of justice, Maria Theresa abolished torture in 1787. The fact that Kafka chose criminal process in the Austro-Hungarian cultural environment as the ground on which vividly

Thus, to recognise the causes of the problem one must go back to the fallacy's hidden primary premises. For this, we shall first look at adjudication as an indispensable complement to likewise requisite societal 'law and order.' A historical view of the evolution of substantive justice and of procedural law will lead to an understanding of contradictions inherent in legal adjudication. The central question guiding the next chapter, therefore, will be whether the role of adjudication is conflict resolution or the more transcendental functions of justice and morality. In the next two chapters, we shall explore the specific incongruities inherent in the criminal procedure by dealing more specifically with contradictions between crime repression and human rights as well as truthfinding and conflict resolution. Moreover, the privilege against self-incrimination and the exclusionary rule will be shown to be an inseparable part of a valid adjudicative situation.

If in the end I shall not be able to suggest any clear-cut solution, this is because the predicament is culturally rooted, is ideologically without opposition and politically ensconced. Such contradictions are inherent in the given social structure and cannot be simply 'resolved.' The extensive changes materialise if we prepare them through small contributions. By unmasking the root causes of the dilemma, however, we hope to contribute to the progress of the advanced 'power of logic' over the primitive 'logic of power.'

As pointed out, the internal contradictions of the kind we shall describe, here I think Hegel is quite right, never get straightforwardly sorted out. If the absurdities of criminal adjudication were only a matter of logic, they would have been resolved long ago. Besides, political lip service concerning human rights is habitually just a disguise for the lack of political will to do away with the real causes of their violations.[13] It is true that the 'political

to demonstrate the existentialist 'absurd in its entirety' could not have been an accident. Kafka must have deemed the procedural absurdities sufficiently plain even for a layman. Jurists may thus admire *The Trial* as an *in cameo* 'deconstruction' of the inquisitorial criminal procedure.

[13] As a member of the U.N. Committee against Torture, I had the occasion over a period of several years to monitor this discrepancy between formalistic 'lip service' and the largely absent 'political will.' The legalistic smokescreens presented by practically all State Parties to the U.N. Convention against Torture reveal the bureaucratic lack of understanding of the structural causes of torture. The latter, in turn, derive from the implicit political instructions under which these bureaucracies, mostly the ministries of foreign affairs, actually function. Their task is to defend the *status quo*, i.e. precisely the kind of administration of criminal justice which in the end degenerates into torture. The structural cause of torture resides in the conception of 'truth' and in the consequently obsessive approach to its 'finding.' The key test of the discrepancy between lip service and political will is thus the State's attitude towards the exclusionary rule mandated by Article 15 of the Convention. It stipulates: "Each State Party shall ensure that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made." The problem, in other words, is not so much the

will' may be relevant only to the extent the determining forces of entrenched social structure will even permit the social protagonists – judges of the courts of last resort among them – to introduce far-reaching improvements. Yet, the sweeping revolution *did* take place in criminal procedure in the 1960s and 1970s when the series of cases culminating with *Miranda v. Arizona* in 1968 and eclipsing with *Leon v. U.S*. in 1986 resolved many legal and moral contradictions. This proves that 'rule of law' is the luxury the social order may afford.

> The vitality of procedure [i.e. adjudication] as a historical phenomenon lies less in its relative stability of form than in its *responsiveness to change in respect of function.* Its most significant problems are consequently not the tracing of the outward history of particular devices, the cumulating of dated technical detail, but the explanation of *functional mutations in relation to social or political changes*, which induce new uses in despite of ancient "certainty." […] Otherwise, the history of procedure becomes a meaningless record of events and its connection to life indecipherable.[14]

At the time when Goebel wrote this, it was not yet apparent that the function of procedure and of adjudication is constant because its genuine purpose always lies in the resolution of conflicts.[15] Yet even in 1937, it was clear that 'functional mutations' of adjudication are related to 'social and political changes,' as if Goebel had anticipated the great procedural 'mutations' to appear twenty to thirty years later.

Unfortunately, despite valiant efforts by brilliant and courageous judicial giants such as Justices Douglas and Brennan of the United States Supreme Court and the enormous impact of the series of cases culminating with

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willingness to prevent and prohibit only torture per se. The problem lies in the authoritarian attitude built into the administration of the criminal justice system as a whole. Torture and other abuses are simply one of the by-products of this authoritarian attitude. Here, it is impossible to distinguish between the lack of self-critical distance (of understanding of the problem) and the lack of political will. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. res. 39/46, [annex, 39 U.N. GAOR Supp. (No. 51) at 197, U.N. Doc. A/39/51 (1984)], entered into force 26 June 1987.

[14] Goebel, *Felony and Misdemeanor: A Study in the History of Criminal Law*, at p. 1 (emphasis added). The influence of the German Historical School and von Savigny's reference to 'the umbilical cord between the law and the life of the nation' is apparent in the last sentence. See von Savigny, *infra* n. 51 to Chapter 2, p. 27-31.

[15] See, for example, Goldstein, *The State and the Accused: Balance of Advantage in Criminal Procedure*, who seems to believe that the intent of criminal procedure is to resolve the "dispute before the court." But see Chayes, *infra* n. 10 to Chapter 3. It is clear that Chayes assumes private litigation to be the only true litigation. When speaking of public law litigation, he says: "The proceeding is recognisable as a lawsuit only because it takes place in a courtroom before an official called 'judge.'" *Id.* at p. 1302.

Miranda v. Arizona (1966),[16] glaring inconsistencies and functional incongruities in both predominant types of criminal procedure persist. Of course, the *Miranda* series of cases, as we shall see, does show how much *can* be done.

However, while these changes were by all means a radical triumph of the 'rule of law' and the 'power of logic,' the inescapable 'law and order' as *function* caused the backlash of 'rule of law' in the last twenty years. The backlash also shows that to maintain law and order in an antagonistic society *objectively* obliges the courts to strike a different balance between human rights on the one hand and the repressive containment of crime on the other.[17] In the short term and narrow perspective, then, the introduction of human rights and 'the rule of law' into criminal process appears impracticable. It hampers the immediate need for the direct repression of crime. That the escalating crime rates are in themselves a symptom of the deeper malaise of anomie is an issue, since the social structure precludes it beyond the purview of those deciding on it.[18]

The incongruities may not be critical for the short-term crime-repressive effects of criminal procedure. From the point of view of human rights, on the other hand, the unresolved problems result in continuous violations of human dignity. This devalues the critical moral impact of the administration of justice; that is to say, it aggravates the anomic processes that are at the root of public disorder and crime. Thus, the ensuing contradictions in the adjudication detract from the legitimacy and credibility of the legal process.

The long-term moral impact of fair administration of justice derives from the substitution of the notion of arbitrary power with the notion of logical consistency (justice). The resort to the use of power, e.g. in violation of the

[16] *Miranda v. Arizona*, 384 U.S. 436 (1966).

[17] The implication is clear. The root causes of crime and disorder in society are not eliminated by repression. They derive from conflicts built into the very social structure, i.e. from what the Marxists called the conflicts of classes and what Durkheim would have called the lack of organic solidarity. The striking of a repressive balance by the courts is a palliative measure and a sign of capitulation vis-à-vis the real problem of anomie. For Durkheim, see *infra* n. 19 to Chapter 2. Moreover, as Merton has shown, this only exacerbates anomie, the latter being a socio-psychological expression of the unresolved conflicts in the social structure. See, *supra* n. 8.

[18] Merton, *supra* n. 8. Marxist conventional wisdom claims that in its final stages the capitalist social structure will be forced to renounce all pretense of the 'rule of law,' constitutional and human rights, etc. The social contradictions (between classes) would exacerbate to the point where the 'rule of law' would no longer afford the above concessions. This, of course, implies the notion of law as an epiphenomenon and of adjudication – 'the vitality of procedure' in Goebel's language, see *supra* n. 14 – as pure artificiality. Merton's theory, however, is free of that fundamental Marxist cynicism. It makes it clear, in my opinion, that what seems in the short run a contradiction between the ethical 'rule of law' and the pragmatic 'law and order,' is in the long run simply the difference between the sophisticated and the unsophisticated assessment of the legal process.

privilege against self-incrimination in criminal procedure, thus ends up in the moral subversion not only of criminal process but also of the whole perception of the rule of law and justice in society.

But, if institutionalised values are not logically consistent and fairly implemented, if they lack legitimacy and credibility, how can people internalise and respect them? One has to keep in mind that in the end it is the moral and not the immediate mechanical effect of the legal process, which is decisive. While the immediate purpose of adjudication is the consistent resolution of conflicts, it is clear that no judicial branch can ever cope with the explosion of disagreements that would result from the complete absence of shared values. The social purpose of adjudication is to instill enduring respect for institutionalised values, i.e. to promote and catalyse what sociologists call normative integration.

CHAPTER TWO

Adjudication and the Rule of Law

From the defeat of the Communist ideology we have learned that the state which is not democratic and ruled by law will not be able to engage the creativity of its subjects and, reversely, that the society prevented from engaging and catalysing the full creativity of all its members will cause, in fifty to seventy years, the downfall of even the most powerful state and ideological structures.[1] We understand now better than ever before that the creativity

[1] In the most basic sense, the law itself is the first great equaliser. This pertains to the essence of law at least in view of the equality in physical powerlessness (prohibition of physical self-help). The law is a service of non-violent conflict resolution. The need for legal process (as a service) arises only after the violent mode of conflict-resolution (*bellum omnium contra omnes*) is forbidden by the Hobbesian state. In this elementary sense, the primordial legal process (as a service) is a secondary response to the abolition of the use of force as a means of conflict resolution. This implies that law is a response to the equality in (physical) *powerlessness*. The proscription of the (physical) inequality as a factor in conflict resolution – *viz.* the privilege against self-incrimination, *nemo contra se prodere tenetur* – has systemic implication for the legal process as a whole. Today this is reflected in the ever wider interpretation of the 'equality before the law.' The reasonableness (proportionality) tests applied by the constitutional and supreme courts in fact all widen the concentric circles of what the young Marx (in his *Critique of the Gotha Program*) critisised as merely a 'formal equality.' The ideology of Communism wanted to go one step further and reform the formal equality (non-discrimination) into the substantive equality: to each according to his needs. Thus, little and short term good was done to the lower classes and a great harm to the more creative members of society. Militant egalitarianism implied in substantive equality effectively made the more creative and energetic member of the society withhold their creative contribution to the advancement and thus caused, in the long run, the economic downfall of Communism. Since equality is always an inequity to the more powerful, energetic and able in the particular framework of competition, too much equality, as Nietzsche put it somewhere, will stifle the life itself. An entirely different danger now lurks in the post-capitalist downfall of the salaried middle classes; their economic status is being reduced – for the last fifty years – by approximately one percent every year. For implications see Thurow, *The Future of Capitalism*.

of an individual in the vast and complex global division of labour must be protected and nurtured if the entropy of human civilisation is to be offset and the global problems from environmental pollution created by progressive economic growth to disease, unemployment, anomie etc. continue to be solved. Only the individual – never the collective – can be creative. Individual's creativity, as has now been empirically shown, is only possible if the social, political and legal conditions for his moral growth (individuation, French: *subjectivation*) are predictable and stable, if his privacy, i.e. his right to be fully and freely himself, is protected and expanded. For the rest it is clear that the society with the highest correlation between individual ability and creativity on the one hand and power and influence on the other hand, i.e. the society with the highest respect for individual qualities, will be the most prosperous and successful.[2]

The influence of the constitutional order and the legal system in maintaining the creative freedom of the individual is limited but crucial. In short, the legal system creates and maintains the basic barrier to violence, brutality, discrimination, insensitivity, stupidity and other ever present regressive tendencies. Constitutional and legal orders create and maintain the social reality in which the creative individual can grow and flourish in his genuine identity – and remain true to it. Since there is no inner liberation without the systemic outer liberation, such as the freedom of expression, the guaranteeing rule of law is indeed now, perhaps more than ever before, an exalted postulate. Without the maintainence of this rule of law, the progress that has been made in Western civilisation or the scientific and technological advances of the last century would not have been even conceivable.

All we propose here is to keep this role played by the legal system in mind and in this sense to re-consider some of the basic premises of legal organisation that had made all of this possible. Beginning with the establishment of the state through its constitution, I will trace the importance of such a constitution in maintaining law and order. An attempt will be made to show that while the basic function of law is replacing the logic of power with the power of logic, such a prevalence of the rule of law paradoxically depends on the power of 'law and order.' Lastly, I will show that the first and foremost function of any constitutional and legal order is conflict resolution and not, as is often assumed, upholding the qualities of morality and justice. Thus, we will uncover the internal contradictions inherent in the system of adjudication, and meanwhile show that the contradictions are mutually indispensible.

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[2] Thurow's prediction is, in fact, that the whole Western civilisation is sinking into the Dark Ages due to the economic under-appreciation of the contribution of the salaried middle classes – the social carriers of science, scholarship, skills, etc. Thurow, *supra,* n. 1.

1. From Combat to Contract: What Does the Constitution Constitute?

We must begin with the most basic premise concerning the true nature of a constitution. What is a constitution? Is it merely the hierarchically highest legal act, the queen bee of the legal system, as Kelsen had called it? If so, is this hierarchy to be politically justified and functionally defined in terms of the ultimate power of the supreme or constitutional court as the court of last appeal? *Vis-a-vis* the legislative branch of government and *vis-a-vis* the executive branch, this would definitely seem to be one of the essential characteristics of the distribution of power in a modern democratic state – determining the limits of power, the checks and the balances between different branches of power. Yet such a political restatement of the position of the supreme or constitutional court does not explain – in the broadest, synthetically (not analytical!) legal terms – why such an additional instance of power would be needed in the first place. Merely because the executive branch is inclined to the arbitrary use and to the transgression of the legal limitations of its power? Or perhaps because the legislative branch also tends to conceive of its power in absolute terms, thus exceeding some loosely perceived criterion of "reasonableness?" Or because the regular courts need an extra instance of appeal, correcting what all of the regular appeals were incapable of correcting?

Such merely 'functional' explanations fail to take into account the logically required deeper premise. This deeper postulate concerns the legal nature of the constitution. Even if the constitution is formalistically seen only as the tip of the pyramid of the logical hierarchy of legal acts – which it is – the mere functional requirement that there *be* such a tip does not explain wherefrom its primary constitutive nature. In other words, the fact that something in a system may be logically presupposed does not explain why it is there in the first place, or as Nietzsche put it: the fact that the hand is good at grasping does not mean that this is how it came to develop.

The legal importance of the constitution becomes apparent when we realise that it prescribes and describes the constituent components of the relationship between a particular society and its state. This relationship between the state and the society may evolve to a higher level of liberty if, and only if, crudely and basically, anarchy is prevented.[3] However, this

[3] This is perhaps one point of cross-cultural agreement in the science of state-law (Ger: *Staatsrecht*). The traditional Chinese fear of *luan* (anarchy, war of everybody against everybody, disorder, disorganisation) clearly exists in an entirely different jurisprudential context due to the reversed relationship between law (*fa*) and morality (*li*). The Weberian rationality of law was maintained on the feeling level (*li*) first and only if that did not work the resort was

simple and rudimentary relationship between the state and society should be understood as Hobbes in his *Leviathan*[4] described it to be. That means that the rest of the civilisation's 'superstructure' will collapse incredibly fast unless the 'infrastructural' relationship – based in the last analysis on fear – is forcefully maintained. The moment the state falls apart, the society regresses to the anarchical war of everybody against everybody. So, what is the role of the constitution in saving the state from falling apart? And, before that, what role does it play in the formation of the state, by stopping the war of everyone with everyone? In other words, what does the constitution constitute?

I believe this is the question we must begin with to be able to more clearly perceive the legitimate social, political and legal reasons for the jurisdiction of modern constitutional courts.[5] The answer to this question is as simple as its repercussions are complex. It is obvious that the purpose of the constitution is 'to constitute,' i.e. to found, establish, create and organise the state. However, it is also obvious that to a superficial observer this would seem to be an *ex post facto* legal fiction: the establishment of the state strikes us as a *fait accompli* of power having more to do with the bayonets (for the establishment of the state) and as Rudyard Kipling put it, with the police clubs (for the maintenance of the state), than with the apparently secondary projection of the abstract and indefinite legal concepts contained in the various constitutions.[6]

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made to the *thinking* level of logical justice *(fa)*. (The latter was considered to be unrefined and inflexible.) See for example, Bond, *Behind the Chinese Face*. Yet the basic relationship between the society and the state is seen in similar terms.

[4] Hobbes, *Leviathan*.

[5] When we speak of constitutional courts, we are referring to the jurisdiction of these semi-specialised courts which also function as the courts of last appeal. The unified jurisdiction of, e.g. the United States Supreme Court would, of course, be much more logical – precisely to the extent to which the function of abstract review is difficult to separate from the so-called 'concrete review.' We shall consider it natural for the legal order to decide specific issues in specific controversies and to endow the particular decisions with the precedential effect. But since the precedential effect of the Supreme Court's decisions requires the switch from deductive formal logical legal reasoning to one based on analogy (analogical legal reasoning) and since this requires the kind of cognitive *metanoia* (change of attitude) the Continental lawyers find difficult to even entertain, this must be compensated for by the institutional set up of (constitutional) courts specialised in this kind of broader, more autonomous, politically more self-confident, constitutional courts. The specific formal-logical elaboration of the legal effects the decisions of the constitutional courts in Europe are to have, proves the centrality of above mentioned distinction between the deductive and the analogical legal reasoning. See Steinberger, *Decisions of the Constitutional Court and their Effects*. (Professor Steinberger was formerly a judge of the German Constitutional Court.)

[6] The hypothesis of the state founded upon an antecedent contract is absurd. Rousseau makes use of it merely as an ideal, an expedient. His purpose is not to show what happened, but what, according to him, should happen. No state has ever been created by genuine contract, that is, a contract freely entered into by all parties (inter volentes); for cessions and settlements

It is, in other words, quite clear that the modern boiler-plate constitutions do not, in any original and elementary sense of the word, 'constitute' the particular new states. Many of the recent East European states, for example, have come into existence haphazardly through the contingencies of the disintegration of larger integrations. It was the nationalistic particularisation, the 'pandemonium,' as Moynihan has called it, which resulted in the proliferation of make-believe sovereignty and many copy-cat constitutions, and not vice versa.[7]

The constitution may not always *de facto* establish, constitute, the state – *ex factis ius oritur* – but it definitely does constitute the basic principles of law and order of the state. Again, according to the Hobbesian logic, the primitive but natural way to resolve conflicts is indeed by aggression and combat.[8] Even today the instant regression to this natural way, i.e. the war, will occur – between individuals or the states – only if there is no greater threat coming to them from the sovereign state (to the individual) or from the stronger state (to the less powerful one). Hobbes' *bellum omnium contra omnes* – brutal and barbaric as this assumption may seem to be – is *the* ultimate way of resolving the differences between human beings. This, too, has been made obvious by

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like those between the trembling Romans and triumphant Teutons are no genuine contracts. Hence no state will come into being in that way in the future. And if ever one did, it would be a feeble thing, since men could quibble for ever over its principles.

Burckhardt, *Reflections on History (Weltgeschichtliche Betrachtungen)*. Nietzsche's contrary views of the matter, expressed in his *Seventy-Five Aphorisms*, see *infra* n. 11, are probably no accident since he came to Basel as a professor of classics at the age of twenty four, attended Burckhardt's lectures in 1870 and even developed a friendship with him. See Nietzsche's letter to Carl von Gersdorff of Nov. 7, 1870 in Giorgio Coli/Mazzino Montinari, *Nietzsche Briefwechsel* (Berlin 1977), Abt. 2, I, 155 as cited in the *Introduction* to Burckhardt's book by Gottfried Dietze, *ibid.*, p. 13 and 14. Burckhardt apparently never thought of the contract as an alternative, not to outer, but to inner (civil) war and, of course, the fora for 'quibbling over the principles' of the contract are the constitutional courts of today. That such a democratic principle could possibly strengthen the (democratic) state, rather than weaken it, that was apparently foreign to Burckhardt's authoritarian views.

[7] See Moynihan, *Pandemonium*. Moynihan maintains that Woodrow Wilson had been forewarned not to endow the then current catch-phrase 'the self-determination of peoples' with an ideological aura. But see, Masaryk, *The World Revolution*. (The two professors – of law and of practical philosophy – had been friends.) Apparently, what has happened in Central and Eastern Europe is indeed a particularisation as a consequence of re-emergent nationalism; it is to be expected that this will be followed by a universalisation, i.e. by re-integration of these new states into larger (1) economic and (2) political associations such as European Community, NATO, etc.

[8] See Lorenz, *On Aggression*. There are two elements built into this. First, the regression to aggression is perhaps biologically natural, but, second, mutual aggression is then a natural experiment for the testing of two mutually exclusive hypotheses concerning the respective powers of the two protagonists.

the events in the territory of former Yugoslavia, by the anarchy in Albania, by the ethic cleansing in Rwanda, etc. not so long ago.

The moment the Leviathan of the state is toppled and there no longer, as Michael Foucault would say, hangs over the populus the permanent declaration of war by the state, the situation regresses to the war of all against all. Since material goods are by definition scarce, conflicts are bound to arise as to their distribution. If the legal order maintains at least a modicum of correlation between what the sociologists call contribution and retribution, for example, then this has economic repercussions on the well being of the society as a whole. But we must keep in mind that this is in the end a precarious state of affairs. Those who lose by the meritocratic criteria will in all likelihood resort to the more primitive means of retribution the moment the general threat deriving from the Hobbesian state is no longer there. In the last analysis, as Freud pointed out in his *Totem and Taboo*, the whole civilisation is based on the external (and the internalised, sublimated) fear.[9]

The state maintains order by imposing the general threat under which the war of everybody against everybody is stopped. If the division of labour in society is thus developed and if generational collaboration (civilisation) is preferred to what the Chinese call *luan* and what we call anarchy, *bellum omnium contra omnes*, civil war, then this rational and productive state of affairs must continue under some conceptual albeit artificial order. The constitution constitutes the basic principles of this order.

In other words, there are two figurative stages in the establishment of a state. In the first stage the greater power (of the future state) establishes its absolute prevalence in society, stops the war of everybody against everybody and introduces peace. Since the essence of this peace is the categorical prohibition of the private resort to arms and combat, in the second stage the state must offer an alternative mode of conflict resolution on all different levels from private controversies, to the conflict between the individual and

[9] See also Freud, *Civilisation and its Discontents* and his *Totem and Taboo*. Freud's views were implicitly, although he was careful enough to never fully articulate them, pessimistic. His basic assumption was that the fear induced by the state aids the suppression of instincts (Id), helps create the primitive internal moral instance (Superego) and results in the compromise of self-image (Ego). The state's induction of fear is transmitted to the family through the Father's conditional love and the final result is the civilisational neurosis epitomised in the contradiction between the individual's instinctual (biological) drives on the one hand and the needs of societal coexistence as articulated in the state and its repressive mechanisms. It never occurred to Freud that there could be a moral evolution (of individual and of society) such as hypothesised later by Jean Piaget and empirically demonstrated by Kohlberg, Kegan, etc. See *infra* n. 57. In this respect, Freud was more a successor to Burckhardt than an heir of Nietzsche whose philosophy he cherished.

the state (as in criminal law) to the political conflicts between the different structured interests in the state.[10] The legal order – in the end constitutional – does just that.

The constitution, elaborating the basic legal order of the state to prevent the Hobbesian war of everybody with everybody, is a social contract between the state and its citizens. To explain this, let us retract to the famous Nietzsche's explanation of the origins of law.

> Origin of Justice. Justice (fairness) originates among those who are approximately equally powerful: where there is no clearly recognisable predominance and a fight would mean inconclusive mutual damage, there the idea originates that one might come to an understanding and negotiate one's claims: the initial character of justice is the character of trade. Each satisfies the other inasmuch as each receives what he esteems more than the other does. One gives another what he wants, so that it becomes his, and in return one receives what one wants. Thus justice is repayment and exchange on the assumption of an approximately equal power position; revenge originally belongs in the domain of justice, being an exchange. Gratitude, too. Justice naturally derives from prudent concern with self-preservation; that means, from the egoism of the consideration: "Why should I harm myself uselessly and perhaps not attain my goal anyway?"[11]

Notions such as "trade," "repayment" and "exchange" imply a contractual relationship, i.e. a relationship in which a promise is kept. As with every other contract in order to further the keeping of the promise – a written (or otherwise recorded) semantic fixation is made thereof between the state and the citizens. The state declares itself as civilised and it articulates the constitutional principles in a written form.

As with every other contract, the essential mental operation required to interpret it is the *ex post* reference to a semantically fixed promise, i.e. the re-

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[10] I have tried to demonstrate this in detail, see *infra* n. 88 and 120 to Chapter 4. "[T]he sporting theory of justice, the idea that judicial administration of justice is a game to be played to the bitter end, no doubt has its roots in Anglo-American character and is closely connected with the individualism of the common law." Pound, *The Spirit of the Common Law*, p. 127.

As it turns out, especially if one reads von Savigny in this connection, this is no original peculiarity of Anglo-American culture. Rather, legal conflict resolution replacing the logic of force by the force of logic is an essential characteristic of all law; codification merely obscured this.

[11] Nietzsche, *Seventy-Five Aphorisms*, Par. 92 and Nietzsche, *On the Genealogy of Morals*, p. 169, § 92. Pashukanis, *op. cit. infra* n. 56, p. 167 to 188, and especially p. 170. Pashukanis, *op. cit.*, p. 168, copied the passage from Nietzsche's *The Wanderer and his Shadow*, Appendix, Seventy-Five Aphorisms from Five Volumes, p. 179 to 182. (So much for the originality of the Communist theory of law!)

interpretation[12] of the past agreement to resolve present disagreement: the past *form* was intended to govern the future *substance*.[13] Thus, the semantically fixed *form* and its *antecedence* (anteriority, precendence) are two essential elements of everything legal – be it an *inter partes* contract or an *erga omnes* effective law. In that sense, we consider the contract as the paradigm of everything legal. The contract is a semantic fixation (the form) of the mutual agreement (the antecedent substance of the relationship) intended to govern[14] – in view of the distrust between two parties – the potential future disagreement (the posterior substance of the relationship).

Democracy as a social, political and legal (e.g. legislative) phenomenon also occurs in the present; it is derivative and secondary in the sense that it, too – legally speaking – derives from the basic social contract, the constitution. This constitution as a contract was established in the past with intent to govern the future of its subject-matter, including the present. In this sense, the constitution is a legal phenomenon *par excellence* no different from any other elementary contract. It follows logically that the future binding nature of the constitution *qua* long term contract requires (a) *continuous* interpretation of the past form governing the present substance and (b) requires a *forum*, i.e. an instance authorised to perform this interpretation.

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[12] The German term *Konkretisierung* is perhaps better since it connotes 'making concrete' what was previously only abstractly (in principle) agreed upon.

[13] Distrust, therefore, and the anticipation of conflict lie at the base of everything legal. In contract law, typically, distrust is specified and made concrete in the clauses of present trust between the parties, but their very articulation is a testimony to the basic distrust: thus the repugnance of the prenuptial agreements. But there is nothing distasteful in the distrust between the individual and the state (e.g. the principle *nullum crimen sine lege praevia* in criminal law and the privilege against self-incrimination). The constitutional separation of powers, more significantly, may be seen as the reversal of the Roman '*Divide et impera!*' i.e. 'Let the powers be divided so that they will not rule!'

[14] In its essence, this governance is a *logical compulsion* wherein the clause of the past agreement is taken as a semantic major premise representing the past (now fictitious) agreement. Logical compulsion is then only a watertight deductive or inductive logical operation. For more details on this, see Stroud, *Wittgenstein and Logical Necessity*. Of course, this opens up numerous complexities ranging from the undetermined nature of the semantically fixed premises to the question to what extent are these determined by shared values. Law is a cultural phenomenon and too large a cultural disparity, for example, may preclude the emergence of the logically required lower level of agreement. (The famous Australian case of *Regina v. Muddarubba* illustrates this point.) Consequently, the constitutional safety of the subject *vis-à-vis* the state and other aspects of constitutional law are likewise a cultural phenomenon in the sense that there must exist, if the language game called 'constitutional adjudication' is to function, certain shared (democratic) values as firmly established major premises not to be questioned by anyone. This shows, further, how difficult is the role of the constitutional courts in the cultural environments in which these values are *not* being shared, when the very existence of the constitutional court presupposes them.

Since every contract presupposes *both* the initial agreement as well as the subsequent disagreement, the constitution as a projection of the criteria for the prevention and the resolution of conflicts also presupposes – in cases of their perceived violation – the impartial third party applying these criteria. If it is true to say that every contract presupposes a judge who will eventually interpret its clauses and who will in turn have the (state backed) power and the authority to enforce his interpretations, then the constitution, too, would be a dead letter unless there were *an authority in the state to interpret it*. The jurisdiction of this authority, be it the supreme court (in unified jurisdictions), a special constitutional court (in dual-track jurisdictions), or any other independent judicial authority derives logically from its own *raison d'etre*: the content of the contract constitutes the limits of the jurisdiction and the extent of the justiciability of the perceived violations.

It follows that the constitution is essentially a social contract binding on everyone in the state and especially binding on the ones in power *vis-a-vis* the ones out of power. In this practical sense, the constitution is a contract between the people and their established state.

The parties, simply speaking, enter the negotiation of an agreement because it pays better to co-operate than not to co-operate – and, in matters of constitutional dimensions, perhaps to regress to a destructive civil war. In that sense, the constitution as a contract is an alternative to civil war. Nietzsche maintained that the origin of law must be traced back to the situation in which two warring factions get themselves in the no-win situation. In this situation they are forced to negotiate and to compromise, i.e. to create a legal *modus vivendi* between themselves.

It is not clear whether Nietzsche had Magna Carta (1215)[15] in mind when he wrote that, but it is historically clear that the mother of all constitutions is precisely the compromise (a contract!) stipulated between the two tired parties, King John and the Barons, in a no-win situation. The parties, in other words, were not willing to perform – to the mutual detriment – the experiment of the civil war. They perhaps realised that this would not, in the longer run, guarantee the stability of the political situation. The blood would have been shed to no purpose and they had understood that *rebus sic stantibus* they must, as we would say today, cohabitate. They understood that they may negotiate a contract to govern the future conduct of the 'executive branch' – a prenuptial agreement of a kind, foreseeing the eventualities of

[15] The Magna Carta of 1215 was a truce between King John the Weak and the Barons. The two warring sides negotiated this model contract of 'social peace' in view of their practical realisation that continuing hostilities would serve no further purpose. The Magna Carta is without doubt the first constitution, i.e. a 'social contract' binding on everyone. See, *The Magna Carta, 1215*, The Avalon Project and Zupančič, *From Combat to Contract: What does the Constitution Constitute?*

the long term cohabitation.[16] The cultural ascent from combat to contract is, therefore, also a question of understanding for the parties involved. In other words, there must exist a situation in which the founding of the state, its stability and its continuity does not happen (and is not further guaranteed) by mere and simple unilateral seizure of power.

The compromise, i.e. the principles of the contract so stricken in the Magna Carta in fact did constitute, for the first time in history, the state based on the rule of law. For the first time in history the power had to be exercised *in reference to a legal document* governing its sharing. The future sharing of power seems to be at the core of this paradigmatic situation, the constitution being nothing else but a contract (a *compromissum*) projected into the general rules of the political, legal and power games played between the parties. In Wittgensteinian terms we could say that this is how – for the first time on the highest and most primordial level – the brutal *power game* becomes a legal *language game*. The checks and the balances of power which we understand today in terms of constitutional law were, at that time, a factual alternative to the civil war and as such a prerequisite for the establishment of the state constituted as a contract between the protagonists of power in the society.

This is important to understand. For the constitution *is* essentially a contract, although the parties today are most often not as obvious as they were in 1215. But the alternative is also obvious and it is the alternative which proves the above logic. The alternative to a negotiated situation is civil war. Since the difference between the civil war on the one hand and the rule of law on the other hand is at once the difference between anarchy and civilisation, the modern constitutions also represent the concise restatement of the cultural attainments of the Judeo-Christian civilisation: their substantive due process, their bills of rights, their provisions concerning the separation of church and state, etc.

Today, more than ever before, the term 'society' connotes the co-existence of groups with mutually exclusive interests, i.e. the latent antagonistic substance of the potential outbreak of an open conflict is always there. Formal democracy with all its political parties representing the conflicting interests as well as all the checks and balances is there to provide the needed institutional structure for the negotiated compromises intended to prevent the political breakdown. Once these structures give way, Klausewitz's formula concerning

[16] We must keep in mind, however, that this had happened in 1215 and that it established the basic politico-legal difference between the Island and the Continent. Certain 'human rights' already came into existence through the 'bilateral' constitution of Magna Carta, e.g. the principle of legality, which took another five hundred years to emerge in 'unilateral' states such as France, Germany, Italy. The above principle, for example, got to be established there only through Enlightenment writers, more specifically through Beccaria's little book *On Crimes and Punishments (Dei Delitti e Delle Pene)* in 1764!

war being the logical extension of politics very quickly materialises and must then be reversed. So much at least we have painfully learned in South-Eastern Europe in the last few years.

As opposed to sociological and political considerations, however, the elemental *legal* logic of contract does require the formalistic-positivistic reliance[17] of both parties upon the semantically fastened mutual promises (*compromissum*) to (a) govern their future mutual conduct and (b) to provide the criteria for the resolution of potential future disagreements. It is debatable whether there may be a better way to resolve social controversies (of constitutional dimensions) than the current resort to legal formalism. This has much to do with the general cultural level of a particular society on the one hand and with the intensity with which values are being shared on the other hand. The traditional Chinese juxtaposition of *li* (implying the friendly cooperation and settlement of disputes) and *fa* (the resort to legal formalism as the *ultimum remedium*) has perhaps much to teach us in this respect.[18]

In the last analysis, the constitution constitutes the law and order of a particular state by ending its internal war of everyone with everyone. The threat of greater harm by the state's 'law and order' ends the internal conflicts. Yet, paradoxically, the state which absorbs all force itself depends on force to maintain law and order in the state.

2. Adjudication as the Surrogate of Force and Violence

In a sense, adjudication of conflicts is the essence of civilisation and organised society. When one goes to the very heart of law as the business of state and of governing and as a complex, diversified, culturally imbued and socio-political phenomenon, we find that it springs from one rudimentary need. This most basic social need and the process of fulfilling it may be called in the fundamental sense of the word and without any exaggeration, the civilisation.

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[17] This again is true substantively as well as *procedurally*:

> If we can expect legally and constitutionally trained lower court judges to subjugate their best professional judgment about constitutional interpretation to the judgments of those who happen to sit above them, then expecting the same of non-judicial officials is an affront neither to morality nor to constitutionalism. It is but the recognition that at times good institutional design requires norms that compel decision-makers to defer to the judgments of others with which they disagree. Some call this positivism. Others call it formalism. We call it law.

Alexander & Schauer, *On Extra-judicial Constitutional Interpretation,* at p. 1387.

[18] See for example, We-Jen, *Traditional Chinese Legal Thought,* (unpublished manuscript).

The natural prerequisite in any interpersonal matrix, however small, is first to establish and then to maintain harmony and freedom from strife.[19] Even in the most primitive tribal community, if it were a community with a most basic division of labour, the inevitable conflicts, disagreements and discords between its members simply cannot be permitted to relapse into physical contests and combat. This is true even of groups of non-human primates and of lower animal species where the dominant males by maintaining their power through 'pecking order' maintain subordination and peace. In the history of human societies this simple and primitive 'pecking order'[20] gradually, incrementally, but progressively develops into ever larger agglomerations of power, that is to say the states (governments) covering ever larger, today, global division of labour. The needs which dictate this gradual enlargement of the 'law and order' are purely practical.

Adjudication is at the centre of this conversion from unrestrained natural aggression to 'law and order' and in turn to 'the rule of law.' In other words, it is the inverse mirror image of blocked violence. By the enforced fiat of the state's 'law and order,' adjudication takes the place of the natural belligerent, aggressive, in short combative conflict resolution.[21] Adjudication testifies to

[19] In modern and complex societies this 'harmony and freedom from strife' grows to be, of course, a complex anthropological, psychological, sociological, ideological and political issue. Durkheim, for example, as a leading social theorist dedicated most of his work to 'division of labour in society' and to contrary concepts such as social dissolution, anomie, etc. See, Durkheim, *Les Formes Élementaires de la Vie Religieuse*, p. 593-638, and the critique of his positivist position in Jameson, *infra* n. 20, at p. 292, n. 11. On division of labour generally, see Durkheim, *The Division of Labour in Society*, and my discussion of it in Zupančič, *Criminal Law and Its Influence upon Normative Integration*, at p. 83-91 and in Chapter 9 of this book.

For our purposes, however, it suffices to appreciate – in a purely functionalist fashion – the fact that simple co-operation in an elemental human gathering requires a simple establishment of 'law and order.' The progressive complexity of the nature of social divergences and individual conflicts finds its complement in ever more complex forms of adjudication. In modern socio-political context, for example, the complex forms of constitutional and international adjudication ('judicial review') *mutatis mutandis* provide for resolution of social conflicts and the consequent appeasement, for social and political stability. The core form of adjudication, however, remains the same throughout human history.

[20] 'Pecking order' is, of course, merely a metaphor. Hegel, on the other hand, based much of his *Phenomenology of Spirit* on the 'battle for power and prestige' between 'master and slave.' The classical treatise on this is by Hyppolite, *Genèse et Structure de la Phenomenologie de L'Ésprit de Hegel*. For an easier interpretation see Kojève, *Introduction to the Reading of Hegel*. (Fukuyama´s *The End of History* is a popular version of this serious work.) For a sophisticated extrapolation of this political philosophy, see Jameson, *The Political Unconscious*.

[21] See Lorenz, *supra* n. 8; Wilson, *Sociobiology*; Skinner, *Science and Human Behavior*. Generally speaking, the empirical and in this sense scientific question is whether the genetic endowment of the human species predisposes it to react aggressively to frustration (conflict). The behaviourists openly insist that this is so and that what we call 'culture' is but a thin layer of

the complete *échec* of the attempt at transcending the elemental volte-face from compulsion by combat to logical compulsion,[22] from physical fight to verbal argument. Thus, adjudication is the quintessence of law.

Adjudication, as a form of conflict resolution, is an attempt at decision-making by reference to criteria other than force: *non sub hominen sed subdeoet lege*. If in a society, people were 'just' in exact proportion to their economic, physical, organisational, institutional power, there would be no need for adjudication. Might would *de facto* and *de jure* be the right. Every outcome of every conflict would be just. The very fact that in legal adjudication the more powerful party may end up as a loser proves that there is a plane of reference other than power. It is usually called justice. In a Nietzschean society where the more powerful superman is necessarily more just, and where the powerless underdog's reference to justice is labelled as mere 'resentment,' there need be no judge and no judging. Adjudication, thus, is an alternative to the use of force between people.

The very reference to 'justice' makes the use of force extrinsic to the proposed mode of conflict resolution. Thus, it follows inexorably from the very institution of adjudication that it is a force surrogate because if conflicts were allowed to be fought out, the reference to a third party judging would simply be otiose.

Historically, different societies have attempted different alternative ways in finding a solution to this fundamental need of replacing anarchy with order.

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varnish on the genetically programmed aggression. Freud then simply maintained, inspired in fact by Nietzsche, that the blockage of aggression forces this energy to sublimate into culture or to become displaced. In this sense, the legal process of adjudication is both displacement of aggression and conversion (sublimation) from physical to verbal.

However, because adjudication transfers the aggression into the 'deep structure' of language, it then becomes 'logical' rather than brutal. Still, the metamorphosis from the logic of power to the power of logic is superficial and consequently subject to constant danger of regression. Foucault's protest against the inherent violence of the state is thus naïve: without the constant threat of *greater* violence, people would not submit to adjudication as a 'peaceful' conflict resolution. For the 'deep structure' argument, see Chomsky, *Cartesian Linguistics*.

[22] On 'logical compulsion' see Barry Stroud's brilliant essay *Wittgenstein and Logical Necessity*, at p. 477-496. Stroud's own comments and his interpretation of Wittgenstein's are probably the best formal-logical demonstrations of the processes of argumentation and proof, or as he calls it, of 'logical compulsion.' It has important ramifications both for epistemology as well as for evidence as a branch of law. One has to keep in mind that in adjudication it is logical compulsion, which replaces the previous non-adjudicatory (before the establishment of the state and its 'law and order') physical compulsion.

My own shorthand formula for adjudication – 'from the logic of power to the power of logic' – is owed indirectly to Stroud and to Wittgenstein.

See also Pitkin, *Wittgenstein and Justice*. Pitkin's book, although philosophically interesting, was a disappointment because she is not sufficiently sensitised to tangible legal issues. Her 'justice' remains philosophically abstract.

As anthropology will confirm, even the most primitive societies must offer the process of adjudication in order to settle the private conflicts, which would otherwise degenerate into anarchy.[23] Depending on the socio-biological fact of greater or smaller measure of aggression natural to the population to be administered, greater or smaller countervailing fear must be instilled through 'law and order.' Oriental societies are perhaps manageable with less 'law and order,' i.e. '*li*' is more likely to exert sufficient pressure to guarantee peace.[24] The Chinese society, for example, resorted to '*li*' (courtesy, politeness, friendly conflict-resolution by mutual appeasement); their '*fâ*' (legal logic similar to our rule of law) was secondary and the Chinese used it only as an ultimum remedium. Still, this tends to influence the mode of arbitrage rather, as Malinowski has shown the need for it. The reading of ancient Chinese judicial records indicates that this mode of arbitrage – what we would call 'the rule of law' – is based more on interpersonal feeling and less, as is the case in the West, on cold reason alone.[25] Accordingly, the binding nature of the decision derives less from the fear of the direct threat of physical sanction and more from immediate social pressure.[26]

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[23] Malinowski, *Crime and Custom in Savage Society*, at p. 123. Also see, Dan-Cohen, *Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law*, in *Harmful Thoughts: Essays on Law, Self and Mortality*. Dan-Cohen posits the same idea as Malinowski i.e. that equity and common sense may prevail over legal formalism on the condition that they are, as they are when the jury is sequestrated, 'acoustically separated' from the 'surface of publicity.' For the negative side of *that* issue, see *Furman v. Georgia*, 408 U.S. 238 (1972).

Durkheim's 'law and order' is not the same as the one posited by Malinowski. For him, 'law and order' is a composite term signifying social peace and stability. For us, the term will indicate the social discipline instilled by the fear of sanction. For Malinowski, insofar as social anthropology would deal with issues such as 'democracy,' the 'rule of law,' etc. there would be no contradiction with 'law and order.' We shall, on the contrary, juxtapose 'law and order' as a mechanical means of maintaining social peace to the subtler (more 'democratic') apparatus of the 'rule of law.'

[24] Taoism and Confucianism seem to indicate that. But see Sima Qian (sometimes spelled Shuma Chien), *History of China*.

[25] I owe the confirmation of this notion to Professor He Weifang of Beijing University, Faculty of Law. In our conversations in 1997, we discussed the idea and its consequences i.e. the obvious fact that historically and culturally, the Chinese society is not inclined to accept the Western 'power of logic' as the essence of the 'rule of law.' The best way to understand this is to distinguish psychologically between what Jung calls the *thinking* function i.e. 'the power of logic' synonymous with 'justice' in the West, from the *feeling* function based on consideration of human relationships. It would be characteristic of our Western arrogance to assume that the feeling function is irrational. It is not. It only refers to a different kind of rationality. See Jung, *infra* n. 32.

[26] This 'social pressure,' however, derives from the so-called *interpersonal matrix* (of relationships) in which the subject finds himself. The fact that such 'social pressure' succeeds in (psychologically) forcing the subject to submit to the decision is due to the very low, in

At least in the Western countries, adjudication as the cogent legal and public conflict resolution method is a service rendered by the state. The state must offer this service immediately[27] once it succeeds in putting a stop to the Hobbesian 'war of everyone against everyone.' This becomes more apparent when we say that the state is *de facto* established only once it establishes 'law and order.'

At the core of this evolution of adjudication spanning through at least thirty millennia lies the need to guard against the constant threat of regression to chaos, anarchy, bedlam, pandemonium, disorder.[28]

> Hereby it is manifest that during the time men live without a common Power to keep them all in awe, they are in that condition which is called Warre; and such a warre, as is of every man, against every man. For Warre consisteth not in Battell onely, or the act of fighting; but in a tract of time, wherein the Will

fact the lowest, level of autonomy of normal moral development. On this primitive level, the difference between right and wrong is delineated by what other people say is right or wrong. See Kegan, *supra* n. 9 and *infra* n. 57. This throws a less idyllic light on some anthropological conclusions, such as Malinowski's. The interesting question to explore would be to compare Kohlberg's and Kegan's teaching (derived from Piaget) and emphasising the growth in moral autonomy with Durkheim's concern over the atomisation characteristic of anomie. Where does the autonomy of individual moral judgment become simply a lack of participation in 'shared values?' Similarly, the collectivistic pressure of the militant egalitarianism in former socialist states – mostly just the classical peasant values such as authoritarianism, patriarchy, insularity and inertia – ran into the individualism of the former 'bourgeois classes.' It would be difficult to say that the former was positive and the latter negative. See Unger's critique, *supra* n. 5, p. 250-253 and especially p. 272.

[27] This emphasis on 'without delay' – because conflicts now prevented from being resolved naturally through physical combat must have an alternative (adjudicatory, logical) mode of resolution – is important. The need for immediate submission of conflicts to alternative resolution implies that the judicial power is a necessary complement of executive power and that it must be set in motion *at the very inception* of the state. This, in turn, has profound constitutional implications for the political neglect – most by the representatives of the executive branch – with which, in Continental law and especially in the French constitutional context, the judicial branch constantly has to deal with.

On the other hand, the emphasis on 'without delay,' in an entirely different framework, also implies the centrality of the formula 'justice delayed is justice denied.' The 'reasonable time' in which the conflict must be resolved, i.e. the swiftness with which the judicial branch must react – for example, as per art. 6 of the European Convention on Human Rights – is therefore a fundamental human right. Judicial delay in resolving the conflict means that the law-abiding party to the conflict often remains at the mercy of the violator of the law. The implications of judicial delays for the *Rechtstaat, l'état de droit*, the rule of law, are obvious and disturbing. One has to admit, however, together with Roman poet Juvenal that judicial delays are a perennial problem: "a thousand vexations, a thousand hold-ups." Juvenal, *Satires*, XVI, 36-47, as cited by Crook, *Law and Life of Rome*.

[28] I have dealt with this more extensively in *Criminal Law: The Critique of the Ideology of Punishment*.

> to contend by Battell is sufficiently known: and therefore the notion of *Time,* is to be considered in the nature of Warre; as it is in the nature of Weather. For as the nature of Foule weather, lyeth not in the showre or two of rain; but in an inclination thereto of many dayes together: So the nature of War, consisteth not in actuall fighting; but in the known disposition thereto, during all the time there is no assurance to the contrary. All other time is Peace.[29]

With Hobbes, we start from the premise that this "Warre of every one against every one" is a natural (instinctive) condition.[30] Compare this to Nietzsche's account of the initial formation of the 'state' and its 'law and order':

> [T]he welding of a hitherto unchecked and shapeless populace into a firm form was not only instituted by an act of violence but also carried to its conclusion by nothing but act of violence – […] the oldest "state" thus appeared as a fearful tyranny, as an oppressive and remorseless machine, and went on working until this raw material of people and semi-animals was at last not only thoroughly kneaded and pliant but also *formed*. I employed the word "state": it is obvious what I meant – some pack of blond beasts of prey, a conqueror and master race which, organised for war and with *the ability to organise*, unhesitatingly lays its terrible claws upon *a populace perhaps tremendously superior in numbers* but still formless and nomad.[31]

After World War II and after the tragic events at the end of 20th Century we know how readily this 'raw material of people and semi-animals' tends to resurface. It reappears spontaneously the moment the power of the state comes into wrong hands or if it entirely disintegrates. Thus, both Nietzsche and Freud, writing as they were before World War I, were mistaken in assuming that the "raw material of people and semi-animals" was irrevocably "formed." The instruments of international surveillance of human rights – the European Convention on Human Rights and the European Court of

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[29] Hobbes, *Leviathan*, XII, 62, 2nd par., marginal rubric, "Out of Civil States, there is always Warre of every one against every one." See also *supra* n. 4.

[30] By 'instinctive' we mean to imply, as we already have, that an aggressive reaction to frustration is biologically (genetically) programmed, inbred and part of our animal inheritance. Lorenz, *supra*, n. 8. The cultural inhibitions of this programmed reaction are what Freud called 'civilisation,' the blockage of aggression having for its consequence the 'civilisational neurosis.' See generally, Freud, *supra* n. 9.

[31] Nietzsche, *Genealogy of Morals*, Sec. 17, par. 1 and 2, at p. 86. (Emphasis added.) Nietzsche, in the continuation of his *Second Essay* then, develops a theory regarding the origins of 'bad conscience.' Cf. Freud's 'civilisational neurosis,' *supra* n. 30. Foucault's protest against the violence of the state seems to derive from the same source, *infra* n. 47. Note also that Nietzsche emphasised 'the ability to organise,' which makes the state capable of imposing its power "upon a populace perhaps tremendously superior in numbers." In modern political science this 'organisation' is considered to be the crucial characteristic of the power of the state. Deutsch, *Academic Lectures*.

Human Rights in Strasbourg among them – were established in the wake of World War II precisely to prevent this regression.

This 'raw' condition tends to spontaneously resurface the moment the 'law and order,' enforced by the organised power of the state, vanishes due to revolution or war.[32] Without delay, the culturally 'formed' inhibitions give way to the biologically inherited animal instincts[33] and there is an indiscriminate regression to generalised combat. In this sense, every civil or international war is a regression to barbarity. Legally speaking, it reveals the dearth of 'law and order' and it points to the practical need to establish it. Should the war be civil, the need to establish 'law and order' is in the frame of nation-state; should the war be international, it indicates the need for cogent international 'law and order.'

The regression to generalised combat, however, may be only a temporary deterioration to the initial stage of the normal progression of agglomeration of power, i.e. to the 'biological' situation in which the power and influence over others depends strictly on brutal physical prevalence. If these developments, say in modern situations once the state falls to pieces, are permitted to continue unchecked, they usually lead to the establishment of a primitive dictatorship.[34] The latter may bring on 'law and order' but no 'rule of law.'[35] Subsequently, one witnesses the correlative regression of all other aspects of division of labour, civilisation, and culture as well.[36] Seen from the point of view of international relations and international law, it is in fact this regressive

[32] Psychologically, there is in such situations usually a general regression to what Karl Jung described as 'the collective unconscious.' Jung's collective unconscious – somewhat analogous to Durkheim's notion of 'collective consciousness,' which appeared about the same time i.e. in the 1930s – is a primitive archetypal reference to Nietzsche's 'semi-animal raw material.' See Goldhagen, *Hitler's Willing Executioners: Ordinary Germans and the Holocaust*.

It usually takes a psychopath to 'activate' this collective subconscious. See Harrington, *Psychopaths*, and Cleckley, *The Mask of Sanity*. Hilter, Mussolini, Stalin, Miloshevich are typical examples. In applying his theory, Karl Jung had in fact predicted in 1933, the consequences of Hitler's rise to power, i.e. the activation of the German collective unconscious. See generally, Jung, *Analytical Psychology*. Due to this activation of collective unconscious such leaders may be democratically (re)elected, usually by a landslide, which then raises the question of the relationship between democracy and the rule of law. See Zakaria, *infra* n. 35.

[33] See Lorenz, *On Aggression*, *supra* n. 8.

[34] Any 'mafia' (organised crime) state-within-the-state may be seen as a paradigm of such primitive and brutal governance. Its danger to the rule of law lies in organisation because the legitimate government's power, too, lies in the organisational superiority of its 'forces of order.' *Supra* n. 31. It is for this reason that the inchoate crime of conspiracy in Common Law is consummated the moment there is mere agreement between two co-conspirators to commit an illegal (and not necessarily criminal) act.

[35] See Zakaria, *The Rise of Illiberal Democracy*.

[36] Any state maintained purely through physical threat and the ensuing paranoia – rather than democracy and the rule of law – is in that sense regressive and deeply detrimental to all

aspect which is most repulsive, being as it must be, fundamentally incongruent with the general accomplishments of civilisation, ethos and culture preserved in other intact agglomerations of power.[37]

This regression, alas, as history and current events amply illustrate, is in any human society an ever present probability. Every collapse of state's 'law and order' – this is almost a tautology – has for its direct consequence the general regression to anarchy. The collapse of Soviet Union, for example, occasioned the collapses of many other state powers in Eastern Europe. One had hitherto many opportunities to observe various degrees of regression both of law and order as well as of the rule of law – from Albania to Moldova, Georgia, Kazakhstan, Serbia, etc. It, therefore, is not an accident that we intimately associate the idiom 'law and order' with the founding and upholding of state power: *ex factis ius oritur!*

Like all other resorting to violence, the September 11 attack, too, derives from – however misguided that perception might be – a perceived and unresolved conflict: the clash between different values, cultures, religions and at the root of it all, the different levels of attained economic development. The fact is that the attack itself was a manifestation of perceived and unresolved conflict. This perception may be a manifestation of the divergence in intimately assumed values, e.g. Islamic versus Western, but the regression to Islamic fundamentalism is clearly the consequence of *real* economic and developmental disparity. If the West will prove unable to reduce this disparity 'organically' (to use Durkheim's term)[38] – through morally motivated economic mutuality and by international economic and social cooperation – the discrepancy in development will then call for a 'mechanical' enforcement. The clear answer to this excessive discrepancy predicament is to co-opt productively the hitherto excluded cultural and economic environments into the 'global' division of labour. The developed nations should offer economic and other forms of aid to those lagging behind in their facility to participate, which would from this farsighted point of view, be in the West's own short and especially long-term best interest.[39]

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productive social processes. For an excellent analysis of the destructive impact of the absence of democracy, see Duverger, *De la Dictature*, and *La Démocratie sans le Peuple*.

[37] See for example the reference to "general principles of law recognised by civilised nations" in art. 7(2) of the European Convention on Human Rights. See also *Kessler, Streletz and Krentz v. Germany*, ECHR, judgment of 22 March 2001 (and my separate opinion).

[38] See Durkheim, *supra* n. 19.

[39] As Lester Thurow has pointed out (see *supra* n. 1), the inherent problem of liberal capitalism is that it cannot project beyond a five year 'return on the investment' period. The 'profit motive' as the driving force of liberal capitalism is inherently incapable of long-term (and therefore great) projects. The initiative thus falls into the lap of the State i.e. if the democratic process did in fact breed leaders with creative initiatives and novel ideas. Thurow's position is that it

Absent this and the only alternative is war, presumably leading, as usual to greater, this time to global aggregation of power. In Durkheim's language, mechanical solidarity would prevail over the organic solidarity, 'law and order' over the global 'rule of law,' the 'logic of force' over the moral and ethical 'force of logic.' The reason, for which adjudication is impossible in like situations, is clear as well: there is no overriding aggregation of power (global state) to enforce it.[40] Paradoxically, we conclude that the 'rule of law' *depends* on the pre-existent 'law and order.' Since today we lack a global government, the resort to violence in international relations is still a regular occurrence.

3. 'Rule of Law' and 'Law and Order' Necessitate each other

Antinomically, both 'law and order' and 'rule of law' exclude and require one another. Adjudication as a mode of conflict-resolution based on reason and on law is only obtainable under condition that there be a sufficiently broad aggregation of power to back up its eventual enforcement. Force, therefore, is not totally alien to the idea of adjudication: first, to make adjudication a

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does not. We are, according to him, inexorably regressing into another Dark Ages period. Thurow suffers from the simplistic economic determinism, the latter presumably evincing his realism, as many of the modern false prophets. Unger's *Knowledge and Politics*, for example, is infinitely more realistic precisely because it is *not* deterministic. *Supra* n. 5 to Chapter 1. See also Unger, *False Necessity: Antinecessitarian Social Theory in the Service of Radical Democracy*: "We do have the elements for a fundamental reconstruction of our ways of thinking about society. Such a reconstruction can liberate us from the illusions of fatalism while advancing the cause of democracy."

[40] As for resistance to this inevitable trend, see for example Abi-Saab, *A 'New World Order?' Some Preliminary Reflections*, p. 89 and p. 91:

> For with this new hope, new dangers arise, not of 'inactivity' but of 'excessive activity' on the part of the United Nations; of what I can only describe in French, for want of an English equivalent, as dangers of '*détournement*' and of '*excès de pouvoir*,' in other words of using or highjacking UN collective decision-making and 'collective legitimisation' mechanisms, to serve individual ends and legitimise new hegemonies; of which we have already had a foretaste not only in the handling of the second Gulf crisis, but also in the *Lockerbie Case* and its implications as to the respective roles and relationships between the Security Council and the International Court of Justice, the highest existing judicial organ. […] Is the Security Council becoming *legibus solutus* (unbound by law)? Or, even more serious, is it becoming a totalitarian instance, concentrating in its hands all that can be marshalled on the international level in terms of legislative, judicial and executive functions and powers, at the expense of the other principal organs of the United Nations and in total disregard of the Charter?

general and viable alternative to force, it must be its mandatory surrogate;[41] second, to make the result of adjudicatory decision-making meaningful, it must be sanctioned, otherwise it is a mere recommendation.

The first act, with which the state (public government) sets itself up, is to absorb all private violence and to make itself a monopolist of violence. In other words, the 'rule of law' will operate and serve only under the compulsive auspices of the monopoly of the state's 'law and order.' This constant threat of *greater* violence is the indispensable sanction without which any legal norm (disposition) remains a mere recommendation. Kelsen has a more ambiguous view of the matter:

> The development of the law from primitive beginnings to its present stage in the modern state displays, concerning the legal value to be realised, a tendency that is common to all legal orders. It is the tendency gradually and increasingly to prohibit the use of physical force from man to man. Use of force is prohibited by making it the condition for a sanction. But the sanction itself is a use of force. Therefore, the prohibition of the use of force can only be a limited one; one must distinguish between a permitted and prohibited use of force. It is permitted as a reaction against a socially undesirable fact, especially against a socially detrimental human behaviour, as a sanction, that is, as an authorised use of force attributable to the legal community.[42]

Except in terms of pure legal positivism, the point however is not that the private use of force is a logical or moral precondition for a legal sanction. This is the case only in the universal criminal offence of 'self-help' in which the private actor uses his physical force in order to defend his purported right: "Live by the gun or die by the law*"* is the folkloric aphorism to the point.

Within the confines of normal state sovereignty, however, the operative and the enforceable ban on private use of force is a factual – rather than logical or moral – precondition for 'law and order.' Only once this fact is successfully enforced, the question arises as to the alternative to the 'living by the gun.' The state that has successfully banned private violence, must next offer an alternative public (verbal, logical, non-violent) mode of conflict resolution in which the state-empowered third participant (the adjudicator)

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[41] The first command of the Roman Code of Twelve Tables (451-449 A.C.) was, according to Cicero: '*Si in jus vocat, ito*!' (If you are called before the judge, go!) Thus, if a Roman citizen wanted to begin an action against another Roman citizen he could be called to follow him *in ius*, i.e. before a council and later praetor. According to the Laws of Twelve Tables, the person against whom the action was begun *had to follow* the plaintiff. The sanction was that the plaintiff was allowed to use force against the inobedient defendant. Korošec, *Rimsko Pravo*, p. 11. See also Berman, *The Background of the Western Legal Tradition in the Folklore of the People of Europe*, at p. 559.

[42] Kelsen, *infra* n. 62, p. 36.

bindingly resolves the private conflict before him. Only on the condition of previously established 'law and order' do the issues of justice, fairness, fair trial, in other words the 'rule of law,' even arise.

However, even in the absence of the violent perversions of 'law and order,' social stability may be fatally undermined by more subtle shortcomings of trustworthy and legitimate adjudication and its 'rule of law.' If the violation of the law by one party to the conflict, presumably the defendant in the judicial process, lingers without fair legal sanction and its quick enforcement, this means that the legal system implicitly accepted the impunity of unlawful action. This undermines the authority of the state and the credibility of the legal order. Legal order, both in terms of 'law and order' as well as in terms of the 'rule of law' must therefore react quickly, consistently and systematically.

Practically speaking, the established precondition of the 'law and order' simply *necessitates* the binding submission of all private conflicts to legal adjudication. Without this compulsion, the law-abiding individual would remain unprotected, i.e. vulnerable to the attacks of non-law-abiding individuals. He would have no way to defend his interests. He would inhabit the no man's land between law and order and the rule of law. It would no longer pay to be law-abiding. It would pay, on the other hand, to violate brutally other persons' legitimate interests. In order to defend his interests, the normal member of the society in such a predicament would be virtually forced to turn to 'live by the gun.' Once this attitude is generalised, once it no longer pays to be law-abiding, private conflicts again degenerate into private fights thus undermining the 'law and order.' Even in the short run, 'law and order' – while dynamically contradicting it – emphatically requires 'the rule of law' as its inexorable complement.

At the very outset of establishing 'law and order,' already, there is necessarily a dialectical reversal from the antagonising logic of power to the righteousness of the power of logic.[43] In the general context of legal process and especially in the context of adjudication, the 'power of logic' comes to be called 'justice.' Justice, consequently, replaces dominance by sheer power. In simplest possible terms, 'law and order' necessitates 'the rule of law' because lacking the latter, conflicts would remain unresolved and would continue to destabilise the matrix of human relationships. Thus, without 'law and order,' the 'rule of law' would not be enforceable whereas without the 'rule of law,' i.e. adjudication, the 'law and order' would not achieve its main purpose of social stability.

The logic of power is a precondition to the power of logic. The 'law and order' is a precondition to the 'rule of law.' Subsequently, the rule of law will

[43] Mead, *The Psychology of Punitive Justice,* at p. 602. See also, Ferri, *Criminal Sociology* and Ancel, *La Défense Sociale.*

cancel out certain unrestrained aspects of the 'law and order,' i.e. its tendency to use state power arbitrarily. In this sense, the 'rule of law' is a negation of the 'law and order.'

The relationship between the 'law and order' and the 'rule of law' is therefore a relationship between two forces which "though mutually opposed, at the same time are mutually indispensable."[44] It is beside the point whether we call this a 'dialectical relationship' or an 'antinomy.' Unger's 'antinomy of rules and values' is clearly off center, i.e. here there is nothing to 'deconstruct.' Besides, given the ancient Chinese *Chuang-tzu Commentary* (3rd century A.D.), the appreciation of this kind of mutually exclusive as well as mutually dependent relationship is nothing new. Hegel, however, is right in pointing out that these kinds of contradictions represent a dynamic force of progress. This constant contest between the 'law and order' and the 'rule of law' and its progressive impact is obvious to every practicing lawyer. The field of constitutional and human rights is clearly the battlefield of these contradictions.

Legal order, i.e. 'law and order' in dynamic combination with the 'rule of law' is the immune system defending the body politic. To extend the metaphor, if this immune system does not react, various opportunistic bacteria will pester and undermine the health (the stability) of the entire state.[45] Here, one has to understand that 'law and order' on the one hand, and 'the rule of law' on the other, are two sides of the same coin. The moral dilemma, however, remains real and true. The contradiction between the 'rule of law' and 'law and order' has not been resolved.

In the meanwhile, the ideology has fallen back onto the traditional rule of law solution, which in the last analysis is still based on the constant threat of state violence. Despite everything, the 'rule of law' still means nothing unless it is sustained by this threat. State sponsored adjudication as a non-violent alternative to generalised combat and anarchy is still binding only if the 'law

[44] See Feng, *supra* n. 9 to Chapter 1, p. 205 and 212; Unger, *supra* n. 5 to Chapter 1, p. 88-100.

[45] In the French 2002 political campaign, Jean-Marie Le Pen's extreme right's sudden political ascension and the ultimate prevalence of President Chirac's centre-right political force was practically due to the neglect with which the previous socialist M. Jospin's government treated the basic social issue of '*securité*' – i.e. of the crimes committed by Arab immigrants in the so-called 'sensitive' suburban areas ('*banlieus*'). Immediately in August 2002, the French National Assembly adopted the first three repressive legislative measures (suspension of family allocations to parents of juvenile delinquents place in closed educational centres, the extension of the procedural possibilities to rely on anonymous witnesses testimony and the sanction of six-month imprisonment for an assault upon schoolteacher). *Le Monde*, 7 August 2002, p. 1, 5 and 10.

and order' enforces the 'rule of law' decisions by means of constant menace of violent implementation. The so-called forces of order are the guarantor of the rule of law.[46] Violence continues as a sponsor of non-violence.

Once we understand this, it becomes apparent that the cultural and ideological superiority of the rule of law is somewhat schizophrenic, i.e. its power of logic ('reason' in Enlightenment terms) is proximally founded upon the logic of power (violence). Social critics such as Foucault[47] have focused upon this noticeable contradiction. It is true that social evolution is – by virtue of the constant need for a shortcut to violent enforcement – prevented from transcending the 'law-and-order-cum-rule-of-law' ideology to something that would be qualitatively different, i.e. clearly transcending the danger of regression to the basic barbarism of violent anarchy. That is to say, potential regression to anarchy is constantly present.[48]

Initially, these ideological questions may have seemed beyond the scope of adjudication. I hope, nevertheless, to have demonstrated how inevitably the described dilemma manifests itself as the lowest common denominator of everything connected to adjudication. At the very least, it was necessary to point these contradictions out in order to situate both the idea of adjudication and the ideal of rule of law in a larger context.[49]

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[46] For a Marxist critique of the 'forces of order,' see d'Orsi, *Le Forze de L'Ordine Italiano*.

[47]

> [T]he problems to which the theory of sovereignty were addressed were in effect confined to the general mechanisms of power, to the way in which its forms of existence at the higher level of society influenced its exercise at the lowest levels. In effect, the mode in which power was exercised could be defined in its essentials in terms of the relationship sovereign-subject.

Michael Foucault then refers to 'disciplinary power' which lies outside 'the form of sovereignty.' Foucault, *Two Lectures*, in *Power/Knowledge: Selected Interviews and Other Writings, 1972-1977*, p. 78 and 104. See a good synopsis of Foucault's 'non-theory' of power at Foucault's *Interpretive Analytics*, available at http://www.horuspublications.com/guide/cm108.html#f3. As to Foucault's 'unswerving opposition to violence,' see Burnier, *L'Adieu A Sartre*, 2000, p. 147: "[M]ichel Foucalt qui fit l'éloge des massacres de Septembre et de la 'justice populaire' Chinoise à la fin de la Grande Révolution culturelle …"

[48] See Zupančič, *From Combat to Contract: What does the Constitution Constitute?* and the earlier section of this chapter which deals with this topic.

[49] See generally, the excellent politico-sociological analysis of the present historical situation in Wallerstein, *After Liberalism*. His conclusions, not surprisingly, overlap entirely with Lester Thurow's economic examination in his *Future of Capitalism*, *supra* n. 1. In place of Wallerstein's 'absence of ideology,' Thurow speaks of the 'absence of great [state-sponsored] projects.' As an M.I.T. economist, Thurow is more fatalistic in arguing that the West is sliding back into the new 'middle ages,' whereas Wallerstein, in my opinion more prudently, maintains that the West now finds itself at the asymptotic tail of the 50-year economic Kondratieff cycle. Because all three reactive ideologies (restoration, liberal ideology, and Communist ideology) have collapsed (the latter two in 1968 and in 1988 respectively), he projects that for a period

4. Substantive and Procedural Law

We noticed above that 'law and order' and 'rule of law' are interconnected such that they cannot be separated completely. Adjudication, we proved, is an indispensible complement to likewise requisite societal 'law and order.' Now, we will look at the evolution of substantive justice and procedural law in order to decide whether the primary role of adjudication is conflict resolution or the more transcendental function of justice.

Philogenetically, as we saw previously too, the establishment of the legal system as the alternative conflict resolution service offered by the state has probably itself evolved in two stages. In the first stage, the state could not have offered a differentiated set of substantive criteria ('justice') for the resolution of all conflicts. It could, however, offer a procedural forum of artificial legal equality in which the parties could verbally articulate their grievances and generally "have their day in court" before the decision resolving the conflict between them was made by a state appointed official backed by the threat of the state itself.

Only after this procedural stage of implementing the rule of law had lasted for hundreds of years, will the casuistry have sufficiently accumulated to provide standard answers to standard controversies. Thus the substantive law emerged and grew in its empirical volume, the level of differentiation, logical consistency and, generally, what Weber calls 'legal rationality.' Today we tend to forget this developmental sequence because we *prima vista* consider 'law' to be these (developmentally secondary) substantive criteria of justice.

Purely in terms of formal logic and legal syllogism, it does seem absurd to speak of judging (minor premise) as primary and criteria for judgment (major premise) as secondary and derivative. Yet, historically and developmentally, this is precisely what happened since adjudication emerged as a necessary complement to mechanically imposed law and order, i.e. it was not invented

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of thirty to forty years, history will be 'idling.' For him, it follows that this is the moment of historical truth, the period of true ideological freedom, i.e. of the freedom to invent fundamentally new solutions. Far-reaching political *imagination* is therefore called for. Cf. Unger's language concerning the needed 'political event,' *supra* n. 7 to Chapter 1. (Of course, this dark tradition goes back to the epochal Spengler's *Decline of the West*.)

For the purposes of our own argument, however, it suffices to understand, that (a) the rule of law, too, is part of liberal ideology, and (b) that liberal ideology, too, has eroded. Today, since the liberal myth is no longer fully effective, the 'rule of law' is gradually being reduced to a mechanical, purely operative solution of fundamental social concerns. It is devoid of moral impact and ideological appeal. In this sense it has, historically speaking, become an interim solution.

for reasons having to do with logic. Adjudication materialised as a natural instrument of social peace and stability before there was any notion of 'justice.'

> One can refute a judgment by proving its conditionality: the need to retain it is not thereby removed. False values cannot be eradicated by reasons any more than astigmatism in the eyes of an invalid. One must grasp the need for their existence: they are a consequence of causes which have nothing to do with reasons.[50]

The point here, however, is not that the procedure is primary and substantive law secondary. The point is that it was this primary establishment of the procedural framework of legal equality which was the first and the natural source of (substantive) law.[51] In other words, the issue never was so much the secondary substantive rationality and logic of legal decisions as the primary surrogate function of legal procedures intended to offset the use of power as a means of conflict resolution.[52]

Legal adjudication, this colossal process of application of substantive criteria for the resolution of all kinds of conflicts, then, has not arisen out of some abstract state-sponsored charitable concern for 'justice.' Conflicts are very disruptive of social stability; i.e. adjudication, as an institutionalised social process, is a *sine qua non* for social stability in the broadest sense of this term. Thus, in spite of the transcendental and moralistic overtones of 'justice,' legal justice is usually based on formal logic. This 'moralistically' limited scope of adjudication can be traced back to the sequence of the evolution of substantive criteria and procedural law, which is the inverse of the common assumption that procedural law is 'ancillary' to substantive law.

Etymologically, too, adjudication refers to a decision-making process based on certain logically derived rules. The word 'adjudication' derives from (a) the Latin noun '*jus*' – law, collection of customs, edicts in the positive sense of the word and at the same time something that is just ('*aequitas*:' to decide '*ex bono et aequo*'); (b) the verb '*dicere*' (sometimes '*reddere*') means to say, to pronounce and derivatively to 'render justice,' to 'do justice.' Thus, we may suppose that in Roman law the verb '*jus dicere*' implied (a) a decision-making

[50] Nietzsche, *The Will to Power*, Sec. 123.

[51] Von Savigny, the famous German legal philosopher, opposed codification because he was afraid this would 'cut the umbilical cord' between the 'life of the nation' and the law, meaning that the empirical contact with the world of real-life controversies would be lost if the past law would once and forever be crystallised in the code. Von Savigny, *Of the Vocation of Our Age for Legislation and Jurisprudence*.

[52] The same conclusion, although in an entirely different context, is implied in the brilliant article by Alexander & Schauer, *supra* n. 17.

process where (b) the decision was arrived at through reasoning (ratiocination, logic, common sense) and was (c) based logically and reasonably i.e. *mutatis mutandis*, on custom, *stare decisis* and positive laws and edicts.[53]

When one speaks of judging, of deciding a legally defined conflict, one immediately thinks of the logical syllogism and the substantive criteria for making a judgment. One supposes that there can be no judgment proper (the logical conclusion) unless it is logically entailed in these criteria (in the major premise of the logical syllogism). One then projects this logical procedure onto adjudication as a *social* process for the resolution of conflicts and comes to a completely wrong impression that adjudication as a social process, too, must have begun with pre-existent substantive criteria (legal rules). In terms of historical evolution, as explained, precisely the opposite was true. Law as a social process had started with the need for adjudication as a conflict resolution context and procedure. The accumulation of substantive criteria, the predecessor of today's substantive law, was an evolutionary spin-off of this basic social need for adjudication.

Thus, justice as an idea, too, is secondary. The abstract idea of objective justice begins to evolve once the 'personal justice' obtained through physical retaliation (combat) is outlawed.[54] Once 'law and order' is imposed through usurpation of power by a particular organised group, once there is thus the initial aggregation of organised power, alternative conflict resolution becomes an immediate practical requirement, irrespective of the obvious fact that there are no pre-existent – apart from common sense – criteria for arbitrating the conflicts.[55]

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[53] See *infra* n. 59.

[54] The so-called talionic principle: '*Si membrum rupsit, ni cum eo pacit, talio esto!*' (If he breaks his limb and does not make peace with him, let *the same* happen to him!) Leges XII Tabularum, Tabula II, Fragmentum 2. In his *Genealogy of Morals*, Nietzsche insists that this talionic cruelty, ratified in the Law of Twelve Tables of Rome – "si plus minusve secuerunt, ne fraude esto" (if they secured more or less, let that be no crime) – is at the very origin of debtor-creditor relationship and as such at the origin of the genesis of law. *Second Essay*, section 5, *supra* n. 31.

[55] 'Common sense' meaning, of course, an intelligent, critical, informed – in short in the original sense 'commonsensical' – approach in perceptive contact with practical realities. In this context, Berkeley's *A Treatise Concerning the Principles of Human Knowledge* – since it was largely a reaction to scholastic abstractions – could easily be subtitled 'A Return to Common Sense.' Modern legal and especially bureaucratic reasoning often attains a 'scholastic' level of alienation from reality and common sense. See for example, Howard, *The Death of Common Sense: How Law is Suffocating America*. In line with the same tradition, see Maguire, *Evidence, Common Sense and Common Law*. Maguire was a professor of law at Harvard Law School and a leading authority on the law of evidence.

Nevertheless, one must watch here for another possible connotation of 'common sense:' In French, '*le bon sens*' may have an unintelligent, nay, positively stupid and detrimental aspect: *Le constat bourgeois, c'est le bon sens, c'est a dire une vérité qui s'arrête sur l'ordre arbitraire de celui qui parle*,

Moreover, the first commandment of the early Roman *Leges Duodecim Tabularum*[56] was *Si in ius vocat, ito!* that is*, if you are called into the court of law, you must go!* This implies that the public adjudication of private conflicts was *ab initio* obligatory, before there even existed a notion of 'right' calling for its 'remedy.' The concern at that stage, in other words, was not primarily 'to do justice' in substantive terms but to provide for a compulsory procedure of adjudication. The intent was to displace private aggression into a public forum. These mandatory and primary procedures, in which private conflicts submitted to binding resolution by way of adjudication (rather than by means of combat), created the need for substantive criteria (principles, doctrines,

says Roland Barth in his *Mythologies*. This "truth, which stops at the level arbitrarily chosen by the one who speaks," is nothing but an unintelligent superficiality, i.e. the exact opposite of Paul Valery's "thinking as the negation of what is immediately before us." Barth's emphasis on arbitrariness is certainly disconcerting when '*he who speaks*' happens to be the judge. See, for example, Martin Shapiro's critique of the American constitutional equal protection doctrine, in which common-sense 'reasonableness' is a key criterion, and my critique of Rehnquist's 'marginal utility' scheme for deconstructing the privilege against self-incrimination and the exclusionary rule. See *People v. Briggs*, Colorado Supreme Court 1985, 709 P.2d 911, n. 559, quoting from Zupančič, *The Privilege Against Self-Incrimination*, at p. 19, where this is specifically acknowledged:

> The privilege against self-incrimination simply is the exclusion of such evidence: without exclusion there is no privilege. This point cannot be over-emphasised. The substantive (criminal law) sanctions that violate the privilege are simply not adequate. This is not a question of deterring police from future misconduct.

Mr. Rehnquist's reiterated references to 'the marginal utility' of the deterring effect of the exclusionary rule went in the opposite direction. His purpose was to reduce the exclusionary rule from being an alter ego of the privilege against self-incrimination, i.e. a prescriptive rule to an instrumental rule status. The latter was then subject to teleological (policy) interpretation. That this was part of an overall calculated pattern is obvious: such is the path from a principled position to (seemingly!) pragmatic policy considerations.

[56] "*Si in ius uocat, ito. Ni it, antestamino. Igitur em capito.*" Leges XII Tabularum, the Laws of XII Tables, were the primary source (… *fons omnis publici privatique juris* …) and the only codification of Roman law. They date to ca. 450 B.C. The very first rule '*Si in ius vocat, ito!*' was cited by Cicero. Another rendition of this rule, presumably from the same source is: '*Si in ius vocat, ni it, antestamino igitur in capito!*' See also Tabularum XII Relicta at http://users.ipa.net/~tanker/tables.htm. Cf. Pashukanis, *Law and Marxism*, at p. 166. For an interpretation of this, see Zupančič, *The Crown and the Criminal: The Privilege Against Self-Incrimination*, at p. 35, n. 11 and Chapter 4 in this book. As far as I am aware, nobody has ever raised the question why this *procedural* requirement should be the first and foremost of all the rules in the XII Tables. In our context, however, it makes perfect sense that this resort to judicial resolution of the conflict should be the most fundamental requirement!

rules). Thus, the concept of a 'subjective right' (*Recht, droit, diritto, pravo, pravica* etc.) is entirely secondary. In turn, the general idea of 'justice' is tertiary that is to say, by and large derivative.

Law and morality, therefore, are two only partially overlapping circles. The morally limited scope of the legal administration of justice was caused by, and is still rooted in, the sequence of development that is the precise inversion of the kind one would expect. Writers from Hobbes to Nietzsche and Kelsen have also demonstrated this primary need for overpowering enforcement from the inception of the state's 'law and order' and the relatively secondary nature of the notions of substantive justice and even of morality as a subsequent and a surrogate by-product.

Today, we take the notions such as 'justice,' 'law,' 'right,' etc. for granted and we may even imbue them with a certain transcendental connotation.[57] It is well to remember, however, that the real origins of this accepted wisdom developed first – via the procedure of adjudication – out of the utterly practical need to maintain peace and harmony within any socially ordered group of people.

Only then, as the development of Roman law amply illustrates, these substantive standards begin to multiply and diversify in and through this process of continuing adjudication. In Roman, as later in Common Law, this had revealed itself as customary law:

> Ingrained custom is not unreasonably maintained as good as law; this is what is known as the law based on men's habits. For since actual legislation is only binding because it is accepted by the judgment of the people, those things of which the people have approved without any writing at all will justly be binding on everyone. And therefore the following principle is also quite rightly accepted, that legislation can be abrogated not only by the vote of the legislator but also with the tacit agreement of all men.[58]

Later, the above 'substantive standards' come to represent the judicial experience accumulated through generations of judges and jurists.[59] The comeback, in the 20th century, of the criteria-producing (precedent-producing)

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[57] For a superb historical rendering of the metaphysical notion of justice (righteousness), see Assmann, *Maât, L'Égypte Pharaonique et L'Idée de Justice Sociale*, and his *Moses the Egyptian*: *The Memory of Egypt and Western Monotheism*. Assman is currently without any doubt the leading theorist in this field. However, to understand the non-metaphysical and modern import of these works, I suggest that they must be read in conjunction with Kohlberg's and Kegan´s work on moral development and with e.g. Maslow, *The Farther Reaches of Human Nature*; Kegan, *The Evolving Self*; the works of Lawrence Kohlberg and his followers. Still, all this goes back to Plotinus´s and Aristotle's notion of *spoudaios*, e.g. Plotinus 14[46].

[58] D. I. 3. 32. I. They attribute this famous passage from *Digestae* to Salvius Julianus. Cited from Crook, *supra* n. 27 at p. 28, n. 71.

[59] The classical passage to this effect is Cicero's treatise, *Auctor ad herrenium*, II, 19, where he

constitutional and international adjudication is no accident. The period in Continental law, between the 1789 French Revolution and the ensuing restatement of theretofore accumulated judicial (adjudicatory, 'Common Law') experience, i.e. codification, represents a blunder of historical proportions. Gnoseologically, this mistake originates in the confusion, created by the Enlightenment writers and later by Jeremy Bentham in his influential *Theory of Legislation*, of judging as a logical procedure and adjudication as a social process.[60]

For our purposes, however, it suffices to establish the fundamental difference between the two legal traditions – Continental and Anglo-Saxon. Even today, it can clearly be seen that the Common Law tradition is in the broadest sense of the word 'procedural,' whereas the Continental tradition is analogously 'substantive.' The distinction – for all its historical, political explanations – has in the last analysis everything to do respectively with either the autonomous or the ancillary place of adjudication in the general legal process. The famous 'convergence of the two legal traditions' thus largely boils down to natural reaffirmation of the procedural and adjudicatory characteristics in the Continental legal systems.[61]

Nevertheless, we might add that the hidden premise in the Anglo-Saxon tradition that law is a procedural phenomenon is typically practical and down to earth. It implies that law is nothing more than conflict resolution method and device. There is no reference here to 'justice' that would transcend the specific issues presented for adjudication. In criminal procedure, as we shall see, this is especially striking because the so-called truth finding remains a mere instrument of conflict resolution. Procedure *qua* conflict resolution is in this sense autonomous since it does not pretend to serve any 'higher purpose.'

By contrast, Continental criminal procedure insists on the ancillary, 'adjective,'[62] role of procedure because the truth about a past allegedly criminal event is somehow confluent with the transcendental issue of sin and guilt: the crime is seen as a hybrid of tort and sin.[63] One is not far from

describes the Roman version of *stare decisis*. For a more skeptical interpretation see, Crook, *supra* n. 58.

[60] Bentham, *Theory of Legislation*.

[61] The best evidence of this is the abundant case law of the European Court of Human Rights in Strasbourg regarding art. 6 (fair trial) provisions of the European Convention on Human Rights. The Court, however, has not yet reached the stage where it would clearly pronounce that a substantive legal decision could not be legitimate unless it is the outcome of a fair procedure.

[62] Even Hans Kelsen used the term 'adjective law.' Kelsen, *Pure Theory of Law*.

[63] The trial and the acquittal of O.J. Simpson was an excellent demonstration of the conflict resolution approach in American criminal procedure. The outcome was a shock to Continental

the truth, if one suspects here the historical influence of the inquisitorial tradition, but the problem goes deeper than that. The central truthfinding to which Continental criminal procedure is instrumental (ancillary) is, of course, the truth as circumscribed by substantive criminal law. Hobbes' formula 'civil laws ceasing crimes also cease' is an early recognition of the hollow nature of this 'truth.'

lawyers because they conceive of criminal process purely as a truthfinding instrument that goes far beyond the mere resolution of the conflict between the government (the prosecution) and the criminal suspect/defendant.

CHAPTER THREE

Truthfinding and Impartiality in the Criminal Process

1. Introduction

If substantive criteria and consequently justice and morality are secondary to procedural conflict resolution, as we saw in the previous chapter, truthfinding, which stems from the transcendental notions of justice and morality, will also be a secondary function of law. In other words, between truthfinding and conflict resolution, truthfinding (too often over-emphasised in the Continental legal system) should be the secondary function of law, especially in the criminal process. Relegating truthfinding to such a position is the natural fallout of the relative nature of 'truth' in criminal process. These aspects of criminal process will be dealt with in detail in this chapter.

Returning to the question of substantive criteria before we delve into the 'internal contradictions' in adjudication due to truthfinding and conflict-resolution, it is necessary to establish at this point that the substantive criteria under which a decision in any conflict is made must be different from the criteria of power and force. Procedurally, too, when parties submit to adjudication, they do so as a surrogate for using power and force, in view of the desire to maintain social peace. If both parties submit themselves voluntarily to the process of adjudication, they have admitted that there exist criteria and systems of reference for deciding the conflict between them that are incompatible with the use of power and force.

This implicit admission that adjudication and the use of power between parties are incompatible signifies that within the structure of substantively and procedurally impartial adjudication there can be no coercion. In other words,

the fact that one party is physically, economically or in any way more powerful than the other party is immaterial to the adjudicated issue. If this were not so, adjudication would not play its intended role. In fact, adjudication would be merely redundant if the more powerful party could win the case simply by resorting to power of force. A purpose which adjudication serves then is to cover up the use of overt power and to put in its place a systematic way of resolving conflict.

The principle that the exercise of power and force between the parties is incompatible with the idea of adjudication shall be referred to as the principle of disjunction. This principle is simply that the parties to a conflict must stand apart or be disjoined in order to prevent any exercise of power between them. The privilege against self-incrimination is a manifestation of this idea and will be discussed at length in the next chapter.

Furthermore, not only does a conflict call for adjudication, but there also can be no impartial adjudication without a conflict. Without a quarrel, one might say, there is no need for a judge. Impartiality is only possible in an interaction of two conflicting partialities. By the same token, the adjudicated question must be so organised that the adjudicator can remain impartial.[1]

While we tend to assume that impartial adjudication serves to resolve conflicts, the reverse is also possible. In order to induce impartiality, it is possible to artificially create a conflict between two parties and assign the impartial adjudication of the conflict to a third party. Conflicts in the sphere of public adjudication, especially criminal law, are in most cases not genuine conflicts of the type from which the idea of impartial adjudication stems. For example, in criminal law it would be possible to process all the cases without any adversariness whatsoever. One would simply have to create a bureaucracy which would apportion punishment in a manner similar to the assignment of taxes today. Such administration of criminal justice would be efficient and swift, but would suffer from the reproach that Max Weber called "khadi justice:" it could not be considered impartial, because the party deciding the issue of guilt and punishment would be the same party maintaining that there is guilt and that there should be punishment.

Another important distinction must be introduced. Conflicts can, for the purpose of this discussion, be divided into two categories. First, there are those conflicts which are only that and nothing more. They can be resolved and adjudication is nothing but a means of resolving them. No matter what

[1] A mode of presentation of the issue requiring the adjudicator to show initiative to resolve the conflict would preclude impartiality. An example of this is where the question is not 'guilty or innocent' but 'what shall we do with this person?' The adjudicator would have to get involved to the extent he would soon lose his ability to maintain psychological ambivalence, since there would be non-continuing neutralisation of one party's evidence by the other party's evidence.

the manner of resolving the conflict, as long as power and force are not used, the conflicts can be properly resolved the moment the parties regard them as such. Second, there are different conflicts, which are not ends in themselves. In these cases, it is not enough that the conflict be done away with, because the conflict itself has only a procedural instrumental role to play, i.e. insuring impartiality. The issue to be decided in such situations is not the same as the issue of the conflict itself.

Here we will demonstrate that in private conflicts (i.e. litigation between private parties) truthfinding is a means to the resolution of the conflicts, whereas in public conflicts (i.e. the criminal process – state v. citizen, etc.) the artificial creation of the conflict serves the purpose of impartiality. Private conflicts are resolved the moment parties regard them as such. Public or criminal law conflicts may or may not be resolved – their resolution does not *eo ipso* imply that the issue addressed by criminal guilt transcends the limits of any conflict between the prosecutor and the defendant.

Such a paradoxical situation is only possible because criminal procedure does not start with the conflict as the problem but regards truthfinding as the problem to be resolved through adversariness. Such adversariness serves well to sustain impartiality, but is not particularly suitable for the purposes of truthfinding. In the end, we hope to discuss at length whether the function of criminal process should be truthfinding or conflict resolution and consequently whether the inquisitorial model or the adversarial model is more suited to public law litigation based on the functions.

The usual juxtaposition of the inquisitorial and the adversary models of criminal procedure derives its continuing pertinence from the persisting incompatibility of two conflicting basic philosophies concerning what, in essence, is law. Even more fundamentally, perhaps, these two different political, ideological, socio-psychological etc. attitudes originate in the history and the (un)democratic tradition of a particular society. They are historically determined and very difficult to change. They cannot, as axiomatic basic attitudes, be reached by practical ratiocination. There are these two fundamental mentalities, two fundamentally different political and constitutional traditions. Their imagined convergence today is circumscribed by the framework of the underlying basic attitudes.

Thus, we have, on the one hand, the authoritarian legal philosophy.[2] It regards law dogmatically and deductively, i.e. as a set of imperiously imposed *substantive* rules to be forced upon all legal subjects. This tradition perceives the

[2] We are speaking here of two Weberian 'ideal types,' i.e. of somewhat hypothetical and exaggerated 'models' or 'attitudes,' not existing in their pure form in the empirical legal, political, ideological, anthropological – social reality. Nevertheless, as demonstrable tendencies they manifest themselves again and again in the decisions of the courts, in the legislation, in the police (mis)behaviour etc.

process of law as entirely *ancillary* to the implementation of substantive rules – the latter functioning as the unquestionable imperatives of the authoritarian power structure. The whole emphasis, for example, in the Continental legal tradition, often quite erroneously ascribed to Roman law, is on the substantive aspect of law.[3] The origin of this lies in the unstated premise, so obvious in Kelsen's *Pure Theory of Law*,[4] according to which the function of law is – in contrast to the more modest Hobbesian liberal tradition – to impose, through the sanctioning power of the State, *Recht und Ordnung* – upon the irregular, illogical, irrational, disorderly processes caused by the antagonistic human relationships in the natural life of society.

On the other hand we have the liberal[5] legal philosophy. It regards law inductively and pragmatically – in the "muddling through" tradition – as an instrumental process for the resolution of all kinds of conflict. In this liberal interpretation of the function of Law in society the social function ascribed to the legal process is in a sense less ambitious, more organic. It regards peaceful conflict resolution as the primary purpose of Law – the substantive criteria of order and justice being this process' secondary deposit. Only in this tradition could Justice Oliver Wendell Holmes exclaim: "Law is not logic, law is experience!"

There is a psychological analogue to the distinction between the liberal and the authoritarian philosophy. This distinction is reflected in the difference between the typical Continental deductive ('positivistic,' 'dogmatic,' 'pandectistic') mode of legal reasoning on the one hand and the broader Anglo-Saxon mode of legal reasoning based on *stare decisis* analogy on the other hand.

The simple question here is, which of the two philosophies[6] is functionally correct, true to legal tradition; which of the two, in other words, adequately describes what the law actually does**.** A particular model of criminal procedure in a given society is usually a symbolic byproduct of its general answer to this historically determined, sometimes religiously coloured, and always value-laden political/ideological question.

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[3] In my opinion the general juxtaposition of the procedural and the substantive aspect of law has a great explanatory value. First, the very distinction between the procedural and the substantive rules should not be taken for granted as something natural and self-evident; second, the question should be posed as to why law operates through these two, rather than one, separate functional aspects; this then, third, brings into focus a deeper understanding of the true – and rather more modest than we usually assume – natural function of law in social relationships.

[4] Kelsen, *supra* n. 62 to Chapter 2.

[5] Hobbes, *supra* n. 4 to Chapter 2. For the broader definition of the 'liberal tradition' see Unger, *supra* n. 5 to Chapter 1, p. 63-144.

[6] … or psychologies.

2. Difference Between Civil and Criminal Procedures

As already discussed, adjudication signifies (a) that there is a conflict to be resolved and (b) that a third party is appointed to decide which one of the two disagreeing parties ('in conflict' with one another) is entitled to a favourable judgment.

Since adjudication implies the substitution of violent conflict with non-violent negotiation to resolve conflicts, it necessitates the precondition of 'equality of arms' between the parties concerned. A 'political solution,' i.e. negotiation and other non-violent means of conflict resolution, only become attractive once the parties to the conflict begin to appreciate that they are approximately equal in power.[7] Consequently, adjudication is turned to when it is recognised by both parties that only Pyrrhic victory or even no prevalence by sheer force can in fact be achieved and that the blood would be shed in vain.

Where there is clear prevalence of one party over another, the improbability of beneficial outcome deters the less powerful party from even entering the conflict. Thus, every conflict is a test in which the uncertainty of the outcome is an integral part of the situation. In situations where the overwhelming prevalence of one party over another makes the outcome certain in advance, an incompatibility of interest will remain, but there will be no open conflict.[8]

Moreover, spatial impossibility defines another characteristic of all genuine conflicts – their either-or nature of exclusion: "It is either you, or me!" Interestingly, the word *con-flictum* in Latin derives from the verb *fligo*, "to strike against something." *Com-fligere* referred to the impossibility of having two bodies in the same place at the same time.

Another significant feature of conflicts is that it occurs between two parties. While there may be many different aspirants for one space, the fight itself will occur, no matter whether one refers to the Second Triumvirate or a tennis tournament, between two combatants. This has less to do with the nature of scarcity than with the physical impossibility of a multiple clash. Even though, for example, there may be many ships simultaneously on the collision course, the collision itself will occur between two ships at a time.

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[7] See 'Origin of Justice,' text accompanying *supra* n. 11 to Chapter 2.

[8] This is very important for our purposes since criminal procedure is such a situation in which the powerful state apparatus could make the outcome of all conflicts clear in advance. However, the test here is not power *per se*, but symbolic prevalence matching according to criteria of substantive criminal law: whoever is more powerful by criteria of criminal law, wins the match. Nevertheless, it cannot be over-looked that the position of the defendant in criminal procedure is so powerless that it is very easy for the state to treat him not as an equal, but as an object (while at the same time pretend that the decision-making process is adversarial).

In cybernetics the conflict is defined by two parameters:

1) the probable extent of incompatibility between the programs of two acting systems for the future; and
2) the probable costs of avoiding collision between them.[9]

All the above characteristics of conflicts are satisfied in the case of private conflicts. The conflict between private individuals, without further ado, lends itself to adjudication and justice acts as the straightforward surrogate of power in the resolution of private conflicts.

Thus, civil procedure is the true model of adjudication. This is because in civil procedure, the controversy itself represents the beginning and the end of the issue to be decided. The conflict is the *primary raison d'etre* of the situation.

The *differentia specifica* of criminal procedure is, however, that the element of conflict is here secondary to the somewhat artificial desire of deciding the subject matter through an adversary process. In other words, criminal procedure is clearly not the model 'rule of law' adjudication. We cannot say that criminal procedure deals with a conflict to be resolved, unless we first posit the 'equality of arms,' which is, when it comes to the relationship between a criminal defendant and the state, almost surrealistically artificial. Obviously, the need to postulate equality in terms of a conflict between equals, derives precisely from the fact that in reality there is no equality because the plaintiff in criminal procedure is the formidable state, i.e. its executive branch (the police, the prosecution) whereas the defendant is a powerless subject of that state. Most of the big guns of the constitutional artillery, therefore, i.e. the so-called constitutional guarantees in criminal procedure, are aimed at the inherent inequality between the suspected or accused individual and the state's powerful criminal justice machinery.

In criminal procedure, thus, adversariness is not an integral part of the issue and criminal procedure is not a conflict resolution process. It is questionable therefore why the Anglo-Saxon process retained adversariness in criminal procedure at all. The first step towards exploring this question would be to compare and contrast private litigation with the public law litigation. The discussion will then lead us to the questions of truthfinding and impartiality in criminal process.

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[9] See Deutsch, *The Resolution of Conflict*.

> Incompatibility between two acting systems can be measured in terms of the sum of the probable changes – that is, the probable changes in inner structure – that would occur in System A, and of the changes in System B, if the inner programs of each of these two systems were carried out.

Id. at 112.

Professor Chayes enumerates the following criteria as characteristic of private litigation:

1) The lawsuit is *bipolar*.
2) Litigation is *retrospective*.
3) *Right and remedy are interdependent.*
4) The lawsuit is a *self-contained* episode.
5) The process is *party-initiated and party controlled.*[10]

In private controversies the polarisation will typically involve property: the controversial item or property will be owned by A or by B but never by both. However, the incompatibility itself will usually not be a legal one since the legal assertions of property and right are merely supportive of one's economic interests. In other words, the matter usually becomes 'legal' only after the incompatibility of actual interest is already established.

Moreover, according to Chayes, private lawsuits are bipolar. Bipolarity is defined by Chayes as "two unitary interests, diametrically opposed,"[11] and is a procedural expression of the substantive "incompatibility of programs."[12] Also, since by the very nature of things the parties cannot quarrel unless they both know what they want and they both want the same thing, bipolarity emerges as not merely an element of the private controversy, but as the controversy itself. Bipolarity being part of the definition of the conflict itself, it is questionable whether its presence reflects anything but the physical impossibility of conflictual multipolarity. Fuller's distinction between monocentricity and polycentricity partially describes the procedural function of bipolarity.[13] Monocentricity, according to Fuller, means that there is only one center of the controversy, one focus and one solution. Two ships on a collision course will collide in *one* point, and the *one* issue is whether ship A or ship B will have to change its course: A or B, either-or, *aut-aut.*[14]

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[10] See Chayes, *The Role of the Judge in Public Law Litigation*. It is clear that the author assumes the private litigation to be the true litigation. When speaking of public law litigation he says: "The proceeding is recognisable as a lawsuit only because it takes place in a courtroom before an official called 'judge.'" *Id.* at p. 1302.

[11] Chayes, *supra* n. 10, at p. 1282.

[12] Deutsch, *supra* n. 9, at p. 114.

[13] See Fuller, *infra* n. 15. I am not implying that 'the purpose' of bipolarity is to maintain monocentricity. The origins of such a phenomenon may have nothing to do with its later function. The hand, as Nietzsche said, may be used for grasping, but that is not how it came into being.

[14] By contrast, polycentric issues are not defined along a single axis of controversy because there are many different ways both in which the issue can be posed and in which it can be resolved. The question there is no longer whether ship A or ship B should change its course, but, for example, *how* the sinking ship C could be rescued.

From this dialectic of interest incompatibility stems the whole structure of adversariness; adjudication is the alter ego of controversy and of adversariness because impartiality can only be a product of two partialities. Thus, bipolarity and monocentricity make sure that the incompatibility itself is never diffused, but sharply focused.

This focus entails several consequences. First, there is what Chayes calls "the interdependence of rights and remedies," which means that the parties know what they want and demand it explicitly. From this it follows, second, that the adjudicator in the controversy does not have to worry about inventing the remedy, since it is naturally given in the plaintiff's action. This means that the judge can remain uninvolved to the extent he is freed from actively devising solutions to the controversy; the solution is already built into the problem. Third, the focused nature of the controversy provides for two clearly articulated incompatible assertions which in the ideal case reflect the incompatibility of parties' interests. That helps the judge maintain his objectivity because he can remain uncommitted and ambivalent (due to constant alternation of the two mutually incompatible hypotheses). Thus, monocentricity and polarity[15] of the presentation of the dispute enable the adjudicator to remain uninvolved to a greater degree, since he is already confronted with a clear choice of alternatives rather than being required to devise them.

Not a single one of these elemental preconditions exists in case of criminal procedure. Chayes describes the public law litigation in the United States as a

[15] For an extensive explication on the distinction between monocentric and polycentric decision making, see Fuller, *Adjudication and the Rule of Law*. Fuller argues that in adjudication-proper the issues have to be monocentrically organised. That means that the decision-maker must not be required to provide his own solution to the problem (he is not asked 'what shall we do?). Rather he is asked merely to decide which of the two parties wins. Thus, there is one center to the problem as presented to the adjudicator. In polycentric decision-making (juvenile proceedings, sentencing proceedings, civil commitment proceedings etc.) the decision-maker is required to be creative, to find his own solutions to the problem. This is not adjudication-proper for the simple reason that in such polycentric situations the decision-maker/adjudicator is required to become *actively* involved with the problem and therefore can no longer be impartial.

This, of course, implies that active involvement with the problem to be decided is incompatible with impartiality, whereas passive-monocentric decision-making can implicitly be impartial. Incidentally, this also implies that no investigation, where the investigator must actively find out what happened (which is essentially a polycentric problem-solving situation), can ever be impartial. If in principle every investigation is partial and biased, then the idea of an 'investigating magistrate' or 'judicial investigator' is essentially a contradiction in terms. A person is either impartial, or he investigates, never both. *Contra* Weinreb*, Denial of Justice,* especially at p. 14-43, 117-46.

party structure that "is not rigidly bilateral but sprawling and amorphous."[16] Criminal justice adjudication is not a monocentric but a polycentric situation,[17] at least insofar as it goes beyond mere finding of guilt or innocence. In other words, in criminal adjudication the issue can be phrased in two fundamentally different ways. Traditionally, it has been phrased in terms of an "either-or" choice: either guilty or innocent. On the other hand, it could also be phrased in terms of "what shall we do with this antisocial person?" The first formula is monocentric, the second polycentric. The first maintains bipolarity, the second diffuses it and conflates the lines along which the parties could confront one another.

So, while in pure private controversy, personal animosity helps maintain a strict disjunction of parties, in criminal procedure, where to an extent the conflict is artificially sustained by the court in order that the truth might impartially be discovered, there is no animosity and emotional disjunction which would lower the probability of settlement. The bipolarity, in other words, is not inherent. First, the conflict can be repressed because of inequality of power. Second, the issue is not of itself monocentric. Third, the accusing party is not a well-defined entity the way private parties are and must be represented *in absentia*.[18]

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[16] The idea of incompatibility itself applies to two combatants at most, although there may be two groups as well. Polarisation, in other words, is always bipolarisation, not multipolarisation. This may derive from the fact that anthropologically a man can fight only one man at a time and that therefore as in any tournament, the fighting has to be organised in pairs even though there is only one trophy to be had. Whether one speaks of a tennis tournament or the Second Triumvirate, however, the showdown is always bipolar. While one can have more than one fight at a time, one cannot have more than one organised controversy at a time since the latter appears before an adjudicator who can only judge one event at a time.

[17] Abram Chayes' 'bipolarity' – although he does not cite him – derives from Lon Fuller's theory concerning monocentric v. polycentric decision-making situations. Typically, the *polycentric* (policy-oriented) decision-making is preserved for the legislative branch whereas the *monocentric* decision making is typical of genuine adjudication. This is inherent in the bipolar nature of the conflict per se, i.e. in the end every conflict (combat, war, sporting event, legalised conflict, etc.) has a winner and a loser. The constitutional type of adjudication – in international, supreme and constitutional courts – in principle trespasses on legislative grounds when its 'autonomous legal reasoning' putrefies and becomes an unscrupulous 'policy choice.' Mr. Rehnquist's 'marginal utility' considerations in reducing the exclusionary rule from a prescriptive to an instrumental status are in this respect sadly typical. See *supra* n. 55 to Chapter 2. This, then, is the proper ground for raising the objections to the 'government of the judges.' When they make 'policy choices' and value judgments, by definition arbitrary, which go beyond the established doctrines of autonomous legal reasoning, the judges no longer act as judges.

[18] If it seems frivolous to speak of the state or society as the absent party in criminal procedure, consider the number of plea-bargained cases in which the society at large would be made to agree with the prosecutor's bargain.

Moreover, the choice of criminal sanction involves a polycentric decision, which also implies that the 'the right and remedy' are never simply interdependent. We cannot even posit that criminal sanction should figure as a 'remedy' or, additionally, that a criminal offence intrudes on the state's 'right.' In public law litigation, unlike a private dispute, the issue is by no means whether the parties are angry at one another; after all, abstract entities do not get angry. The issues there are more objectively determined and the procedural participants have no monopoly over their understanding, appreciation and often over their solutions. Even the judge cannot just shrug the issue away as he can do in private disputes (if, e.g. the parties settle). Public law issues cannot be resolved simply because the procedural participants cease to be adversaries in the process. Therefore, in private disputes the issue and the dispute are one and the same thing; in public law litigation the issue and the dispute at best overlap. To *resolve the dispute does not mean to resolve the issue*. These incongruities between dispute and the issue derive from the fact that, if the reader will excuse the simile, the game of tennis in criminal procedure is not played in order to decide simply who is the winner; it is played in order to find out which one of the players is truly morally superior.[19]

In criminal procedure, party control, too, is not absolute. First, the very existence of the controversy is defined in advance by substantive criminal law. In private disputes, the conflict of interests usually comes first and its legal definition merely recodes it for the purpose of legal decision-making. In criminal law, there is no dispute at all unless there is a legal issue. There may be, in other words, a discrepancy between a factual and legal definition of the controversy in private conflicts. But there is no such possibility at all in criminal law. The prosecutor does not ask the victim, for example, whether

[19] This opens up a whole new area of inquiries into the congruity between the procedure and the substance. The illustration is to some extent false, because in civil procedure, too, the issue is clearly not decided merely by procedural skills. In a tennis game, the criteria of winning and losing always derive from the game itself as played then and there. The result stands for the particular game only, and does not purport to stand for anything more than what happened within the temporal and spatial confines of that game. In this sense, then, the result of a tennis game is a reflection of the player's superior skill and may fairly describe him as a champion. Still, if a clearly superior tennis player loses his game because he feels sick that day, we shall not consider the result to be unjust. We shall simply say that this result describes what happened on that day and that is that. In a private controversy, similarly, it is to some degree acceptable if one of the parties wins merely because he has a better lawyer; but we accept this not because we would agree that the substantive considerations are irrelevant, but rather because we consider the matter of private controversy to be only of private importance. Society at large does not care too much about the truth in these matters because it affects only a small circle of protagonists in the controversy. But even so, there is "inevitable tension between procedure generalised across substantive lines and procedure applied to implement a particular substantive end." Cover, for James Moore's *Some Reflections on a Reading of the Rules*.

he or she feels aggrieved and then attempt to phrase the issue in terms of criminal law. Rather, he looks at the law and then decides whether there is an issue in the first place. Thus, the conflict itself is *ab initio* defined in criminal than in other spheres. Similarly, even in the most adversarial model, criminal procedure is never 'party-initiated,' insofar as the prosecutor does not have absolute discretion whether to press the charges or not.

Additionally, since the interests involved are 'society's general interests,' the 'lawsuit' in criminal procedure is clearly not a 'self-contained' episode. "The [private] lawsuit is a self-contained episode. The impact of the judgment is confined to the parties."[20] In public law litigation as well as in criminal procedure the impact of the judgment is not confined to the parties. This explains why the parties should not have total control over the issue in the first place. It is as if the question of guilt were a transcendental question, objectively posed and determined and not at the defendant's disposal.

Furthermore, criminal procedure, inasmuch as it involves 'prediction and prevention of harmful conduct' of every criminal defendant is never 'retrospective.' To prove this, let us begin with the question: are a genuine conflict and its resolution of necessity a retrospective phenomenon? Since the conflict is a sharply focused incompatibility of defined sets of unitary interests, it is by its very nature something that derives from the past.[21] The legal resolution of the conflict derives from criteria assented to in the past, too. But while it is clear that the conflict is at the time of legal interference always a past event – *propter hoc ergo post hoc* – the resolution does not have to be retrospective. It will be retrospective to the extent that it is bound by rules promulgated and consented to in the past. If that means that all legal reasoning is retrospective, so be it, since it is obviously based on the rules.[22]

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[20] Chayes, *supra* n. 10, at p. 1283.

[21] A conflict could therefore be compared to the situation where a clear goal is projected into the future. The incompatibility of interests prevents such projections into the future. Even in Kojève's interpretation of Hegel's phenomenology, we find that he regards future as a negation of the past – since he regards time essentially as Man's purpose: "Therefore: '*die Zeit ist der daseiende Begriff selbst*' means: Time is Man in the World and his real History." Kojève, *Introduction to the Reading of Hegel*. In a very real sense, a conflict prevents such a negation. Thus the famous saying attributed to Prince Peter Kropotkin: "*Le code est une crystalisation du passé pour étrangler l'avenir*."

[22] American jurisprudence tends to consider the role of law and lawyers more broadly, regarding strict adherence to the rules (which is somewhat incompatible with the idea of judge-made law) as formalistic, if to an extent unavoidable. It nevertheless emphasises the conflict resolution as such (i.e. not necessarily by reference to past rules). Given such a definition of the legal interference, it does not have to be retrospective. But it is good to remember that the type of public law litigation which Chayes describes, (*supra* n. 10 and accompanying text) simply did not exist on the Continent until constitutional courts were introduced in some countries in clear imitation of the American system.

These rules derive their legitimacy from a past consent to them. The characteristic feature of all law is this past consent to the rules, devoid of specific import, since at least one of the parties would not consent to the rules if it was known what they would bring at some future date.[23] Decisions must be made in reliance on the past rules, which no longer receive feedback from reality. The continued inflexibility of those rules is in fact the very essence of the rule of law.

Thus, a private controversy is 'retrospective' in the sense that it derives the criteria for its solution from two kinds of past events. One is the prior consent on which the contract, for example, was built. The other is the past event in response to which the *restitutio in integrum* is now requested. In both respects, the reinstatement of the *status quo ante* is the purpose of the lawsuit.

Criminal law is in this respect eclectic. There would be no legal action were it not for a past criminal event.[24] So, a blame-worthy past event *is* required for the state to be able to intervene purposefully.[25] On the other hand, the

[23] The availability of 'prior consent' to the criteria of the future resolution of conflicts between private parties, for example, derives from their inability to tell in advance that certain *abstract* stipulations in the contract will have certain concrete consequences. This phenomenon of "anticipatory abstraction," where people agree to abstract stipulations because they cannot anticipate their concrete contents, makes the reliance on previously-abstract-now-concrete-rule possible. Insofar as law is based on explicit consent by the parties involved, which is patently less true in criminal law than in private law, law itself is based on anticipatory abstraction. The public law, however, simply and falsely 'presumes' prior consent through the fiction of consent of formal democracy. These dialectics of command and consent and their mutual interpenetration tend to show that law is never wholly subject to the present because it derives from the past. The fact that legal rules are bound by the *past* – although abstract – stipulations nevertheless imposes certain limitations on the exercise of *present* power.

[24] In *Robinson v. California*, 370 U.S. 660 (1962), the defendant was prosecuted under a statute which demanded punishment not for specific acts (of drug use) but for the general status of *being* an addict. The Supreme Court of the United States refused to accept such a solution, thus inadvertently reaffirming the long-standing *transactional* concept of crime: unless there is a specific *pro quo* there can be no *quid*. The theory of crime as an involuntarily incurred contract (Aristotle), as a barter derived by analogy from the law of obligations (Nietzsche), or as a bourgeois analogy to the exchange of commodities (Pashukanis) is not new; but it has implications for our purposes. The requirement of an act, as in *Robinson*, implies the centrality of the bilateral exchange *(do ut des* type of contract). But the requirement of an act is not merely a bourgeois compulsion to see everything through the *quid pro quo* spectacles. As anybody familiar with the *Robinson* problem will agree, the requirement of an act was meant to protect the suspect. While it may have reasserted the 'barter' concept of crime, it has thereby also reasserted the underlying existence of the real and palpable conflict between the individual and society, which made him criminal in the first place and now wants to 'treat' him for that.

[25] The absurd result of this is that often in order to prevent future mischief, some past mischief must exist: one has to incur present harm to prevent the future one. In the language of substantive criminal law, it is the *Robinson* requirement of an act which makes possible a

punishment is a future event not wholly meant as a compensation for a past mischief.[26] The division of labour in modern criminal procedure, where the establishment of a criminal act (retrospective) gives the adjudicator the right to sentence according to criteria of special and general prevention[27] (prospective) reflects the eclecticism and ambivalence of the modern criminal law.

Hence, there are fundamental differences between the paradigmatical private dispute and its resolution on the one hand, and criminal procedure on the other. Chayes has thus attempted to demonstrate the difference between the private lawsuit and the public law litigation or the criminal process.

There is one more difference between civil and criminal law conflicts. Civil law conflicts are highly suitable for adjudication, since the principle of disjunction can generally be adhered to, and there is virtually no use of force[28] because the parties more or less freely agree to impartial adjudication. Criminal law conflicts necessarily involve some use of force and some infringements on the principle of disjunction since most defendants do not want to have their cases adjudicated at all.

As adjudication substitutes violent conflict resolution with non-violent negotiation, it ineluctably follows that the use of force of any kind by either party is incompatible with the whole idea of adjudication. But, how extensively can we interpret the phrase 'use of force?' The accuser must exercise power

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purposeful action. Retrospectivity must precede prospectivity. The reason for this lies in the conflict of interests between the individual and the society. Were it genuinely possible to say that the criminal sanction is in the best interest of the criminal himself (treatment), it would not have to depend on the criminal act and its proof. However, as long as the defendant sees his interests as incompatible with those of the society at large (insofar as his treatment is concerned), he will demand to know the act for which he is forced to pay the price.

[26] Pomponius, *Digestae* 35,1,72,6 ("The reason for punishment derives from the past, but the punishment is meant for the future.")

[27] The idea of such prospectivity is not new at all. Iulius Paulus, the famous jurist of the classical period of Roman Law whose work represents fully one sixth of Justinian's *Digestae*, wrote: "*Poena constituitur in emendationem hominum.*" *Digestae* 48,19,20 ("Punishment is imposed to mend the person.")

[28] Even civil law, however, must sometimes deal with situations where one party refuses to submit to adjudication. Roman law is a good example: *Si in ius vocat ito!* (If you are called into court, you must go!). Thus, if a Roman citizen initiated an action against another citizen, the latter had to come into court before the magistrate, consul or praetor. The Law of XII Tables (451 to 449 B.C.) gave the plaintiff the right to use force against the defendant if the latter would not submit to the jurisdiction of the court. Thus, even when the parties did not freely come before the court, the principle of disjunction was inviolate and force was not used until unavoidable. In Roman law, the court sent three notices; if the defendant refused to appear, he was declared *contumax* (stubborn, disobedient). Until this declaration, no force could be used between the parties. Even today, civil litigants are usually willing to submit to adjudication because they will lose their cases automatically if they do not appear.

directly over the accused in apprehending him and bringing him before the court. Without first catching the criminal, there can be no adjudication in criminal matters. Moreover, if the police are allowed to catch criminals, and it is all too easy for them to force the suspects to give self-incriminating information that will be used against them at trial, the principle of disjunction is vitiated from the beginning, even before the adjudication is started.

This is the basic problem of criminal procedure. The suspect has no interest in having his guilt adjudicated until he is captured. Therefore, he must be apprehended and some strictures placed on his freedom to assure his participation in the adjudicative process. He may be freed on bail, or he may be detained. Detention may be necessary even though it violates the principle of disjunction. The difference between civil and criminal proceedings is reflected in the quality (intensity) of the disjunction and the quantum of force used.

Thus, in the case of criminal procedure, the principle of disjunction of the parties serves an ancillary function in the process of adjudication because when the choice between the subordinate principle of disjunction and the superordinate process of adjudication becomes inevitable, it is clear that adjudication will prevail over disjunction. That this is a crippled adjudication, however, is a separate question.

The Framers of the United States Constitution probably intuitively sensed that it is inherent in the structure of adjudication that the parties be separated from each other as much as possible.[29] Indeed, the courtroom's architecture reflects the reality that the prosecution is entrenched on one side, the defence on the other, and the judge above and between them in the position of impartial adjudicator. No wonder they verbalised this principle in the Fifth Amendment through the Constitutional provision that no person shall be compelled to be a witness against himself. This provision should be interpreted as a verbal formula for the principle of disjunction that mandates the accuser (the prosecutor and the police) to exercise as little control over the defendant as is structurally possible. That is, it should be extended into a broad principle[30] against self-incrimination, both in court and out.

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[29] The closest one can get to the principle of disjunction through constitutional interpretation of the Fifth Amendment is to interpret the word 'compelled' as concerning physical and psychological coercion as well as general lack of informed consent on the part of the defendant.

[30] Justice Douglas' penumbric theory of law in *Griswold v. Connecticut*, 381 U.S. 479 (1965), reinforces the conclusion that the self-incrimination clause should be read broadly. Douglas says:

> [The] specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance […] Various guarantees create zones of privacy […] The Fifth Amendment in its

3. The Criminal Process: Conflict Resolution or Truthfinding?

The question however remains as to why one would want artificially to create as Nietzsche put it, an 'approximate equality,'[31] to create the conditions for a conflict considering there is no conflict to resolve in a criminal process. As shown above, in criminal procedure, the conflict is secondary to the substantive issue to be decided. A conflict, *nota bene*, presupposes approximate equality in power (or powerlessness), and the state power – unless artificially restrained by 'the rule of law' – simply cannot be 'in conflict' with the powerless private individual. The 'equality of arms' in criminal procedure would thus appear simulated and rather unreasonable, somewhat irresponsible or even perverse self-castration of the state.

Given the fundamental inequality between the state and the individual who is attacking its law and order and given the centrality of the law and order issue, the *prima vista* judgment would be that there should be an unyielding unilateral state investigation – by the executive branch – of the 'probable cause' ('reasonable suspicion') with ultimate punishment as its logical consequence. Undoubtedly, the question of criminal responsibility has often been treated in this kind of an ordinary non-adversarial decision-making manner. One can remind oneself of the pure inquisitorial model wherein the defendant was seen as an object of efficient unilateral truthfinding, and where there was no admission of the conflict between the state and the suspect.[32]

In criminal procedure, thus, one can say that the truth can be arrived at without any legally structured procedure at all. In order to punish the criminals one really does not need criminal law at all. Just as a scientist does not need any protocol of regulations to proceed from the formation of a hypothesis to its final testing and conclusion,[33] so the investigator in criminal cases could find

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> self-incrimination clause enables the citizen to create a zone of privacy which the government may not force him to surrender to his detriment.

This is precisely what we have called the principle of disjunction. Douglas' interpretation of the particulars in the Bill of Rights as merely a para-tactical index to be used in a form more symbolic than exhaustive, allows us to support our theoretical conclusions with judicial opinion. More about the principle of self-incrimination in the next chapter.

[31] Nietzsche, *supra* n. 11 to Chapter 2 and accompanying text.

[32] To be sure, the conflict was there, but since the state was so much more powerful, it could simply disregard it. As discussed, the genuine conflict can only occur between two combatants that are approximately equal in their power.

[33] See Popper, *The Logic of Scientific Discovery*, at p. 27:

> A scientist, whether theorist or experimenter, puts forward statements, or systems of statements, and tests them step by step; in the field of the empirical sciences, most particularly, he constructs hypothesis, or systems of theories,

out the truth about a past criminal event without any procedural instructions and barriers. Without a doubt, such unhindered truthfinding would be much easier for him and more efficient. Likewise, in purely empirical terms, it is not possible *a priori* to argue that such an epistemologically unhampered investigative modus operandi would yield more false positives (innocents being convicted) and false negatives (the guilty ones being acquitted) than the present dual investigation-adjudication process.

The central preliminary question of any criminal procedure is therefore why artificially subordinate the public goal of maintaining the law and order in society to the kind of legal procedure, which has historically evolved for the purposes of entirely private conflict resolution?

One reason is that in terms of human rights, one speaks of the 'equality of arms' as a precondition to a 'fair trial.' However, such a 'fair trial' would not occur without the criminal procedure, which would define what the state is *not* allowed to do (due to the inequality of powers) while deciding the conflict. If such a curb on the state's power were not put, criminal procedure would be a simple and efficient investigation (*inquisitio*) and would be reduced to a mere truthfinding instrument. Would that be rational, i.e. would it be acceptable to have the police themselves deal with crime and the criminals? Assume for a moment that the human subjectivity of the suspect-defendant, i.e. his constitutional and human rights and his dignity, is of no concern.

Would such a system be efficient?

The clear answer is that such a system would be supremely efficient. One only has to read one of Solzhenitsyn's novels and combine this reading with the realisation that the crime rates in the former Soviet Union were, at any rate in comparison with today's, extremely low. One then immediately understands that everything depends on how narrow is one's definition of 'efficiency' and how strict is one's characterisation of 'law and order.'

Unfortunately, the above perception of 'efficiency' and 'law and order' is not as outlandish as it seems. One has to look at the reports the United Nations Committee against Torture makes to the General Assembly or cases such as *Selmouni v. France* to comprehend the universal tendency to indiscriminate abuse of human rights. This tendency occurs everywhere where the executive branch and its police are not – via structured scenario of adversary criminal procedure – under constant supervision of the judicial branch.[34]

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and tests them against experience by observation and experiment. I suggest that it is the task of the logic of scientific discovery, or the logic of knowledge, to give a logical analysis of these procedures; that is to analyse the method of the empirical sciences. It can be observed in this statement that the scientific method comes first – it can be seen as intuitive. Its description and logical analysis is really *ex post facto*.

[34] *Selmouni v. France*, ECHR, judgment of 28 July 1999.

However, criminal procedure comes into existence once the question arises as to what the State is *not* allowed to do in order to discover the truth in criminal cases. Criminal law only becomes necessary when the central question becomes – in 18th century after Beccaria,[35] for example – whom *not* to punish. Thus, both criminal law and criminal procedure are in essence inhibitions of the Government's power. Politically, they are a product of the reaction of the bourgeoisies against the arbitrary use of the power by the aristocratic state.

Of course, one may say that this is an overstatement, because is criminal procedure after all not about catching and punishing the criminals? It is obvious, one could say, that the courts punish the criminals, rather than 'inhibit' the State.[36] To this, there are two answers. First, it is true that criminal

[35] Beccaria, *Dei Delitti e Delle Pene (On Crimes and Punishments)*. Beccaria's ideas are dealt with more extensively in Section 2 of this book.

[36] This basic dilemma, namely, whether criminal law and criminal procedure are supposed to further the punishment policies or instead inhibit the government's exercise of power and authority run as a basic theme through most Supreme Court cases in the United States. It is instructive and illustrative to see the essentially antithetical attitudes of the Warren Court and the Burger Court. It is almost amusing to see how the Burger court tries to effectuate a policy which is antithetical to the previous Warren Court policy – and all that by means of reinterpretations of the cases-precedents handed down by the Warren majority. An excellent example of such incompatibility can be obtained by comparing the case of *Chimel v. California*, 395 U.S. 752, 89 S.Ct. 2034, 23 L. Ed.2d 685 (1969) with *United States v. Robinson*, 414 U.S. 218, 94 S.Ct. 467, 38 L. Ed.2d 427. Both cases concern searches incident to arrest and yet in *Chimel*, the Court relied on *Terry v. Ohio*, 88 S.Ct. at 1879 where the Court said that

> [T]he scope of a search must be 'strictly tied to and justified by' the circumstances which rendered its initiation permissible, whereas that precise link between the reason for arrest and the scope of the search incident to arrest is simply severed in *Robinson* where Justice Rehnquist declares by judicial fiat that a search incident to the arrest requires no additional justification.

However, our concern here is not the scope of the search incident to arrest but rather the two antithetical philosophies concerning the rule of criminal law and criminal procedure. For illustrations, however, one can regress to such cases as *Wolf v. Colorado*, 338 U.S. 25, 69 S.Ct. 1359, 93 L. Ed. 1782 (1949) where Justice Frankfurter discusses the conflict between the idea of excluding evidence for the purpose of procedural sanctioning and the primary truthfinding intention of criminal procedure. The question is whether the basic right to protection against arbitrary intrusion by the police demands the exclusion of *logically irrelevant evidence* obtained by an unreasonable search and seizure. The exclusionary rule, of course, epitomises that same conflict because by adopting exclusionary rule as a form of procedural sanctioning, one implicitly admits that the truth-finding function of criminal procedure is secondary to the procedural propriety. Were criminal procedure a mere *ancilla* to the goals of substantive criminal law and it is obvious that the goals of substantive criminal law are defined in terms of truth about a past criminal event, then exclusionary rule would not be possible. On the other hand, however, a proper balance of forces and, therefore, strict obedience to the procedural rules is necessary in criminal procedure, not only because of the substantive constitutional

law is about punishment and criminal procedure about handling of criminal cases, but as we said above, this is possible even without either criminal law or procedure. Second, it is true that the central dialectic in both criminal law and procedure is the oscillation of the power of the State as against the power of the citizens, and individual against an organisation. This includes the power of the state, of course, but by the same token, it includes a limitation on it.

Applied to criminal process this simply means that adjudication is not merely about truthfinding, or not even primarily about truthfinding. The fact that the relevant truth is pursued by the State implies that this pursuit will be checked upon by the Courts and will therefore be inhibited simply because it is a powerful state that has to be checked in its power. Thus, often truthfinding has to be subordinated and criminal procedure given precedence for the sake of maintaining this 'check' and consequently, having a 'fair trial' due to the equality of arms so induced.

To explore this question of the position of truthfinding as opposed to criminal procedure, let's compare the position of truth in law with that in science. In science, it is true that the discovery procedures (methodology) were for a long time seen as clearly subordinated to the 'scientific truth' to be unveiled by the method. Yet in legal procedure, especially in private controversies, *it is the truth that is instrumental to the process, not vice versa.*[37] In science, truth is interesting as such; in legal procedure, the truth is interesting only in order to resolve the dispute. If the truth is sought only to conciliate the parties, it will be sought only to the extent the parties themselves consider this to be in the interest of the resolution of their conflict. The more the parties disagree, the more intense the controversy, and the more important the discovery of facts. The lesser the chance of reconciliation, the greater the autonomous importance of the truth.[38] Nevertheless, reconciliation may happen at any time and the truth would then be irrelevant. Thus, both the relativity of the truth to be discovered as well as the fact that it is not important per se, point to significant differences between a scientific method and the legal process.

It follows logically, first, that the primary purpose of adjudication is to resolve the conflict and, second, that truthfinding comes into play only if the

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rights of the defendants involved, but also because criminal procedure must necessarily be adversarial and monocentrically organised, if there is to be proper impartial adjudication.

[37] The 'process' is the controversy; the controversy is the issue; and the 'truth' (about e.g. ownership, contract, damage) is being discovered in order to end the process of coded controversy.

[38] The more the parties disagree, the less they have in common. The less they have in common, the more important the prior consent embodied, e.g. in the contract or in the law promulgated prior to the dispute. The truth sought then corresponds to these legal criteria which make certain facts relevant.

parties cannot settle or otherwise resolve their disagreement. This however is not completely true in the administration of criminal justice. Here, the truthfinding goals implicitly postulated by the substantive criminal law are morally and socially paramount; the general and the special prevention of crime require it. The truth, therefore, is not simply dispensable. Since the criminal and his act are "morally repugnant," truthfinding, which in civil procedure is relevant only as far as it contributes to the resolution of the conflict, often becomes in criminal procedure an end in itself.

Is public legal process, then, a pragmatic conflict resolution device or is it a vehicle of moral enforcement?

If truthfinding is the untouchable goal of criminal procedure, we get the pure inquisitorial model. If truthfinding is only an instrument of conflict resolution we get the pure adversary model of criminal procedure. Generally, and especially in relation to the truth the criminal process supposedly uncovers, the first philosophy is absolutistic (dogmatic) and the second is relativistic (pragmatic).

Thus, the European notion of crime as hybrid of practical tort and moral sin derives from the historical imposition of Catholic inquisitorial way of thinking. The latter warped the notion of procedural adjudication as a normal adversarial conflict resolution and transformed it into an inquisitorial trial ending logically in torture. The moralistic impetus is innately authoritarian and is *a priori* alien to the legal process as an intrinsically democratic confrontation of two equal parties. However, a benevolent view of the inquisitorial criminal process might be that it was the need for the enforcement of morals that has caused this mutation of the normal civil adversary proceeding. This moral imperative requires that the truth be discovered about a past allegedly criminal event (criminal act) and consequently the normal legal procedure in which truthfinding is merely an instrument of conflict resolution must be made to serve this purpose.

It is at the same time still true that adjudication, i.e. impartial decision-making as to the question of guilt or innocence, is criminal procedure's central feature. Adversary procedure is to some extent at odds with these goals. The preliminary question therefore remains as to what is the valid purpose of the criminal process.

Let us regress further and assume that human dignity is only a 'value judgment' and that the 'rule of law' is a mere academic castle in the air, both incompatible with Roland Barth's 'le bon sens,' *c'est a dire [avec] une vérité qui s'arrête sur l'ordre arbitraire de celui qui parle*.[39] Would it then be possible to say – in distilled Weberian terms of rational law-making and law applying – that such a pure inquisitorial system is acceptable?

[39] See, *supra* n. 55 to Chapter 2, *in fine*.

One hesitation comes to mind even in this limited perspective of sheer efficiency of crime-repression. This objection has to do with the nature of truthfinding. The purpose of any rational truth finding is to accurately identify the true positives and the true negatives, in our case the truly guilty and the truly innocent suspects. In purely empirical, scientific environment, the objective verification of a hypothesis is accomplished with the aid of the scientific experiment, in which all variables, except for the one tested, are kept constant. The event tested is repeatedly subjected to this experiment. The underlying hypothesis is thus verified vis-à-vis objective reality. However, this procedure is workable only if the event so tested lends itself to innumerable replications.

The so-called 'legally relevant' events, in our case 'crimes,' are not repeatable. The process of adjudication deals with unique events, or epistemologically speaking, with 'historical events.' We cannot submit the hypothesis of a historical event to an experiment. Historians, for example, may describe the event and depict all kinds of indirect proofs for its existence but they cannot in real time – for the historical event is consigned to the past and cannot be replicated – demonstrate its continuous existence. The universal laws of physics and chemistry, however, subsist in time. Through their particular manifestations, they lend themselves to continuous verification vis-à-vis objective reality.

The arbitrary human laws are not necessarily ephemeral, but while they may last, they do not express an objective reality.[40] The purpose of a scientific experiment is to demonstrate the existence of a universally valid objective law through a particular event. The purpose of legal truthfinding is to demonstrate that there has occurred a particular event whose characteristics correspond to the law. However, while the major premise ('intellectus') in science at least attempts to reflect and describe the objective reality, i.e. is ontological, the major premise in law is deontological. The intent of the legal norm is not descriptive; it is prescriptive. It is the intent of the legislator. What this prescriptive aspect describes – jurists deal with it only partly through teleological interpretation – however, is not something which could be called entirely 'real' in the usual sense of the word.

Lawyers, moreover, deal only with the intent per se, which is the least 'real' aspect of the legal major premises. The tacit major premise preceding the intent of the legislator, on the other hand, the one which jurists take for granted, is the real question whether and to what extent the lawgiver obtains and maintains the power, which makes its intent relevant in the first place.

[40] On the contrary, they endeavour to change the reality of human action and conduct. The natural laws discovered by empirical sciences are descriptive and 'ontological' whereas human laws are both descriptive and prescriptive and are therefore 'deontological.'

Incidentally, the normative major premises of law – the dispositions of the legal norms – are of necessity both descriptive and prescriptive. An entirely prescriptive norm, such as *thou shalt not breathe!* would not be enforceable and thus makes no sense because the power of the legislator does not extend that far. Moreover, an entirely descriptive norm such as *thou shalt breathe!* makes no sense because it is redundant. It follows that all legal norms are both descriptive and prescriptive – inasmuch as the reality of social relationship does not comport with the intent of the legislator.

Thus, while in physics we concern ourselves with the proof of objective and universal laws, legal truthfinding preoccupies itself with the proof that a particular event happens to correspond to the intent of the legislator expressed in the legal norm. However, while to demonstrate this 'correspondence' between the universal (law) and the particular (event) is critical in both cases, the purpose of the endeavour and its result are vastly different.

In science, the above 'correspondence' proves the validity of a scientific theory. In law, it proves merely that there is a virtual *adequatio intellectus et rei*: perhaps an entirely absurd 'validity.' For example, when the Roman emperor Augustus, the self-proclaimed 'divus Augustus,' decided that spitting in front of a statue depicting his person amounts to the crime of '*laesio majestatis*,' the correspondence between an event and the law, objectively speaking, proves nothing about the law. If anything, it 'objectively' only proves that the Emperor has the real power to sanction it. Since the purpose of truthfinding is not to prove the validity of Augustus's edict, someone's act of spitting in front of his statue is relevant only per se, as a unique historical event.

Moreover, unlike science, where a historical event is a particular expression of a universal law, in law, the historical event somehow 'hangs in the air' and must be shown to have occurred 'on its own terms.' If it happens to correspond to the normative major premise, this is scientifically speaking, an arbitrary coincidence. The evidence of the legally relevant event, in other words, does not draw on, nor does it evince, an empirically established objective and universal law. The proofs of the event's correspondence with the norm (and the sanction) come wholly *ex post facto*.[41] They are extrinsic to all empirical reality except to the one deriving from the power of the state.

In empirical science, even though endowed with the reliability of scientific experiment, any doubt whatsoever concerning the employed methodology of

[41] This is not to say that legal proofs have no connection to human laws. Quite the contrary is true. However, this does not change the fact that the legally relevant event in question is not a dependent variable of a universal law subsisting in time. The legally relevant event matters only *as such*, only as a particular occurrence. For a detailed analysis of the burden of proof and the legally relevant elements of a criminal event in the series of cases of *In Re Winship,* 397 US 358 (1970)*, Mullaney v. Wilbur,* 421 US 684 (1975) and *Patterson v. New York* 432 U.S. 197 (1977), see 'The Problem of Burden of Proof' in Chapter 10 of this book.

truthfinding fatally detracts from the validity of the arrived at results, i.e. of the proof. The scientific researcher must minutely describe the methodology he had employed. He thus enables other researchers to replicate the procedure and arrive at identical results. Otherwise, the proof is not valid. It follows logically, that the 'methodology employed' is *a fortiori* critical where the proof by experiment is wholly unavailable.

Whereas in empirical science the methodology affects only the legitimacy of the concrete experimental procedure, in legal truthfinding the result depends wholly, only, and finally on the methodology (procedure) employed. This means that in science, an error in methodology is corrigible and consequently that despite incorrect experimentation, the result may nevertheless be correct. In law, we would never know.[42] In law, we cannot separate the epistemological legitimacy of 'truth' from the legitimacy of the procedure employed to discover it.[43]

Based on the above-mentioned characteristics of truthfinding in law as opposed to that in science, we have justified the need to keep truthfinding and truth as subsidiary goals in criminal law and the need to consider conflict resolution as the primary goal.

The above discussion on the secondary nature of truthfinding as compared to conflict resolution, however, also supports the trustworthiness of the bilateral adversary procedure as opposed to the unilateral inquisitorial approach.

That is because first, in adversary environment the prosecution's hypothesis of guilt is exposed to ardent critique by the defence. The defects in the prosecution's 'methodology' are laid bare as are the weak points in the defence. Second, the adjudicator, is free to choose whom to believe. He is not required to form his own hypothesis concerning the subject matter of the dispute before him, at least not before the final stages of adjudication. The *de facto* shifting of the burden of proof is the mirror image of the respective persuasiveness of the two parties before him. Third, while this shifting of the respective persuasiveness is taking place before him, he may remain impassive, hesitant, undecided, and ambivalent.

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[42] This is the key argument against the irreversibility of capital punishment. The fact is that this argument stands and has been proven repeatedly to be valid, most recently by adducing DNA scientific proofs *excluding* the condemned person from the circle of suspects.

[43] Most Continental criminal procedures distinguished between 'absolutely essential procedural errors,' the consequence of which was the annulment of the judgment and the trial *de novo*. However, the 'relatively essential procedural errors' only had that effect if they were deemed to affect the veracity of truth finding. Typically, the constitutional, human, or procedural rights of the defendant played no role: even truth arrived at via torture was in principle acceptable.

In the unilateral investigating approach, efficient as it may initially appear, the same individual (the police officer, the inquisitorial *inquirens*, the investigating judge etc.) adhering to the initial hypothesis of guilt is also the one who verifies it. By the nature of things he is required to hold on to the hypothesis of guilt otherwise he has no reason to investigate in the first place. The more he is committed to the presumption of guilt the greater the likelihood of the final 'false positive' conviction. From Dostoyevsky to Kafka, from Camus to Solzhenitsyn, literary giants have written about this absurdity, yet the legal profession, especially on the Continent, refuses to understand how bizarre and how intellectually dishonest is the inquisitorial approach to truthfinding.[44]

4. The Incompatibility Between Truthfinding (Investigation) and Impartiality (Adversariness)

We have already discussed that in criminal procedure, the conflict is not spontaneous and genuine. The investigation's main problem is usually that the identity of the other party to the conflict is not even known. How can one have a conflict with somebody who refuses to defend his position to the point where he will not even reveal his identity? However, in order to maintain the legitimacy derived from the impersonal nature of its rules, criminal procedure goes so far as to create the conflict. This means that the hypothesis of guilt must also be impersonally tested. Since a conflict is necessary for the sake of this impersonal testing of the hypothesis of guilt, the law goes so far in its demand for legitimacy that a whole initial phase in the bilateral criminal process is not adjudication at all, but is dedicated to investigating whether there is or whether there should be a conflict in the first place.

In other words, as it is necessary to create a conflict to attain the elements necessary for adversariness in the adjudication phase, an initial phase – entirely non-adversary and partial – must precede it. Thus, the actual decision concerning criminal guilt is arrived at in two phases. In the investigation phase, one of the parties forms the hypothesis and presents it to the adjudicator. In the adjudication phase, this hypothesis of guilt is tested by someone other than the person who formed it. The process can thus be divided into hypothesis formation and hypothesis testing.

[44] Of course, the self-referential nature of legal 'truth' compounds this absurdity to an n^{th} degree. See Popper, *supra* n. 33 and Bayer, *supra* n. 6.

4.1. Investigation and (Im)partiality

Between the two phases of criminal investigations, the initial phase is clearly idiosyncratic to criminal cases since it does not start from the premise of the material conflict of interests. The main difference between 'investigations' in private disputes and criminal investigations is that only in the latter has the accusing party the power to physically interfere with the accused one. The need for such intrusion, from which most legal problems in criminal procedure seem to stem, derives from two further discrepancies between the civil conflicts and the criminal cases.

Private conflicts in most cases concern stable social situations (e.g., property, family) where the 'accused' party has a distinct interest in a palpable social arrangement. Because of this controversial interest, it is always possible to introduce a procedural sanction of the forfeiture of this interest for the contumacious party. For example, if two people quarrel over a piece of property, the latter is there and provides a lien by which procedural obedience of the parties can be maintained. In private disputes either both parties want something which the court has the power to give, or at least, as in torts, the identity of the accused party is clear from the beginning and the stake too small for it to flee.

In criminal investigations, the central issue is much more intimately human. The issue is not objectified in a commodity or a right to a certain relationship and cannot be conceptually or physically separated from the accused party. Justice in criminal cases cannot be done without the physical presence of the accused individual, because it is not something that he has or that he must do that is at stake, but something that he did and something for which he must expiate.

But while this requirement of physical presence is accentuated in criminal procedure, the probability that the accused individual will actually attend the trial is less precise since he does not have a firm bond with the objectified external interests which could be exploited for a lien. In civil disputes the individual can be threatened with the loss of his interests, but to threaten an absentee criminal defendant with the pronouncement of guilt *in absentia* is less effective.

Criminal investigations attempt to determine whether there was a criminal act committed and who it was that committed it. There can be no accusation without investigation because, unlike the private dispute where it is always clear that there is a conflict and where 'investigation' really just gathers the evidence, in criminal procedure it is not clear *ab initio* whether there is a legal issue in the first place. The initial phase of investigation is in this sense out of focus, diffused and vaguely exploratory. Only slowly is a hypothesis formed as to the criminality of the act and the identity of the actor. At some point the

investigation focuses on one particular individual and assumes the character of evidence-gathering. In the beginning, the investigators seek to 'persuade themselves' of the identity of the actors. In the focused phase, they seek to persuade a future adjudicator by anticipating legal evidentiary requirements.

There is a curious yet dishonest type of complementariness between investigation and the later adjudication of the criminal case. The prosecution's ability to win its case clearly depends on the evidence gathered during the investigation. The abuse of the defendant by using him as a source of evidence against himself may reach a stage where the adjudication becomes an *appeal from investigation*. The abuse often effectively decides the case against the accused party. This enables the system to pretend that it balances the procedural powers of the parties in order to maintain adversariness. But, the system can afford adversary adjudication *only after* it has by physical and emotional pressure destroyed its opponent. It can "balance" the power later only because it has previously overpowered the defendant. The adversary phase of the process, especially in some Continental systems, thus becomes a simple cover-up for the abuses of the investigatory phase.[45]

Apart from this inevitable corruptive influence of criminal investigation, it seems clear that without its sometimes abusive partiality there could be no impartiality. The dynamic concept of impartiality, the central feature of which is the vacillation of the adjudicator between two incompatible hypotheses, demands that there be two antecedent *partialities* of the disputants, before there can be the impartiality of the adjudicator. In other words, impartiality is a composite product of two partialities.[46] The paradox arises from the necessity

[45] Notorious in this respect is the French criminal procedure, Art. 133 which provides for a forty-eight hour detention period during which the dynamics from cases such as *Brewer v. Williams*, 430 U.S. 387 (1977) can take place. It is even possible to maintain that the very division of criminal procedure into two consecutive phases of investigation and adjudication is *in principle* unacceptable, if the investigation relies upon the defendant as a source of information (which is true in most cases). Since the issue in every adversary adjudication is proving one's point in juxtaposition to the opponent, who is trying to prove *his* point, it is logical to assume that the balance between the two can be maintained. This is especially so since adjudication is presumably guided by legal criteria, which means that the parties are treated equally before the law. However, to maintain that there is such a balance of power in the adjudicatory phase of the process, whereas the investigatory phase is yet another game, is akin to dividing a duel into the first phase in which I take the gun away from my opponent and the second phase of actual confrontation, in which I, pretending that we are now equal in power, shoot him. It would be more honest if I never entered the duel in the first place and simply used my power over the other person.

[46] An interesting illustration is provided by those cases in American criminal procedure which deal with the function of the grand jury. In *Costello v. United States*, 350 U.S. 359 (1956), the Supreme Court addressed the question of whether hearsay evidence can form the basis for a grand jury indictment. On essentially practical and *ad hoc* grounds the Court held that

of two distinct and articulated partialities in order to have the subsequent impartiality, coupled with the fact that the prosecutioral partiality in criminal cases cannot be formed without an intrusion upon the body and the mind of the other party.

A better approximation of the adversary ideal would be achieved if the criminal investigation derived all its information from sources other than the defendant. The problem could be partially alleviated if the investigation, even if not predicated upon strict respect for the privilege against self-incrimination, could be conducted impartially. The investigation would then simply be necessary to discover whether a conflict exists. Once that were determined, the claim of criminal guilt could be presented in court and properly adjudicated through confrontation of the parties. The prosecution would derive all its evidence from the objective circumstances and witnesses, and the defendant would be forced to appear and defend himself only after all this evidence was independently gathered. However, the question remains whether there can be such an "impartial investigation."

Weinreb[47] maintains that the police are too involved with peacekeeping to be capable of impartial investigation: "We cannot expect the same public officials to act in dangerous, violent, unpredictable, and uncertain circumstance with the minimum of harm to themselves or to others and also to act judiciously, with discretion, and mindful of conflicting interest."[48] Weinreb thus suggests that a magisterial investigation be established, where the neutral judicial officer rather than the police will conduct the routine investigatory (as opposed to the "involved" peacekeeping) functions:

> At the police station, where he is detained only to accomplish the state's investigative purpose, a person who is arrested cannot be other than an object,

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the grand jury should not be impeded by the exclusion of hearsay evidence. An analogous question was presented in *United States v. Calandra*, 414 U.S. 338 (1974) where the Supreme Court refused to permit the witness to invoke the exclusionary rule before the grand jury because that "would precipitate adjudication of issues hitherto reserved for the trial on the merits and would delay and disrupt grand jury proceedings." 414 U.S. at 349. The American grand jury is a hybrid between investigation and adjudication, as in a sense is the Continental investigating magistrate. The body of twenty-three people, of course, cannot be an active investigating body; for this purpose it would be far too cumbersome an institution. However, since it receives only *ex parte* information and is not impartial, its role cannot be seen as adjudicatory either. It may be a historical accident, but presently it does play a role that could be defined as 'passively investigatory.' The Continental investigating magistrate is supposed to be an impartial investigator. While his role is also more 'supervisory' than that of an active investigation – the latter is performed by the police – he is nevertheless better equipped for investigation than is the grand jury. This difference between the two investigating institutions is illustrative of the differences between the two systems of criminal procedure.

[47] Weinreb, *supra* n. 15.

[48] *Id.* at 120.

> a source of information. Before the magistrate interposed between him and the police, he can be a participant in a fair procedure designed partly for this protection.[49]

Weinreb believes that there is a possibility of a "neutral, complete, and convincing investigation"[50] in spite of the fact that "while prosecutorial bias is not an inevitable feature of an investigating magistracy, it ought to be taken seriously into account."[51] While it is true that an investigating magistrate such as those in Continental criminal procedure is less 'involved' since he is not assigned any immediate peacekeeping function, it is inevitable from a purely epistemological point of view that he will maintain a prosecutorial bias.[52]

If a person is asked to investigate a problem, he must first of necessity form a hypothesis, no matter how broad and diffused it be. The person may not even be aware of the fact that he is making assumptions which have yet to be proved. Such assumptions, prejudices, anticipations and hypotheses are inevitable with every investigator because an investigator is not just an abstract perceiver of reality, but is by the task required to distinguish between what is essential and what is not. For this, there must be more or less definite criteria.

If the investigator were to be merely an impartial fact-finder without a hypothesis, which conceivably would make him impartial, he should simply collect all the facts that are even remotely connected with the suspect (e.g. the whole family history of the suspect, the fact that he went to the barber the week before the crime was committed, etc). Such unfocused investigation,

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[49] *Id.* at 124.
[50] *Id.* at 133.
[51] *Id.* at 127
[52] I can confirm this from my own personal experience at the Circuit Court of Ljubljana, Yugoslavia where I clerked for several investigating magistrates. One cannot start from the presumption of innocence in such matters. The initial information amounting to reasonable suspicion would generally be collected by the police and a formal request for investigation submitted by the prosecutor. A file would be opened and the suspect invited, before the formal opening of the charges. Only after the suspect has been heard in this manner could there be an official investigation which marked at the same time the official opening of the process. The suspect would be told at this first meeting that he has a right to have a lawyer present, that he does not have to answer any questions, etc. With this and other pro-defense-bias clearly evident in the code, the attitude of the investigating magistrates was clearly inquisitorial. In purely practical terms, if one opens a file in which there is only a police report and the prosecutor's subsequent request for investigation and develops one's thought processes from this departing point – one cannot but be partial. A clear hypothesis is established as to somebody's guilt, and the investigating magistrate's job is to verify it. But just as a scientist cannot start from the premise that his hypothesis is wrong, so the investigating magistrate cannot start from the premise that the defendant is innocent. Epistemologically this is not a question of probability of prosecutorial bias; the latter is certain.

however, would really not be an investigation. Even if it is not possible for an active fact-finder to be hypothesis-free, it is still possible to be flexible in changing the hypothesis or to have more than one hypothesis at any time. But it is impossible to have no hypothesis.

There is another practical problem to consider. The line of least resistance, the line of the least possible effort – a very human attitude, especially in the administration of criminal justice where one cannot expect a deep intellectual commitment to fact-finding as in science – is to stick to one hypothesis and to change the direction of the search for the facts as little as possible. The economics of effort do not encourage more effort if the result can be achieved by less.

Moreover, the perception of facts in a criminal case is influenced by the various possible hypotheses and their legal relevance. The fact that the victim's fingerprints were not on the barrel of the gun becomes relevant only after the possibility of self-defense is established, viz., that the gun was pulled while in the defendant's hands which would have triggered the shot. A fact is really a fact only because of the special prism that the criminal law super-imposes on the reality of human behaviour.

In this sense, the perception of the raw reality will differ significantly from the perception as determined by criminal law. Through the eyes of a criminal lawyer (let alone of the policeman) the world is potentially guilty of something all the time. The whole reality of human behaviour is coded in the guilty and innocent stereotypes. Every aspect of reality, which attracts attention in the first place, does so because it is "legally relevant." Of course, things and events are legally relevant from the point of view of criminal law only if they prove or indicate criminal guilt. Any interest in innocence is wholly secondary to the accusation.

It is again a fact that the initial hypothesis must of necessity be one of guilt. An investigating magistrate in the best of all worlds, can be skeptical as to the truth of the police-prosecution's hypothesis. Nevertheless, when he opens an investigation he must proceed *as if* there is at least a substantial probability that the police-prosecution are right. He cannot start from the presumption of innocence. If he started from such a premise, the situation would be legally irrelevant. In ordinary life, we actually presume innocence when we do not even think of other people's behaviour in terms of criminal guilt. The moment we even become interested in someone's innocence from that point of view, the presumption of innocence has been destroyed.

An investigating magistrate's function is to investigate. If he believed the suspect is innocent, he would not investigate. Every fact that the investigating magistrate investigates, he must approach from this broader guilt perspective.[53]

Because it is the probability of guilt which makes a fact relevant in the first place, all investigation is infected with a prosecutorial bias. Even the defense lawyer' attempts to investigate are relevant because of the hypothesis entertained by the prosecution: that the defendant is guilty. Only a totally absurd accusation with no connection whatsoever to any factual premise from which to deduce legal guilt can be free from that bias.[54]

4.1.1. The Procrustean Tendency

When the imminent investigatory bias is coupled with the physical control given to the investigator over the body of the suspect, the intellectual partiality will tend to test and manifest itself in the defendant's recalcitrance. Ultimately, the challenge such recalcitrance represents to the investigator will make him rely on such 'experimental' approaches as torture, third degree, psychological manipulation, as well as illegal searches and seizures, and the like. Since the defendant is by the nature of most criminal cases often the only – and always the best – source of evidence, he will inevitably become an object of exploration in confirmation of the investigator's hypothesis, should the investigator be given the chance to have the defendant in his possession.

When the investigator tries to corroborate the adopted hypothesis, problems will likely arise, even if the hypothesis is correct, because a past event is explorable only in terms of probabilities. Even in the best of possible cases, where the prosecution's hypothesis is true, the defendant will not likely admit to committing the act. Such a defendant thus simultaneously represents a challenge and a frustration: a challenge, because objective evidence can

[53] There are, of course, not only many different kinds of guilt, which we take for granted, but also many different kinds of innocence. A defendant may have committed the physical act of killing, but it was in self-defense. He may have intended fully the consequences, but that precisely is a symptom of his insanity. Yet, clearly, such 'secondary' innocence is based on the 'primary' hypothesis of guilt.

[54] The invocation of criminal law occurs on the basis of a suspicion of guilt. All subsequent attempts to doubt, to counteract this suspicion already take place within the system. George Herbert Mead realised this when he maintained that the whole system of criminal law personifies one single 'hostile' (as opposed to 'friendly') attitude. He suggested that a wholesale switch ought to be made from hostility to friendliness, because he realised that the moment an argument, even a theoretical one, takes place within and with reference to the criminal law as a context, it is already bound by the invisible bonds of transactional justice of the talionic kind. See Mead, *supra* n. 43 to Chapter 2.

be tested against the defendant's recalcitrance, and a frustration because the defendant is not likely to give in. This tends to make the defendant the battleground of the contradictions of the compiled evidence even in the strongest possible cases. Simply stated, the defendant is the most available and the most manipulatable 'piece of evidence.'

Moreover, the investigation as performed by the investigator-adjudicator is never a pure search for truth in the sense found in science. There is always an element of indignation, a special relationship between the investigator and the defendant, and many other factors which cloud the search for the truth. The investigator's initial attitude is influenced by the accusation brought forward by the prosecution. The more atrocious the crime charged, the less chance that the investigator's initial attitude will be impartial. This explains the logic of the maxim in *attrocissimis leviores coniecturae sufficiunt et judici jura transgredi licet*[55] ("the more atrocious the crime the less proof needed to convict"). Where the situation is less clear, as where there are internal contradictions in the evidence itself (apart from the defendant's testimony), the defendant is an even more desirable object of exploration. The longer the investigation, the thicker the file and the more of a frustration to the investigator is the recalcitrant defendant. Also, the investigator has the power to force the defendant to speak, even to lie against his own best interests. In terms of investigation psychology – where the initial moral indignation raised by the prosecution's hypothesis also raises the investigator's eagerness to find the supporting facts – in the absence of such facts he may be willing to be satisfied with *leviores coniecturae.* "An intellectual function in us demands unification, coherence and comprehensibility of everything perceived and thought of, and *does not hesitate to construct a false connection if, as a result of special circumstances, it cannot grasp the right one.*"[56]

This is the pairing of the Procrustean tendency (the tendency to "modify" the data to fit the hypothesis), inherent in any hypothesis-verification, with

[55] See Esmein, *infra* n. 67 at p. 262.

[56] Freud, *Totem and Taboo,* p. 124. Freud's theory, moreover, maintains that all moral indignation in fact represents the pressures of the Superego's aggressive response to the unconscious yearning of the Id. In other words, people act aggressively against the criminals, to the extent that criminals provoke their own temptations to act identically. The aggression is thereafter projected on the criminal as an outside personification of the repressed Id. Nietzsche, in his *Second Essay* of the *Genealogy of Morals*, attributed the very existence of moral conscience (Superego) to the repression of aggression by the monopolist of physical violence – the State. He considered, for that reason, conscience and the accompanying guilt to be a disease. See Nietzsche, *supra* n. 31 to Chapter 2. If we take into account these theories, then the criminal investigator emerges as an exponent of institutionalised moral indignation, who is unconscious of the fact.

the power inherent only in the investigator, the power to force the defendant to supply information against himself. This obviously tends toward abuse, towards one form of torture or another.

The situation in which the investigatory bias is tested on the suspect in the investigator's possession is thus subject to the Procrustean tendency. The defendant is, as it were, put on Procrustus' bed and if too long, the excess is chopped off; if too short, the defendant is stretched to fit. Meanwhile, the recalcitrant defendant resents playing the part of the laboratory rat in the accuser's experimental scenario, and the accuser goes on insisting that the defendant fit himself onto the Procrustean bed of his underlying hypothesis of guilt. The accuser tries to stretch the object of his testing on the skeleton of his basic hypothesis. The image is particularly suitable because the situation, if uninhibited by legal rules, tends to end up being torturous.

As a general proposition, then, we can say that there will always be the tendency for abuse if the investigator is given power over the defendant because the defendant represents the major challenge to the Procrustean tendency implicit in every investigation. This holds true for police, and sometimes even for psychiatrist and social workers. Whenever there is *the marriage of power with active investigation* concerning a human being, there will always be a tendency towards such abuse.

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Thus, a system which values the truthfinding function highly will tend to resort to this ultimate means of proof. Such a system, in which investigation is functionally predominant, in a sense like the Continental criminal procedure where all facts have to be judicially ascertained[57] before the case even goes to trial, will tend to end up in this extreme, unless tempered by procedural barriers.

On the other hand, a pure adversarial model, while it cannot do without *ex parte* investigation, ought to strictly enforce the privilege against self-incrimination. The fact that the accusing party is allowed to capture and detain the accused party and subject the accused to investigatory attempts and tests, is incompatible with adversariness. To the extent the privilege against self-incrimination, for example, is limited to 'testimonial evidence,'[58] the system is,

[57] See Langbein, *Prosecuting Crime in Renaissance England, Germany and France*, at p. 131.

[58] *Holt v. U.S.,* 218 U.S. 245, 252 (1910), where Justice Holmes wrote:

> The prohibition of compelling a man in a criminal court to be witness against himself is a prohibition of the use of physical or moral compulsion to extort communications from him, not an exclusion of his body as evidence when it may be material.

no matter what it calls itself, simply inquisitorial. In this respect, the difference is negligible between torture, on the one hand, and on the other, situations where the police psychologically manipulate a religious fanatic to confess, where they cunningly ply and disburden the defendant, where they listen in on conversations, or illegally search and obtain evidence from the defendant's blood, urine, voice and speech exemplars. These are merely different modes of overcoming the defendant's recalcitrance: stealth and trickery versus overt force. The tendency of each derives from the same epistemological compulsion. The difference between a system which allows torturing of the defendant to force confessions and the system which tolerates other more subtle modes of making the defendant an unwilling source of evidence against himself, is just a matter of degree.

It is not merely or even primarily a question of whether the captive suspect wants or even volunteers to confess. The very obtaining of information by one party from another across the party lines is illogical in terms of adversariness. Adversary adjudication is a battle by information. To require one party to hand over information to the other, or to allow one party to extort it from the other is to require one combatant to hand over its arms to its opponent. To extend the metaphor, this arguably may be done only in cases where one combatant uses a sword to fight against a gun.[59]

To maintain that the interparty exchange of information, willing or unwilling, is against the idea of adversary adjudication seemingly contradicts much of the current procedural reality. The reasons for this assertion are simple. Adversariness is a re-enactment of conflict. The conflict, although admittedly artificial in criminal procedure, can be seen as a breakdown in negotiations.[60] Negotiations are an attempted exchange. In criminal procedure, the exchange procedure concerns information: the defendant confesses and pleads guilty,

[59] If the response is that criminal adjudication is not a sporting event where the equality in arms is an end in itself, then it should be pointed out first, that adversariness serves the important epistemological purpose of maintaining impartiality; second, that this goal of impartiality cannot be achieved but by an approximate procedural balance of power. Third, there is no way the sporting aspect of adversariness, including the procedural balance of power, can be avoided once the adversary model has in principle been accepted. Indeed, it is logical to maintain that the Anglo-Saxon criminal procedure simply is not an adversary adjudication to the extent it allows its police to obtain information from the suspect. No amount of later adversariness in adjudication can cure this investigatory flaw. This was recognised by Justice Goldberg in *Escobedo v. Illinois*, 378 U.S. 478 (1964), where he maintained that under certain conditions the adjudication becomes a mere appeal from the abuses of investigation. This was also recognised by the 'critical state' doctrine of *Powell v. Alabama*, 287 U.S. 45 (1932), which maintains that some stages of investigation predetermine the outcomes of the later adjudicatory stages, and are in this sense 'critical,' and should be for various procedural purposes treated as adjudication.

[60] In plea bargaining, the 'bargain' itself clearly eliminates all need for the conflict.

and the prosecution reduces its charges. If the information crosses the party lines without being procedurally 'paid for' (because it is cajoled or forced out of the defendant, or mandated out of the prosecution in cases of discovery rules), then this transactional principle is violated. The party is forced to give up information (power) and gets nothing in exchange.[61]

To the extent the possession of information *is* power in adversary procedure, to allow one party gratuitously to obtain this information from another is incompatible with the adversariness. On the other hand, to the extent the parties can actually communicate and exchange the information *sua sponte*, there is no controversy and therefore no adversariness.[62] In a logically consistent mode of adversary criminal process the parties stand apart and do not communicate except in front of the adjudicator. Consequently, even a system, which allows interparty exchange of information, based on consent, i.e. a system which forbids extortion of information or its acquisition unless the suspect knows he is being made an unwilling source of evidence, cannot be seen as adversary. To the extent a defendant voluntarily gives in, that defendant no longer wills to be an adversary and is, indeed, no longer capable of being an adversary in the full sense of the word.

4.2. Adjudication and Impartiality

In adjudication, the potential use of force is transferred to the adjudicator. The State takes over the adjudication in order to prevent the use of force between its citizens. Paradoxically, this is achieved by the threat of force: the

[61] The objection might be raised that the information, and especially its exclusive and secretive possession in criminal procedure, is power also because it means the chance of surprise at the trial. Since, or so goes the argument, criminal procedure is not a poker game, this power of surprise is not acceptable anyway. But there is no possibility of getting away from the fact that all adversary procedure and much of unilateral investigation is a game of chance – precisely to the extent to which the procedural factors (luck, intelligence of its participants, availability of evidence, etc.) *extrinsic* to the *substantive* issue of guilt, but which nevertheless influence the decision on criminal responsibility, actually determine the final outcome. Every defendant knows full well that criminal procedure *is* a poker game and a whole literature of detective stories has been built on this precise fact of gambling. If this is unacceptable, then the only alternative is unilateral bureaucratic decision-making which usually goes under the name of 'inquisitorial procedure.'

[62] Often, for example, the attitude of the prosecutor will be: "I shall let them see all I have in my file. I am interested in truth, not in conviction." Laudable as such an attitude may be, it only demonstrates the limits of adversariness in a criminal process which values the substantive determination of criminal responsibility higher than the procedural balance of power, i.e. it is more essential to it to discover truth about a past allegedly criminal event than to adjudicate the conflict. This is only possible because the conflict in criminal procedure is not, as in private disputes, an issue in itself.

State threatens to punish criminally those who are not willing to submit to its civil adjudication. Substantive law would make little sense, if the State did not have the monopoly over adjudication. All this is postulated on the premise that the use of force is prohibited between the citizens. Therefore, the threat of greater force (by the State) prevents the use of smaller force (between citizens).[63]

In order to imbue this usurpation of adjudication with some legitimate purpose, the State refers to justice, or procedurally speaking, to impartiality. The case is not decided, purportedly, by the arbitrary use of power. It is decided by reference to law (principle of legality), not power, and the law is promulgated in advance by a body that is representative of the populace (and therefore entitled to be arbitrary).

Impartiality is the central question of adjudication.[64] Both adjudication and the notion of impartiality are social responses to the problem of conflict.

[63] In such cases, however, no mandatory sanction can be applied by the adjudicator. Since without a sanction every substantive disposition in any rule remains mere recommendation, the modern system of law cannot possibly rely on voluntary submission to adjudication.

[64] Impartiality could be defined as such an attitude of the adjudicator that guarantees that the conflict is going to be decided on intrinsic rather than on extrinsic considerations. This means that the case will be decided on the basis of the information presented by the parties – information that is legally relevant – and not on extrinsic considerations such as, for example, race, religion, political orientation, national origin or any other such extrinsic aspect of the case. Impartiality is, consequently, a question of specific psychological attitudes towards the problem confronting the adjudicator. This attitude could be seen on two levels. The first, namely, the willingness to decide the case on strictly intrinsic considerations can be seen as an absence of overt bias; the second is the ability of the decision-maker to take into consideration *all* the information presented by the parties. In the latter case, the requirement obviously is that the adjudicator *remains undecided* for as long as possible because to remain undecided is to remain receptive to all the information. In other words, since the decision can be defined as a refusal to consider any information contrary to the direction of the decision, the ability to continue to receive information is essentially the ability to remain undecided. That ability is definitely a part of what we call impartiality. Deutsch, *The Nerves of Government*, p. 105:

> The fundamental problem of 'will' in any self-steering network seems to be that of carrying forward and translating into action various data from the net past, up to the instant that the 'rule' is formed [the determination becomes 'set' or the decision 'hardens'], while *blocking all subsequent information* that might modify the 'willed' decision. Rule resembles the 'deadline' in the newspaper; it could be called the *internally labour preference for pre decision messages over post decision ones*. The 'moment of decision' might then be seen as that threshold where the cumulative outcome of a combination of past information begins to inhibit effectively the transmission of contradictory data.

The concept of decision-making in criminal procedure could in fact be broken down into two constitutive elements: first, there is the process of actual formation of opinion in the head

Without conflict there is no adjudication, and without the two partialities of the dispute there is no impartiality of the adjudicator. Thus, the elements required for impartiality are as follows:

1) The controversy must be decided *entirely* on the basis of the information presented by the parties because the adjudicator must remain passive and cannot engage in independent truth finding;
2) the conflict has to be monocentrically organised;
3) the case has to be presented as a dynamic alternation of two mutually incompatible hypotheses.

The claims of the parties in conflict must be so structured that one is necessarily a winner and the other necessarily a loser. There is a good reason for such a monocentric organisation of issues. Monocentric organisation of issues makes the passive ambivalence, and therefore impartiality of the adjudication, more probable. It was Professor Fuller's genius to see this aspect of the organic connection between conflict and impartiality. Fuller recognised that the monocentric organisation of the subject matter enables the adjudicator to remain uninvolved and passive on the one hand, and actively ambivalent on

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of the adjudicator and, second, there is the 'will' to translate that 'opinion' into a decision-proper, i.e. into a legal decision with definite legal consequences in terms of conviction and sentence.

Since it is obvious that the concepts of impartiality and decision are mutually exclusive and incompatible, it is also obvious that in the last analysis, impartiality will be exchanged for a legal decision in any meaningful adjudication process. Therefore, we are talking about the *postponement* of the 'moment of decision' in order not to 'inhibit the transmission of contradictory data.' Cf. Sfez, *La Décision*, p. 77: "La décision moderne, c'est un processus d'engagement progressif, connecte a d'autres, marque par l'equi-finalité, c'est-à-dire par l'existence reconnue de plusieurs chemins pour parvenir au même et unique but."

Also, the system of adversary impartial decision-making must strive towards the situation that will make the postponement of decision-formation in adjudication more probable. Since the difference between the decision and an opinion is merely one of degree, so is the difference between the final partiality of a conviction and the intermediate partiality of a hypothesis which an investigator must commit himself to in order to be able to investigate in the first place. Firstly, a criminal investigator will only investigate if he is committed to a hypothesis of guilt. If he thinks there is no crime in an objective situation, he will simply not investigate; second, the criteria of what is essential and what is not in his investigation will, of necessity, be determined by his hypothetical apperception of the life situation. Moreover, while that does not mean that the data contradictory to his hypothesis are totally blocked – it definitely does mean that his receptivity for them is significantly reduced. In contrast, where a passive adjudicator observes the alternation of mutually incompatible hypotheses of prosecution and the defence, he may very well form one opinion during the presentation by the prosecution and the contrary opinion during the presentation by defence. It must be admitted that this process of creating long term impartiality out of a series of mutually incompatible partialities is also very close to the dialectical way of thinking by thesis and antithesis.

the other. The adjudicator remains passive because the presentation of all the information is done by the procedural opponents and because the nature of the process is such that they seek to carry their respective burdens of proof in direct proportion to the persuasiveness of the other party's arguments. Thus, an automatic negative feedback is built into this process, allowing the adjudicator to remain a mere non-participating observer.

Passivity of adjudication means that the judge must not be required to actively go about and find out the truth about the case. He must sit still and be passively open to allegations and counter-allegations. This is so because the moment we require the judge to find out what happened, to find this out on his own, he is of necessity required to form a hypothesis. Without a hypothesis, he cannot function as an investigator. Whoever is charged with finding out the truth through his own investigation is in criminal cases contaminated with the hypothesis he must create in order to be able to investigate at all. To counterbalance this inevitable prosecutorial bias, adversary adjudication and impartiality offer the only hope.

If, therefore, the adjudicator is allowed to remain a passive receptor of two opposing hypotheses (monocentricity)[65] as to the defendant's guilt or innocence respectively, then he does not have to be committed to any hypothesis. This helps to delay the hypothesis formation on his part and essentially improves the chances that he will see the case from at least two different sides. This is perhaps an analogy to the dialectical form of reasoning.

Impartiality, consequently, is an attitude of conceptual non-committal, hypothesis-aloofness. Such an attitude can only be preserved in a procedural situation where two parties alternate before an inactive adjudicator, each one pressing its own hypothesis and by the same token trying to neutralise the opponent's one. The adjudicator's attention shifts from one side to another – the courtroom architecture manifests this arrangement – and the very committal to one hypothesis at one moment becomes its own negation at the next one.

This mutually attempted neutralisation of the other party's arguments, if successful, keeps the adjudicator *actively ambivalent*. This active ambivalence is a product of two opposed, stubborn and resolved attitudes neutralising one another in the process of trying to prevail. This ambivalence will have to be displaced since the purpose of the whole process is to ultimately render a

[65] See Fuller, *The Adversary System*, p. 30-43:

> An adversary presentation seems the only effective means for combatting this human natural tendency to judge too swiftly in terms of the familiar that which is not yet fully known. The arguments of counsel hold the case, as it were, in suspension between two opposing interpretations of it. While the proper classification of the case is thus kept unresolved, they stand to explore all its peculiarities and nuances.

decision. Yet during the process the decision must be postponed, for even a tentative decision made before the parties have had their day in court would tend to severely limit and colour the intake of information that the parties consider relevant.

The concept of decision-making in the adjudicatory phase of criminal procedure could in fact be broken down into two constitutive elements. First, there is the process of actual formation of opinion in the mind of the adjudicator and, second, there is the 'will' to translate that 'opinion' into a decision proper (i.e. into a legal decision with definite legal consequences in terms of conviction and sentence.) The issue can be considered from the point of view of cybernetics.

> A fundamental problem of 'will' in any self-steering network seems to be that of carrying forward and translating into action various data from the net past, up to the instant that the 'will' is formed [the determination becomes 'set' or the decision 'hardens'], while blocking all *subsequent information* that might modify the 'willed' decisions. Will resembles the 'deadline' in a newspaper: it could be called the *internally labelled preference for predecision messages over post decision ones*. The 'moment of decision' might then be seen as that threshold where the cumulative outcome of a combination of past information begins to inhibit effectively the transmission of contradictory data.[66]

Since the concepts of impartiality and decision are mutually exclusive, it is obvious that impartiality will ultimately be exchanged for a legal decision in the adjudication process. Therefore, we are speaking about the postponement of the "moment of decision" in order not to "inhibit the transmission of contradictory data."

Since the decision itself cannot be impartial, we are then talking about an impartial way of arriving at decisions, an impartial process of adjudication. The very purpose of any adjudication is to end impartiality and to enable the adjudicator to attach his "will" (legal consequences) to the opinion reached on the basis of a process characterised by impartiality. Consequently, one of the principal aspects of impartiality must be the willingness and indeed the ability of the adjudicator to postpone or suspend the final formation of his opinion until the parties have "had their day in court" and have presented *all* the information that they consider relevant in the context of adjudication.

Because nobody's mind is a *tabula rasa* and because we consciously or unconsciously apply various criteria of essentiality to the perceived world around us, there is no attitude entirely free of prejudice. Even a scientist committed to a hypothesis about a natural event cannot, once committed to believing tentatively that such is the truth of the natural problem, be impartial any longer.

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[66] See Deutsch, *supra* n. 64.

Consequently, we would distinguish between impartiality and scientific objectivity. The latter concept simply implies the willingness to accept the data contradictory to the scientific hypothesis when the latter is tested in an experiment. Judicial impartiality, however, serves a process where no definitive feedback of an experiment is really available, but in which the issue must nevertheless be finally decided on the basis of information made available during the process of adjudication. Since this is the only information that will ever be available – unlike in natural sciences where such information supplies only the beginning of the hypothesis-formation process – it is essential that the opinion formation in the process of adjudication be postponed for as long as possible. Taking into account everything presented by the parties is an essential element of the idea of impartiality in an adversary structure of decision-making. The system of adversary impartial decision-making must strive towards the ideal situation, which makes the postponement of final decision-formation in adjudication more probable.

Impartiality is thus an active ambivalence. This ambivalence now becomes an intellectual ambivalence – not knowing which of the parties is legally right. Impartiality in its substantive aspect is then no longer a matter of values, but a matter of reason and formal logic. All conflicts must be "coded" in legal concepts. They are taken over by trained professionals who organise them monocentrically after translating them into a conceptual model that is alien to the parties to the primary conflict.

To the extent that impartiality changes from a more constant moral ambivalence into an unstable intellectual ambivalence, the procedural balance of power becomes much more important, especially in terms of the knowledge of how to translate interest into legal language. The juxtaposed partialities, which produce the impartiality in legal conflicts, are now generally legal partialities. Two legally incompatible assertions collide head on, and the impartial third party in between is legally impartial. Part of the legal impartiality is not to consider legally irrelevant criteria. If moral criteria differ from legal criteria, they are deemed extrinsic. If the judge relies upon them, that judge is no longer impartial.

4.2.1. Impartiality and the Criteria of Essentiality

Impartiality is a quality that the adjudicator must have in order to be an adjudicator. It refers to the absence of overt bias whereby the case would be decided in reference not to law but to criteria extrinsic to the legal definition of the issue to be adjudicated, e.g. in reference to the friendship between one of the litigants and the judge.

If impartiality means not taking sides, does that imply that the adjudicator passively witnesses the dispute without any criteria whatsoever? It seems clear that eventually the adjudicator will have to "take sides" because to decide is his main task. For this, criteria are needed, most of which exist beforehand because the very possibility of legitimate adjudication is usually founded on prior knowledge of the criteria or even on prior explicit consent to them. So, the difference between partiality and impartiality cannot lie in the absence of criteria, because every impartiality must eventually resolve itself into a partiality of the final decision.

Decision-making can be partial, but not biased. Partiality refers to the timing of the decision. If the latter is made before all the information is in, it limits consideration of the rest of the information and tends to become a self-fulfilling prophecy. A biased adjudication, on the other hand, applies unacceptable criteria of decision-making. Whereas a biased judge decides on the basis of friendship, race, religion and other extrinsic criteria, a partial judge merrily jumps to conclusions.

Assume that a particular judge dislikes blacks and decides in a particular case to convict the black defendant immediately after the trial has begun. Because in effect there was no trial, it would be wrong to say that this trial was "partial." The decision has been made beforehand and on the basis of extrinsic criteria. If the trial was not partial, because there was no trial, and if the decision was not partial in the pejorative sense of the word, since all decisions are partial, what then went wrong?

The decision in such a case is made by the unacceptable criterion of race. It was made immediately after the trial began and that made the whole trial a sham, because the application of the unacceptable criterion of race precluded the influx of information relevant according to the acceptable substantive criminal law criteria of guilt. Since, however, the criminal trials are structured not to enable the adjudicator to ascertain the race of the defendant, but to consider all the information legally, a trial of that kind is a pretense. It does not serve a purpose.

Imagine, moreover, a judge who finds it difficult to suspend judgment and decides a case immediately after hearing the first piece of information in the case. This judge is partial. Yet if the same decision is made at the end of the case, when all the evidence has been presented, then the judge's decision-making is to be granted the attribute of impartiality.

It seems, then, that a properly reached decision in a controversy must have these two qualities: (1) it must be reached only through application of acceptable legal criteria; and (2) it must be reached only *after* all the essential information is presented.

In this sense, impartiality presents a problem of timing: how to make the adjudicator continually receptive to all the data presented by the parties. Impartiality, thus, is a state of indecision, vacillation, and suspension of judgment.

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Some very important conclusions would follow, if we accept the above doctrines. For one, there is a difference between a passive adjudicator and an active investigator. Active investigation requires at least a prior tentative opinion because one cannot investigate unless one has a hypothesis about what happened in the particular criminal case. Thus the European investigating magistrate is a contradiction in terms: either he investigates, or he is a judge.[67] The idea of judicial investigation that finds adherents on the Continent is likewise unacceptable on theoretical grounds: it implies a wrong assumption that a judicially conducted investigation is any less partial because the police do not conduct it.

From a comparative procedural point of view, the cultural differences between the Continental system and the Anglo-Saxon system are relevant insofar as they clearly godfather the differences in the perception of criminal procedure. If the pursuit of truth is central, as it is on the Continent, then investigation must necessarily become more central than adjudication. Investigation is definitely the more active and the more exhaustive approach to truthfinding in criminal procedure. Likewise in science: imagine a scientist who in his 'investigation' proceeds in an 'adversarial' manner. If he does it, this is done for dialectical reasons and only in his head.

If, however, adversarial adjudication is the prevalent mode in criminal procedure, it is clear that truthfinding is secondary to the ideals of impartiality and conflict resolution.[68] The secondary nature of the truthfinding function in

[67] We assume here that the essential quality of judging is impartiality, moreover that it is this impartiality that distinguishes the judge from a bureaucrat. In the inquisitorial system, the investigator-inquisitor was precisely that, he was not presumed to be impartial and he was not a judge in terms of attaching the legal consequences to the decision of the case. This was done by a separate body of judges who were never involved in the actual investigation. See Esmein, *History of Continental Criminal Procedure, with special reference to France*, p. 178-179.

Of course, this decision-making by less involved persons was not precisely impartial either, because after all, it was still an *ex parte* proceeding. If these 'judges' were at least less partial than the actual inquisitor, this was only because they had less stake in the hypothesis of guilt. Compare this situation to the one where a magistrate issues a search or arrest warrant in the United States. Such a magistrate could not be seen as impartial since he, in fact, received the information only from the police.

[68] See Kamisar, *A Reply to Critics of the Exclusionary Rule*, p. 55-84. A court which admits the evidence in such a case manifests a willingness to tolerate the unconstitutional conduct which

American criminal procedure is apparent in its preference for the exclusionary rule, the consequence of which is that people truly found to be guilty will go unpunished in order that the ideals of impartiality and procedural fairness are preserved. Such an attitude necessarily implies that the procedure is not a mere means to truthfinding[69] dictated by the substantive law. Procedure becomes a goal in itself in the sense that it protects different procedural rights as independent entities and not merely supplements to the substantive questions of guilt and innocence.

If adversarial adjudication prefers limitations on the state power to the truthfinding function (as in exclusionary rule), this necessarily means that

produced it. How can the police and the citizenry be expected "to believe that the Government meant to forbid the 14 (Cont.) conducts in the first place?" Paulson, *The Exclusionary Rule and Misconduct of the Police*, at p. 255 and 258. Why should the police or the public accept the argument that the availability of alternative remedies permits the court to admit the evidence without sanctioning the underlying misconduct when the greater possibility of alternative remedies in the 'flagrant' or 'willful' case does not allow the court to do so? A court which admits the evidence in a case involving a 'run of the mill' Fourth Amendment violation demonstrates an insufficient commitment to the guarantee against unreasonable search and seizure. It demonstrates "the contrast between morality professed by society and immorality practised on its behalf." Justice Frankfurter, dissenting in *On Lee v. United States*, 343 U.S. 747, 759 (1952)1. It signifies that government officials need not always "be subjected to the same rules of conduct that are commands to the citizens." Brandeis, dissenting in *Olmstead v. United States*, 277 U.S. 438, 471, 485 (1928)1. Once the court identifies the police action as unconstitutional, that ought to be the end of the matter. There should be no degrees of offensive among different varieties of unconstitutional police conduct. A violation of the constitution ought to be the bottom line. This is where the Weeks and Mapp Courts drew the line. This is where it ought to stay. Kamisar's article is in this respect perhaps typical. It deals with the question of exclusionary rule on the low conceptual level of the Supreme Court. The source and the bottom line of the exclusionary rule cannot be in the moral and value judgment whether something the police have done is right or wrong, or even legal or illegal. The source of exclusionary rule must be in the structural requirement of the adversary process of adjudication. If the exclusion of evidence in violation of the principle of disjunction cannot be proved inevitable and logically inescapable, then the exclusionary rule is in a very precarious position indeed.

[69] The very concept of 'truth finding' implies that there is a certain 'truth' that the substantive and procedural law – in various degrees – are concerned with. Of course, the truth we are concerned with here is not some philosophical or scientific concordance between reality and consciousness, between the essential idea and the accidental existence. The concordance we speak of here is the simple syllogistic subsumption of the minor premise of the fact pattern under the major premise of the legal norm in substantive criminal law. It should not concern us here that this 'truth' of legal syllogism has little to do either with the whole truth as opposed to merely legally relevant truth, or with any other more profound epistemological approach to reality. In essence, the problem we are tackling here manifests itself in law as the question of legality. As we shall see, the question of legality really is a question of the extent to which the words can guarantee certain actions.

criminal procedure from the policeman's point of view will be seen as somewhat dysfunctional. If a criminal is acquitted on a 'mere technicality' this is seen as abuse. However, if we see criminal procedure to have an independent function, the 'technicality' becomes its main purpose.

5. Conclusion

I have tried to show that both the procedural and the substantive foundations of criminal law depend on and are manifestations of the conflict and that their function is partially to resolve it.[70] This by itself does not set the criminal law apart from other branches of law, except to the extent that the intensity of the values challenged in this conflict as well as the severity of the remedies imposed exceed those of the private law.

Criminal law's legal origins derive by analogy from private dispute resolution. The characteristic differences occur insofar as criminal law and its procedures are neither about resolving the conflict, nor is the conflict, to the extent there is one, a private one. Also, the "prior consent," so essential in private disputes, is not immediately given in criminal, as in other private branches of the law.

One of the basic problems concerning the integrity of the premises from which the criminal law proceeds is precisely the fact that the prior consent to the social contract, part of which is the criminal law itself, is largely fictional. Depending on the discrepancy between the best interests of the state and those of the society, criminal law can be seen either as an approximately legitimate manifestation of the minimal societal morality of duty, or as a sheer class terror legitimised by the mimicry of the prior-consent-posterior-conflict dialectic of the private law branches. Whether the criminal law and the social practices it induces are a legitimate defense of society or an exploitation of a semblance of prior consent really depends on the relationship between the state and society.

Since prior consent in criminal law is at best presumed from social contract theories, and since the central issue in criminal law decision-making has little to do with resolving the conflict based on prior consent, it is no surprise that there should be a contradiction between the policy-inducing purposive

[70] In criminal procedure, the real conflict between the individual and the state calls for impartiality, which in turn produces the less genuine procedural variant of the conflict. The latter cannot be real because it is a conflict only from the defendant's point of view; the state could resort directly to physical force and needs no resolution of any dispute. The procedural adversariness, then, is a concession to the defendant and the goal of the process is not primarily its resolution.

reasoning, manifesting the intentions of social control, and the essentially legal dispute-resolving adversariness and formalism.

In private law there can be no policy in this sense, since its only policy is to resolve the conflict. The intentions of substantive law are in this sense wholly operative – if the parties cease to quarrel, the substantive law's power of intrusion disappears. But in criminal law the conflict is *not* the issue. Thus, it becomes possible to impose the intentions of the substantive law irrespective of the wishes of the procedural opponents in criminal procedure. Clearly, at this point a choice has to be made between the substantive and the procedural aspects.

Furthermore, from the accused individual's point of view, the incompatibility of his interests with the state's intentions has, of course, always been clear. But this incompatibility is not enough to call the relationship a conflict. For that to exist, there must be an approximate equality in power, which can only be artificially maintained in the confrontation between one individual and the vast apparatus of the state. As the ultimate monopolist of all physical force, the state will not easily renounce its power simply to give viability to a conflict that it tends to regard as a nuisance anyway. From a position of power one's interests become 'policies' – sometimes to the point where the opponent is deprived even of being the judge of his own best interest.

It is for this reason that there can be no public law without the strict separation of powers. Only if the state itself can be reduced to an equally powerless party to a conflict can one speak of conflict and controversy, and therefore of legal adjudication. To the extent there is separation of power there is law, otherwise it becomes a simple command. Criminal law amply demonstrates this truth. The relationship between the individual accused of a crime and the state will be a conflict of two approximate equals only if and when both parties are (artificially) reduced to an equally powerless legal status before the courts.

It is then possible to say that the level of adversariness and the level of formal legality in criminal law depend on the power of the judiciary. In turn, of course, the power given to this branch manifests the respect for the individual when confronted with the State. In societies which believe that the individual is the ultimate repository of existential values, his status *vis-à-vis* the majority will remain uncontested even when he is accused of crime. He will not be an object of purposes and policies, but an equal partner in a legal dispute. Hegel understood the problem in the following terms:

> What is involved in the action is not only the concept of crime, the rational aspect present in crime such as whether the individual wills it or not, the aspect which the state has to vindicate, but also the abstract rationality of the individual's volition. Since that is so, punishment is regarded as containing the criminal's right and hence by being punished he is honored as a rational being.

> He does not receive this due of honour unless the concept and measure of his punishment are derived from his own act. Still less does he receive it if he is treated either as a harmful animal who has to be made harmless, or with a view to deterring and reforming him.[71]

In an intensely ideological society, on the other hand, where right and wrong are rigidly differentiated and believed to be known, little respect will be paid to the technicalities of legality and adversariness – in which both are derived from the emphasis upon the conflict resolution, not social policy. After all, the very concept of a conflict presupposes uncertainty as to which one of the parties is right.

Ultimately, then, the intensity of legal formalism in procedural and substantive criminal law will depend on whether we want to honour the individual as a rational being. If the individual is to be honoured, he can demand that the society keep its promises (the principle of legality) as well as that the dispute over the promise be decided before a third party (adversariness).[72] The extent to which the State will indeed relinquish its power is, in the end, a value choice. More important, it is a value choice that determines whether in the future members of the society will regard themselves as autonomous and rational beings.

[71] Hegel, *Philosophy of Right*, at p. 100.

[72] If formalism is thus seen in its substantive and in its procedural variant – in both cases there is a certain prescriptiveness and a refusal of resort to purposive reasoning – then the Continental and the American system can be seen as mere variations on the same theme. The Continental emphasis, for whatever sociological reasons, is substantively formalistic, since it emphasises the rigid adversariness and its procedural barriers to conviction. In both cases, however, the formalism is a response to mistrust between the individual and the State.

CHAPTER FOUR

The Crown and the Criminal: The Privilege Against Self-Incrimination

1. The Privilege as a Human Right

Today we may perceive human rights as self-evident and as inalienable subjective legal constituents of every man and woman as such. This basic ideological premise is protolegal and inherently democratic.[1] Human rights are thus 'democratic' in the usual ideological and political sense of the word. This is their derivative, secondary, meaning.

Historically, however, human rights are above all 'democratic' in the sense of being a *reactive*[2] negation of 'aristocratic' political and legal premises. As a basic ideological and legal premise, human rights – *les droits de l'homme et*

[1] La Convention affirme l'existence de droits. Ceux-ci ne sont pas créés par la Convention, mais seulement reconnus par elle: en effet selon l'article 1er de la Convention, Les Hautes Parties contractantes reconaissent à toute personne relevant de leur juridiction les droits et libertés définis au titre I de la présente Convention. Ce qui signifie que les droits sont protolégals, ont une valeur permanente et antérieure à la Convention qui a un effet déclaratif et non constitutif.

Pradel & Corstens, *Droit Pénal Européen*, para. 7, at p. 13.

[2] The word 'reactive' has negative connotations in Nietzsche, e.g. in his *Beyond Good and Evil, The Genealogy of Morals, The Will to Power* and most other writings. The strong and powerful *act*. The weak, powerless and those who lack incentive and initiative, *react*. The genesis of religion, ideology or any other system of beliefs, however, is almost always *reactive* both in terms of time (against the past) as well as in terms of space (against others). See, for example, a brilliant presentation of this 'anti-normative' tendency in Assmann, *Moses the Egyptian*, *supra* n. 57 to Chapter 2.

du citoyen – are one of French Revolution's reactive legacies.[3] As an integral part of the Revolution, human rights were a form of the revolt[4] against the fundamental aristocratic assumption that, fixed in their station in life, people are not at all equal or alike either in their being or in their human potential and consequently, they should not enjoy even the same initial prospects in their pursuit of happiness.

In modern constitutional legal terms, the adjective 'democratic' translates into egalitarian values and principles, whereas 'aristocratic' would imply a discriminatory violation of the equal protection of the laws. If it is to implement and sustain itself, any discrimination presupposes power.[5] Conversely, it is the powerless, and not the mighty, who need 'equality' and the 'equal protection of the laws' to offset the natural tendency to inequality (discrimination). Needless to say, that, too, requires power – in this case the power of the State and of its laws because ultimately it is only the power of the State which is capable of neutralising other powers, of individual or groups, which tend towards advantage, superiority, prevalence, domination or supremacy.

Since bio-diversity is not something confined to animals and plants, people in their potential are not equal or identical. Legally speaking equality, inasmuch as it necessarily presupposes identity, is a cultivated political, ideological and legal fiction. Thus it has to be taken into account at the outset that even formal equality balancing the initial prospects in the pursuit of happiness – is a precarious and artificial equalising legal compensation[6] for the real and substantive differences between people: their creativity, energy, initiative etc.

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[3] See Cappelletti & Cohen, *Comparative Constitutional Law, Cases and Materials*. In Chapter 3 at p. 25-71, especially at p. 25-27, Cappellletti explains the reactive post-revolutionary procedural reforms against the *ancien régime* aristocratic justice. In terms of separation of powers (checks and balances), this meant a permanent reduction in the autonomy of the judicial branch of power all over the Continent. Both abstract and concrete judicial review, for example, which in the United States started with *Marbury v. Madison* in 1803, were introduced in Europe (by Hans Kelsen) only about hundred and ten years later.

[4] For a fascinating cultural dimension of revolt as a creative reaction to anomie, see Camus, *L'Homme Revolté*.

[5] Egalitarianism, of course, is also a question of power. Equality means empowerment of the powerless. The empowerment of the powerless implies neutralisation of the powerful – by a yet greater aggregation of power. This greater aggregation (organisation) of power is embodied in the State. The criteria of equality, i.e. the legal criteria of non-discrimination, are the constitutional standards of the equal protection of the laws. These are classical issues of constitutional law. See generally Zupančič, *From Combat to Contract: What does the Constitution Constitute?* This legal (formal) equality, however, is largely counterbalanced by the meritocratic and autocratic corporate and managerial power. See, for example, Chomsky, *Secrets, Lies and Democracy*.

[6] In his aphoristic and characteristically metaphorical style, Nietzsche articulated the

Equality, in other words, is not a reality. Equality is a deontological premise and a practical policy. This is because equality is a natural byproduct of the basic proscription of the use of force in the context of legal resolution of conflicts. The moment self-help in society is forbidden the private parties are equal in their powerlessness while legal procedures are instituted to resolve conflicts previously resolved by force. While the State creates this powerlessness by monopolising physical force in society, the law takes over the alternative resolution of conflicts. Since the resolution of conflicts by force is natural, spontaneous and instinctive the surrogate of legal procedure to replace this use of force must of necessity become an artificial and consequently sophisticated system of the logic of justice – a veritable immune system of culture and civilisation.[7] This artificial system, however, still depends for its existence on the State's power.

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precarious nature of equality sooner and better than any legal theorist did. This is what he has to say about the rule of law:

> 'Just' and 'unjust' exist, accordingly, only after the institution of the law (and not, as Dühring would have it, after the perpetration of the injury). To speak of just and unjust in itself is quite senseless; in itself, of course, no injury, assault, exploitation, destruction can be 'unjust,' since life operates essentially, that is in its basic functions, through injury, assault, exploitation, destruction and simply cannot be thought of at all without this character.
>
> One must indeed grant something even more unpalatable: that, from the highest biological standpoint, legal conditions can never be other than *exceptional* conditions, since they constitute a partial restriction of the will of life, which is bent on power, and are subordinate to its total goal as a single means: namely, as a means of creating *greater units of power*. A legal order thought of as sovereign and universal, not as a means in the struggle between power-complexes but as a means of preventing all struggle in general – perhaps after the communistic cliché of Dühring, that every will must consider every other will its equal – would be a principle hostile to life, and agent of the dissolution and destruction of man, an attempt to assassinate the future of man, a sign of weariness, a secret path to nothingness.

Nietzsche, *On the Genealogy of Morals*, Second Essay, *supra* n. 31 to Chapter 2, at p. 76. (Emphasis added). Of course, this view is part of Nietzsche's general philosophy concerning the will to power and must be taken cum *grano salis* partly as his own intentional provocation and partly as a philosophical, not sociological, metaphor. His reference, however, to the rule of law as an 'exceptional' i.e. precarious phenomenon is important because it implies that the egalitarian ideology of formal equality remains vitally contingent on the maintenance of the State's 'power-complex.' The regression to anarchy and Hobbes' war of everyone against everyone is always a real possibility. See also Mazower, *The Dark Continent: Europe's Twentieth Century,* p. 73. The author has described – without specific reference to him – how Nietzsche's idea of 'greater units of power' was abused by the Nazis.

[7] Of course, the criminal's attack on social values is also an attack on culture and civilisation, but the relapse into forceful resolution of the conflicts in society (anarchy, civil war) is but an

Human rights, equal protection of the laws and rule of law, thus, depend on the organised[8] force of the State. Because of the always imminent regression to the internal or external state of war, human rights have everything to do with the preservation of the State as this 'greater unit of power.' The rule of law, as a general barrier to the arbitrary use of power, has precisely the same anti-power, anti-discriminatory and egalitarian connotations as the human rights.[9] Democracy also implies that all individuals must be treated as subjects,

endemic criminalisation of the whole society. Thus, law prevents statistically what it protects individually. In other words, if the society were to declare the war on crime and decide that the criminal is not entitled at all to legal protection, it would in this respect abolish law and civilisation. This is what Stalin did and that is what they used to call 'administrative criminal procedure' in which a KGB official in Ljubianka decided the fate of a prisoner. Dictatorship and anarchy have apparently much in common. In anarchy the use of force is generalised, in dictatorship the State is in no respect inhibited by law. What this does to morality (normative integration) in society can today be seen in the phenomenal rise of the crime rates in the former Soviet Union. Crime, in other words, is not so difficult to suppress but there is a great difference between low crime rates that are a consequence of fear and perhaps higher crime rates that are to a greater extent a result of normative integration. In his C*ivilisation and its Discontents*, Freud realistically assumed that fear induced through the Oedipalisation process in the primary family is all there is to morality. However, Deleuze and Guattari, for example, in their *Anti-Oedipus*, postulate the collapse of the Oedipalisation process which is the psychological essence of the normative integration, i.e. of internalisation of the fear and the morality based on it. In this perspective the socio-psychological difference between the direct fear induced by dictatorship and in the indirect, programmed, fear based on the internalisation of moral values through Oedipalisation – becomes a relative difference. The alternative is in a morality based on moral growth such as described by Kohlberg and Robert Kegan in his *The Evolving Self*, and *supra* n. 57 to Chapter 2.

[8] Vis-à-vis the population it governs, the power of the State is not superior in terms of sheer physical force, but due to its organisation (army, police, secret services etc.). Consequently, all alternative organised forces amount to a 'state within a state' and represent a mortal danger to the maintenance of the State's superiority. Examples include organised crime, terrorist organisations, and even ordinary criminal conspiracies.

[9] In enforcing this egalitarian view, one can stay on the level of formal equality (the rule of law, human rights, etc.). This is in fact where liberal Western democracies have established their ideology. One can, however, go one step further in enforcing material, as opposed to merely formal, equality. See Marx, *The Critique of the Gotha Programme*. This in fact had been the professed ideology of the Communist and socialist East European regimes: "each according to his abilities and to each according to his needs." Formal equality provides for the equality of initial condition*s* for success of individuals. Material equality guarantees the equality of final results.

The ultimate collapse of East European economies, and consequently of the corresponding political system, is due precisely to this 'militant egalitarianism' in combination with *réssentiment* and classical peasant values (patriarchy, authoritarianism, insularity and inertia). The final consequence of the communist experiment was thus the disastrous breakdown of the normal meritocratic correlation between ability and power – resulting in Durkheim's anomie and the ultimate collapse of the whole social system. The reason for this is, of course, that

not as objects. Democracy, as opposed to aristocracy, is inextricably linked to both equality and the rule of law, *Rechtstaat*,[10] *état de droit*, *stato del'dirritto*, etc. In Kantian terms this means that an individual is always treated as an end in himself or herself and not as a means to an end outside himself or herself. In procedural terms this means that in all legal controversies – including those in which the State is the plaintiff as in criminal procedure – the 'equality of arms' must be preserved. If the equality of arms is not maintained (as in the case of forced self-incrimination by the defendant in criminal procedure), this would ruin the rule of law, democracy as well as human rights.

In Hegelian terms, then, we have here a 'dialectical inner contradiction' propelling historical progress.[11] It is indeed a contradiction, because the enforcement of impersonal rules protecting the powerless vitally depends on the greater power of the State. This point is crucial in our argument since it entails the complete exclusion of power in legal – and especially in criminal[12] – procedures. Nevertheless, the rule of law itself, while seemingly a pure negation of power, depends on (State) power. The rule of law is consequently in danger of being subverted by the arbitrary use of power. The precariousness of the independence of judiciary, for example, as the least dangerous branch[13] – the European Court of Human Rights included – is a constant reminder of the dangerous arrogance of the executive branch of power.

Thus one would expect, on the part of the State's institutions, an utmost effort to sustain the legitimacy of the rule of law in criminal procedure. Since it is in the interests of the State to sustain its own credibility it must be in the interests of the State to sustain the rule of law and to contain its war on crime to the framework of legitimate legal procedure. If the State is forced, by the rising crime rates, to break out of this framework and to regress from

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egalitarianism in all its forms is always the use of (State) power against the more energetic, the more able, etc. Nietzsche pointed that out saying that 'too much equality will stifle life itself.' Chomsky disagrees with this and he points out that formal democracy in capitalism is really neutralised by the 'material' autocracy of corporations. However, the economic success of the latter is attributable precisely to this in-equality. See Chomsky, *supra* n. 5.

[10] Characteristically, the term 'Rechtstaat' is much younger than the term 'rule of law.' It was introduced by von Mohl in his *Das Staatsrecht des Koenigsreichs Wurttemberg*.

[11] See Kojève, *Introduction to the Reading of Hegel*, also *supra* n. 21 to Chapter 3. (Fukuyama's *The End of History*, *supra* n. 20 to Chapter 2, is a popularisation of the complex Hegelian power and prestige dialectic occurring between the master and the slave.) On the notion of 'dialectic,' see Cornforth, *Materialism and the Dialectical Method*, p. 67.

[12] This 'exclusion of power' in criminal procedure *is*, as we shall see later, the privilege against self-incrimination. More comprehensively, however, the exclusion of power in criminal procedure also entails the complete procedural 'equality of arms,' i.e. the adversarial, rather than inquisitorial, model of criminal procedure.

[13] Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics*.

the rule of law to the rule of sheer force, this will be, in my opinion, a major step toward the destruction of the very foundations of the State.

As we shall try to demonstrate, forced self-incrimination, too, is a truly Kafkaesque example of this subversion of rule of law by the arbitrary use of power and ultimately of human rights.

2. The Logic of the Privilege Against Self-Incrimination

The idea that the accused should not be made an unwilling source of evidence against himself has long represented a riddle whose historical background has been relatively well explored,[14] whose existence has been – at least in the Anglo-Saxon world – long taken for granted, but whose logical inevitability in adjudication has never been shown to exist. The position taken by the literature is at best intuitive.[15] One reason, perhaps, is that to show the logical necessity of the privilege in every genuine adjudication would contradict much of the hard sociological reality. Strict enforcement of the privilege would bring in its wake so rigid a disjunction of the procedural parties as to drastically reduce the truthfinding, crime-repressive function.[16]

Professor Ellis of Iowa University wrote an article[17] many years ago in which he specifically admits that we do not understand the origins of the age-old idea of the privilege against self-incrimination such as it appears for example in the Fifth Amendment to the American Constitution. He said that intuitively we see its logic, but that we do not understand and cannot

[14] See generally Ellis, *Vox Populi v. Suprema Lex: A Comment on the Testimonial Privilege of the Fifth Amendment*.

[15] "The essential and inherent cruelty of compelling a man to expose his own guilt is obvious to everyone, and needs no illustration. It is plain to every person who gives the subject a moment's thought." Justice Field in *Brown v. Walker*, 161 U.S. 591, 637 (1896) (Field, dissenting) quoted in Ellis, *supra* n. 14, at p. 838. Professor Ellis maintains with much intellectual honesty that the privilege is a value choice whose necessity cannot be either proved or disproved.

[16] In the 1920s, there seems to have developed in the United States a powerful reaction against the protective 'absurdities in criminal procedure.' This reaction was led by Roscoe Pound and endorsed by the American Bar Association. Pound, *On Crime*; Committee Report to Third Annual Meeting of the American Law Institute, Extracts cited in *Defects in Criminal Justice,* 11 A.B.A.J. 297, 299 (1925) and generally Perkins, *Absurdities in Criminal Procedure*. Interesting enough, the leitmotif of the dialectic of protection of the defendant as against protection of society has not changed in the last fifty years. Compare, for example, Damaška, *Evidentiary Barriers to Conviction and Two Models of Criminal Procedure: A Comparative Study*: "In the dialectics of the criminal process there is always a point where fact-finding precision must give way to other social values." *Id.* at 588. What is lacking in Perkins' adherence to truthfinding and in Damaška's emphasis on historical and cultural determinants is an analysis of the structural requirements of the adversary process *an sich*.

[17] See Ellis, *supra* n. 14.

explain where it comes from. The American Supreme Court, even in the time of Justice Douglas, failed to understand the cardinal importance of and the basic reasons for the privilege and reduced its applicability, for example, to "testimonial evidence."[18] When the judges speak of privacy in cases concerning criminal procedure, they refer to the right of the defendant to be left alone by the Government, i.e. by the police. When they speak of the right to counsel as some kind of buffer between police and the defendant, as in *Escobedo*,[19] *Miranda*[20] and especially in *Brewer v. Williams*,[21] the talk is really about the enforcement of the privilege against self-incrimination. But since they do not understand the cardinal centrality of the privilege in a broader jurisprudential context, the courts tend to treat it as a minor procedural rule, accidentally perhaps, of constitutional relevance.

It took me many years to unravel the elegant simplicity of the answer to Professor Ellis' question. The essence of the sentence 'shall not be compelled to testify against himself' clearly does not lie in the general proscription of self-incriminating evidence. The defendant may at any time volunteer self-incriminating statements and other evidence and guile may be used to make him testify against himself either by police or by the prosecutor on cross-examination. The issue, therefore, is not the self-incrimination as such. The point is that he must not be *physically compelled* to incriminate himself.[22]

This issue will be discussed on two levels. First to be discussed are the theoretical underpinnings for the hypothesis that "there is no adjudication without the privilege against self-incrimination." Then, I shall attempt to

[18] The wording in the Fifth Amendment refers to 'testimonial evidence:' "Nobody shall be compelled to testify against himself." The Court, instead of understanding the privilege and consequently its broader (*penumbra*) meaning, maintained that the privilege against self-incrimination applies only to spoken and written 'testimony' of the defendant, but not to writing samples, voice exemplars, pen registers, etc. The Court also never enlarged Justice Douglas' 'penumbric' doctrine of privacy to cover the concentric circles of self (body, clothing, cars, houses). The cases concerning searches and seizures cite the English case of *Entick v. Carrington and Three Other King's Messengers*, 2 Eng. Rep. 275 (1765) in the context of the constitutional protection of privacy, but they do not extrapolate from its true importance and meaning. Searches and seizures, *Escobedo*, *Miranda*, *Brewer*, right to counsel, etc. – all these are decidedly not mere instrumental, 'prophylactic' measures against police misbehaviour as Chief Justice Rehnquist likes to put it in order that he may be able to reduce the prescriptive norm of the privilege against self-incrimination (and its alter ego emanation, the exclusionary rule) to an instrumental 'prophylaxis,' i.e. some kind of procedural punishment of the police.

[19] *Escobedo v.* Illinois, 378 U.S. 478 (1964).

[20] *Miranda v. Arizona*, 384 U.S. 436 (1966).

[21] *Brewer v. Williams*, 430 U.S. 378 (1977).

[22] Clearly, he may be *morally* compelled although *not* in the physically compelling context, i.e. in the setting of 'custodial interrogation' referred to in *Miranda* and the cases that followed it. *Brewer v. Williams* brings this issue to the fore.

demonstrate some of the conceptual connections between the structure of adjudication and the privilege, as manifested in the opinions of the United States Supreme Court.

We start from the premise that the most basic postulate and the essence of law's social function is the prevention of Hobbes' *bellum omnium contra omnes*. Conflicts, in other words, must not be resolved through physical combat between the parties in conflict. To this purpose the establishment of the State is first of all the monopolisation of physical power and the collapse of this monopoly instantly results in civil war and the consequent anarchy.

The essence of (the social function of) law, in other words, is not what it positively is, e.g. a set of sanctioned regulations or whatever other definitions legal philosophers endeavour to produce. *The essence of law is negative*. Law is simply the prevention of the use of physical power. Law is indeed the replacement of the logic of force by the force of the kind of logic implied in the word 'justice.' The establishment of the State and law represents an artificial surrogate for this natural regression to physical combat.[23] This artificial state must constantly be sustained in factual and in moral terms.

As explained before, the approximate equality of power is an important precondition of a conflict, as there will be no conflict if the parties are too disparate in their power. For the purpose of civil procedure, in which the two (equally powerless) private parties are engaged in a legal controversy, the State prevents the resort to self-help and maintains the legitimate legality of the process. In criminal procedure, however, the State itself is the plaintiff. Suddenly this very entity, the State, the personification of all the physical power in society, must be reduced to a status equally powerless as the criminally stigmatised subject of the State; the strongest must suddenly be somehow equal (before the law) with the weakest: the Crown and the Criminal. This is most unnatural[24] – and consequently most difficult to sustain. In natural terms there is clearly no conflict between the individual and the State. The State is far too powerful. But it is in the very nature of Law to create equality. By creating equality, however, Law creates "approximate equalities" such as in the natural state would not exist.

[23] How very natural this is – is currently obvious in the Balkans: an instant regression to *bellum omnium contra omnes* took place the moment the (Yugoslav) state 'withered away.' All the beastly atrocities, far beyond what Konrad Lorenz foresaw in his famous study *On Aggression* – occurred when Foucault's 'declaration of war' ceased to guarantee peace. (People apparently do not have the intra-species aggression inhibitions such as prevents lions, for example, from exterminating themselves.) This instant regression to aggression demonstrates how thin is the veneer of civilisation and how very artificial is the process of law as a surrogate of the use of power in inter-human conflicts.

[24] By 'unnatural' I, of course, mean civilised, cultured, democratic.

If legal process is essentially a surrogate conflict resolution service both offered and required by the state – the latter having forbidden the war of everybody against everybody – then physical violence by one of the parties to the controversy has no place in the legal process. *Mutatis mutandis*, the same applies to procedures in which the State is a plaintiff (criminal procedure) or defendant (administrative law, etc.) Thus, in any legal procedure the resort to physical self-help (within the procedure itself) is tantamount to the collapse of the whole purpose of law. Clearly, if the purpose of law is to prevent self-help, i.e. the resort to physical prevalence as a means of winning in the conflict, then self-help within the procedure effectively subverts the whole idea.

Moreover, we must observe how very fragile is the artificial equality between the Crown and the Criminal and how easily it succumbs to the overwhelming difference in power. When the State, which is simultaneously the guarantor of the non-use of force and the monopolist of all physical force, is itself a party in the legal procedure, it is obvious that *de facto* the State can use force whenever it pleases, *de jure* if the essential legality of the procedure is to be preserved the State must not influence the outcome. When the police compel the defendant (by force) to become an unwilling source of evidence against himself on the surface everything is the same and the legal *decorum* is not disturbed in the least. This facade, however, covers the pristine Kafkaesque absurd in which the State uses the fraudulent semblance of the legal process to conceal Law's precise opposite – the instant regression to anti-law.[25] That this must have been obvious to Roman jurists is illustrated by the formula *nemo contra se prodere tenetur:* nobody should be expected to testify against himself. This already is the privilege against self-incrimination in its full articulation.[26] In the public law area, however, it took two thousand years for the logic to prevail over the *raîson d'état*.

As long as the police are only trying to find out what happened and as long as their investigation is not yet focused on a particular suspect, they are within their proper sphere of duty because there is yet no prospective defendant and

[25] Moreover, since criminal procedure is the most symbolic confrontation of the citizen and his State, the absurdities of this kind have an extremely destructive effect upon the regard of the individual for the State and the law. This point is emphasised by Robert Merton in his *Continuities in the Theory of Social Structure and Anomie*.

One should perhaps no longer read Kafka's *Trial* as an existentialist metaphor. It should be read as critical legal theory. Kafka after all was a lawyer and he understood this absurd even better than Dostoevsky in his *Crime and Punishment*.

[26] It applied, of course, to private litigation because Roman law was primarily private law, criminal law being only a late and incongruous excrescence on its body. See generally, von Bar, *The History of Continental Criminal Law*.

thus there is yet no legal controversy. Unfocused investigation means trying to find out 'who's done it,' i.e. there is yet no 'passively legitimated' procedural subject.[27]

From the moment, however, the police have focused their attention on a particular suspect and have begun, in coercive custodial setting, to question him as the probable future defendant in the criminal case against him, they are *ultra vires*. Such interrogations must – always and in all legal systems – mean that the police are attempting to use the suspect as a source of evidence against himself. Consequently, such custodial interrogations[28] are of necessity an anticipatory simulation of the future criminal trial.[29] To permit the police in the phase of focused investigation to procure evidence from other sources may be procedurally acceptable, just like it is procedurally acceptable in civil procedures for both parties to gather their own evidence, i.e. to carry their future burden of proof. What is not acceptable, because it is not logical, is to permit one party (the police) to gather evidence through forcible intrusions into the privacy sphere of the other party (the suspect, the future defendant).

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[27] *Legitimatio passiva* in Continental Roman law tradition is 'passive standing.' It may be *legitimatio passiva ad causam* or *legitimatio passiva ad processum*. These civil procedure terms are very difficult to transplant into criminal procedure because there the defendant disputes his 'passive standing,' i.e. he must, for example, maintain throughout the trial that the police have not apprehended the right person. The constitutional variance of *legitimatio passiva ad causam* is the probable cause test as a bar to unfounded violations of privacy by the police.

[28] 'Custodial interrogation' is a term developed in the series of cases cited *infra* n. 29. There are borderline cases in which it is not entirely clear whether the suspect was or was not free to leave, i.e. whether he or she was in fact arrested. From the point of view of the argument developed here, the arrest itself, of course, is force and if the privilege were strictly logically applied the confessions and other evidence obtained in custodial settings would all be in violation of the privilege. Again, the prima facie absurdity of such an argument fades if transplanted into the context of a private controversy and civil procedure. What would we say of a civil procedure in which one party were permitted to arrest and detain the other party and thus obtain the evidence leading to its eventual defeat?

[29] The distinction between focused and unfocused investigation was developed in *Spano v. New York*, 360 U.S. 336 (1959), a case that preceded, *Escobedo v. Illinois*, 378 U.S. 478 (1964), *Miranda v. Arizona*, 384 U.S. 436 (1966) etc. The latter two cases do not explicitly concern the privilege against self-incrimination, i.e. they refer to the suspect's right to counsel immediately after arrest. The presupposition was, of course, that arrest, because of the required probable cause, is a clear sign of a focused investigation. Consequently, incommunicado custodial interrogation by the police is no longer 'trying to find out who's done it.' Rather, such interrogations are an attempt at making the suspect an 'unwilling source of evidence against himself.' The right to lawyer at this 'critical stage' is simply a buffer to forced self-incrimination. This trend culminated in the murder case *Brewer v. Williams* 430 U. S. 378 (1977), where the police first prevented the lawyer from being present and then persuaded – with the so-called 'Christian burial speech' – the deeply religious defendant into showing them the body.

The consistent and total application of the 'equality of arms' principle would make the criminal procedure – whether Continental or American – legitimate and consequently uphold the ideals of human rights and the rule of law. Civil procedure, ancient Roman or a modern one, is a very close approximation indeed of such a consistent 'equality of arms.' It follows that the changes required in criminal procedure – in order to re-establish a balance of power between the plaintiff and the defendant – would all have to do with the abolition of prerogatives of the State *qua* State as plaintiff in criminal procedure.

Even in the mixed procedure with strong inquisitorial elements in the judicial investigation phase, human and constitutional rights of criminal defendants are for the most part scrupulously respected. However, all this *post factum* respect means little because of the 'efficiency of police truthfinding.' The duplicity of this procedural 'justice' consists in the schizophrenic split between pre-trial procedure and the trial, i.e. in the intentional 'unawareness' of the career judges who ignore and condone all kinds of abuse by the police.[30] This matter was very succinctly put by Justice Goldberg in *Escobedo v. Illinois*.[31] Discussing the Government's request that incommunicado interrogations be legitimised by the Supreme Court, Justice Goldberg wrote:

> In *Gideon v. Wainwright*, 372 U.S. 335, we held that every person accused of a crime, whether state or federal is entitled to a lawyer at trial. The rule sought by the State here, however, would make the trial no more than an appeal from the interrogation …[32]

[30] Most of these criminal judges, if sincere, would respond that they have little choice but to condone police violation of the privilege if they wish to see the justice done in the specific cases before them. What this really means is that pure adversarial, or even mixed procedure, does not satisfy the repressive needs. In the end the criminal justice system takes away with the left hand what it purports to give with the right hand. Of course, as anomie statistically rises in society these – short term and counter-productive – repressive needs also rise. This triggers political changes and more repressive judges are nominated to supreme and constitutional courts. The 'truthfinding' efficiency of the criminal justice system is enhanced, false acquittals are avoided and, in the ideal scenario, all guilty criminals are punished. So, one might say, is there anything wrong with this ideal situation? From the analytical point of view, i.e. on a case by case basis, nothing is wrong. On a synthetical, abstract level of 'society,' 'legal system,' 'justice,' etc however, this repressive success causes a long-term decline in 'normative integration' (sociologically speaking). Since most people refrain from committing crimes because they have internalised institutionalised values, disruption of normative integration really means the relative increase in anomie. Since anomie, social and internalised, is the main statistical cause of crime in society, the long term effect of all this is the rise of crime rates and further rise in repressive needs.

[31] 378 U.S. 478 (1964).

[32] *Id.* at 487.

What is extremely interesting in this quote is not the distinction per se between investigation and adjudication. That had already been established by the time *Escobedo* was decided.[33] It is the realisation that a certain manner of communication between the police and the defendant is incompatible with the whole idea of adjudication. After all, the Continental criminal procedures do resort to a double standard according to which compulsive interrogations are tolerated – in the sense that they are not sanctioned by the exclusionary rule – in the investigative phase, even though they are not allowed in the trial phase. If Justice Goldberg were simply to maintain the distinction, formalistic as it would be, between investigation and adjudication, he could have acquiesced to the incommunicado interrogation during the police investigation phase. It is implicit, however, in the words "trial would be no more than an appeal from interrogation," that *coercion of the defendant to incriminate himself is not compatible with the idea of judging*. If the police are to extract the confession from the defendant, then the trial court can no longer pretend that it is deciding the issue. This is why Justice Goldberg was so right when he said that unless the rights of the defendant, and especially the right to have the counsel present immediately after arrest, are respected at the stage of focused police investigation, the remaining procedure is nothing but an appeal to what had happened at the police station. The issue, in other words, has already been decided[34] by the police by force. Thus, the decision by an adversary adjudication is made redundant and superfluous.

The true 'revolution' in criminal procedure thus consisted in abolishing this schizophrenic split and in the legal recognition of the empirical fact that the controversy between the defendant and the state begins the moment the police have focused on a particular suspect and have begun to question him.

If the police powers were abolished from the moment their investigation focuses upon a particular suspect this would mean that further evidence – and especially everything potentially self-incriminatory – would then have to be gathered in the adversarial context of criminal procedure. Official and legal procedure, in other words, would take over much of what is now happening at the police station. There would be no coercive custodial interrogations. The

[33] See *Spano v. New York*, 360 U.S. 315 (1959).

[34] The word 'decide' here is potentially misleading because it carries a double meaning. If the issue is solely the truth about a past criminal event in which the suspect may have been involved, then there is really nothing to 'decide.' If the police succeed in precipitating truth early in investigation, so much the better. On the other hand, if the outcome depends not only on the propriety of the procedural moves of the parties (and it does, due to the exclusionary rule), then the verb 'decide' assumes a different meaning. In the former case it is merely declarative since procedure does not affect the substantive truth. In the latter case, the meaning of 'decide' is constitutive because in autonomous procedures the outcome can fully depend on what is done by the parties during the process.

suspect could still be questioned, but only in an adversarial context i.e. in the presence of the judge or the jury.[35] One can even imagine the transformation of the institution of the Continental investigating magistrate into a special judge supervising the 'equality of arms' in this pre-trial stage.[36]

There are several cases from the United States Supreme Court that illustrate the above discussion. The purpose here is not to show that the Supreme Court has followed any specific theoretical view, but the reader may find that some of the steps the Court has taken appear almost predetermined by the basic premises of the adversararial criminal procedure.

In *Warden v. Hayden*,[37] the Supreme Court abolished the so-called "mere evidence rule" which forbade the police to search for any items which could not be characterised either as fruits, instruments of the crime, or contraband. The dissent of Justice Douglas in *Warden* points out that the "mere evidence" rule was in fact derived from the idea that no person should be made "an unwilling source of evidence" against himself. Of course, for Douglas the principal argument to that effect was the Fifth Amendment. He believed that the mere evidence rule was an expression of the privilege against self-incrimination as formulated in the Fifth Amendment. Underlying this conclusion is the idea that privacy interests in criminal procedure forbid the government from intruding into all aspects of defendant's' existence. If we also draw on the philosophy of *Griswold v. Connecticut*,[38] where Justice Douglas

[35] The length of police detention immediately following arrest (detention on remand) now varies between 24 and 48 hours in most countries. The shorter this period the lesser the probability of forced self-incrimination. The above mentioned 'duplicity' of the criminal justice system is proven by the fact that every repressive regime tries to lengthen this period because the police know full well that this is their only chance to use the suspect as an unwilling source of information against himself. The awareness is age old in English law where *habeas corpus (ad subjiciendum)* writ enabled the judicial branch to procure 'the body' of the defendant from the executive branch. *Habeas Corpus Act*, adopted by English Parliament in 1679, is the first comprehensive Act concerning the rights of criminal defendants.

[36] The institution of 'investigating judge' (*juge d'instruction*) developed out of the inquisitorial *inquirens*, i.e. out of a police function in judicial garb. This tradition as well as functional pressures, unfortunately, collapsed the judicial into the police function. Were it not for that, however, the judicial investigation could very well develop into a buffer phase of criminal procedure, except that, of course, this would no longer be an investigation by the judge. The burden of proof and the risk of non-persuasion (*in dubio pro reo*) would at this stage, too, be squarely on the shoulders of the State. Cf. Weinreb, *supra* n. 15 to Chapter 3.

[37] 387 U.S. 294 (1967).

[38] 381 U.S. 479 (1965). Justice Douglas' penumbric theory of law reinforces the conclusion that the self-incrimination clause should be read broadly. Douglas says:

> [The] specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance […] Various guarantees create zones of privacy […] The Fifth Amendment in its

established the theory of 'penumbra,' according to which the privacy of the individual (i.e. is right to be left alone) is the common denominator which can be extracted from the Bill of Rights insofar as the rights functionally overlap, the idea seems even more tangible.

On the other hand, of course, it is well known that the privilege against self-incrimination is not – and probably could not be – interpreted in the broad fashion of Douglas' dissent in *Warden v. Hayden*. In *Holt v. United States*,[39] Justice Holmes said, "the prohibition of compelling a man in a criminal court to be witness against himself is a prohibition of the use of physical or moral compulsion to extort communications from him, not an exclusion of his body as evidence [against him] when it may be material." Cases such as *Breithaupt v. Abrahham*,[40] *Schmerber v. California*,[41] and *Gilbert v. California*,[42] make it very clear that even the defendant's own blood or handwriting examples can be used against him. In that sense, there seems to be no doubt that under certain circumstances the defendant's body itself may be made a proof of his crime and used against his interest in a criminal trial.

It will probably be difficult to reconcile Douglas' dissent in *Warden* – in which he seems to believe that anything derived from a defendant's sphere of privacy should be excluded from use against him in a criminal trial – with a generally accepted but more limited perception of the privilege against self-incrimination, to the effect that only communicative and testimonial evidence can be excluded under the imprimatur of the Fifth Amendment. This interpretation derives from the strict interpretation of "no one shall be compelled in any criminal case to be a *witness against himself*."[43]

What would happen if the model of criminal procedure were actually to follow the broader interpretation of the privilege against self-incrimination? In other words, what would happen if Black's concurring opinion in *Rochin v. California*[44] were to be the generalised and accepted doctrine? Black wrote, "I think a person is compelled to be a witness against himself not only when he is compelled to testify, but also when, as here, incriminating evidence is forcibly taken from him by a contrivance of modern science."[45] Defendants usually do no acquiesce to any type of self-incrimination and thus most of

self-incrimination clause enables the citizen to create a zone of privacy which government may not force him to surrender to his detriment.

[39] 218 U.S. 245, 252-53 (1910).
[40] 325 U.S. 432 (1957).
[41] 384 U.S. 757 (1966)
[42] 388 U.S. 757 (1967).
[43] 342 U.S. Const. amend. V.
[44] 342 U.S. 165 (1952).
[45] *Id.* at 175.

the evidence against them has to be taken from them by force, by guile, or at least against their informed consent.

Under such circumstances, could there still be criminal procedure at all, since most of the evidence in criminal trials does derive from the sphere of control of the defendant? The defendant, after all, is the best source of evidence against himself by the mere fact that he is the perpetrator of the crime.

The Constitution itself has a built-in mechanism, a balancing test, according to which the social contract theory provides the following solution. In principle, the individual must be left alone by the government. However, if it becomes probable ('probable cause') that the individual has damaged the society (has in fact broken the contract between himself and society), then the society acquires a limited right to impinge upon his privacy and investigate into this 'alleged' anti-social behaviour. Before *Terry v. Ohio*,[46] this was a rigid test in the sense that a limited intrusion of an arrest and perhaps search was possible only when the fixed barrier of what was known as probable cause was successfully overcome by the government. In *Terry,* this balancing test was relaxed. According to the new doctrine, based on a suspicion which amounted not to probable cause but to something less, there could not be a full arrest, but only a limited stop and frisk. Implicit in this formula is the trade-off between the individual's violation of society's interest and the reciprocal permission given to society to violate the individual's interest and make him to some extent a source of evidence against himself.

Thus, the whole Fifth Amendment prohibition against self-incrimination is a manifestation of the disjunction requirement, which in turn is based on adjudication as a surrogate of force. Therefore, it is not only a question of giving the defendant the political right not to incriminate himself, but also a question of the rationality of adjudication itself. If the case can be 'decided' by the exercise of force by the more powerful party (the state) over the less powerful party (the defendant), then there is no adjudication, because legal adjudication, even in ancillary conflicts, is a replacement of force by reference to impersonal rules.

The law enforcement system could be run by the police without courts, but the main objection to such a system is not that innocent people would go to prison – after all, we have no reason to believe that police would be purposely dishonest, at least no more than any other bureaucracy – but rather that *guilty people would be found guilty by means of force.* It is this *power* aspect of the process that the liberal doctrine seeks to legitimise through the use of the intermediary system of adjudication.

[46] 392 U.S. 1 (1968).

As we said before, it would be much simpler for the Supreme Court to cut through the Gordian knot of self-incrimination problems if it simply forbade any contact between the defendant and the police. The half-way solutions such as the one offered in *Miranda* ("With a lawyer present the likelihood that the police will practice coercion is reduced, and if coercion is nevertheless exercised the lawyer can testify to it in Court."[47]) do not solve the problem of coercion and self-incrimination. At critical points in the process the police are still the ones who exercise the actual physical control over the defendant. The best proof of this is perhaps offered by *Brewer v. Williams*,[48] where the police persuaded a mentally unbalanced religious fanatic to disclose the site where he left the body of the girl he killed. Significantly enough, even the Burger Court felt that such manipulative coercion – referring to the 'Christian burial' of which the girl's body would be deprived if the defendant did not disclose the site – was unacceptable. If the Court simply chose to exclude all the evidence (and the fruits thereof) derived by police from the defendant, it would have solved the problem. There would be no more self-incrimination.

Although it is possible to say that such would be the only position logically consistent with the Bill of Rights,[49] the Court was, is and will remain unwilling to do that (i.e. accept complete enforcement of the privilege against self-incrimination). The price paid by society for this political benefit of the illusion of impartiality is the lesser efficacy of law enforcement. The reason is that if the privilege against self-incrimination, with all its 'penumbras,' were consistently carried through in criminal procedure, there would be very few criminal cases left. Law enforcement would suffer, and insofar as society believes that such law enforcement prevents the spreading of crime, the result is that eclectic and *ad hoc* solutions are worked out at the level of the Supreme Court as well as on all other levels. The reason is that if 'the constable blunders,' if he violates the defendant's constitutional privilege against self-incrimination and if the evidence is in consequence excluded, the truth so acquired will not reach the jury and the defendant may indeed go free.

Thus, in this collision of procedural (constitutional) rights and the substantive criminal law there arises an internal contradiction in the legal system. This is because there is a significant difference between the State's interest in judicial resolution of private controversies on the one hand and repression of crime on the other hand. As far as private controversies are concerned, the State's interest does not in principle[50] lie in such or other

[47] *Miranda v. Arizona* 384 U.S. 436 (1966), at 470.
[48] 430 U.S. 387 (1977).
[49] See Douglas' dissent in *Warden v. Hayden*.
[50] We say 'in principle' because, clearly at least today this is an extreme position; there are many particular civil law situations in which the State has a vested interest in particular

substantive outcome – as long as the controversies are peacefully processed. In criminal matters the State feels directly threatened because crime, to say the least, disrupts social division of labour. The State cannot simply shrug its shoulders and say that it does not have a stake in the arrest, conviction and punishment of all criminals. There is, consequently, an internal contradiction – between human rights and efficacy of repression – built right into criminal procedure, such as does not burden civil procedure.

If we side with the constitutional rights of the defendant the norm of substantive criminal law will not be vindicated. If we side with the substantive criminal law, the constitutional rights of a citizen will be violated. The curves of procedure and substantive law supposedly intersect at some 'optimum' point. At that point one supposedly gets the maximum truth for the minimum violation of the defendant's constitutional rights. The only issue remaining here, however, is whose 'truth' and what kind of 'truth' we are talking about.

3. On the Power to Make Crimes

The problems begin when the proclaimed prohibition of self-help in the pseudo-legitimate legal process no longer binds one of the parties. The very State whose law forbids self-help suddenly uses self-help to enforce the very (criminal) laws that condemn it. When this happens as it does when the executive branch of the State makes the defendant an unwilling source of evidence against himself, the effect is absurd.

It is absurd because in the last analysis we have one kind of force and power (the substantive criminal law's major premises) being simply reinforced, confirmed, etc. by another kind of force and power (the one that in criminal procedure forces the defendant to speak 'the truth'). Since the substantive definitions of crimes are, in the last analysis, an emanation of State's power, the use of that same power to reconfirm the validity of their 'truth' in criminal procedure – perhaps through the use of torture – amounts to a deceptive circular reconvalidation of something that might not exist at all.

Hobbes said: "Civil laws ceasing, crimes also cease." What Hobbes meant was in line with his general theory of state and power, i.e. that crimes are not objective phenomena, but emanations of the power of the state. Should the power of the state vanish, there would be no crimes.

The state may choose to make, *vel non*, something criminal. However, if the general power of the state ceases to function, the criminality of conduct

outcomes. Moreover, it is, of course, in the general State's interest that 'justice be done' in private controversies, too.

incriminated by the state also ceases. This in turn implies that it is power – and nothing but power! – which makes conduct criminal. Furthermore, if we carry this argument to its logical Hobbesian conclusion, the threat and the materialisation of punishments attached to defined modes of conduct, are not only contingent on State power but are from outset a pure manifestation of State's power.

The state's power to incriminate certain conduct may be used wisely, i.e. in concordance with the enforcement of proper values and *bonos mores* in society. However, that crimes are a pure emanation of state power becomes painfully obvious when political crimes and other arbitrary and absurd incriminations are in question. Such arbitrariness is obvious in every dictatorship where human rights are repressed by such incriminations, and that conduct is made criminal which in democratic societies amounts to nothing more than the exercise of freedom of speech, association etc. The history of criminal law is saturated with examples of arbitrary and politically motivated incriminations. In times of Emperor Augustus, for example, Roman law incriminated as *laesio maestatis* spitting, the removal of one's clothes or the chastisement of one's slave in the vicinity of the statue of the Emperor.[51]

The ideal type, in the language of Max Weber, of this situation is exemplified in the incrimination and persecution of witchcraft. The power of the Catholic Church was sufficient to make certain purely imaginary conduct criminal. Then the power to apply torture was used to make suspected women confess to acts, which they have never committed. In the end, the initial hypothesis of witchcraft was confirmed, i.e. the vicious circle was complete.

Today, we may easily deconstruct this self-referential circle as nothing but one form of power confirming and reinforcing another. The proof, however, that this self-referential circle may become a self-fulfilling prophecy and consequently a collective form of madness, a *folie à million*, lies in the fact that sometimes even the victims of this procedure were led to believe that they were witches. Recent examples of this include stigmatisation of political dissidents in the Soviet Union as schizophrenics, political trials in Eastern Europe in which those accused were tortured and pressured to admit 'wrongdoing' amounting to sheer exercise of freedoms of thought, speech, press and association, incriminations of sheer status such as membership in a 'terrorist' organisation or even 'being addicted to drugs' etc.[52]

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[51] Von Bar, *supra* n. 26, at p. 42, n. 2 and 4.

[52] Making mere status, without an act, a criminal offence – typically being addicted to drugs, being a terrorist, being a member of a forbidden organisation, being a war criminal, being a counter-revolutionary, etc. is unacceptable from the point of substantive criminal law's principle of legality. One of the principle's aspects is the *lex certa* requirement. This requirement was implicit even in Roman Law: *Poena non irrogatur nisi quae quaque lege vel quo alio iure specialiter imposita est.* (*Digestae* 50.16 131) (Punishment should not follow unless it is

Legal truth, thus, may be very similar to what the famous Danish philosopher of criminal law, Alf Ross, called *tû-tû*.[53] In legal syllogism, the major premise may be purely a caprice of Divus Augustus, i.e. that spitting in front of his statue is a *crimen laesae majestatis*. Thus, to conclude that somebody who had spat in front of his statue, has truly committed a *laesio maestatis,* amounts to a purely circular conclusion which, is what Ross calls a *tû-tû*.[54] The value of this truth, the kind based on the mere logical concordance of major and minor premises, clearly depends on the validity and meaning of the major premise. If major premise is *tû-tû* then the conclusion itself is a circular self-

specifically for that crime imposed by a legislative act or some other form of law.) See also Hall, *General Principles of Criminal Law*, at p. 29, n. 10. An act can be so defined that there remains no doubt as to what is the border between criminal and non-criminal conduct. Being, for example, a drug addict does not lend itself to such a definition. Quite apart from that, a criminal act is a specific historical event capable of precise determination, leaving traces in the outside world, lending itself to proofs etc. Thus a legal controversy can be structured around an act, but cannot be structured around a status of e.g. being a drug addict. See for example, *Robinson v. California,* 370 U.S. 660 (1962).

Article 7(1) of the European Convention speaks of "*any* act or omission *which did not constitute a criminal offence* …" Yet the Court has never tackled this issue although some member states do have incriminations of pure status on their criminal codes, e.g. being a member of terrorist organisation. Here substantive criminal law's theory of inchoate crimes (conspiracy as a pure agreement but requiring a substantial act in its furtherance) would also have to be considered.

[53] Ross, *Tû-Tû*; see also his *On Guilt, Responsibility and Punishment*.

[54] In law, the major premises have some empirical contents, since the definition of murder, for example, is indeed an empirical description of a typical piece of human behaviour. We have no illusions, however, that these empirical constituents of a legal definition, derived from age-long judicial process of deciding controversies, do in any sense validate the legal definition. It does not cross anybody's mind, for example, to say in a legal context (as opposed to a moralistic one) that a particular homicide is 'truly', 'objectively', 'actually' etc. murder. We take it for granted that the 'truth' of legal conclusions is only a *superficial* concordance of a particular legal definition (of murder) and a particular event. Another way of seeing this would be to say that legal major premises are deontological, not ontological. The purpose of legal major premises is not to describe reality adequately (ontology), but to change it (deontology). Since the desire to change reality is intimately connected with power, the lawgiver may invent any legal major premise he chooses. In terms of formal logic, an arbitrary major premise (law) without any basis in objective reality may be a contrived definition saying that there is *tû-tû* –'when it rains heavily.' If, in turn, somebody were to conclude that 'it rains heavily' and that 'therefore' *tû-tû* exists, this would be formally true. This 'truth,' empty as it would be, would only prove that so-and-so made up a certain major premise (definition, denotation). If, however, the person (entity, State, legislature etc.) had the power to 'stand behind' his or her contrived major premise, this would then be 'law.' Certain real consequences could flow – for example, declaring a particular region of the State a 'national disaster area' – from the conclusion that *tû-tû* has occurred at a particular time and in a particular place. In any case, however, the only objective reality on which the validity of legal major premises depends is the reality of power.

referential and self-fulfilling prophecy. The truth about this kind of 'truth' is that it is no truth at all. It is merely self-reinforcement and self-validation and legitimisation of power of repression.

Since the major premise as defined by the legislature is in effect the reflection of its factual power – "*Ex factis jus oritur!*" – the legislature may define as crime virtually anything.[55] In some cultures bigamy is a crime, in others it is not. Under some conditions killing a person is a murder, under slightly different conditions you may get a medal for it. Radovan Karadjic may be a war criminal in Hague, but he is a war hero at home. Whether he is a murderer or a hero depends in the last analysis on *power* – not on law and not on morality!

I do not wish to deny the criminological realities of the rising crime rate and I do not wish to maintain that all substantive criminal law be somehow arbitrary – but the power to proclaim and enforce it is definitely a *sine qua non* of its 'truth.' All this is legitimate and logical in terms of law being the mandatory surrogate of self-help in society.

This critique of the relativity of legal truth and truthfinding was necessary for the simple reason that everything from torture to other forms of forced self-incrimination has always been justified in the name of 'truthfinding.' Torture as an inquisitorial practice, for example, emerged partly because the IVth Lateran Council of Catholic Church abolished the participation of priests in ordeals (*ordalia*) – which were essentially an experimental method of ascertaining truth in criminal cases.[56] Thereafter, people had been tortured to extract their confessions, the progressively aggressive encroachments on their privacy being justified on the grounds that this aids in the finding of truth about crimes and criminals. There is a need to challenge this seemingly absolute 'truthfinding' argument used in justifying forced self-incrimination.[57] To say that forced self-incriminations (and other violations of privacy) are

[55] See, for example, the brilliant article by Quinney, entitled *The Problem of Crime*.

[56] Epistemologically speaking, an ordeal (*Lat. pl. 'ordalia'*) is an empirical experiment, albeit a mystical one, because it tests the continuous existence of transcendental guilt. The underlying belief was, of course, that God himself would assist in ascertaining the guilt of the accused sinner, hence the necessary participation of priests. If the premise of God's presence at the experiment were accepted, then an ordeal would test something (the existence of sin, guilt) that would continue to exist, although the critical event (the offence) was historical, i.e. had lapsed into the past and could not have been repeated. As we pointed out above, however, legal procedures always deal with non-repeatable (historical) events.

[57] The reference is primarily to Justice Rehnquist and the United States Supreme Court since ca. 1986. Rehnquist's utilitarian calculus based on consideration of marginal utility is absurd even in terms of policy. How can a Supreme Court calculate the diminution of the exclusionary rule's additional marginal utility effect on the police abuse of constitutional rights? I doubt, however, that Rehnquist himself ever sincerely believed that his utilitarian calculations are anything more than a formalistic cover-up of his authoritarian hierarchy of values.

justified, because they enable the police and the courts to 'find truth,' is logically misleading – to the precise extent to which the very 'truth' while justifying the (ab)use of power (torture) is itself an emanation of power.

Thus, in the case of self-incrimination, the use of state power to compel criminal suspects and defendants to testify against themselves is absurd, because it creates a Kafkaesque circle of the presumption of guilt and there is no stepping out of it: one is guilty because one is guilty. The inquisitorial vicious circle of power reconfirming power often masks monstrous abuse of the rule of law and always subverts its basic intent i.e. to resolve controversies without resort to power.

Furthermore, to make the finding of this absurd truth an overriding concern of criminal procedure, an end that justifies violations of various human rights – think of inquisitorial resort to torture! – is an integral part of the general authoritarian attitude. It is characteristic of this attitude that its subject uncritically identifies with the existing power and authority.[58] Certain legal theorists in fact maintain that the differences between the Continental and the Anglo-Saxon Criminal procedures derive from the different attitudes, in respective legal cultures, *vis-à-vis* authority.[59] In this sense to say that the truth in criminal procedure is sufficiently relative to permit the exclusion of tainted evidence despite the risk that a guilty defendant will in the end be acquitted, is clearly less authoritarian and more democratic than to insist that a guilty defendant absolutely must be convicted and punished despite the violations of constitutional rights committed in the name of 'truthfinding.'

Interestingly enough, the relative dispensability of truth in criminal trial, is now an internationally established legal requirement. The United Nations Convention against Torture[60] in its article 15 mandates the exclusion of all tainted evidence directly or indirectly[61] acquired through torture. The goal

[58] See generally Adorno et al., *The Authoritarian Personality*. The authoritarian attitude is psychologically measurable on the so-called F Scale.

[59] Damaška, *supra* n. 16.

[60] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), G.A. Res. 39/46 [Annex, 39 U.N. GAOR Supp. (No. 51) at 197, U.N. Doc. A/39/51 (1984)], entered into force 26 June 1987. About 130 States have ratified the UN Convention. It is of concern that despite widespread acceptance of the prohibition of torture under international law, the Convention against Torture remains the least ratified of the six main UN human rights treaties (as a point of comparison, the Convention on the Rights of the Child has been ratified by 191 States). In international law, the prohibition of torture contained in CAT is considered *ius cogens*, *Al Adsani v. U.K.*, ECHR, judgment of 21 November 2001. Consequently, the exclusion of tainted evidence ('the exclusionary rule') and therefore the above relativity of truth is no longer a peculiarity of American criminal procedure and something arrived at through 'judicial implication.'

[61] 'Indirectly' here, means that the tainted piece of evidence would not have been acquired *were it not* (the *sine qua non* logical requirement) for the previously obtained piece of evidence

of truthfinding is not absolute, i.e. that when it collides with certain human rights, the latter prevail over the former. This implies that the 'rule of law' interdicts the abuse of power (by police), i.e. that the power which may be used to obtain the truth has its limits and is not absolute.

Supporting the above conclusions is Professor Damaška's view that the "adversary system in its modern variant [as] inspired to a great extent by an attitude of distrust of public officials and its complementary demand for safeguards against abuse."[62] From this, he goes on to conclude that the adversary process can be used to implement and protect values other than the discovery of the truth, indeed which are incompatible with the discovery of the truth.[63]

Thus, on exposing the relative nature of truth, the privilege against self-incrimination emerges as an important right of the defendant as it helps in upholding the rule of law by legitimising the adjudicative process and making truthfinding the secondary goal. Further, the privilege against self-incrimination also helps in upholding the procedural principle of legality, which also helps in the rule of law function of the state as well as in upholding human rights of the citizens.

4. The Procedural Principle of Legality

If the essence of substantive criminal law lies in the criteria of guilt and innocence, then the essence of criminal procedure would seem to lie in the application of these criteria to particular cases: a translation of a general legal act into a particular one. However, this process is not exhaustive and does not point to the essence of criminal adjudication,[64] which cannot be reduced

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acquired through torture. This doctrine originates in the case of *Wong Sun v. United States*, 317 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2nd 441 (1963), a case in which the prosecution attempted to use derivative evidence it would not have obtained *were it not* for the illegal arrest. See Zupančič et al, *Constitutional Criminal Procedure (Ustavno kazensko procesno pravo)*, p. 818-822.

[62] Damaška, *supra* n. 16, at p. 583.

[63] *Id.* at p. 585-86.

[64] See Esmein, *supra* n. 67 to Chapter 3. Esmein distinguishes three different systems of criminal procedure: the accusatory system, the inquisitorial system, and the mixed system. He explicitly proclaims the inquisitorial system to be "more scientific and more complex than the accusatory system." The reasons according to Esmein are, first, "the detection and prosecution of the parties are no longer left to the initiative of private parties;" second, the judge is now 'an officer of justice' whose rulings are superimposed on the parties and their conflict; and, third, "the judge's investigation is not limited to the evidence brought before him." It is interesting that Esmein notes from the very beginning of his treatise the fact that the judges' passivity or activity in the decision-making process of criminal procedure bears upon the scientific or unscientific nature of the procedure.

to a role that is entirely procedural (i.e. ancillary to the goals of substantive criminal law). A substantial number of criminal procedure decisions are not based on a substantive factual determination. These 'procedural acquittals' are traditionally treated as substantive outcomes of criminal trials even though they are not arrived at by application of the rules of substantive criminal law. In *United States v. Scott*,[65] a case raising double jeopardy issues, the Supreme Court tried to apply the newly discovered distinction between acquittals made on the basis of a substantive factual determination and acquittals that are 'merely procedural.'

However, the very fact that an acquittal can be had on non-substantive grounds indicates that criminal procedure is not totally ancillary to the substantive law but has its own decision-making criteria.[66] In other words, the

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The accusatory system is described by Esmein as originating from "a sham fight between two combatants, to which the judge puts an end by deciding against one or the other of the parties." Esmein also believes that adjudication, be it civil or criminal is a replacement ("sham fight") of the resolution of the conflict by means of force. That means that even in the most primitive social conditions, the resort to adjudication functions essentially as a peacekeeping procedure that replaces the actual use of power and force which could disrupt social life. See Berman, *The Background of the Western Legal Tradition in the Folklaw of the Peoples of Europe*.

[65] 437 U.S. 82 (1978).

[66] This basic dilemma whether criminal law and criminal procedure are supposed to further the punishment policies or instead inhibit the government's exercise of power and authority, runs as a basic theme through many Supreme Court cases in the United States. Compare the essentially antithetical attitudes of the Warren Court and the Burger Court as evidenced by reinterpretation of the decisions handed down by the Warren majority. Compare *Chimes v. California*, 395 U.S. 752 (1969) with *United States v. Robinson*, 414 U.S. 218 (1973). Both cases concern searches incident to arrest. Yet in *Chimel* the Court relied on *Terry v. Ohio*, 392 U.S. 1, 19 (1968), where the Court said, "[T]he scope of a search must be 'strictly' tied to and justified by the circumstances which rendered its initiation permissible," whereas in *Robinson* that precise link between the reason for arrest and the scope of the search incident to arrest is severed by Justice Rehnquist's judicial fiat, viz, "a search incident to the arrest requires no additional justification." 414 U.S. at 235. Such doctrinal inconsistencies are possible (or at least not impossible) because there seems to be no underlying order or connection to the rationales advanced by the Supreme Court for such basic legal safeguards as the privilege against self-incrimination and the exclusionary rule.

However, our concern here is not the scope of the search incident to arrest but rather the two antithetical philosophies of criminal law and criminal procedure. One can regress to *Wolf v. Colorado*, 338 U.S. 25 (1949), where Justice Frankfurter discusses the conflict between the idea of excluding evidence for the purpose of procedural sanctioning and the primary truth-finding intention of criminal procedure. "The immediate question is whether the basic right to protection against arbitrary intrusion by the police demands the exclusion of *logically relevant evidence* obtained by an unreasonable search and seizure." *Id.* at 28. The exclusionary rule, of course, epitomises that conflict because by adopting it as a procedural sanction, one implicitly admits that the truthfinding function of criminal procedure is secondary to the procedural propriety. Were criminal procedure a mere *ancilla* to the goals of substantive criminal law, (and

procedural criteria are not entirely reducible to substantive criteria. Procedural rules are themselves prescriptive to some extent, and have goals that are not only independent of those of the substantive criminal law, but often conflict with them.

The difference between such a procedure that is autonomous and one that is entirely an instrument of truthfinding lies in the so-called procedural sanction. If procedure's role is merely to serve the substantive truthfinding, then procedural rules will not be independently sanctioned. So long as truth is discovered the purpose of procedure is fulfilled. On the other hand, the American criminal procedure is more inclined to protect the defendant than simply to find truth, although such a statement can be considered an oversimplification. The differences so characteristic of the American procedure stem from the same origin as the substantive guarantees (the principle of legality) in criminal law, that is, the procedure in American criminal law enjoys substantive status. Here, we will discuss the differences between autonomous and ancillary procedures and then take into consideration the importance of procedural sanctioning before applying these definitions to the 'procedural principle of legality,' according to which if the procedural rules are violated, the very legality of process gets annulled.

4.1. Autonomous and Ancillary Procedures

As discussed, one function of adjudication is to offer a surrogate for physical fighting. Physical matching of power is actually an experiment where two approximately equal opponents maintain and are willing to test two mutually incompatible hypotheses concerning their power. The outcome of such a fight is objective reality and the truth of such a reality does not even have to be conceptualised and verbalised. It cannot be overemphasised that the objectivity ('impartiality') of such an experiment is *ipso facto* given and cannot be challenged but by another fight. In international law, needless to say, resort is still made to such modes of conflict resolution.

Fighting may be socially and otherwise disruptive, but there are clear advantages to this mode of conflict resolution. First, its authenticity cannot be challenged because the outcome does not merely purport to describe reality, but *is* reality itself. Second, resolution of conflicts through matching of power happens spontaneously. It needs no organised monopoly of violence (the state) to enforce and to implement it. Third, and most important, there is in an actual fight *no discrepancy between the process and the outcome*. The outcome

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it is obvious that the goals of substantive criminal law are defined in terms of truth about a past criminal event), then the exclusionary rule would not be possible.

is wholly the result of the process of fighting. The fight and only the fight, then and there, determines both the winner and the loser.

It would be very easy to organise society around the principle of fighting. Of course, the actual matching of power would not have to be limited to physical power. Economic and other forms of power could also be used. There are two possibilities regarding the process of adjudication. It can either simulate the reality of the forbidden physical fight, or it may refer to criteria other than power.[67] Adjudication, which simulates reality, such as a tennis match or a chess match, is still essentially an experimental situation. The participants say: "Let us see who will be the winner!" The constitutive rules, without which the match cannot even be set up, create the make-believe environment into which both parties enter, to maintain the equality of those variables not being tested in the 'experiment.' The advantage of this is, as in a 'natural' fight, that the outcome is nothing but the result of the process itself. The outcome is determined by criteria intrinsic to the process. In the natural combat (a civil or an international war, a sporting combat such as boxing match, tennis match, etc.) there is no unnatural separation between procedure and substantive rules. The combat as an experiment is an organic mixture of procedure and substance. The procedure here *is* the combat or the game and the substantive criteria of winning (or losing) in the conflict are built into the game itself.

The only aspect in which the decision organically rendered by such an experiment can be attacked are the procedural constitutive rules. If a tennis player complains that his opponent did not abide by a particular rule (e.g. he did not serve in the inner square), then the game and, therefore, the result must be invalidated. If that is not feasible, at least the particular unorthodox move must be retroactively annulled. If, in a chess match, I move my bishop as if it were a knight, that particular move, as well as all the "fruits of this poisonous tree" must be retroactively annulled. If, however, the procedural rules are scrupulously followed, the result itself cannot be attacked because the result is but an extrapolation of the procedure. It is for this reason that I shall call such a procedure *autonomous*: it renders the outcome both spontaneous and autonomous by criteria intrinsic to the procedure as such.

The main reason that a pure autonomous model does not appear in law is that legal adjudication 'suffers' from deontological tension. In many cases it is

[67] Clearly there are many conflicts in any society that remain hidden because of the inequality of the parties. As regards the matching of economic power, such conflicts were clearly suppressed and remained latent until unionisation brought them into the open. There are other kinds of prevalence, which have 'the stabilising effect' by suppressing conflicts. Yet it is good to remember that in the final analysis one always speaks of *physical violence*. Even the prohibition of the use of physical violence between private parties, for example, is based on the threat of greater physical violence.

not satisfied with the procedural resolution of the conflict, but maintains its own criteria of right and wrong. A tension is thus created between the reality and the law, and an *ought* is juxtaposed to an *is*. Whereas the autonomous procedure is in fact an experiment that lets the reality decide the outcome, legal adjudication strives for 'justice' which often means the negation of the existing reality.

It is possible to have a procedure which is not in this sense autonomous. The outcome, however, is no longer a spontaneous result of the procedure itself, but is rendered by criteria extrinsic to the process. In a sense this happens in a boxing match decided not by a knockout, but by the judges. Since these judges will use criteria which only approximate the probable result if knockout were the criterion, there is already a 'tension' between the criteria of the process and the criteria of the judges. The losing participant may already say: "The judges decided that he is the winner, but had they let me fight on, I could have shown them who is the winner!"

The judges here may simply simulate the probabilities of the final knockout (and thus, prevent the injury) or they may in fact use other criteria (skill, elegance, courage, intelligence, etc.) that may or may not also reflect on the probabilities of the actual knockout. Such a procedure I shall call *ancillary*. The difference between the autonomous and the ancillary procedure can be demonstrated through the relevance of the violation of their respective rules. If the rule of an autonomous procedure is broken, it necessarily affects the outcome and such violation must clearly be annulled. If a rule for an ancillary procedure is broken, this may have no effect upon the result.[68]

But when a society purports to be organised by a more differentiated set of criteria and maintains established substantive rules that govern behaviour not on the basis of the qualities ascribed to the participants (the so-called legal equality), but on the basis of the abstract congruence of their behaviour to the pre-existing rules, then procedures will no longer be autonomous. They cannot be relied upon to automatically legitimise objective outcomes, since now the results depend on procedurally extrinsic retrospective logical testing. The question becomes "does this piece of past behaviour comport with this rule?" Since it is the logical congruence of a given past event with an antecedent rule that must (according to the principle of legality) dictate the outcome, we can no longer rely on a competition, sham-fight or other form of autonomous procedure which would automatically render the result.

The result now depends on criteria extrinsic to the procedure, which is concomitantly relegated to the ancillary status. In a very real sense, such ancillary

[68] The proverbial sentence was uttered by Mr. Justice Cardozo in *People v. Defore*, 242 N.Y. 13, 21, 150 N.E. 585, 587 (1926): "The criminal is to go free because the constable has blundered."

procedure of adjudication is an antithesis of the autonomous procedures. It is precisely because one no longer wants to rely on what is organically given and could spontaneously occur as a conflict resolution criterion (physical power, economical power, race, religion, etc.) in an experimental test that one relies on the impersonal rules. These rules are called 'impersonal' because the personal qualities of power, wealth, race, religion, etc. are to be ignored as irrelevant in the resolution of conflicts. In other words, if society wanted to rely on these qualities, it would not need impersonal rules and adjudication according to them.

It is at this point that the process gets separated from the substance. The procedure is no longer a genuine experimental situation which would itself automatically render the result as an imitation of reality. The procedure becomes merely the context in which the decision is rendered. This, quite simply, is the difference between the criminal procedure and the boxing match. In the latter, the combatants win or lose by criteria of the 'procedure' itself. It is what happens in the procedure that determines the outcome. Good 'procedural' moves are what is tested, as is true in a tennis match or a chess game. The outcome does not purport to describe anything that is not chronologically and spatially comprehended in the game itself.

In criminal procedure, however, the parties do not (or at least ought not to) win or lose on the basis of their procedural skills. Criminal procedure is not a simulation of reality and cannot declare the winner by criteria of what happens within the procedure. The criteria are derived from outside, from the substantive criminal law.

The ancillary procedures seem to be qualitatively different and are not expected to render results automatically. Indeed, since they are not intended to have any influence upon the result, one may legitimately raise the question why we have them at all. Moreover, since their rules are often not sanctioned procedurally (i.e. by nullification) they seem to be more in the nature of recommendations, and it would not be absurd to question the very legal existence of such procedures.

While comparing autonomous and ancillary procedures, we are actually comparing the extreme adversary model (trial by ordeal, trial by battle) with the extreme truthfinding model (classical inquisitorial model). In the first case, the procedure is the decisive criterion; in the second case, the procedure is merely a set of rules defining the bureaucratic handling of the file from the beginning of *inquisitio* till the file as *ad acta*. The inquisitorial model required that the investigator *ex officio* explore all the relevant facts in order to arrive at the historic verity of the case. The procedure as such is not expected to influence the outcome that ought totally to depend on the "truth." However, the autonomous procedure generally followed by the adversary model seems necessary to make adjudication impartial and logically valid, as we shall see.

4.2. Procedural Sanctioning

4.2.1. The Need for Procedural Rights

If the integrity of adjudication is to remain intact, if adjudication is to remain impartial, procedural rights must have an independent existence.[69] A procedural right can be seen from two basic points of view. First, it can be seen as a subjective right granted to the defendant in spite of the truthfinding interests of the criminal process. From this point of view, a procedural right is a political concession that runs against the basic purpose of crime-repression. Insofar as these rights are derived directly from the Constitution, i.e. from a non-procedural source, this perspective seems to be valid.

However, second, the privilege against self-incrimination, the right to counsel, the right to be protected against warrant-less searches and seizures, the right against double jeopardy, and so on, also can be seen as logical structural requirements without which a rational process of impartial adjudication is not possible. This less subjective perspective gives procedural rights an independent existence because it shows that the rights of the defendant exist not only to protect the defendant, but also because impartial adjudication is impossible in view of self-incrimination, the absence of counsel, as well as the use of force by the state to make the defendant an unwilling source of evidence against himself. Insofar as this is true, the procedural rights of a defendant are not concessional aberrations from the basic truth-finding function of criminal procedure: they are inevitable logical deductions from the basic requirement that adjudication be impartial. Or in constitutional

[69] To say that a procedural right exists independently in this context simply means that it is seen as a substantive right of a person suspected or accused of a crime. This substantive aspect of criminal procedure – in this context criminal procedure could be seen as the Magna Carta of people suspected or accused of having committed a crime – exists not only independently but in clear opposition to the goals implicit in the substantive criminal law. If criminal procedure were totally procedural, i.e. ancillary to the goals of substantive criminal law, the finding of who is guilty and who is innocent would be the only goal of criminal procedure. It is clear that the substantive rights of suspects and defendants conflict with the goal of truth finding as it is evidenced clearly in the institution of the exclusionary rule. See *Wolf v. Colorado*, 338 U.S. 25, 69 S.Ct. 1359, 93 L. Ed. 1782, *Mapp v. Ohio*, 367 U.S. 643, 81 S.Ct. 1684, 6 L. Ed.2d 1081 and especially also *Boyd v. United States*, 1886, 116 U.S. 616, 630, 6 S.Ct. 524, 532, 29 L. Ed. 746.

Since a right or a sanction cannot really be procedural because the adjective procedural implies that a legal institution does not have an independent existence and that it serves a goal defined outside that particular institution, to say that a procedural right must have an independent existence is really a contradiction in terms. Instead, we should be talking about substantive rights that a defendant has in the context of criminal investigation, prosecution and adjudication. But since we are talking about procedural sanctioning, it is perhaps not too inappropriate to also call them procedural rights.

terms, one can say that criminal procedure is not totally ancillary to the goals of the substantive criminal law (truthfinding) but exists rather as an independent barrier that inhibits the direct imposition of the state's power over the defendant.

Virtually the whole procedural aspect of the Bill of Rights can readily be subsumed to a logical-requirement analysis. The right to counsel, for example, is necessary not only because this is a political right of a defendant when faced with the almighty state, but also because the impartiality of the adjudicator (judge or jury) is impossible unless the conflicting theses of the defendant and the government are presented by approximately equal persuasiveness. If, for example, the government's case is stronger simply because it has good lawyers who prosecute the case, then the defendant's case might be lost simply because he had no lawyer. In the last analysis, therefore, it would be possible to show that he was convicted not because he was guilty, but because he had no lawyer. That is unacceptable, not only because it is manifestly unjust, but also because the issue of guilt and innocence was decided on grounds extrinsic to the issue (the guilt depends on the quality of defence).

Similarly, the whole Fifth Amendment prohibition against self-incrimination, i.e. making the defendant an unwilling source of information against himself, is a manifestation of the disjunction requirement, which in turn is based on adjudication as a surrogate of force. Therefore, it is not only a question of giving the defendant the political right not to incriminate himself, but also a question of the rationality of adjudication itself. If the case can be indirectly influenced by the exercise of force of the more powerful party (state) on the less powerful party (the defendant) then the adjudication is not really an adjudication, because adjudication is by the nature of things a replacement of force in the resolution of conflicts. A similar analysis would apply to the right against unwarranted intrusions on the suspect's privacy. All this is based on the intuitive understanding that judging would be a mere farce if the more powerful party were always allowed to win merely because it is more powerful. Such judging would be a transparent attempt to legitimise the direct and partial use of power. Once, however, the concept of disjunction is introduced to the effect that the parties in conflict should strictly be kept separated, it becomes clear that the privilege against self-incrimination is not an easy-come-easy-go, protected and personal interest of the defendant, but something *without which adjudication ceases to be a meaningful replacement of force*.

4.2.2. The Need for Procedural Sanctioning

If we have established that there are certain inescapable principles in criminal procedure, the remaining question is how to sanction those rules. Every rule

must have a disposition and a sanction, and the disposition without sanction is mere recommendation. The same holds true for procedural rules, i.e. if they have no sanction they will not be obeyed.[70]

The amount of potential controversy stirred by a particular confrontation of the parties in criminal procedure would seem roughly to correspond to the intensity of the sanction required to maintain the rule. For example, the rule requiring that the defendant be apprised of his procedural rights before

[70] It can be shown that the peculiar 'procedural sanctioning' represents the very origin of the exclusionary rule. See *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 60 note 2, 16 L. Ed.2d 694 (1966), the Supreme Court said: "We sometimes forget how long it has taken to establish the privilege against self-incrimination, the sources from which it came and the fervour with which it was defended." Its truths go back into ancient times. Perhaps the critical historic event shedding light on its origins and evolution was the trial of one John Lilburn, a vocal anti-Stuart Leveller, who was made to take the Star Chamber Oath in 1637. The oath would have bound him to answer to all questions posed to him on any subject. The Trial of John Lilburn and John Wharton, 3 How. St. Er. 1315 (1637). He resisted the oath and he claimed the proceedings, stating: "Another fundamental right I then contended for, was, that no man's conscience ought to be wrecked by oaths imposed, to answer to questions concerning himself in matters criminal, or pretending to be so." Haller & Davies, *The Leveller Tracts*, at p. 454.

> On account of the Lilburn trial, Parliament abolished the inquisitorial Court of Star Chamber and went further in giving him generous reparation. The lofty Principles to which Lilburn had appealed during his trial gained popular acceptance in England. These principles worked their way over to the Colonies and were implanted after great struggle into the Bill of Rights. Those who framed our Constitution and the Bill of Rights were ever aware of subtle encroachments on individual liberty. If exclusionary rule is to be interpreted as a procedural sanction, this can be done in at least two ways. First, the exclusionary rule can be interpreted as a simple deterrent of illegal police practices. This has been the recent trend of the Supreme Court decisions: namely, to reduce the exclusionary rule to simple deterrents of police, while it is quite obvious that this is not the central reason for its existence. Second, the exclusionary rule can be interpreted as in the above quotation for *Miranda*. The simple initial logic of exclusionary rule is the logic of exclusion from the eyes and ears of the fact finder-adjudicator everything that violates the privilege against self-incrimination. The exclusionary rule is in that sense an evidentiary rule, rather than a procedural rule: it simply excludes what is not fit to be the basis for adjudicative decision-making. It would matter little today and in times of John Lilburn's trial in 1637 that the evidence in violation of the privilege against self-incrimination was obtained by police or somebody else. It is clear that what follows from the above quotation of that trial is not some attempt to educate the police of England: it is simple exclusion of information that would make the defendant an unwilling source of evidence against him, because this is violation of the very idea of adjudication. How can there be impartial adversary adjudication if one 'man's conscience … be wrecked by oaths imposed, to answer to questions concerning self in matters criminal, or pretended to be so.'

the police can interrogate him applies to an intensely controversial situation. Unless the police are aware that the sanction is certain, they will likely disobey the rule. By contrast, the rule authorising the defendant to file the pre-sentence memorandum probably need not be harshly sanctioned.

The parties in criminal procedure and its officials may, advertently or inadvertently, violate the rules. Some of these violations will not be 'prejudicial,' but others will definitely and critically affect the positions of the procedural parties. The question arises as to how sanctions can be devised that would deter the misconduct of the officials as well as remedy the procedural damage[71] the defendant will have suffered from such violations.

4.2.3. Sanctioning in Substantive Fashion

In principle, a violation of a procedural rule can be sanctioned in a substantive or in a procedural fashion. Substantive rules are sanctioned by a threat to the person who disobeys them. That person is made to suffer a loss or incur a damage, which could have been avoided by following the rule. In the case of substantive sanctioning, a violation of procedural rule becomes just another substantive case that lives its life apart from its procedural mother-violation. For example, if a policeman threatens a suspect, the policeman has violated simultaneously the defendant's procedural right, but most probably also a substantive provision forbidding him from threatening criminal suspects. The policeman should accordingly be punished; the suspect, however, is because of that no less suspicious and if in fact guilty, no less guilty. There is in principle no trade-off between police misbehaviour and the guilt of a criminal. To questions of guilt or innocence, the procedural propriety seems to be totally extrinsic: if a killer confesses after torture, he is no less of a killer just because he has been tortured. This in substance is the view of most of the Continental criminal procedures.

In the above example, it is clear that we are dealing with two substantive violations, the suspect's and the policeman's. Both must be properly 'processed' and adjudicated, yet the policeman's violation should in principle have no effect whatsoever on the suspect's case simply because the procedural question of his threat is extrinsic to the question of the suspect's criminal responsibility, which ought to be decided by the criteria of guilt or innocence as defined in the substantive criminal law.

[71] The concept of 'procedural damage' depends on the philosophy upon which the criminal procedure is based. In the inquisitorial system there can be no procedural damage if the truth is eventually discovered. In a purely adversary system the truth arrived at by means of violations of procedural rules is not an acceptable outcome.

4.2.4. Sanctioning by Procedural Fashion

The above view, however, is not logical if we see procedural rights as having an independent existence. If procedural rights exist independently – are not merely ancillary to the substantive, to the truthfinding goal of criminal procedure – then these procedural rights in fact become specific substantive rights of somebody under criminal suspicion. These rights (right to counsel, the right to be free from unreasonable searches and seizures, the right to be free from compulsive self-incrimination, etc.) must be sanctioned within that very criminal process, because the loss of procedural advantage occasioned by police's procedural violation must be compensated within that very procedural context. A procedural loss on the part of the defendant occasioned by procedural misbehaviour of his adversaries (police, prosecution) must be compensated by a procedural advantage.

If an adversary process is seen as a battle of two opponents, then an illegal move by one of the opponents must be answered by a compensatory remedy restituting the procedural balance of forces. In a chess match, for example, when one of the opponents makes an illegal move, it is logical to require that this illegal move be disannulled and the previous situation restored (*restitutio in integrum*). It would make little sense in such a context to allow the illegal move to remain while punishing, perhaps through the chess organisation, the player who has made that illegal move. Unless the illegal move in *that game* is disannulled, the integrity of the whole game and the legitimacy of its outcome have been destroyed.[72]

[72] Judicial supervision of the administration of criminal justice in the federal court implies the duty of establishing and maintaining civilised standards of procedure and evidence. Such standards are not satisfied merely by observance of those minimal historic safeguards for securing of trial by reasons which are summarised by 'due process of law' and below which we reach what is really trial by force. Moreover, review by this Court of state action in passing its notion of what will best further its own security in the administration of criminal justice demands appropriate respect for the deliberative judgment of a state in so basic an exercise of its jurisdiction. Considerations of large policy in making the necessary accommodations in our federal system are wholly irrelevant to the formulation and application of proper standards for the enforcement of federal and criminal law in the federal courts. The principles governing the admissibility of evidence in federal criminal trials have not been restricted, therefore, to those derived solely from the Constitution. *McNabb v. United-States*, 318 U.S. 332, 341. This so-called McNabb Judicial Integrity Doctrine is the closest analogy to the chess game simile that is explained above. This integrity doctrine seems to be followed by the leading theorists in the United States. See Kamisar, *A Reply to Critics of the Exclusionary Rule*, at p. 82, *supra* n. 68 to Chapter 3.

4.2.5. Impact on Outcome

The problem we outlined here points to a curious incompatibility between the substantive and procedural criminal law. This antinomy resides in the fact that the substantive criminal law pretends to give precise criteria of guilt or innocence as if the truth of that question is always ascertainable. There is no chance aspect to that perspective. The adversary criminal procedure, however, involves a chance aspect due to which the substantive question of guilt or innocence is decided not merely according to the substantive criminal law criteria, but also according to the procedural rules themselves. While substantive criminal law says that there are only guilty or innocent criminal defendants, the criminal procedure allows for a third category, namely those who would in view of procedural developments (procedural sanctioning, procedural accidents such as good defence confronted with bad prosecution, and other more or less accidental factors) fall under the category of the presumption of innocence. In other words, according to the substantive criminal law there are only guilty or innocent defendants, whereas according to criminal procedure we will pretend that a defendant is innocent even though he is not, if the procedural factors lead to that result. Thus, a procedural sanction will always be illogical because substantive issues ought to be decided by substantive, not procedural criteria.

Typically, the Continental criminal law system resolves that conflict in favour of the substantive criminal law; whereas the American system adopts the exclusionary rule as a procedural sanction and therefore implicitly declares that the truthfinding function of criminal procedure is secondary to its protective function and that criminal procedure plays a role independent of the goals declared by the substantive criminal law.

The unfortunate side effect of the exclusionary rule is then a seeming trade-off between the procedural violation and the defendant's guilt. Whereas in the game of chess the result depends totally on the 'procedural' developments of the game, the game of criminal procedure is sufficiently separated from the rules of the substantive criminal law so that this discrepancy between the game and its result may arise.

This discrepancy between the 'game' and the 'result' is perhaps due to the historical origin of the trial in criminal matters. In times of ordeals when guilt or innocence was decided by irrational criteria such as floating on the water or touching the hot iron, the result, i.e. the guilt or innocence, was dependent wholly on the 'game' of the ordeal. There were no substantive rules to speak of in that respect. In all other games that are in their nature adversary, such as soccer, tennis, chess and so on, the result depends on what happens in the

'procedure' itself. The substantive result is therefore wholly a consequence of the procedural happening. Insofar as there exist rules that govern that happening, these are wholly procedural rules.

In the game of criminal procedure, however, the criteria by which guilt or innocence should be decided are not the procedural criteria; rather they are alienated from the procedural structure and embodied in the substantive criminal law. If criminal procedure were a game, the winner should clearly be the person who is procedurally more skilful. The procedure, therefore, would be an end in itself, and not ancillary to an end that is not embodied in its own rules. Legal history, however, made criminal procedure a tool towards a goal that is totally alien to the game itself. 'Procedural accidents' in the game of soccer, for example, legitimately result in the loss or winning of the game. Insofar as the result is due to luck that is seen as totally acceptable. Imagine, however, that the game of soccer or a game of tennis or a game of chess would decide not who is the winner in that particular game, but would decide which one of the two opponents is, for example, morally superior. Since moral superiority is extrinsic to soccer, tennis and chess games, it cannot be decided in the respective 'procedural' confrontations.

Insofar as criminal procedure is a game with its chance input and existence, and is independent of the question that it is supposed to decide, the same absurd result follows, namely, that the question of guilt or innocence does not depend merely on the substantive criteria of the substantive criminal law. Rather, it depends largely on the procedural chance of the 'game aspect' of criminal procedure. This incompatibility between the substantive and the procedural aspect of criminal law is made evident in the problems of exclusionary rule. It follows logically that procedural sanctioning through exclusionary rule is acceptable only if we see the 'game' of criminal procedure as having a purpose and existence independent of the goals of substantive criminal law. One must keep in mind that this implicates a certain view of criminal procedure as being primarily an adversary and therefore involves a relative pursuit of truth, rather than an absolute inquisitorial demand for truth.

4.2.6. Importance of Issue, Truth and Impartiality

Whether a procedure will be ancillary or autonomous will, in the end, depend on the importance of the subject matter. The more a procedure transcends the limits of the private dispute between the parties, the less it will be allowed to have an independent impact on the substantive outcome.

In some cases, the procedure is primarily a means of conflict resolution where the decision rendered upon the subject matter of the controversy is not per se relevant but only serves to resolve the conflict. For instance,

even though it is not logical to say, "If you will not participate in the dispute over the contract, you will be presumed to admit your fault," it can be done, because the contract, after all, is merely a question of pecuniary interest. In other cases, however, the subject matter to be decided is so important (e.g. parenthood, criminal responsibility) that ideally the procedure would have no effect on the substantive outcome. Thus to say, "Unless you duly participate in a trial, you will become the father of a child," is clearly absurd. It is absurd not because it would be less logical to presume somebody to be a father than to be at fault in a contract controversy, but because the issue of fatherhood goes *beyond the dispute of the parties*. The society itself, and many members of the community not directly involved in a parental dispute, may have an interest in its authentic (i.e. substantive) resolution.

Again, the distinction between the autonomous and ancillary conflicts forces itself upon the subject matter at hand. In a parental dispute, the procedure is more ancillary. In pecuniary matters, it is more autonomous. The more the procedure is ancillary, the less effect it is supposed to have on the ultimate outcome. An entirely ancillary procedure is merely a means to the ascertainment of truth, whereas in an entirely autonomous procedure the only criterion of decision-making is the procedure itself.

Since procedural sanctions attach to procedural rules that are essentially extrinsic to the substantive issue to be decided, and more so if the issue is larger than the parties, they will be very problematic in criminal law. The issue to be decided there is decidedly larger than the parties who participate in the process of deciding it. However, we have already discussed Professor Damaška's position that criminal procedure serves a set of values independent and sometimes incompatible with the goal of truthfinding.[73] A criminal procedure that is not entirely ancillary can have an independent effect on the final outcome, and thus the procedural product of the verdict can vary from the substantive truth of the case. If the exclusionary rule is applied as a sanction, for example, then the law openly admits this discrepancy to be legitimate.

In the Continental system where the goals of substantive criminal law are seen as clearly primary because the ascertainment of the truth as to the guilt or innocence of the defendant is seen as a primordial goal of criminal procedure, the exclusionary rule cannot be applied. Consequently, criminal procedure is a mere servant of the substantive criminal law, here. That is not due to some theoretical position held by Continental theorists; rather, it is due to the cultural and political attitudes towards authority.[74] If the government is not seen as a mere opponent, but is rather seen as a State in a Hegelian

[73] Damaška, *supra* n. 16 and accompanying text.
[74] See Damaška, *Structures of Authority in Criminal Procedure*.

fashion, then this same government and its definition of guilt or innocence cannot be reduced to a mere 'game' aspect of criminal procedure. The latter consequently becomes a linear pursuit of truth that does not tolerate the chance aspect so typical of the Anglo-Saxon criminal procedure. In the Anglo-Saxon system, individual freedom is more highly regarded than the state-defined criminal truth. This is essentially a value judgment in which certain optimism regarding the human nature prevails over thematic revenge. In this sense, the exclusionary rule is perhaps typically American.

Ultimately, it can be said in defense of procedural sanctioning that it does make sense to sacrifice the truth of one case in order to maintain impartiality in other cases. This is not mere deterrence of police behaviour. A rule, once established, has to be sanctioned. If it is not sanctioned in one case because the goal of truthfinding was nevertheless attained then the rule is reduced to an instrumental one, and the goal of truthfinding prevails over it. As we have pointed out, that very truthfinding, however, is no longer acceptable as a general practice unless it is impartial.

It could be said that the level of autonomy of the criminal process ought to correspond to the intensity of the need for impartiality as a required attribute of truthfinding. A dictator can 'find' whatever truth his tyranny needs and will not even pretend to be impartial. A just ruler will appoint an independent decision-maker even in cases – and especially in the cases – where his own interest is at stake. He will value impartiality in direct proportion to the probability of his own partial need for truth. The more avid, in general, our desire to know the truth, the more likely we are to be partial and to imagine that we are not.

4.3. The Procedural Principle of Legality

In substantive criminal law, the principle of legality[75] has been, ever since Beccaria published his little book entitled *Dei delitti e delle pene* in 1764, the cardinal criterion of justice. In criminal procedure, however, we have yet no such principle of legality. Most of the rules of the typical Continental code of criminal procedure have no sanction attached and may be violated by the police, by the prosecutors and by the courts without affecting the (substantive) validity of the outcome (the verdict, the conviction, the sentence). The typical provision we find in the German, the Russian and the Chinese codes of criminal procedure divides the procedural violations into (1) absolute and (2) relative violations where only the absolute violations have for their effect the automatic reversal on appeal. All the rest are relative violations of criminal procedure in the sense that they cause reversal only if they could have affected

[75] The principle of legality will be dealt with in more detail in Section 2 of this book.

the substantive correctness or veracity of the final outcome of the criminal case. This procedural general clause, which I consider the most symptomatic provision of the Continental criminal procedure, usually reads as follows: "All other violations will be reason for reversal only if they have caused the violation of substantive criminal law or if they have affected the veracity of the final verdict."

On the other hand, the American debate before the introduction of the exclusionary rule was epitomised in the phrase of Justice Cardozo "The constable blunders and the criminal goes free!"[76] In *Mapp v. Colorado*[77] Justice Frankfurter, for example, maintained that the procedural violations by the police of what we would today call 'the constitutional rights of the defendant' could be sanctioned as criminal acts through substantive criminal law, as torts by substantive civil law and as disciplinary violations by the internal police regulations. In the Sixties and Seventies, the liberal majority on the American Supreme Court, especially Justices Douglas, Warren, Goldberg (in *Escobedo*) and Brennan in *Leon v. U.S.*[78] – established the idea that the substantively correct conviction cannot stand if it was arrived at with the help of the procedural violations of the defendant's substantive constitutional rights, i.e. that the substantive end does not justify the procedural means. Thus the American (constitutional) criminal procedure made the decisive step from 'the ancillary criminal procedure' to what may be called 'the autonomous criminal procedure.'

Nevertheless, it has never been fully understood as to why compelled self-incrimination is unacceptable under the rule of law principle. Since the use of force is so essential for arrests and most other things the police do, it apparently never occurred to the judges and the legal writers, although the case-law empirically leads in this direction, that the use of force to influence the legal outcome of the procedure vitiates the very legality of the procedure and the substantive legitimacy of the final conviction. The explanation was too simple and too obvious to be seen.

This premise perhaps is so elementary that legal thinkers, while taking for granted its implications, tend to overlook it. To repeat: if the legitimacy of the rule of law is to be maintained, then the divorce from the rule of arbitrary power must be absolute. If, on the contrary, the immediate use of power becomes decisive in the resolution of a particular controversy between two individuals or between an individual subject and the State, as for example in criminal process, or even between two states, then the legal process and the rule of law have been subverted in their fundamental intent and purpose.

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[76] *People v. Defore,* 242 N.Y. 13, 21, 150 N.E. 585, 587 (1926).
[77] *Mapp v. Ohio*, 367 U.S. 643 (1961).
[78] *United States v. Leon*, 468 U.S. 897, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984).

It is true that, some social critics, such as Michael Foucault, question the fundamental moral legitimacy of the rule of law – and thus the ideology of human rights – because in the last analysis the enforcement of the rule of law depends on the (threat of) violence by the State. The state of peace in society, says Foucault, is founded upon the constant declaration of war. Thus, the rule of law is ultimately based on the ugly realities of power.

Even so, the rule of law strives to maintain at least a relative independence from the arbitrary use of power.[79] If it is true in fact that the whole ideology of human rights is a negation of the non-logical use of power – the European Convention of Human Rights being a quintessence of this ambition – then the internal legitimacy of any legal process depends on the total prevalence of the power of logic over the logic of power. The autonomy of legal reasoning and the maintenance of its independence from the constant threat to regression is the subjective cognitive counterpart of the objective independence of the rule of law from power.[80] The autonomy of legal reasoning in turn depends on the moral autonomy of the judges, i.e. on their attained level of moral development.[81] Legal processes are subverted the moment the ultimate outcome of the legally processed controversy becomes contingent upon the logic of power (politics, policy etc.) and not on the power of logic.

Autonomous legal reasoning, I think, must come to the conclusion that in criminal procedure, too, the violation of certain basic rules should affect the substantive outcome of the case. This I call 'the procedural principle of legality.' To put it bluntly, if the constable does blunder the criminal *should* go free.

Thus, if the privilege as well as the exclusionary rule were given due importance, they would be established as the most fundamental, prescriptive rules under the Fourteenth Amendment's Due Process clause. Moreover, Rehnquist could not have reduced it to an instrumental rule. In order to limit the impact of the exclusionary rule, he first had to separate it from

[79] See generally, Perenič, *Relative Independence of Law (Relativna samostojnost prava)*, a doctoral dissertation, 1981.

[80] The autonomy of legal reasoning was severely reduced through 19th-century codifications. Strict distinction was enforced after 1789 Revolution between abstract legislative competence and concrete judicial competence (e.g. art. of *La déclaration des droits de l'homme et du citoyen*, 1789). This untenable abstract-concrete distinction is a constant source of practical trouble in constitutional law, e.g. in distinguishing abstract judicial review from concrete constitutional complaints' jurisdiction. Cappelletti & Cohen, *Comparative Constitutional Law,* p. 73-112, *supra* n. 3; see also André-Vincent, *L'Abstrait et le Concrète dans L'Interprétation*; for English variation on a similar theme, see Williams, *Law and Fact*. As to the historical source of all this trouble, see the truly brilliant defense of judge-made law by von Savigny, *Of the Vocation of Our Age for Legislation and Jurisprudence*. Also see, *supra* n. 51 to Chapter 2.

[81] See generally, Kegan, *supra* n. 57. See my *From Combat to Contract: What Does the Constitution Constitute*, *supra* n. 5.

the privilege against-self incrimination and then make it look as a simple prophylactic educational device to discourage police misbehaviour. This he could not have done if it were established, first, that the exclusionary rule is an alter ego of the privilege and, more fundamentally, that the privilege is not simply a constitutional right of the defendant but a fundamental precondition of a legitimate legal procedure, the quintessence of Due Process and Fair Trial.

5. Exclusionary Rule: The Alter-Ego of the Privilege Against Self-Incrimination

The privilege against self-incrimination alone cannot prevent the incriminating admission from transpiring. It is possible to imagine that those who cause the illegal emergence of incriminating information could be punished. But that would not enforce the privilege, since the punishment of Cardozo's 'blundering constable' seems to be no remedy for the violation of the defendant's privilege: he would still be 'incriminating' himself. Thus, if the defendant's privilege is violated, there must be a procedural sanctioning (through the exclusionary rule) which would reverse the disadvantage done to the defendant's case due to the police's blunder.

The separation of investigation and adjudication means that the incriminating information is produced in the first instance when out of the reach of the adjudicator's ear. This means that it is possible to effectively preclude the taking of the illegally obtained information into account when considering the defendant's guilt.[82] The privilege against self-incrimination could thus be seen as the privilege to exclude the respective information.[83]

[82] Interestingly enough, the exclusionary rule is functionally dependent on the institution of the jury. It is the jury that frees the judge to exercise the procedural control and makes him free to consider information which must not reach the ear of the jury.

[83] This point cannot be overemphasised. The substantive sanctions against the police who violate the privilege (civil action, criminal action and disciplinary proceedings) are simply not adequate. This is not a question of deterring the police from future misconduct. The issue here is that the procedure itself differs from other situations addressed by law. For example, once the substantive criminal law rule is violated, there can be no *restitution in integrum*. The only possible response is a sanction. A legal procedure, however, is a *mise-en-scène* where the situation is never entirely irreversible. If all goes wrong a new procedure can always be started. This is why enforcement of the privilege against self-incrimination is possible. The question why it is mandatory to enforce it through the exclusionary rule, however, need not be answered solely by saying that the exclusion of illegally obtained information is the best and therefore the required remedy. If the information is not effectively prevented from reaching the ear of the adjudicator, the privilege does not exist. The issue here is not whether a command of the law has been disobeyed by the police and must therefore be properly sanctioned. The issue

Thus, *there can be no privilege against self-incrimination without the exclusionary rule.* Not to incriminate oneself really means that a certain type of evidence is not admissible in the court deciding one's criminal guilt. Thus, the privilege against self-incrimination, simply *is* the exclusion of such evidence. Without this exclusion there *is* no privilege.

The idea of exclusion *qua* enforcement of the privilege against self-incrimination depends on the simple fact that self-incrimination is not merely giving out incriminating information, but giving it to the proper authority (i.e. the one with the power to impose criminal sanctions). One cannot incriminate oneself unless the incrimination comes before an adjudicator. If one were to tell his friend that he committed a crime, it would not be self-incrimination; at most it might be called self-stigmatisation. This demonstrates that it is the ability of the adjudicator to impose sanctions upon the individual that makes an extracted admission a self-incrimination. In fact, were it not for the strict division of labour between investigation and adjudication, the exclusion of any evidence would not be possible. This distinction was refined in *Spano v. New York*[84] into one between 'focused' and 'unfocused' investigation. It enables the system's left hand (the police) to discover the privileged information (e.g. through violation of *Miranda*), but prevents its right hand (the jury) from ever knowing of it.

Giving the police this privileged information is self-incrimination only insofar as that same information ever reaches the ears of the adjudicator. If such information could not be excluded from reaching the adjudicator's ears, there would be no privilege against self-incrimination. Therefore, it is only when one is within the adjudicative context that he or she needs the exclusionary rule to prevent self-incrimination.

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here is the right of a defendant who is in no sense compensated if the police are punished but the illegally obtained information is not excluded. If in a chess match an unorthodox move is made and allowed to remain on the board, then the 'substantive' penalties by the International Chess Federation outside the game will be no remedy. The privilege against self-incrimination is the defendant's privilege, not the police's duty. Contrary to popular misconception, the purpose behind it is not to deter the police. Whether the police follow the rules or not, the privilege can still be preserved. But if the courts allow the illegally obtained information to be taken into account by juries, then the courts themselves violate the privilege, because it is in effect they who allow the defendant to incriminate himself. The self-incrimination proper does not happen in front of the police, who do not have the right to apply the criminal sanctions. It happens in front of the jury, which does have the power on the basis of that information to pronounce the defendant criminally responsible (i.e. the power to 'incriminate him').

[84] 360 U.S. 315 (1959).

5.1. Origin

Merely fifty years ago, criminal procedure was perceived everywhere as an instrument of repressive power to be used against 'criminals.'[85] Franz von Liszt, the famous German criminal law theorist, for example, may have maintained that the purpose of (substantive) criminal law was the reverse, that it was the Magna Carta Libertatum of the individual suspected or accused of crime. Even before that, in 1764, similar views were proffered by Cesare Beccaria[86] and nominally accepted by the enlightened despots from Leopold of Tuscany to Catherine the Great. However, the basic procedural logic of discrimination of those suspected of having committed a criminal offence – irrespective of the presumption of innocence – was inquisitorial.

In the 1960s, there occurred a so-called criminal procedure revolution led by the Supreme Court of the United States, notably its Justices Douglas, Warren, Marshall and Brennan. In a series of cases culminating in *Miranda v. Arizona* (1964) the U.S. Supreme Court established what we call the 'equality of arms' starting with the arrest of the criminal suspect. The powerful tool of this revolution was the exclusionary rule taken from the law of evidence.[87]

The law of evidence, a fact rarely noticed, exists in the Anglo-Saxon legal systems, but does not exist in Continental legal systems. Here, there are

[85] The legal position of the 'common criminal' could be described as a consequence of a specific discrimination. Since 'criminals' were perceived as a separate class, especially inquisitorial criminal procedure could be seen as a scenario for their discriminatory treatment. In simple terms, this meant that they were no longer equal *subjects* of the State and became its discriminated procedural *objects*. Similar conclusions could *mutatis mutandis* be made about committed mental patients and juvenile delinquents in their respective procedures. See generally, Katz, Goldstein & Dershowitz, *Psychoanalysis, Psychiatry and Law* and Dershowitz, *Cases and Materials* (unpublished) for the course entitled 'Prediction and Prevention of Harmful Conduct,' Harvard Law School, acad. year 1974/75, or later editions. Because of the implicit loss of legal status caused by any of these procedures (criminal procedure, civil commitment, *parens patriae* procedures) the initial legal requirements (probable cause, reasonable suspicion, danger to oneself and others etc.) for this change of status are of such crucial importance: they trigger the loss of privacy, certain constitutional rights etc. The reason why Continental criminal procedure and its theory have never considered this a basic issue lies in the insufficient connection of criminal procedure and constitutional law. With the more independent activity of Continental Constitutional Courts (German, Italian and others) this has begun to change. Criminal procedure is slowly becoming a branch of constitutional law. See generally, Zupančič et al*, Constitutional Criminal Procedure Law (Ustavno kazensko procesno pravo)*.

[86] Beccaria, *supra* n. 35 to Chapter 3.

[87] My own contribution to this revolution was the idea that the exclusionary rule is merely a different form, an alter ego of the constitutional privilege against self-incrimination because one does not legally incriminate oneself before the police but before the jury: thus, if evidence tainted by forced self-incrimination is excluded the privilege remains intact. See Zupančič, *The Privilege Against Self-Incrimination* and the text accompanying n. 82-84 of this chapter.

no rules of hearsay, no doctrine of evidentiary presumptions, no rules on admissibility of evidence. It is curious, indeed, that there is on the Continent practically no legal epistemology such as developed in the systems where jury trial is a constitutional right of every defendant. The right to trial by jury trial is intimately connected with the development of the predominantly adversarial (accusatorial) criminal procedure of the Common Law countries. For obvious reasons, the trial by jury is not compatible with the inquisitorial belief in truthfinding.[88]

The exclusion of evidence tainted by police's violations of defendant's constitutional (human) rights in American law, however, was judge-made;[89] it evolved through cases having to do with violations of other constitutional rights (probable cause,[90] searches and seizures etc.) i.e. not only through cases having to do directly with forced testimonial self-incrimination. From *Mapp v. Ohio* to all other cases involving one form or another of self-incrimination, the exclusionary rule evolved and extended its effects through all the concentric circles of privacy.[91]

[88] There are several factors of incompatibility between truth-finding ideology and the trial by jury. (1) Juries' verdicts may be, from the syllogistic point of view, unpredictable and all the more so (2) because jury's verdicts are not reasoned out (explained). This in turn (3) precludes appeal on substantive (legal or factual) grounds and (4) shifts the emphasis on procedural violations as grounds for appeal. Since one does not know (and does not want to know) how juries decide their cases, this (5) liberates jury's decision-making process from formal-logical restrictions and *de facto* makes the jury in some cases little *ad hoc* legislatures *pro hac casu*. In a sense trial by jury thus represents an invasion of truth-finding procedure by democracy. No wonder then, since this democracy has to be bridled, that there was a need for an evidentiary filter of information i.e. for the development of the law of evidence. But it is clear even at first sight that the right to a jury trial will be unpalatable to every non-democratic regime – if for no other reason then because the career judges can be controlled and made predictable whereas with juries this is practically impossible. See Zupančič, *The Crown and the Criminal*. See also, Damaška, *Evidentiary Barriers to Conviction and Two Models of Criminal Procedure*, and my critique in *The Privilege Against Self-Incrimination*, *supra* n. 87, p. 8, n. 10.

[89] i.e. was arrived at 'by judicial implication' and not through direct mandate of constitutional norms. This, of course, is not true if one understands that the Vth Amendment's privilege against self-incrimination directly requires the prevention, i.e. the evidentiary exclusion, of self-incrimination. See *infra* n. 92.

[90] Probable cause as a bar to arbitrary arrest, detention and accusation was already decreed in Magna Carta's (1215) Section 38; it proscribed the introduction of (criminal) procedure by 'lower judicial officials' against a suspect only upon own word and without witnesses to support such allegation(s). It is fair to say that probable cause as an initial bar to searches and seizures and as constitutional right emanating from the presumption of innocence has been, in Continental constitutional law, rather neglected. See, more specifically, *Legitimatio ad Causam: the Comparison of Criminal and Civil Procedures (Legitimatio ad causam: primerjava med kazenskim in pravdnim postopkom)* in Zupančič, *Constitutional Criminal Process (Kazensko procesno pravo)*, p. 249 to 275.

[91] These circles go approximately as follows: (1) inner mind, (2) body, (3) communications, (4) home, (5) cars etc.

5.2. Scope

The primary function of the exclusion of evidence tainted by the use of force against the defendant is to prevent the subversion of legal legitimacy of the whole idea of adjudication as a legitimate surrogate of the use of force in resolution of controversies. The importance both of John Lillburn's trial in 1637, as well as of *Miranda* (1964) 327 years later, is that they bring into public law what has always been taken for granted in private law. In other words, these two cases affirm the lofty principle, spanning literally across centuries, that it should not matter that the plaintiff in criminal law is the State with its repressive *raîson d'état*. The privilege preserves the suspect's independent standing to participate as an equal procedural opponent in his or her conflict with the State. Concomitant to this direct and specific human-rights-effect of the privilege is, thus, the indirect significance it has for the general preservation of the legitimacy of the rule of law.

Still, we would look in vain there for a clear and definite articulation as to the logical reasons that make the privilege constitutionally unavoidable. In *Miranda v. Arizona*, 384 U.S. 436 the U.S. Supreme Court said:

> We sometimes forget how long it has taken to establish the privilege against self-incrimination, the sources from which it came and the fervor with which it was defended. Its truths go back into ancient times. Perhaps the critical historic event shedding light on its origins and evolution was the trial of one John Lilburn, a vocal anti-Stuart Leveller, who was made to take the Star Chamber oath in 1673. The oath would have bound him to answer to all questions posed to him on any subject. The Trial of John Lillburn and John Wharton, 3 HOW. ST. ER. 1315 (1673). He resisted the oath and he claimed the proceedings, stating:
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> "Another fundamental right I then contended for, was, that no man's conscience ought to be wrecked by oaths imposed, to answer to questions concerning himself in matters criminal, or pretending to be so." Haller and Davies, The LevellerTracts, 1647-1953, p. 5 (1944)
>
> On account of the Lillburn trial, Parliament abolished the inquisitorial Court of Star Chamber and went further in giving him generous reparation. The lofty principles To which Lillburn had appealed during his trial gained popular acceptance in England. These sentiments worked their way over to the Colonies and were implanted after great struggle into the Bill of Rights. Those who framed our Constitution and the Bill of Rights were ever aware of subtle encroachments on individual liberty.

Despite later restrictions imposed on the exclusionary rule, chiefly under Justice Rehnquist's misleading 'marginal utility' doctrine, it can be safely inferred from the above quotation that in 1964 the privilege against self-incrimination and the exclusionary rule were thought of as one and the same legal principle. The simple initial logic of the privilege against self-

incrimination was the exclusion from the eyes and ears of the judicial fact-finder (the jury) of everything that violated the privilege.

Seemingly the assumption has been all along that the exclusion of evidence obtained in violation of constitutionally prohibited searches and seizures or in violation of the right to counsel was to be explained simply as a deterrent to police. However, the rule isn't a simple procedural sanction[92] giving teeth to a basic procedural requirement.[93] It is an answer to Justice Cardozo's

[92] In procedural law generally, and especially in criminal procedure, it is often forgotten that a rule (a disposition) without a sanction is a *lex minus quam perfecta* i.e. a mere recommendation. Both in Anglo-Saxon, as well as in Continental criminal procedures, the rules are predominantly such *leges imperfectae*. The exclusionary rule is the only serious exception. In this sense, it is reasonable to say that there is no criminal procedure to speak of unless the exclusionary rule is there to guarantee the respect of its rules by police, the prosecutors and the judges. Without such strict procedural sanctioning the procedure is collapsed into substantive law. It then becomes ancillary to the truth-finding goals implicit in substantive law (with all reservations as to the 'truth' described above) and loses its natural conflict-resolution physiognomy. Since the impartiality of the jury or the judge depends on the balancing effect of the two partialities juxtaposed in the context of the procedural 'equality of arms' – the objectivity (fairness, detachment, unbiased or unprejudiced approach) of the truthfinding process also suffers. In the end, we may get the characteristic inquisitorial deformations of fact-finding and even the circular self-referential effects epitomised in the myth of witchcraft.

The traditional Continental reference to procedural law as 'adjective law' – purely ancillary to the 'substantive' law – was theoretically acceptable so long as constitutional and human rights of criminal defendants were not explicitly recognised as substantive rights, the privilege against self-incrimination amongst them.

Nevertheless, every sanction, substantive or procedural, is logically secondary to the disposition (the rule) and secondary in terms of time to the violation of the rule. Even in pure Hegelian terms the sanction is secondary to the violation of the rule because it is the negation of the rule's negation i.e. its affirmation. Hegel, *The Philosophy of Right*, par. 100. The application of the exclusionary rule at an evidentiary hearing out of sight and hearing of the jury, however, is a true anticipatory prevention of self-incrimination. (Hegel's negation of negation of the rule's violation would neither prevent self-incrimination nor reinstate the *status quo ante*.) Since the exclusionary rule applies within the virtual reality of the controlled world of orderly procedure this makes the timely prevention of self-incrimination possible – something which is impossible in the real world of rule-violations to which the substantive (criminal, civil etc.) law generally applies. This is why we say that the exclusionary rule *is* the privilege against self-incrimination. This doctrine concerning the identity of the exclusionary rule and the privilege against self-incrimination was explicitly adopted by the Supreme Court of Colorado in *People v. Briggs*, 709 P2d 1911 (1985), opinion by Justice Neighbors.

[93] See, Kamisar, *supra* n. 68 to Chapter 3, at p. 55-84:

> A court, which admits the evidence in such a case, manifests a willingness to tolerate the unconstitutional conduct which produced it. How can the police and the citizenry be expected to 'believe that the government meant to forbid the conduct in the first place?' (Paulson, *The Exclusionary Rule and Misconduct by the Police*.)

famous (and misleading) aphorism 'the constable blunders and the criminal goes free.' The exclusionary rule in this sense – despite its evidentiary origins – cannot be reduced to a simple evidentiary rule geared towards preserving the adversarial 'equality of arms' and thus the impartiality of the process in a better manner.[94] All of the above side-effects of the exclusionary rule are secondary.

To better understand the scope of the privilege against self-incrimination, and therefore the scope of the exclusionary rule, one must comprehend the "critical stage" theory of *Powell v. Alabama*[95] as a corollary to adversary adjudication. It is at the critical stage, when the investigator has focused upon one suspect, that the right to self-incrimination attaches and the need for the exclusionary rule arises to redress breaches of that privilege. The Supreme Court, in interpreting when this critical point occurs, has a choice of two approaches: a formalistic one and a substantive one. In *Massiah v. United States*,[96] the Warren Court made a formalistic distinction, holding that incriminating statements deliberately elicited from a defendant after indictment and in the absence of counsel were excluded. Five years earlier, in *Spano*, also a post-indictment case, the Court had established the proposition that when the police decide on one suspect the process takes on the characteristics of adjudication. The formalistic approach allows the police to circumvent the beginning of the adjudicative process by delaying the arraignment of a

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Why should the police or the public accept the argument that the availability of alternative remedies permits the court to admit the evidence without sanctioning the underlying misconduct when the greater possibility of alternative remedies in the 'flagrant' or 'willful' does not allow the court to do so. A court which admits the evidence in a case involving a 'run of the mill' Fourth Amendment violation demonstrates an insufficient commitment to the guarantee against unreasonable search or seizure. It demonstrates 'the contrast between morality professed by society and immorality practiced on its behalf.' (Justice Frankfurter, dissenting in *On Lee v. U.S.,* 343 U.S. 747, 759 (1952)).

[94]

> An adversary presentation seems the only effective means for combating this human natural tendency to judge too swiftly in terms of the familiar that which is not yet fully known. The arguments of counsel hold the case, as it were, in suspension between two opposing interpretations of it. While the proper classification of the case is thus kept unresolved, they stand to explore all its peculiarities and nuances.

Fuller, *The Adversary System*, at p. 44. "Un bon juge est un bon juge qui doute." ("A good judge is a doubting good judge.") i.e. impartiality derives from adversariness (ambivalence + passivity of the judge). Coulon, *La Conscience de Juge D'Aujourdui*, p. 337.

[95] 287 U.S. 45 (1932).

[96] 377 U.S. 201 (1964).

suspect before a magistrate. This is why, in *Mallory v. United States*,[97] the Court held that an eight-hour delay between arrest and first appearance before the magistrate was unreasonable.

When one takes the concept of critical stage into account together with the privilege against self-incrimination, the scope of the exclusionary rule becomes apparent. Furthermore, because there can be no privilege unless any breach of it is excluded in the adjudicative setting, the privilege against self-incrimination is the equivalent of the exclusionary rule.

5.3. Is the Rule Prescriptive or Instrumental

The next step in the analysis of the exclusionary rule is to say that insofar as the exclusionary rule is the equivalent of the privilege against self-incrimination, the rule is an end in itself.

An instrumental rule is one that is not an end in itself, but a means toward a purpose beyond the grammatical scope of the rule. If such an interpretation of the rule does not serve its underlying purpose, it should not be applied in those situations.

On the other hand, a prescriptive rule is an end in itself. This means that a prescriptive rule stands no matter what the purpose. Teleological interpretation of prescriptive rules is not allowed, since one is by its definition not permitted to question the purpose. The exclusionary rule's correct perspective within the American system of adversary adjudication is that of a prescriptive rule and, therefore, not subject to interpretation as to its purpose.

However, the absence of synthetic jurisprudential articulation and the open-textured nature of the exclusionary rule, arrived at on an analytical case-by-case basis and only through 'judicial implication,' left the privilege as a primary, prescriptive rule vulnerable to a similar case-by-case and step-by-step instrumentalisation and abatement.[98] However, the privilege as a principle is irreducible in its exclusionary effects. The exclusionary rule, as a mere policy will reduce the privilege to nothing.

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[97] 377 U.S. 201 (1964).

[98] This is a general problem concerning the open-textured and casuistic judge-made law: legal principles are discovered and judicially established, sometimes categorically as in *Miranda*, but academic writers in United States almost never search for theoretical reasons and justification for their existence. The anti-intellectual attitude characteristic of American law, what Unger calls 'low level analogy mongering,' for example, leaves both substantive criminal law and criminal procedure in the United States utterly deprived of a solid and articulated theoretical justification. Professor Lawrence Friedman, the leading American legal historian, for example defends this general attitude as an 'open-textured' (as opposed to 'close-textured') constant readiness for change, presumably progressive, whereas Bickel, *supra* n. 13, maintains that the

The trouble with the exclusionary rule is that despite its being a prescriptive rule, it carries with it several by-products or secondary purposes, which it can accomplish. The problem arises when one envisions these other purposes as being *the* purpose which the rule serves. These by-products are the deterrence theory first articulated in *Wolf v. Colorado*,[99] and the theory of judicial integrity presented in *McNabb v. United States*.[100] However, one can see the shortcomings of elevating these purposes – or dragging down the rule, depending on the point of view.

In *Mapp v. Ohio*,[101] the Supreme Court extended application of the exclusionary rule to the states. As the legal basis for the decision, it cited *Boyd v. United States*,[102] a case squarely based on the penumbra of the Fourth Amendment, overlapping with the privilege against self-incrimination. Seventy-five years ago, in *Boyd v. United States*, considering the Fourth and Fifth Amendments as running 'almost into each other' on the facts before, this Court held that the doctrines of those Amendments "apply to all invasions on the part of the government and its employees of the sanctity of a man's home and the privacies of life. It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offence; but it is the invasion of his indefeasible right of personal security, personal liberty and private property .... Breaking into a house and opening boxes and drawers are circumstances of aggravation; but any forcible and compulsory extortion

life-span of a legal principle in constitutional law is one, at most two generations (of judges). See Friedman, *The Legal System: A Social Science Perspective*.

The open or close textured approach dialectic in judge-made law deserves a thorough jurisprudential investigation since the Continental approach is clearly in the other extreme: it is far too close-textured and often too conservative and incapable of progressive change. For historical explanation of this see von Savigny, *supra* n. 51 to Chapter 2, who traces this to the 19th-century (Napoleonic) drive for codification and the consequent cutting off of the umbilical cord between the theoretically based (codified) law and 'the life of the nation.' There is probably a happy and equidistant ground between the open-textured anti-theoretical American approach on the one hand and the over-interpreted close-textured European approach on the other hand. The re-emergence of judge-made sources of law in Europe is probably part of the healthy convergence of the two legal traditions. See the delicate wording in *Selmouni v. France* (1999) judgment of the European Court of Human Rights where the issue was whether or not explicitly to incorporate the U.N. Convention against Torture art. 1 definition of torture – or to leave the legal perception of torture 'open textured.'

[99] 338 U.S. 25 (1949).

[100] 318 U.S. 332 (1943).

[101] 367 U.S. 643 (1961).

[102] 116 U.S. 616 (1886).

of a man's own testimony or of his private papers to be used as evidence to convict him of crime or to forfeit his goods is within the condemnation … [of those Amendments]."[103]

The proposition that the Court based *Mapp* on the privilege against self-incrimination and not on the policy of the deterrence of police misbehaviour is further reinforced elsewhere in the opinion:

> Moreover, our holding that the exclusionary rule is an essential part of both the Forth and Fourteenth amendments is not only the logical dictate of prior cases, but it also makes very good sense. There is no war between the constitution and common sense. Presently, a federal prosecutor may make no use of evidence illegally seized, but a State's attorney across the street may, although he supposedly is operating under the enforceable prohibitions of the same Amendment. Thus the State, by admitting evidence unlawfully seized, serves to encourage disobedience to the Federal Constitution which it is bound to uphold.[104]

Mapp, therefore, seems to say that the exclusionary rule will apply to the products of Fourth Amendment violations because these violations are also in effect violations of the Fifth Amendment's privilege against self-incrimination. Since the Court admits that the origins of the exclusionary rule cannot be derived directly from the Constitution,[105] it strives in *Mapp* to show that Boyd stands for the proposition that insofar as the Fourth Amendment is consubstantial with the Fifth, it is entitled to the same inherent exclusion of the products of the violation.

Four years later, however, that logic which interpreted the exclusionary rule as part and parcel of the constitutional rights themselves (prescriptive rule), was first subverted in *Linkletter v. Walker*.[106] There the Court considered the question of retroactive application of the *Mapp* case, which in practical terms meant a release of many convicted prisoners. The Court shrank from such a result and resorted to an instrumental interpretation of the exclusionary rule. Clearly, if the Court held that it was constitutional rights themselves that were at stake in *Mapp*, it would have no option but to make application retroactive. After all, a constitutional right is created by the Constitution, not by the Court, and therefore exists *ex tunc*, not *ex nunc*. Against Black's and Douglas' dissent,[107] the *Linkletter* majority nonetheless decided as follows: "*Mapp* had as its prime purpose the *enforcement* of the Fourth Amendment through the

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[103] 367 U.S. at 646-47.

[104] *Id.* at 657.

[105] *Wolf v. Colorado*, 338 U.S. 25 (1949). Justice Frankfurter therein refers to it as the product of 'judicial implication.' *Id.* at 28.

[106] 381 U.S. 618 (1965)

[107] "There are peculiar reasons why the *Mapp* search and seizure exclusionary rule should be given like dignity and effect as the coerced confession exclusionary rule." *Id.* at 647.

inclusion of the exclusionary rule within its rights. This, it was found, was the only effective deterrent to lawless police action."[108]

The logical misstep in *Linkletter* remained latent until it became clear that reduction of the exclusionary rule to deterrence meant its abolition. *Mapp's* "enforcement" of the Fourth Amendment has nothing to do with deterrence of police and everything to do with the preservation of the defendant's privilege not to become an unwilling source of evidence against himself. Thus, while deterrence of the police is "enforcement" of the Fourth Amendment, it is not the kind of enforcement that the *Mapp* decision had in mind. In other words, every "deterrence of the lawless action of the police" is "enforcement of the Fourth Amendment," but not every "enforcement of the Fourth Amendment" is "deterrence of the lawless police action."

The Supreme Court has never explicitly articulated the overlapping penumbras of the exclusionary rule and the privilege against self-incrimination. The Burger Court majority, however, has done grave damage by further creation of precedents that describe the exclusionary rule as an instrumental means of deterring police misconduct.

Chief Justice Burger is probably the Court's most persistent and vehement critic of the exclusionary rule. He sees the rule as merely an unsuccessful deterrent against police misconduct, and since it is unsuccessful it should be done away with as soon as a plausible alternative is available. In *Bivens v. Six Unknown named Agents*,[109] Burger's dissent argued that the rule extracts too high a price from society in that it deters convictions, not police. For the most part, Burger is correct in his charge that the rule does not deter the police. The police ignore the Fourth Amendment with impunity, a fact little understood by the public.

The rule operates only in those situations where a case actually reaches the adjudicative stage. Most cases end not in trial but in pleas of guilty. The rule has no application to situations involving arrests that are never charged and to those that, when charged, are later dismissed by a prosecutor. Burger even pointed out, in his *Bivens* dissent, that the rule is "diluted by the fact that there are large areas of police activity that do not result in criminal prosecutions – hence the rule has virtually no applicability and no effect in such situations."[110] This further tends to confirm that the exclusionary rule was not designed for the purpose of deterring police.

In *United States v. Calandra*,[111] Justice Powell described the exclusionary rule as merely "a judicially-created remedy designed to safeguard Fourth

[108] *Id.* at 636 [Emphasis added.]
[109] 403 U.S. 388 (1971).
[110] *Id.* at 418.
[111] 414 U.S. 388 (1977).

Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved."[112] This position is inconsistent with the standing requirement for suppressing evidence. Procedurally, a defendant may challenge evidence on the grounds of the exclusionary rule only if he has standing to do so.[113] If the purpose behind the exclusionary rule was to deter police misconduct, would it not make more sense to allow anyone against whom illegally obtained evidence is going to be used to move to suppress in hope of deterring future misconduct? Or does this mean that the Supreme Court will make the exclusionary rule a subjective personal right (as in standing cases), or an objective deterrence policy (as in *United States v. Linkletter*[114] and *United States v. Janis*[115]), depending only on the desired result of the minimisation of the rule?

In conclusion, if the privilege against self-incrimination is a logical concomitant of adversary adjudication (the principle of disjunction) and if, furthermore, the privilege against self-incrimination cannot exist without the exclusion of evidence obtained in violation of that privilege, then the exclusionary rule itself can be deduced from the postulate of impartial adversary adjudication. In other words, one cannot sustain the privilege against self-incrimination without excluding the contaminated evidence. Insofar as this is true, the exclusionary rule is not only a *sine qua non* of the privilege, but seems to be consubstantial with it.

5.4. Comparative and International Aspects

In the second half of the 20th Century, the exclusionary rule became more and better established in American constitutional criminal procedure law and also penetrated into other legal systems and into international law.

Even in the 1960s, several Continental mixed-type, but preponderantly inquisitorial, criminal procedures – introduced the exclusionary rule as a procedural sanction for police's and prosecutors' violations of the privilege. This transplantation of a typical Common Law institution – the inadmissibility of evidence in a jury trial – required some modifications. In a purely adversary trial, all evidence is orally presented to the jury, i.e. anything not presented is capable of influencing the outcome of the trial. In such a trial, there is no dossier. In a Continental procedure, the dossier arriving to the trial judge is the repository of all police and judicial investigation performed during

[112] *Id.* at 348.
[113] *Jones v. United States*, 362 U.S. 257 (1960).
[114] 381 U.S. 618 (1965).
[115] 428 U.S. 433 (1976).

the inquisitorial phase of procedure.[116] The strict exclusion from the dossier of incriminating information would, in fact, prevent self-incrimination. The exclusionary rule incorporated into the 'mixed' criminal procedure would additionally mean that the trial judge, while reasoning out his judgment, could not refer to tainted evidence. If he did, this would be ground for appeal and the judgment would have to be reversed *ex officio* by the appellate court.

Empirically, however, the introduction of exclusionary rule in Europe never had the dramatic effect (upon lowering the official abuse of criminal suspects and defendants) it had had in Anglo-Saxon criminal procedure. The reasons for this are not entirely dissimilar to the motives behind instrumentalisation of the exclusionary rule in the United States, i.e. the rule was reduced to its formal effect and it, therefore, also failed to deter the police. Both in Europe and in the United States the interests of crime-repression, in other words, prevailed over the just and legal consistency, i.e. the constitutional rights of defendants.

The minimisation of the effect of exclusionary rule in Continental criminal procedure had also to do with the fact that it was transplanted from an entirely different (adversary) procedural environment and had no evidence law, no 'principle of orality,' no separate evidentiary hearings and no differentiated case-law to support its integration into criminal procedure. In *Wong Sun* case, for example, it was held that derivative evidence obtained on the basis of the original violation of a procedural-constitutional right of the defendant, i.e. secondary evidence that could not have been obtained were it not for the primary violation by police, must also be excluded. The definition of the causal, *sine qua non link* between the tainted primary and the secondary 'fruits of the poisonous tree' – and many other variations on the question of connection between the two – was developed in many Supreme and Circuit Court cases. On the other hand, the exclusionary rule in Europe continued to wither as an incongruous and lonely evidentiary rule in a preponderantly inquisitorial context. As a foreign evidentiary body, the exclusionary was thus tacitly rejected by the immune system consisting of the inquisitorial mentality of judges who never in their lives perceived themselves as arbiters in a conflict

[116]Legal theorists speak of two 'principles' here. The 'principle of orality' is juxtaposed with the 'principle of inscription.' The latter prevails in the investigatory phase before the investigating magistrate and its product is the dossier. The fiction is then maintained that the 'principle of orality' prevails during the trial phase, i.e. that nothing that is not orally presented to the judge and the assessors is valid evidence. The practical effect, however, is far from this since the trial judge reads the dossier prior to the trial and, since he is actively involved in articulating the proofs during the trial, he selects the proofs he considers relevant on the basis of his prior conjectures. In the end 'the principle of inscription' clearly prevails over 'the principle of orality' even during the presumably oral trial. Lon Fuller's critique of this, *supra* n. 94, is fully applicable here.

between the individual and the State.[117] The latter fact has, of course, to do with an eminent aspect of democratic and constitutional tradition, i.e. with the (insufficient) independence of the judiciary from the executive branch.

However, Article 15 of the United Nations Convention Against Torture (hereinafter CAT) explicitly requires all evidence obtained through torture to be made inadmissible.[118] The same applies to the 'fruits of the poisonous tree.' As a member of the U.N. Committee Against Torture between 1995 and 1998, I had the occasion to observe the empty and formalistic resistance of many States Parties' delegations to CAT, i.e. the bureaucratic incomprehension of the capital importance of the preservation of the privilege and the exclusionary rule in their respective legal systems. During Spring 1998, through official exchanges with the U.N. Commissioner for torture, Professor Nigel Rodley, an explicit agreement was articulated to the effect that the exclusion of tainted evidence is clearly the most effective way of preventing torture. Yet, the Committee perceived no visible progress on the part of States Parties to CAT in terms of making an effort to reform their criminal procedures. When the question of strict exclusion was raised with certain European countries, we encountered stiff official resentment.

The answer of practically all countries with Continental criminal procedure (from Europe to South America to Asia) was that the judges are forbidden to refer to tainted evidence – otherwise part of the procedural file (the dossier) – when reasoning out their written judgments. From a serious epistemological point of view, however, this is not a serious 'argument.' First, it is obvious that arriving at a judgment is an entirely different mental process than *ex post* explaining it.[119] Second, for the purposes of appeal, the judgment may be sufficiently explained through using other facts and derivative evidence, i.e. the 'fruits of the poisonous tree.' Third, if we extend the metaphor, once the judge has eaten from 'the poisonous tree,' there is no way of deleting this from his consciousness. Fourth, the career judges are 'professionally deformed' and are capable of filling-in the obvious *lacunae* in the evidentiary

[117]The investigating judge, the protagonist of the Continental criminal procedure, is a characteristic personification of inquisitorial mentality. While perhaps less biased and more 'professional' than the police's investigators, he is nevertheless also an embodiment of the presumption of guilt. How can he be expected to remain impartial and even to bend over backward applying the exclusionary rule? In terms of the rather presumed 'convergence' of the inquisitorial and the adversarial procedural systems there was at least one theoretical admirer of the institution of the French investigating judge in the United States. See Weinreb, *supra* n. 15 to Chapter 3.

[118]The Convention Against Torture has a sophisticated definition of torture (art. 1), it requires the States Parties to integrate it into their respective legal systems. Likewise, it explicitly requires the States to integrate the exclusionary rule into their criminal procedures at least inasmuch as evidence is the direct or indirect product of torture.

[119]In philosophy, this point was first raised by Bishop Berkely.

material – even if the evidence was in fact deleted from the dossier before it reached him, whereas the lay judges, the assessors sitting together with the professional judge, rarely oppose him or her. Many other considerations of the kind could be made here, but they boil down to one conclusion. The part-inquisitorial part-adversarial European criminal procedure is unsuitable for consistent protection of the privilege as a human right.

Another observation from the United Nations Committee against Torture was, unsurprisingly, that countries with inquisitorial tradition tend to have a higher incidence of torture and other official abuse. This raises an interesting question as to what extent do the inquisitorial attitudes of police, of prosecutors and of judges manifest simply an acute absence of true democratic tradition. As we have indicated in the Introduction of this chapter, the rule of law itself, and the privilege as an integral aspect of it, are inherently democratic.[120] In contradistinction to that, inquisitorial process is – because it treats the suspect-defendant as an object and places the burden of proof on him to undo an authoritarian presumption of guilt etc. – intrinsically authoritarian. It follows logically that the inquisitorial model of criminal procedure, and furthermore the philosophy of law on which it is founded, is pretentious, arrogant, and authoritarian. It is pretentious because it starts from an explicit premise, embodied in the persecutions of the 'Holy Inquisition,' to the effect that human rules are a manifestation of Divine Will and that human justice can know the whole truth; it is arrogant because it imagines the pretentious premise giving it the empowerment and the license to enforce whatever *it* deems 'true' and 'just.' But above all, it is authoritarian, since pretentiousness and arrogance serve here as secondary rationalisations for the usurpation of power man wields over man. The fact that this power is embodied in the State makes little difference.

Thus, criminal procedure may be seen either dogmatically as a vindication of moral values (essentially personal beliefs of those who have the power to write the substantive rules of criminal law[121]), or it may be perceived

[120]More specifically, one speaks here of the attitudes *vis-à-vis* authority. See Zupančič, *The Crown and Criminal: The Privilege Against Self-Incrimination*.

[121]See the brilliant analysis by Svend Ranulf in his *Middle Class Psychology and the Demand for Punishment*, and Harold Lasswell's *Introduction* to it. Ranulf demonstrates persuasively that the 'truth' as defined by the substantive criminal law's incriminations is to a large extent an outgrowth of the middle-class *réssentiment* – much in the same fashion as suggested by Nietzsche in his *Genealogy of Morals, Second Essay, supra* n. 31 to Chapter 2 and Freud in his *Totem and Taboo*, *supra* n. 9. In view of this the current emphasis on 'truth-finding' in American criminal procedure, i.e. in the Supreme Court's cases, is an epistemological curiosity. It demonstrates perhaps that the legal profession is far too hermetically separated from the rest of social sciences.

pragmatically as yet another resolution of conflict between the State and the defendant as two equal legal subjects – like in any normal civil proceeding.[122]

On international level, the privilege, at least inasmuch as torture as the gravest abuse is concerned, is no longer debatable. Both the privilege and the exclusionary rule are now explicitly required by international law. The problem, therefore, lies in the complex repercussions the required integration of both should trigger in the respective legal systems. The signatories to CAT probably did not realise that the prevention of torture is merely the tip of the inquisitorial iceberg and that CAT – probably as the only U.N. Convention – directly affects the whole philosophy of criminal procedure. While the eradication of torture may seem to be a political and cultural ambition, one simply cannot separate this ambition from the procedural context generating the compulsive and authoritarian tendency towards 'truthfinding' and consequently the official abuse, the inhuman and degrading treatment and torture by the police. The required effective exclusion of tainted evidence, however, simply cannot be merely a political ideal; it requires serious structural and consistent changes in the whole system of criminal procedure.

6. An Analysis of the Substantive Definition of Torture Deriving From Article 1 of the Convention Against Torture

The word torture derives from the Latin semideponential verb *torquor* meaning 'to turn,' 'to press,' 'to turn the screw,' etc. The Latin noun *'tortura'* was already in use in Roman law. It signified then, as it does now, the intentional infliction of suffering with the specific intent to extract a confession or other kinds of information relevant in the context of criminal procedure.

The extent of the legal use of torture in Roman law is not known. After the Fourth Lateran Council (1214) when the Catholic Church specifically proscribed the participation of its clergy in ordeals, the Continental Criminal procedure reverted to an old Sicilian form of criminal procedure. The issue was, in modern terms, epistemological in the sense that the ordeals as an

[122]It is curious, perhaps, that many of the Constitutions of the new states in Central and Eastern Europe as well as the international acts which these constitutions were obliged to follow, speak of the '*complete equality between the State and the defendant'* in criminal procedure. Since the State (its Executive branch) and the defendant are *un*equal in terms of actual physical power, the equality would clearly mean that the State should be forbidden to use physical power of the defendant. But this is simply inconceivable since starting with arrest, custodial interrogation, pretrial detention etc. are all manifestations of the State's physical superiority. If equality were consistently carried out in the procedural legislation, however, criminal procedure would of necessity become like the normal, adversary civil procedure.

'experimental method' of ascertaining the truth about a past criminal event were no longer possible and thus a new mode of inquiry into the allegation of a criminal act had to be devised.

The maxim "*Confessio regina probationum*!" ("The confession is the queen of all proofs!") was the central principle of the inquisitorial criminal procedure. This naturally led to torture as a means of extracting the confession. Torture was mentioned and criticised in Césare Beccaria's famous book *Dei delitti e delle pene* in 1764. *Codex Theresiana*, an Austrian code of criminal procedure has the dubious honour of being the only illustrated criminal code in history: the illustrations (etchings) pertained to two traditional methods of torturing the suspect, the Spanish and the Prague form of torture. In 1776, Maria-Theresa of Austria finally, upon urging of her minister Sonnenfeld, abolished torture. From the historical point of view it is perhaps good to keep three things in mind:

1) Torture has always been a concomitant of the inquisitorial criminal procedure. The English tradition relying upon jury rather than torture has, with the sole exception of the Star Chamber period under the Stuarts, never employed torture as a means of truthfinding in criminal procedure. The preponderantly inquisitorial modern ("mixed") criminal procedure as employed in most countries with the Continental legal tradition *systemically* favours forced self-incrimination.
2) Torture together with the inquisitorial model of criminal procedure is a Western invention. The legacy of the two (together!) has been inherited by the countries outside Europe, from China to Chile.
3) Europe has no reason to be particularly proud or paternalistic about torture for another reason. It has itself abolished torture only about 200 years ago, without however abolishing the root cause of torture, i.e. the inquisitorial model of criminal procedure.

6.1. The Definition of Torture as per Article 1(1) of the Convention

It is clear that the definition of the offense of torture was carefully drafted by the legal experts to contain all the established doctrines of substantive criminal law (the doctrine of the *actus reus*, the doctrines of volition and cognition, the doctrine of *dolus specialis,* the doctrine of *delictum proprium,* and the doctrine of justification). Thus, the definition of torture in Article 1 of the Convention cannot be really seen and interpreted apart from the general principles and doctrines of substantive criminal law such as represent the common heritage of human civilisation. This is especially true because in the Convention, the definition of the crime of torture is *not* presented as an

integral part of a criminal code. It would be misleading, however, to suppose that the meaning of the definition of torture cannot thus draw on the general principles and doctrines contained in a modern criminal code. The State Party to the Convention, for example, cannot be expected to punish a torturer, if he presents the excuse of insanity, if he is a minor etc. Also, there would be borderline cases, for example those of intoxication which in some states represents a legitimate excuse (not justification!) whereas in other legislations it may represent even an aggravating circumstance. Clearly, thus, the Convention presupposes the existence of a doctrinally consistent criminal legislation (code) context and clearly the crime of torture would fall into a very different context depending on whether it would appear as a crime in the German *Strafrecht,* the American *Model Penal Code* (MPC) or the Chinese Criminal Code. The Convention, however, only requires the State Party to incorporate the crime of torture into its own extant Criminal Code – assuming, however, that it does contain all the relevant principles, doctrines and rules of substantive criminal law.

What follows is simply a short analytical elaboration deriving from the definition itself:

"Each State party shall ensure that all acts of torture are offences under its criminal law" (Art.4(1)). This implies that the State Parties are free to integrate the definition of the criminal act of torture into their domestic criminal law. They may expand the zone of incrimination foreseen by the Convention but they may not constrict it. Thus, for example, they must make complicity punishable, but they may also punish conspiracy to commit torture and thus make punishable the sheer agreement to commit torture.

The most complex issue in dealing with the States Parties' mode of integration of the offence of torture into their criminal law will be, unsurprisingly, the relationship between their national criminal law and procedure and the Convention as a piece of international law. It is not only a matter of copying the definition of torture and putting it into the so-called special part of the criminal code of the respective country. The moment this happens all the provisions from the general part of the criminal code (e.g. different defenses) become applicable to torture also as one of the offences.

Apart from the particular reservations the State might itself have made concerning its applicability in its own legal system, the Convention foresees the following limitations upon the State Parties:

1) Justification, Art.2(2) of the Convention: "No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as justification of torture."

2) Order of a Superior Officer, Art. 2(3): "An order from a superior officer or a public authority may not be invoked as a justification of torture."
3) The Attempt, Art. 4(1): "Each State Party shall ensure that attempt to commit torture is an offence under its criminal law."
4) Complicity or Participation, Art. 4(1): "Each State Party shall ensure that an act by any person which constitutes complicity or participation in torture is an offence under its criminal law."
   (1) It is now fairly clear what constitutes complicity (solicitation, instigation, aiding and abetting, aiding after the fact etc.) although here, too, there will be wide variations between different legislations.
   (2) The word "participation," however, does not have such an established meaning in criminal law and is apparently meant to apply to broader criminal responsibility for conspiracy. The latter, however, is not a crime in the Continental criminal law codes.
5) Punishment, Art. 4(2): "Each State Party shall make [all acts of torture, attempted torture, complicity and participation in the acts of torture] punishable by appropriate penalties which take into account their grave nature."

The very fact, for example, that the attempt to torture must be an offence will, at least in most Continental criminal jurisdictions per se imply that the act of torture is punishable above certain levels of punishment, because the attempts are foreseen as punishable in the general part of the criminal code only if the punishment foreseen for the (attempted) offense is e.g. above five years of imprisonment.

The Convention also makes certain general procedural requirements upon the State Parties (Arts. 5 and 6), the main elements of which are as follows:

1) the *establishment of jurisdiction* over the offences of torture;
2) the *arrest* of the perpetrator of torture;
3) the ensuring of his *presence* during the trial or pending extradition;
4) the *preliminary inquiry* into the facts:
   (1) by the police and the prosecution in the Anglo-Saxon legal system;
   (2) by the police and the investigating judge in the Continental legal system;
5) ensuring the *communication* with the representative of the State of which he is a national;
6) *notification* of States referred to in Art. 5(1)
7) Art. 12: "Each State Party shall ensure that its competent authorities proceed to a prompt and impartial investigation wherever there is reasonable grounds to believe that an act of torture has been committed under its jurisdiction."

8) Art. 13 and 14 provide for two kinds of rights of the victim of the act of torture:
   (1) the *ex officio* criminal investigation of the alleged act of torture upon the complaint of the victim;
   (2) the civil redress (in torts) comprehending the right to compensation *(damnum emergens, lucrum cessans)* and full (medical, social, psychological etc.) rehabilitation.
9) Art. 15, The Exclusionary rule**:** "Each State Party shall ensure that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings."

The importance of this provision in terms of the systemic preventative impact the exclusion of illegally obtained evidence has upon the inherent police tendency to resort to putting pressure (torturing him or her) upon the suspect in their custody (the so-called custodial interrogations) cannot be overemphasised.

Different countries have adopted this rule mainly under the influence of the decisions of the former U.S. Supreme Court (Justices Douglas, Brennan, Warren, Goldberg etc.). Many Continental law countries have also followed the example and introduced the exclusionary rule into their preponderantly inquisitorial criminal procedures. However, the efficacy of the exclusion of the tainted evidence is somewhat reduced unless there is a jury from which the evidence be excluded in the context of an adversary criminal trial.

Since the purpose of torture is in most cases the violation of the privilege against self-incrimination, i.e. to make the (tortured) suspect an unwilling source of evidence against himself, and since the exclusion of such evidence precisely frustrates such police intentions and practices, the exclusionary rule is the best systemic device for preventing acts of torture committed at the police stations all over the world.

6.2. Elements of the Definition of Torture as a Criminal Offence (Corpus Delicti)

1. Torture is an act:

The *actus reus* of torture may be a commission. This would be the regular situation in which the actor would "inflict severe mental or physical pain or suffering on another person." The verb "to inflict" implies that there must be (1) a physical bodily movement on his part; (2) a mental or physical pain or suffering on the part of the person (so tortured); and, (3) there must be a causal link between (1) and (2).

The act of torture could also be one of omission or a commission by omission (*commission par omission*).

Moreover, an *act* of torture must be a manifested effort of the will of the actor. The act (of torture) must be a clear manifestation of the actor's criminal will, of his being a torturer. If the causal nexus between the actor's being and the act is broken by either the circumstances on the part of the actor (*excuse*) or the objective circumstances (*justification*) we may have the case of an excuse, insanity, mistake of fact (error facti), mistake of law (error juris), intoxication. However, we cannot have the case of (as per Art. 3(1) of the Convention): an order from the superior officer, an order from a public authority, using prevention of greater evil or self-defense or defense of another as a justification.

2. An attempt of torture is an act (Art. 4(1))

Article 4, subsection 1 of the Convention specifically provides: "Each State Party shall ensure that [all attempts to commit torture] are offences under its criminal law."

Note the words "under its criminal law." This implies that the State Party is permitted the latitude of its own definition of attempt as it may occur in the general part of its criminal code. However, note that torture as an act is not complete unless severe pain or suffering in fact occurs on the part of the victim. The general part definitions of the criminal attempt will vary from jurisdiction to jurisdiction according to the definition as such of the attempt; the punishability of the attempt up from a certain severity of the sanction foreseen for it; the (non)criminality of the voluntary abandonment of the attempt.

3. There must be a causal link between the act of torture and its consequence (the severe mental or physical pain or suffering)

The doctrine of *sine qua non* causation will usually apply, i.e. the act of torture must only be the necessary preceeding condition of the severe pain or suffering. This will usually be a medical or a psychological question to be advised upon by the experts.

4. There must be the consequence of torture (severe pain or suffering)

There are four combinations here: severe mental pain, severe mental suffering, severe physical pain, severe physical suffering.

5. Torture must be intentionally inflicted

This comprises the whole *mens rea* doctrine (and some of the defenses mentioned above), but it is important to take into account that under "intentionally" will fall: direct special intent where one has full cognition or full volition.

6. Torture is inflicted with specific intent
Torture must be inflicted with specific intent for such purposes as "to obtain from him or a third person information or a confession;" or to "punish him for an act he or a third person has committed or is suspected of having committed."

7. Torture can only be inflicted by a public official or other person acting in official capacity
Torture is a *delictum proprium* and cannot be committed by a person who is not an official, or acting in official capacity. Very complicated legal problems can arise out of the possible, if paradoxical, defense that a person cannot be acting in official capacity if he is not only transgressing the official powers of his official capacity but is thereby committing the crime (of torture).

7. Presumption of Innocence

The usual procedural concerns (searches and seizures, probable cause required to accompany them, double jeopardy, the privilege against self-incrimination, the right to a public trial, the right to confront one's witness, to have the assistance of counsel, etc.) can be seen as simple constitutional commands elaborated in the case law into a detailed and coherent structure. The mirror images of these commands are the rights of the defendant. As we saw in a previous discussion, when the procedure is autonomous to the substantive criminal law, often, a suspect may be acquitted based on a procedural techicality irrespective of his substantive guilt or innocence. In such a case, the suspect is presumed to be innocent. The rights of the defendant, if violated, may activate the presumption of innocence doctrine to have this effect on the outcome.

To elaborate on the above point, we again take a look at the value placed on substantive morals in a particular legal system. No matter how 'guilty' the individual is 'in fact,' if he is never caught, his crime investigated and his guilt adjudicated, he will never be punished. The substantive criminal law is, however, so conceived that an abstract criminal responsibility attaches immediately after the substantive criteria are satisfied – immediately after the act has been committed. Even if such a person is never convicted, we would still say of him: "He is a criminal!" This is not true to the same extent in civil procedure, where a claim, if controversial, will have to be judged by a court before a party can meaningfully assert that his claim is valid. The difference stems from the overlapping of the criminal law with strongly held moral values, which makes the legal declaration of the violation of these norms seem to be almost a tangential matter.

Whereas the substantive criminal law can be seen as the minimal moral code, a simple articulation of intensely shared values, the process seems nothing but a necessary evil. Simply because we must first find out who did what and why and only then declare this guilt, do we have to have a process. There is an effect to the contrary, however. The more abhorrent the criminal act seems to us, the more careful we have to be not to convict the wrong person. Thus, the more we condemn the act, the more we hesitate about condemning the actor because we cannot afford to pin *peccatum sicut horrible* on any individual unless convinced beyond any doubt that he really did it.[123] The eagerness to condemn has a built-in restraining mechanism. Moral indignation must see forbidden acts as truly exceptional unless it arises from sheer misanthropism. If exceptional, such acts are rare and unlikely, as is the probability that a particular person could in fact have committed them.

It follows that the more ancillary the criminal process to the substantive criminal law, the more likely is the process to become autonomous and independent from the substantive law. Why?

If moral values are strongly held and criminal behaviour is met with much blame, the criminal process will simply declare what is seen as intrinsically true (i.e., it will be merely ancillary). Yet the intense condemnation of the act calls for prudence in convicting anybody of it. The ancillary truthfinding mechanisms of the criminal process must be complemented by 'procedural barriers.'[124] These procedural barriers must be so constructed that they will under no condition allow an innocent man to be convicted. There thus appears a whole population of false negatives – individuals who are guilty by substantive criteria but presumed innocent by the procedural yardstick, whose existence proves the relative independence of criminal procedure from the substantive criminal law. The presumption of innocence is the theoretical issue which epitomises this paradoxical outcome.

Despite all the complexity of its procedural and evidentiary detail – the trees that obscure the nature of the wood – it is possible to say that the presumption of innocence is not merely a sociological result but a practical necessity. Imagine a primal adjudicative scene: A charged that B has done something forbidden and asks a judge to adjudicate. In such a situation the presumption of innocence is a logical necessity because it simply means that A cannot accuse without proof; if that were possible then one quarrelsome A could bother a whole population of B, C, D, E, F, etc without ever producing anything beyond sheer accusation. It would also be illogical to require B, C, D, E, F, etc to produce evidence that they haven't done something in order to disprove A's accusations.

[123]The reverse logic is, of course, also possible.
[124]Damaška, *supra* n. 16.

Presumption of innocence simply means, then, that one is held innocent unless found guilty by a competent court. From this point of view the presumption is 'true' only insofar as it is true that in general the people in any given society are innocent. In particular, however, an individual is guilty, per se implies that he might not in fact be innocent. If it were so clear to us that he is innocent, there would be no need to presume that he is innocent.[125]

Presumption of innocence is not a logical presumption. It is a postulate, a principle that guides criminal procedure and criminal law and is not a statement of fact. If it were a statement of fact to say that "all people are innocent," there would be no need either for criminal law or for criminal procedure. On the other hand, it is also not logical to have a person indicted or perhaps even detained and at the same time to claim that that person is presumed innocent. If he is so innocent, why then is he put in jail even before being found guilty by a competent court?

Let us examine now what must logically happen after a criminal trial is over. The scope of experiment lists the following possibilities: (1) the answer regarding guilt is either known or not known; (2) if the answer is known, it is either (a) guilty or (b) not guilty. However, given the fact that the court cannot shrug its shoulders and pronounce the verdict of doubt we are left with only

[125]But see Fletcher, *The Presumption of Innocence in the Soviet Union* and his *Two Kinds of Legal Rules: A Comparative Study of Burden-of-Persuasion Practices in Criminal Cases*. In such writings, presumption of innocence is seen as a technical rule distributing the burden of proof. But before such technicalities can be understood, it must be established that the presumption of innocence is a necessary logical corollary of the accusation itself – and it does not really matter whether that accusation occurs in the civil or criminal procedure. It is a corollary to the common sense conclusion that the person who comes forward to require adjudication must be able, at least, to carry the initial burden of proof. That the 'presumption of innocence' is not necessary in civil procedure, whereas it presents such a great problem in criminal procedure, is simply due to the fact that there is an imminent conflict between presumption of innocence and truth-finding. Since in civil procedure, truthfinding is not essential, the truth about the civil dispute does not *have* to be discovered. The essence of the civil dispute does never have to be discovered (e.g, if the parties decide to settle the case before the end of adjudication). However, according to the criteria of substantive criminal law, a person is seen as guilty even though never really adjudicated as such. It is for that reason that the Model Penal Code never speaks of a 'defendant,' but rather of an 'actor.' Substantive criminal law requires the truth about criminal guilt to be discovered, and it exercises such moral pressure on all the parties involved in criminal procedure that the presumption of innocence represents an attempt to counter-balance this pressure of the presumption of guilt.

Presumption of innocence is logical only insofar as the adversary (not the inquisitional) procedure can afford to keep the parties in dispute apart. Such conclusion follows from the very nature of adjudicating. The party who raises the issue to be adjudicated must have some evidence whereby he intends to persuade the adjudicator (the indictment plays the same inhibitory role). The presumption holds valid only for the adjudicator – but not in the inquisitorial procedure where the judge and investigator are merged into one person.

two possibilities, namely, guilty and not guilty. But is it really so self-evident that the court cannot pronounce a verdict of doubt in criminal cases?

It is obvious that a conflict is presented to an unbiased adjudicator in order to be resolved. It is in the nature of the conflict to be presented in either-or form, because one of the two judicial combatants must win and the other lose. Thus, anything short of such a resolution which clearly redefines the social roles of the parties in conflict is an adjudicative fiasco. Judges, in other words, must decide, not doubt. In many social conflicts the decision, whatever it be, is more important than its substance or the solutions. When the adjudication based on doubt is pronounced, it is not founded squarely on doubt, but *asserts* innocence positively. Were the judge allowed to say, "I doubt that you are innocent but I rely on the presumption of innocence and therefore pronounce you acquitted," he would effectively destroy the *raison d'être* of the presumption. This, then, is a problematic situation to which there are two possible solutions. The most obvious is that the judge should say nothing, but acquit the defendant under the heading of 'not guilty.' This is a lie, but then again it is not because the law declares in advance that those who are not persuasively prosecuted will be acquitted as if they were not guilty. If it is a lie and considered as such, it is still a very small one and does not require the judge to fabricate the non-existent reasons for acquittal.

Another less pleasant and rational solution is that the judge should explain his reasoning concerning the doubt. Again, however, a dilemma arises. If he explains fully why he doubts the defendant's guilt, inevitably he will be explaining why he doubts his innocence, too. Thus, there is a schizophrenic duality to the judgment. The verdict is 'not guilty,' the explanation 'doubtful,' perhaps implying guilt. The solution is unacceptable, yet most European criminal procedures have not found a way out.

Anglo-Saxon criminal procedure has it the best way, because the jury is not required to explain its verdict. If it says 'not guilty,' the defendant will be fully rehabilitated even though the prosecution and perhaps the defendant himself will have doubts about the rationality of the verdict. Yet the absolute and unexplained nature of the verdict gives full force to the presumption of innocence.

The presumption of innocence and the double jeopardy proscription go hand in hand. Legally, the double jeopardy doctrine is derived from the Fifth Amendment of the Constitution, which provides that "[n]o person shall be … subject, for the same offense, to be twice put in jeopardy." If we ask why a person cannot be tried more than once for the same offense, we find that the theoretical basis is derived from the doctrine of the presumption of innocence.

As far as the presumption of innocence is concerned, if a person has been tried once and been found innocent with regard to a particular event, it

does not necessarily follow that he must not be tried the second time for the same offense, because exactly the same 'presumption of innocence' could be operative in the second trial. Thus, it seems, the presumption of innocence in itself would not prevent the second trial for the same offense.

To punish the same person for the same offense more than once would be manifestly unjust. This follows from the premise that the first punishment suited the crime and thus the second punishment must necessarily be superfluous. If the first punishment is just, then the second punishment is necessarily unjust. If a person adjudicated guilty, sentenced and punished should have to go through another criminal trial for the same offense, that would necessarily imply that the first trial was not enough, that it was wrong. If the possibility of second trials of guilty persons were systematically allowed, it would result in the destruction of the adjudicatory system, which by allowing successive trials, would be implicitly declaring itself untrustworthy. The distrust would be literally built into the system of adjudication. A system of adjudication, however, that does not evoke trust of those that subject themselves to it is at best a contradiction in terms, and more likely a farce.

The same reasoning extends to the verdict of guilty as well as to the non-guilty. However, the only verdict logically consistent with a second trial of the same issue (the verdict of doubt) is pre-empted by the presumption of innocence and therefore, second trials are logically impermissible.

Presumption of innocence, therefore, cannot exist without the privilege against double jeopardy.

If the logic of the presumption of innocence is to be given some reality, then the criminal prosecution of a citizen must be considered an exceptional situation. Exceptional situations cannot be prolonged, nor can they be too frequent. Therefore a verdict must be given at the end of every trial that puts *ad acta* the case and the prosecution against a particular defendant. Golding cites this requirement for finality as one of the three basic principles of adjudication.[126] If the prosecution has not succeeded in proving its case and acquired a conviction and punishment against a particular defendant, then the presumption of innocence should regain full force and the defendant be left alone on that account once and for all. He regains full social respect and is not to be bothered in this particular regard again.

If the model of criminal procedure is to impart legitimacy, it must be a model of a rational impartial adjudication. That model in itself dictates certain requirements that we tend to call procedural rights. One must have procedural barriers not only because they protect the defendant, but because

[126]See Golding, *Philosophy of Law,* at p. 112.

they are mandated by the rational model of adjudication itself. Therefore, we are not choosing between granting or not granting certain procedural rights, rather we are choosing between rational and irrational adjudication.

8. Conclusion

The basic argument we developed here covered the underlying logic of forcible self-incrimination. But the far more acute problem we face today, unfortunately, is no longer only self-incriminating evidence extracted by torture and other ill treatment, i.e. by force. Witness the current subversion of all levels of trust[127] in society brought about by many different kinds of self-incrimination and erosion of privacy based on deception and concealment.

None of the intrusive practices of deception and concealment derives from the force directly applied to the victim of invasion of his or her privacy. In English and American case law, such invasions of privacy have been denoted as based on guile. Initially, in the 18th century, judicial cogitation was focused upon protection of property (home) as the *situs* of privacy. As the attention later shifted from 'territorial' aspect, it became obvious that privacy was about 'people not places.'[128] Thus, everything from eavesdropping, electronic

[127] For an interesting appraisal of 'trust' as 'social capital' see Fukuyama, *Trust, The Social Virtues and the Creation of Prosperity*.

[128] "The Fourth Amendment [protecting against unreasonable searches and seizures] can certainly be violated by *guileful* as well as by forcible intrusions in a constitutionally protected area [of privacy]." (Emphasis added.) *Gouled v. United States*, 255 U.S. 298 (1921).

The first English case concerning privacy goes back to 18th Century: *Entick v. Carrington and Three Other King's Messengers*, 19 How. St.Tr. 1029 (1765). Lord Camden held there:

> By the laws of England every invasion of private property [as a territorial aspect of privacy], be it ever a minute, is a trespass. […] It is very certain that the law obligeth no man to accuse himself; because the necessary means of compelling self-accusation falling upon the innocent as well as the guilty, would be both cruel and unjust; and it would seem that the search for evidence is disallowed upon the same principle. Then, too, the innocent would be confounded with the guilty.

Lord Camden's doctrine was then followed-up in the United States in *Boyd v. United States*, 116 U.S. 616 (1886):

> It is not the breaking of his doors and the rummaging of his drawers, that constitutes the essence of the offence, but it is the invasion of *his indefeasible right of personal security, personal liberty and private property* [*i.e. privacy*] […] It is the invasion of this *sacred right* which underlies and constitutes the essence of Lord Camden's judgment. (Emphasis added.)

Later on in *Katz v. U.S.*, 389 U.S. 347 (1967), a case in which the police listened on an conversation carried on in a public phone-booth, the Supreme Court developed the doctrine

wiretapping and bugging to different kinds of informants, stoolpigeons, *agents provocateurs* (entrapment by provocation) and many other new 'techniques' – now enable the police (and many others) to procure self-incriminatory evidence covertly and wholly without the use of force.

Moreover, these intrusions into concentric spheres of individual privacy are no longer related only to incipient criminal procedure i.e. to self-incrimination proper. We now speak of the massive commercial, political, intelligence and police surveillance of everyone everywhere and consequently of capital diminution of personal privacy. Most of this surveillance never develops into criminal evidence, i.e. the subject of surveillance will never even find out that he has been producing information against his interests. He or she does not know the information is being used against him, is never legally accused of anything, there is no criminal trial. Consequently, too, the procedural sanction of evidentiary exclusion is entirely inapposite.

As in many other constitutional reasonableness tests – increasingly pivotal to American constitutional adjudication[129] feigning judicial 'objectivity' – it simply became less and less 'reasonable' for the individual in different private life situations to assume that he or she can expect privacy. People have psychologically internalised their constant exposure, i.e. they are by now sufficiently apathetic to take the progressive erosion of their privacy – often amplified and exploited by the 'free press' – for granted. Even suspicious reactions to perpetual surveillance have all but disappeared, as if people, which may be true, have nothing worth keeping intimate any more. If this means that smugness and complacency have replaced personal distinctness, individuality, originality, rebellion and the possibilities for change, this has

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of *reasonable expectation of privacy*, i.e. it abolished physical trespass upon private property as a criterion of violation. The criterion of 'reasonable expectation of privacy' was adopted by the European Court of Human Rights thirty years after *Katz* in *Halford v. U.K.* judgment of 25 June 1997; see the first essay in Section III of this book.

[129]These tests (standards of judicial review of constitutionality), based on Art. II of the United States' Constitution, are so far probably best condensed in *Equality Foundation of Greater Cincinnati Inc. v. Cincinnati*, CA 6, No. 94-3855, decide 5/12/1995), 63 LW 2706 (5/23/95). There are three of these criteria (doctrines). They correspond to three different levels of alleged discrimination:

(1) The most stringent or *the strict scrutiny test* applies to judicial review of statues targeting a suspect classification such as race, alienage, national origin etc: "The law will be upheld only if it is (a) suitably tailored to serve (b) a compelling state interest."
(2) *The heightened scrutiny test* applies to legislative acts burdening a 'quasi-suspect' class, such as gender or illegitimacy (of birth) etc: "The law is presumed invalid unless it is (a) substantially related to (b) a sufficiently important government interest."
(3) The least strict is *the rational relationship test* applicable to social and economic discrimination issues: "[It] inquires whether the classification at issue is (a) rationally related to (b) a legitimate government interest."

ominous implications for human creativity, i.e. for the psychologically and socially indispensable processes called individuation.[130] The liberal Western State has, by authorising and sometimes exploiting these deceptive incursions into privacy, receded to very un-liberal positions.[131]

The descent, however, to this massive and progressive loss of separate individuality, erosion of interpersonal trust, destruction of intimacy, in short, privacy was marked by a series of decisions by the Supreme Court of the United States. In these decisions, the compliant and self-referential 'reasonable expectation of privacy'[132] test proved to be a knife that cuts both ways. By this reasonableness test, the courts effectively empowered themselves to decide which subjective expectation of privacy is 'objectively' reasonable and which is not.

Self-incrimination based on force at least leaves the subject of torture or ill treatment the choice, i.e. his 'consent' to self-incrimination may be forced, but it is conscious.[133] Self-incrimination based on guile, however, cannot be said to have anything to do with 'consent' of any kind. The object[134] of

[130]Karl Jung describes this as a process of 'individuation,' i.e. an individual's self-actualisation, self-realisation, the attainment of his or her particular subjectivity, individuality etc. Michael Foucault uses the word *subjectivation* derived from *subjectivité*: *Se dit de ce qui est individuel et susceptible de varier en fonction de la personnalité de chacun*; or, in Shakespeare's words 'But above all else, my son, to thy own self be true.'

Both of these processes, whatever they are called, are inextricably in tandem when it comes to original creativity, i.e. there is no original creativity without original subjectivity. If we reverse this commentary to sociological parlance, we get 'the hegemony of dominant social consciousness,' a term introduced by Antonio Gramsci in his *Prison Notebooks*, *1929 to 1935*, resulting in what Erich Fromm of the Frankfurt school called 'the prototypical character.'

[131]See Chomsky, *supra* n. 5.

[132]To know more about the 'reasonable expectation of privacy,' see the first essay in the third section of this book.

[133]Even the rudimentary legal psychology recognises that a valid consent must have its cognitive and its volitive constituent. Perhaps the most interesting American case dealing with these aspects of consent is *Schnecloth v. Bustamonte*, 412 U.S. 218 (1973).

> Except where a person is unconscious or drugged or otherwise lacks capacity for conscious choice, all incriminating statements – even those made under brutal treatment – are 'voluntary' in the sense of representing a choice of alternatives. On the other hand, if 'voluntariness' incorporates notions of 'but-for' [*sine qua non*] cause, the question should be whether the statement would have been made even absent inquiry or other official action. Under such a test, virtually no statement would be voluntary because very few people give incriminating statements in the absence of official action of some kind.

Bator & Vorenberg, *Arrest, detention, Interrogation and the Right to Counsel: Basic Problems and Possible Legislative Solutions*.

[134]We use the term 'object' rather than 'subject' because the individual here, if anywhere, is no longer an end in himself. In terms of Kantian categorical imperative he has clearly become an

eavesdropping does not even know that he has been producing information to be subsequently used against him. Even in purely legalistic language, consent to anything may be vitiated unless there is free volition and full cognition. Torture subverts volition because it makes the subject consent to something, e.g. confessing, giving information, which he would without this kind of pressure not do.

In terms of respect for personal dignity, however, deception, is doubly subversive because it wholly eliminates cognition and consequently precludes all willed resistance to intrusion. In other words, while torture only distorts volition, guile eliminates both the surveyed victim's cognition and volition.

The first question for us is, therefore, why does the basic logic of rule of law precluding forcible self-incrimination not preclude guile and deception?

The answer to that is short and clear. Historically, as a system, the rule of law has always been a very basic substitute for force alone. In other words, law as a social antidote for brute physical power and force merely shifts the criteria for conflict resolution from a natural combat to artificially enforced logic. Its original, rather primitive teleology does not go much beyond that, i.e. substantive justice and the ethics associated with it are very much, as we said before, a secondary by-product to the primary Hobbesian state-pragmatism.

Substantive criteria of 'justice' only accumulated later through this primary 'procedural' practice. Layer after historical layer of these secondary ethical deposits created an illusion, albeit imbued with culture and civilisation, that law is not only about procedural fairness but primarily about what is in fact secondary and derivative: substantive justice, ethics, honesty, substantive fairness. However, it is important to remember that the primary process did not, in itself, even require that the secondary substantive 'justice' be either logical or honest.

As indicated by the relationship between positive law and equity or by the adage *summum jus summa injuria* – the relationship between formal logic (legal formalism) and substantive justice, too, has always been somewhat uneasy. Justice by formal logic has always been highly susceptible to abuse – by the parties, by the judges and by others. Law is not an exact empirical science where deception is quickly offset by the objective feedback of empirical experiment. Cicero's dictum to the effect that law is the art of good and just (*Jus est ars boni et aequi*) has never been taken quite so seriously. For similar reasons, the so-called 'natural law' has never really taken root in Western legal cultures. The relationship between law and morality is at best tenuous and is usually illustrated with two, only partly overlapping circles. Moreover, whenever in history the relationship between the rule of law and (someone's)

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object used for purposes other than himself. Kant, *The Foundations for the Metaphysics of Morals* and *The Critique of Practical Reason*.

morality was too intense, there have always been serious deformations.[135] The inherited procedural deformations of inquisitorial procedure derive from 'morality' of Catholic Church concerning apostasy, blasphemy, schism etc.[136] In other words, law as a system derives from logic and experience, not from morality or ethics.[137]

Ruling by law has, even in the time of sophists, always, not only made deception possible, but also has positively encouraged chicanery, trickery, guile, deceit, cunning, duplicity and other forms of non-violent dishonesty. As physical combat was replaced by verbal combat in front of judicial and other authority, the advantage has always been on the side of the cunning and the deceptive. This was to be expected and is entirely understandable. The likelihood of 'perversion of justice' largely derives from the necessary legal coding and decoding of minor premises ('facts') to make them fit the selected legal major premises ('norms').[138] Hence the derisive, hostile and at best ambivalent attitude we witness in all cultures *vis-à-vis* the sophist and counter-intuitive effects of legal formalism as a means of resolving personal conflicts in the State-sponsored framework of the rule of law.[139]

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[135]For a recent, and failed, attempt at revival of natural law see Finnis, *Natural Law*.

[136]See Bayer, *supra* n. 6 to Chapter 1.

[137]Holmes' venerated article *The Path of the Law,* for example, makes this abundantly clear, as does Lon Fuller's book *The Morality of Law*.

[138]For a description of this coding and decoding, see Berman, *Socialist Legal Systems: Soviet Law, International Encyclopedia of the Social Sciences,* at p. 204. For reasons, why this is inevitable, see Unger *supra* n. 5 to Chapter 1, at p. 93. I vividly remember a conversation I had as a young lawyer around 1976 with the late international law professor Myers McDougal. He said to me: 'If as a lawyer you cannot find a [legal] hook to hang your [factual] hat on, you're not worth the money they're paying you…!'

[139]There are innumerable cultural examples devoted to this ambivalence from Fyodor Dostoevsky's *Crime and Punishment* and *Resurrection*, Camus's *Stranger*, Kafka's *Process*, Strindberg's *Father*, Miller's *The View from the Bridge* to many others in which lawyers are negative heros and in which legal process is interpreted as a falsification of reality. Even in the Anglo-Saxon cultural context where law is better regarded, we have Samuel Johnson saying that "it is perhaps good to study law, but it is not good to practice it." Even the current fashion of 'lawyer bashing' in the United States, however, would not induce legal writers to look for true reasons for this ubiquitous hatred of everything legal. Consider this ambivalent defense of legal formalism by a famous 19th-century German philosopher of law:

> The professional philosopher, who has no understanding of the peculiar technical interests and needs of law, can see nothing in formalism but … a clear derangement of the relationship between form and content. Precisely because his vision is directed to the core of things … this anguished, pedantic cult of symbols wholly worthless and meaningless in themselves, the poverty and pettiness of the spirit that inspires the whole institution of form and results therefrom – all this, I say, must make a disagreeable and repugnant impression on him …. Yet we are here concerned with a manifestation which,

In basic anthropological terms we could say that the great Leviathan may have made civilisation and peaceful division of labour possible by substituting intelligence for brutal force – but that guile and chicanery, unfortunately, are also part of this 'intelligence.'

In the second half of the 20th Century, however, there has emerged the technology expanding the former semantic predilection for deception inherent in the rule of law to qualitatively new technical possibilities for abuse. In ethical terms, the legal immune system has always been capable of protecting society primarily against brute force, torture etc. This immune system, however, based as it was on non-force, almost automatically led to guile. In this sense it could be said that the whole Western civilisation continues to function through all kinds of laudable surrogates of force – but also through deception.[140] To put it differently, law is immuno-deficient as far as deception is concerned.

Nevertheless, cases such as *Katz v. U.S.* (1967) and *Hallford v. U.K.* (1997) do indicate that the constitutional and human rights aspects of privacy are not entirely foreign to the rule of law – partly, of course, because the underlying logic of law as a surrogate of force has never been articulated.

The question emerges, therefore, whether guile subverts the rule of law the same way force corrupts it. Clearly, however, the subversion of the rule of law by guile – if it can be said to exist – does not occur on the same level as the subversion by force. Significantly, perhaps, no one ever speaks of law as an emanation of honesty, i.e. non-deception.

If, in its inception, the rule of law simply means 'law and order,' i.e. the eradication of physical violence as a means of conflict-resolution, does that not imply commitment to moral solutions of all kinds of social and individual controversies and conflicts in society? Does that mean that 'justice' and the rule of law are not, on some even deeper level, an emanation of moral consistency, honesty, principled attitudes? Are we as a civilisation ready to go beyond the Hobbesian premise implying that the rule of law is merely the secondary positive side of the far more important primary negative repudiation of physical violence? Or, in Hegelian language, have the quantitative (evolutionary) changes collected in the procedural historical phase of the development of the rule of law accumulated to a sufficient degree that we may be ready for a qualitative (revolutionary) jump to a truly ethical conception of the rule of law?

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just because it is rooted in the innermost nature of law, repeats itself, and will always repeat itself, in the law of all peoples.

2 Von Jhering, *Der Geist Des Romischen Rechts.*

[140] Freud's pessimistic views, for example, are evident in his *Civilisation and its Discontents*, *supra* n. 9 to Chapter 2. See also Clarke, *Freud: The Man and the Cause.*

The ingress of modern technology and its progressive encroachment of privacy have forced these neglected ethical issues on us. The question of the relationship between virtue and law must be reconsidered. This re-consideration, however, can be neither ideological nor moralistic; it must be, in the best Hobbesian tradition, refined in its intelligence and brutal in its realism. Let us, therefore, restate the question here. Is it possible – irrespective of all kinds of policies and ideologies – to come to the logical conclusion that guile, as opposed to force, is inherently incompatible with the rule of law?

In the context of autonomous legal reasoning the answer to this question is 'no' – and the empirical fact that invasions of privacy based on guile have proliferated out of control in the last decade would seem to confirm this answer. In our search of the answer to these ethical questions, therefore, we would have to delve much deeper into the nature of human association. In the end, I am afraid, we will not find an answer within the current jurisprudential frame of reference. We will require a thorough reassessment of even more 'primary' links between the rule of law and morality. Fortunately, in law the lack of such theoretical answers is not an insuperable impediment either to judicial, purely ethical, considerations in cases concerning privacy or to honest legislative policies. The privilege against self-incrimination as a right to be left alone by the state is only one aspect of privacy as the right to be left alone by everybody.

In modern law, privacy is clearly an endangered species. The autonomous subjectivity of the individual is put under pressure, his or her most basic and natural right to be what he or she chooses to be, is ignored and violated by social, political and business interests. What is left of what is original and individual is being raped by the collective interests. The hegemony of the dominant social consciousness and its indoctrinating effects threaten to produce psychological clones, Erich Fromm's 'prototypical characters' interacting in a *folie à million*.

However, one has to keep in mind that creativity is always individual, never collective. Creativity is inextricably linked to – we are tempted to say 'caused by' – genuine individuality. Moreover, there is no moral development, beyond the conventional levels, without the freedom to become what one is meant to be.[141] There is no such thing as a 'collective morality,' unless we are referring to inhibitions based purely on the fear of Leviathan. This is what Foucault meant when he referred to peace under the constant declaration of war.

This may have a double negative effect. The leveling of individualised moral development[142] – as a consequence of the hegemony of the dominant social

[141]See generally, Kegan, *The Evolving Self*. See my *From Combat to Contract: What Does the Constitution Constitute?*

[142]We do not use the term 'moral development' as a moralistic or deontological term, but as

consciousness – may lead to political inertia and the society of sheep being led anywhere.[143] In such a context, not only does the notion of democracy become meaningless but the presumed connection between democracy and the rule of law, too, is irreparably ruptured.[144] The recent example of such mass 'democracy' devoid of the rule of law in Serbia, induced as it was by the mass media, should be a warning sign to all of us.

The second negative effect of the advanced extinction of privacy has to do with the complexity of division of labour in society. Today, the mere maintenance of this complexity requires an ever increasing input, not of simple and routine work, but of creativity. Original new ideas are constantly needed merely to avert the effects of progressive entropy.[145] The fall in original creativity (technical, scientific, artistic, humanistic etc.) may have the disastrous effects predicted by Lester Thurow in his *Future of Capitalism*.[146]

As the French jurist Maurice Duverger has shown in his *De la Dictature*, there is an inherent reciprocity between freedom and creativity. The recent collapse of the Communist system is empirical proof of that. Human rights in general, and especially the right to be left alone, are not an indulgence or a benevolent concession of the liberal State. Freedom is a systemic attribute of a modern society and is indispensable in the world so highly dependent on individual creativity and originality.

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terminus technicus referring to Kohlberg's theory which he derives from Piaget's evolutionary psychology. See *supra* n. 57 to Chapter 2.

[143]The Serbian mass psychosis, for example, has been caused wholly by the Yugoslav mass media. However, this effect would have been avoided if the individual moral resilience to this hegemony were superior to what Kegan calls the 'level of interpersonal matrix,' i.e. the lowest normal level of moral autonomy. On this inferior level people distinguish between right and wrong by reference to 'what others say is right or wrong,' i.e. the individual has no moral autonomy vis-à-vis the collective. See also Goldhagen, *Hitler's Willing Executioners*.

[144]For an excellent presentation of this rupture, see Zakaria, *supra* n. 35 to Chapter 2.

[145]One compelling example of this is the pervasive presence in the environment of chemicals that mimic hormones. See Colborn, Dumanoski, Meyers, *Our Stolen Future*, Introduction by Vice-President Al Gore (1997). Unless original new solutions will be thought up soon we shall see disastrous demographic declines all over the planet.

[146]Thurow, *supra* n. 1 to Chapter 2. From a purely economic point of view, Thurow, an economics professor at M.I.T., examines the current trends and predicts a slow relapse into the Middle Ages and the loss of civilisational potential – unless the social system becomes capable of generating new ideas and new challenges for itself.

CHAPTER FIVE

Plea Bargaining

Up to now our discussion concerned a more or less ideal-type model of adversarial impartial adjudication. We said that the conflict in criminal procedure is artificially created and sustained in order to provide for the bipolar antithetical alternation of mutually exclusive hypotheses represented by the prosecutor and the defendant. We said that the very concept of adjudication implies the prohibition of making the defendant an unwilling source of evidence against himself, and we concluded that procedural sanctioning through the exclusion of evidence obtained in violation of any aspect of the privilege against self-incrimination is a necessary condition of a rational impartial adjudication. A major correction, however, has to be added to these broad theoretical postulates. Plea-bargaining has now become endemic in the United States to an extent which makes questionable the whole discussion of adversary adjudication.

The difference between a full criminal trial and its simulation in the plea bargaining procedure is the difference between adjudication of a dispute and its settlement. This difference is analogous to the distinction between adjudication on the one hand and reconciliation and mediation on the other, and also between autonomous and ancillary conflicts.

Generally, in adjudication, the control of the parties over the dispute's handling and its outcome is appropriate to the extent that the dispute is per se the issue and the only problem. If the parties quarrel over a question that is so strictly private that it concerns nobody else, then they are entirely at liberty to resolve it any way they choose. The only interest society at large maintains in this controversial relationship is that it be resolved without major social disruption. If we move along the spectrum between an entirely private dispute to an entirely public one, we shall see, as Professor Chayes so well observed,[1]

[1] Chayes, *supra* n. 10 to Chapter 3.

that the nature of adjudication changes. The emphasis on the rigid legality grows stronger, the settlement of the dispute becomes per se less relevant until it is clear that in certain public law adjudication the controversy itself and the ensuing adversariness are a pure pretext, their only potential function being the maintenance of the semblance of impartiality of the adjudicator. If the conflict between the parties is not the whole subject matter to be decided, if there are certain issues within the conflict that transcend the parameters of the current controversy, the parties should not be allowed to settle their dispute between themselves. In criminal procedure the conflict is, as we have shown before, not an end in itself but is artificially created. It follows that in criminal procedure the conflict is not what the issue is all about. The conflict is merely a symbol and a symptom of the moral and social issue of crime. For this reason, criminal law disputes cannot be a matter to be decided simply between the parties.

Since in ordinary private disputes the conflict is the issue, the moment there is no conflict, the need for the trial soon vanishes. The guilty plea in criminal procedure, as distinct from mere confession, similarly abolishes *eo ipso* the whole criminal trial. Mr. Justice Douglas called a plea of guilt "more than a confession which admits that the accused did various acts; it is itself a conviction; nothing remains but to give a judgment and determine punishment."[2] On the other hand, this power of the defendant is inconsistent with society's interest to find out objectively, not merely through his unreliable guilty plea that may be rendered for extraneous reasons, whether the alleged past criminal event actually happened.

The contradiction here, again, is the dialectic between the generally private nature of the conflict and the public aspect superimposed on it in criminal procedure. In other words, the incompatibility arises from the private nature of adversariness and the public interest in truthfinding. We object to plea-bargaining for many reasons, even though, for example, we do not object to the settlement and compromise in civil conflicts. There, it is clear that conflict resolution takes precedence over the ascertainment of truth and that in fact the latter is important only insofar as it serves the former. In criminal procedure, on the other hand, it would be absurd to accept the settlement merely because both the prosecutor and the defendant have agreed to it. It is no business of the prosecutor to secure a guilty plea in exchange for a violation of truth. Our intuitive reaction here is that the categorical imperatives of the criminal law are not (or should not be) for sale; that it is one thing to settle for lower damages than those deserved, but another to reduce punishment below the one deserved. This, I think, is a clear indication of the difference between the cost-benefit approach of civil law, and the deontological and moralistic

[2] *Boykin v. Alabama*, 395 U.S. 238, 242 (1969).

approach of criminal law. It is somewhat paradoxical then that there are many more 'settlements' in criminal law than in civil law conflicts.

The question arises as to why the most consistently adversarial system of criminal procedure so readily collapsed from a monocentrically organised adversarial adjudication into a plea bargained settlement. Plea-bargaining is a collapse of the monocentrically organised conflict into collusion: collusion, it is true, that imitates the conflict in its taking into account the potential use of evidentiary and procedural rules, but is nevertheless not 'the real game.' Here, it is well to remember that the conflict in criminal law is not really one that would occur between two directly controversial parties. The immediate victim is not allowed to participate because insofar as the damage is concerned he can seek it in a civil suit, whereas vengeance is not seen as legitimate. Vengeance (retribution) is reserved for society and it is the prosecutor that represents it through the demand for impersonal punishment. Conflict is the fuel of adjudication. Thus, the lack of reality of conflict in criminal procedure predisposes it to collapse into collusion: prosecutorial discretion – paradoxically enough – is at the same time necessary for proper adversariness (if he does not want to prosecute, there can be no conflict), but it also enables the prosecutor to lower the charges in the process of destruction of adversariness. If he did not have the right to reduce the charges, plea-bargaining would not be possible.[3]

What the power of the guilty plea is for the defendant, the prosecutorial discretion is for the prosecutor. Continental criminal procedures do not

[3] On the Continent, the principle of legality as applied to prosecutorial role prevents this discretion. Davis, *Discretionary Justice*, at p. 188-212. Writers sometimes forget that there it is possible not to have prosecutorial discretion because the Court's role carries far more initiative. The prosecutor on the Continent essentially 'triggers' the procedure which then evolves with the Court's own initiative. The German *Instruktionsmaxime*, the institutionalised imitation of the investigating judge is seen as a main criterion for a differential diagnosis between accusatorial and inquisitorial procedures. The *Officialmaxime* i.e. "the duty of the governmental organs to conduct the entire proceeding ex officio, by virtue of the office" likewise figures as a surrogate of conflict. Schmidt, *Einführung in die Geschichte der Deutschen Strafrechtspflege*, Göttingen, 1965, p. 86, as cited in Langbein, *Prosecuting Crime in the Renaissance: England, Germany, France*, at p. 131. If in adversarial context, conflict is inevitable because the case cannot proceed without prosecutorial pressure, then in Continental procedure the surrogates of *Instruktionsmaxime* and *Officialmaxime* supply the necessary incentive. We said that this is theoretically not acceptable, not because it is procedurally compulsive in its pursuit of truth, but because it precludes impartiality of the adjudicator. A measure of prosecutorial freedom is inevitable in a process that depends on his spontaneous initiative. Prosecutorial discretion, then, is a direct outgrowth of the demand for impartiality of the adjudicator. Reversely, however, the Court's virtually autonomous and spontaneous handling of the criminal case on the Continent prevents the free discretion that would make plea-bargaining possible in endemic proportions.

allow the prosecutor to choose whether he is going to prosecute or not. In contrast, the Anglo-Saxon criminal procedure allows the prosecutor freely to decide whether or not he will prosecute a particular crime. This, too, is a consequence of the centrality of the dispute in the Anglo-Saxon criminal procedure; if there is no dispute, there is no procedure. But there can be no dispute unless the parties are spontaneously engaged in conflict. It is thus especially important that the initiator of the conflict be free to decide whether he is interested in the prosecution or not. If he were to be forced to prosecute – or so goes the adversarial model – he would not vigorously pursue the defendant and consequently the whole structure of adversary initiative would suffer. Again, it is paradoxical that this intended aid to adversariness turns into its own opposite, since it helps to collapse the intended conflict into simple collusion between the prosecutor and the defendant.

Would the victim of the crime prosecute the case, the conflict would be much more genuine and negotiations much less likely. In criminal procedures, however, there is no personal animosity between the parties. The prosecutor is willing to step outside the official conflict situation and negotiate with the defendant. He is willing to negotiate for reasons of mere bureaucratic and administrative convenience. He would not be willing to do this were his personal interests at stake. As it is, the conflict between the prosecutor and the defendant is devoid of the flesh and blood of vengeance, is alienated from its grassroots, and it consequently collapses into collusion.

This conflict is an artifice in which the abstract part called 'justice' (and lately 'society') is represented by a lawyer who has no direct stake in the success of his legal action. In a sense, this is a problem of bureaucratisation of justice, where an impersonal institution has taken over something that was originally invented and operated by directly involved individuals.[4] In a sense, one could compare criminal justice to a planned economy that is detached from the grassroots of immediate human interest.

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[4] See Esmein, *supra* n. 67 to Chapter 3, p. 11:

> In the accusatory procedure, the detection and prosecution of offenses are left wholly to the initiative of private individuals, an initiative which may slumber through their inertia, fear, or corruption … But, on the other hand, the inquisitorial procedure has very serious defects; under it, the prosecution and the detection of offenses are entrusted exclusively to the agents of the states …

Here and elsewhere, Esmein apparently assumes that the institution of a public prosecutor is clearly an inquisitorial institution, i.e. it does not and should not exist in the accusatorial system. Esmein does not explain this from a structural point of view; he only shows that this has historically been so. It is possible to show that no criminal procedure operating on the initiative of public prosecutor can be genuinely accusatory and adversarial: the very fact there has to be a paid public official who creates the conflict implies that there would be no conflict

The reverse logic applies to the defendant's position. He, for one, is not interested in having the 'conflict' resolved, because as far as he is concerned, there is no conflict. He is willing to 'quarrel' only after he has been physically restrained and because he has been physically restrained. The question of guilt is not in this respect like a dispute over a piece of property. There both parties actively claim the right, whereas in criminal procedure one party could not care less whether he is guilty or innocent – as long as he does not go to jail. Only then does the 'conflict' arise for him.[5] Consequently, there is less of a probability of settlement in civil disputes, where there is a direct and irreconcilable conflict of interests.

Thus, the difference between criminal procedure proper and plea-bargaining is the difference between certainty and probability. In criminal procedure, the defendant is either convicted or acquitted. The outcome is not at all reflective of pre-procedural probabilities because the *ex post facto* certainty makes otiose the previous probabilities. Probabilities per se do not influence the outcome.

Plea-bargaining, on the other hand, reflects the probabilities because they are never allowed to become certainty. Thus, a defendant's murder charge is reduced to manslaughter because the prosecutor believes that his chance to win in the trial is only 70 per cent. The reduction from murder charge to manslaughter is reflective of the prosecutor's estimate of the probability of his winning the case. The truth is one thing and its ascertainment something potentially quite different. They are after all separated in time, in space and in mode of perception. The discrepancy will be due to factors that have nothing to do with truth per se. These extrinsic factors reduce the hundred per cent truth to the seventy per cent probability that it will be ascertained beyond reasonable doubt.[6]

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were it not for this artificial bureaucratic initiative. Moreover, this implies that the very conflict is not genuine and it further implies that such 'accusatory' procedure is really not accusatory, but to the extent of artificiality of prosecutorial initiative, is in fact inquisitorial.

[5] It could be said that in civil disputes, both parties are interested in truth because both parties claim that the truth is 'on their side.' If they don't, the definition of the conflict often changes from civil to criminal. For example, if the dispute is over a piece of property, it remains a civil dispute as long as both parties explicitly claim that the property belongs to them; the dispute becomes criminal, however, the moment one party is not willing to argue that the property belongs to him, but simply disappears with that piece of property, in which case we have a problem of larceny, where the defendant is clearly not interested in the establishment of truth and is clearly not interested in participating in any truth-finding whatsoever. It is not possible to overemphasise the already stated conclusion that all those problems stem from the original sin, the false analogy of criminal prosecution to private accusation, of criminal trial to civil trial.

[6] For the French version of the 'intimate conviction' beyond reasonable doubt, see art. 353, par. 2 of the French *Code de procedure penale*: La loi ne demande pas compte aux juges des

A real trial's outcomes statistically reflect the probabilities, but it is good to remember that probability is a statistical concept representing the connection between statistical certainties in large populations and the extrapolations from those certainties into the probabilities of individual cases. Glueck's prediction tables in juvenile delinquency cases are a typical example.[7] Probability thus is nothing but a subjective estimate and as such has nothing to do with the case. A defendant is not 70 per cent guilty of murder. He is either guilty or innocent. Consequently, it is absurd to translate this subjective estimate of procedural probabilities of winning the case into the reduction of charges.[8] This is, however, precisely what plea-bargaining does.

Should the defendant be certain that he will win his case (i.e. should he be convinced that he is innocent and trust in the truthfinding capacity of the adversary trial), he would always choose the trial over the proposed plea-bargain. The fact that he is willing to plead guilty under certain conditions itself demonstrates that he considers his conviction in the full trial at least possible, if not also probable. Thus, while in the full adversary trial it is at least theoretically possible to conceive of an outcome which is *in toto* a reflection of the facts of the case, this is not possible in the plea-bargaining situation, where the outcome at least partially reflects the two parties' estimate of the probability of winning or losing. If the prosecutor estimates that he will probably lose the case, he will be more willing to reduce his charges. If the defendant estimates that he will probably lose, he will be willing to plead guilty sooner than otherwise. In plea-bargaining, we thus have an example of a situation in which it is quite clear that the determination of criminal guilt is going to be influenced by factors which have nothing to do with the guilt itself.

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moyens par lesquels ils se sont convaincu, elle ne leur prescrit pas de règles desquelles ils doivent faire particulièrement dépendre la plénitude et la suffisance d'une preuve; elle leur prescrit de s'interroger eux-mêmes, dans la silence et le recueillement et de chercher, dans la sincérité de leur conscience, quelle impression ont faite, sur leur raison, les preuves rapportées contre le accuse, et les moyens de sa défense. La loi ne leur fait que cette seule question, qui renferme toute la mesure de leurs devoirs: 'Avez-vous *une intime conviction* ?' (Emphasis added.)

[7] Glueck & Glueck, *Predicting Delinquency and Crime*; Glueck & Glueck, *Unravelling Juvenile Delinquency*. On the question of probabilistic extrapolations from small populations see Rosen, *Detection of Suicidal Patients: An Example of Some Limitations in the Prevention of Infrequent Events*.

[8] There are, of course, many cases in which the trade-off is not between a procedural probability of conviction and the respective charge and consequently the structure. Many a plea-bargain is reached purely on the ground of potential bureaucratic inconvenience of having a full scale jury trial. These cases, however, are not problematic, since there the extrinsic nature of the trade-off is beyond any doubt and the problem of comparison with the similar side-effects of the exclusionary rule does not exist.

In *Boykin,* the Supreme Court took into account that a guilty plea represents a waiver of the constitutional rights to trial by jury, to confront one's accuser and the Constitutional privilege against self-incrimination. The defendant in *Boykin*, however, was a black man who pleaded guilty to five robberies and was thereupon sentenced to die. In such a case, clearly, there is no *quid pro quo*, and the Court consequently held that the record must show that the accused voluntarily and understandingly entered his guilty plea.[9]

In all cases where the issue is the consent of the defendant, the Court is faced with the same problem as the one in *Schneckloth v. Bustamonte.*[10] *Schneckloth* was decided four years after *Boykin*, but it in fact reiterates Douglas' solution to the consent problem. Since the philosophical issue of determinism has not been resolved, the question of freedom of will in cases where the party does not understand the full range of its options, or where he or she decides under the threat of a greater penalty, cannot be properly resolved either. Mr. Justice Frankfurter wrote, in *Colombe v. Connecticut*,[11] that "[t]he notion of 'voluntariness'[12] is itself an amphibian." Professors Bator and Vorenberg, as cited in *Schneckloth*, have defined the dilemma as follows:

> Except where a person is unconscious or drugged or otherwise lacks capacity for conscious choice, all incriminating statements – even those made under brutal treatment – are 'voluntary' in the sense of representing a choice of alternatives. On the other hand, if 'voluntariness' incorporates notions of 'but-for' cause, the question should be whether the statement would have been made even absent inquiry or other official action. Under such a test, virtually no statement would be voluntary because very few people give incriminating statements in the absence of official action of some kind.[13]

In *Boykin*, Douglas found his way out of the dilemma simply by putting the burden of proof of the undefined voluntariness and informed nature of the consent to the guilty plea on the prosecution, the example followed also in *Schneckloth* – a typical procedural solution of a substantive problem.

Boykin illustrates another of the central problems of plea-bargaining. What the defendant pays for with his plea of guilt is a certain probability that his sentence will be less than the one he would receive should he decide to exercise his constitutional right to trial. However, the prosecutor can only promise that he will reduce the charge and make the sentencing recommendation to the judge or jury. He cannot promise that the sentence will in fact be less, especially since in most cases the sentencing provisions are indeterminate to

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[9] *Boykin v. Alabama*, 395 U.S. 238, 242 (1969).
[10] 412 U.S. 218 (1973).
[11] 367 U.S. 568 (1961).
[12] *Id.* at 604-605.
[13] 412 U.S. at 224.

the extent that even lesser included charges can result in sentences which will overlap with those of greater excluded charges.

This 'contract' is thus an aleatory one in which the transaction involves a certain plea of guilt for an uncertain probability of reduced punishment. As *Boykin* well demonstrates, the defendant, in exchange for his plea, may nevertheless get the maximum punishment.

If the exclusionary rule is applied in an actual criminal procedure, it of course influences the probabilities of the outcome, but in the end, it is impossible to say to what extent the outcome is causally linked to the exclusionary rule. In addition, it is not the intent of the exclusionary rule to influence the outcome of a criminal trial. A procedural sanction merely guards procedural propriety and the respect for procedural rules. The influence its application has on truthfinding is an undesirable by-product whose casual link to the outcome would ideally be absent. After all, procedural sanction should remain precisely that. All this turns upside down in the plea-bargain whose outcome is a direct resultant of truth and procedural probabilities. The procedural probabilities do exist in a trial, but they are legally irrelevant. In a plea-bargain, they form the battleground of negotiation.

The problem with the exclusionary rule is that a substantive consequence of acquittal occurs 'because' of the procedural violation: the defendant is acquitted on a 'technicality.' He is after all no less guilty because of police over-zealousness. Nevertheless, we accept the judgment not so much on the practical ground of police deterrence, but more on the theoretical ground of the logical integrity of criminal procedure. It is for these reasons that we accepted the extrinsic trade-off implied in the exclusionary rule. Plea-bargaining can be criticised on the grounds that it allows the conviction and the sentence by extrinsic factors that are not related to the defendant's guilt or innocence as measured by the substantive criminal law.

A question arises, and it has been a subject of current controversy, whether the European 'mixed' system of criminal procedure is also subject to deformations such as plea-bargaining. Since the Continental system of criminal procedure – even though not entirely inquisitorial but rather 'mixed' in its modern variant – places a much greater emphasis on truth and truthfinding than does the Anglo-Saxon system, it would be much more grave should this prove to be true. But the same dilemma is evident in most Supreme Court opinions in the United States touching upon criminal procedure, because in the back of every one of them stands the question of the exclusion of evidence. Thus, if Goldstein could show that the Continental system engages in falsification of truth comparable to the plea-bargaining phenomenon in the United States, it could also be shown that the sacrifice of truthfinding goals so apparent in the American criminal process is not as tragic as the critics of the exclusionary rule would like to imply.

Goldstein[14] tried to show that in France, Italy and Germany there exist similar defects in criminal procedure, defects that reduce the idea of "judicial supervision" to a "myth." While it would be impossible here to discuss thoroughly the question of whether Continental criminal procedure functions 'better' than its Anglo-Saxon counterpart, it is possible to reject any attempt at saying that there are processes comparable to plea-bargaining in the Continental criminal procedure. The most obvious argument – and not necessarily complimentary to the Continental procedure – is that there is simply *no need* for plea-bargaining on the Continent because the system there is so much more efficient. The system is more efficient due to its inquisitorial-bureaucratic functioning, in which truthfinding is not subject to the adversary approach that could make it more cumbersome and slow.

Plea-bargaining sums up the central contradiction in the Anglo-Saxon criminal procedure: the paradox of impartial truthfinding. In order to create the conditions of impartiality, artificial adversariness is introduced that is more likely to collapse into a collusion because the parties are not genuinely in conflict. Because of adversariness, they have to be given certain controls over the process such as prosecutorial discretion and the possibility of waiver of the trial. Since the parties themselves are not concerned with truth (the defendant wants an acquittal, the prosecutor a conviction), and since the impartial adjudicator has no direct control over the controversy, the temptation is strong to take a shortcut.[15]

The solution to the dilemma of impartiality and truthfinding would also be a solution of the problem of plea-bargaining. The question to be asked then is *why* we need truthfinding and impartiality. The reasons for both reside in the conflict – not the legal artifact of criminal adversariness – but the real conflict of interests between the individual and the state. Both the rigid formalism of legality (and the concomitant finding of facts that would fit into the legal pigeonhole), as well as the procedural requirement of impartiality with its adversarial aftermath, stem from this conflict of interests. The problem of crime, after all, is a social problem, not a private controversy. Legal means of substantive formalism and procedural adversariness are simply not appropriate to deal with issues which transcend private controversies. The

[14] Goldstein & Marcus, *The Myth of Judicial Supervision* in *Three 'Inquisitorial' Systems: France, Italy and Germany*. See also Langbein & Weinreb, *Continental Criminal Procedure: 'Myth' and Reality*.

[15] Alschuler, in a lecture delivered at Iowa Law School in Spring 1980, maintained that plea-bargaining seems to have strong anomic side effects because it clearly falsifies a moral issue of guilt. However, such reasoning centered on expediency rather than on principle seems to be precisely the origin of plea-bargaining. Only a pragmatic attitude could godfather a procedural short-cut to a moral problem. The exclusionary rule, too, is a falsification since it suppresses information relevant to the moral issue of guilt, but there it is possible to maintain that the dilemma is between that and the fairness of the process, a moral value itself.

fact that in the area of crime resort is made to legal means, probably means that there is nevertheless an underlying conflict, a hostility and a threat of domination. It is this threat which produces the flight to impartially applied personal rules.

CHAPTER SIX

Conclusion

In this section, we have deconstructed the various contradictions inherent in the process of adjudication. As we saw, conflict resolution, which is the primary function of adjudication, only partly overlaps with the transcendental notions of morality and justice. Moreover, if the notions of conflict resolution and impartiality are valued in a particular legal system, truthfinding as a value has to be compromised, as impartiality and truthfinding are contradictory goals and cannot be simultaneously achieved.

In adjudication, conflict resolution by the nature of things takes precedence over truthfinding. This is logical because there would be no genuine adjudication were it not for the conflict. Adjudication is philogenetically and ontogenetically inextricably entwined with quarrel and conflict. But, a conflict hardly exists in the case of criminal process. The parties only pretend to quarrel, while the conflict, insofar as it exists at all, is intended to serve as an artificial framework within which there will be proper finding of guilt or innocence.

Consequently, adjudication is not an appropriate tool in matters where truth is more important than the resolution of the conflict. This is especially true for the Continental criminal law system, where truth is first and resolution of conflict essentially secondary. Here, criminal guilt is an issue that extends to moralistic, transcendental and metaphysical subjects. On the other hand, if truthfinding is made secondary and conflict resolution is made primary in adjudicating criminal cases, the situation often dissolves into plea-bargaining. This is true in the Anglo-Saxon criminal system where the settlement of a transcendental issue like crime is done between the prosecutor and the defendant through plea-bargaining. Thus, it emerges that criminal guilt is not an appropriate subject matter for adjudication.

It is essentially a value choice and a political consideration as to what balance of powers we are willing to strike between the individual and the

state. In the last analysis, the legal system followed by a particular State – authoritarian or liberal – ultimately decides how criminal procedure is viewed in that society. The aspects of adjudication we have deconstructed are based on the ideology of the particular legal system. For instance, the adjudicative model of criminal procedure gives reality to the independent existence of procedural and constitutional rights while the inquisitorial model emerges as more efficient in crime-repression. However, as we saw while discussing the privilege against self-incrimination, the goals of crime repression and human rights are incompatible with each other, because one stems from an authoritarian attitude while the other from a more liberal and democratic one.

Thus, while dwelling on human rights in the context of constitutional criminal procedure, we found that upholding human rights versus crime containment are two mutually opposed fallouts of a legal system's attitude towards criminal procedure. The Continental legal system which values truth over impartiality, is very efficient in crime-repression because here the criminal procedure is ancillary to the substantive goals. That is, procedural sanctioning through the privilege against self-incrimination and exclusionary rule are not valued here to a large extent. Here, the efficiency in crime-repression becomes such an important goal that human rights are often sacrificed. This we see in the Continent's resort to torture in the name of truthfinding.

On the other hand, in the Anglo-Saxon legal system, where the privilege against self-incrimination and the exclusionary rule are important elements that make a criminal procedure valid, crime-repression becomes a secondary goal. This is because democracy, rule of law and human rights get the upper hand in this system.

In the last analysis, in today's world where individual creativity and freedom are of utmost importance for mankind's development, rule of law and human rights do need to take the upper hand. 'Truthfinding' as a goal may help in lowering crime rates but it impinges on human rights. Moreover, with truthfinding the question always remains whose truth is being talked about and if the truth is just a legal truth, whether human rights should be compromised for such a truth.

Additionally, we also saw that a legal system where the privilege against self-incrimination and exclusionary rule are not valued, the process of adjudication will not be valid at all because the very essence of adjudication – that is the principle of disjunction – will be overlooked in such a system. Of course, criminal guilt adjudicated in an Anglo-Saxon system dissolves into plea-bargaining which also defeats the whole idea of a fair trial through adjudication. Thus, the mixed-inquisitorial legal model continues to impinge on human rights while the adversarial model, having emerged from the civil

procedure, continues to overlook the larger issue of crime as a social evil that needs to be curbed. The contradictions inherent in the process of criminal adjudication continue without getting resolved.

The long term impact of these unresolved contradictions is however detrimental to the perception of rule of law and justice in society. This is because values that are not logically consistent and lack legitimacy and creditability are not easily internalised by the people. The goal of normative integration, i.e. internalising and instilling enduring respect for institutionalised values or shared values, therefore, remains unattained.

SECTION II:

Human Rights in the Context of Substantive Criminal Law

CHAPTER SEVEN

Introduction

In the previous section, I showed that the idea of impartial adversary adjudication is essentially incompatible with the function of truthfinding. I showed that the conflict in criminal law is less genuine than that in civil law because of which the impartiality of adjudication in criminal cases represents problems that never occur in private disputes, where the parties are much less disparate in their power. While I revealed how the imbalance in power between the state and the individual creates the need for procedural safeguards in adjudication, here I will examine the need created by the same imbalance to have substantive safeguards through the principles of 'advance notice' of estimated punishment for a criminal act, i.e. through the principle of legality.

I also showed in the previous section that the centrality of truth and truthfinding in criminal law – as opposed to its secondary and instrumental nature in private disputes where it only serves as a means towards the resolution of the conflict – derives from the essential ambition of criminal law to treat the individual case as a symbol of a broader conflict between reality and morality. Since the 'truth' in criminal law is not merely the question of an isolated human conflict of interest, since it is a truth about a past morally reprehensible event, i.e. a conflict between an individual and the group as an entity *sui generis*, it carries not only the private dimensions of an individual disharmony, but is rather intended to reverberate throughout the societal structures, or perhaps trigger even larger existential and philosophical dilemmas as for example represented in classical Greek tragedies. Considering these broader dimensions of the effects of criminal law, the significance of developing antecedent universal legal norms, according to which it will be possible to resolve future conflicts, becomes all the more apparent. The main purpose behind any law in any social context is to provide such an antecedent universal legal norm.

Thus, there are two basic questions to be asked. When we are concerned with how the decision is going to be made, by whom, under what conditions, with what attitude toward truth – then we are clearly asking questions about procedure or the nature of adjudication. On the other hand, when we are concerned with the nature of the norm according to which the decisions in future conflicts will be made, we are in essence concerned with the problem of making the decision-maker, the adjudicator, abide in his particular judgments to the universal norm. The principle of legality is thus in essence a question of the distribution of power between the legislative branch entitled to be arbitrary because it represents the sovereignty of the nation on the one hand and the individual decision-maker who cannot represent himself and can therefore act only on behalf of the compelling logic of the Law on the other.

In the last analysis, as we saw in the section on adjudication and we will see here in the chapter on the principle of legality, the role of criminal law is essentially to provide the appearance of legitimacy to lies. While in adjudication, a conflict is created when no conflict really exists, the principle of legality creates the illusion of predetermined legal norms, when such predetermination is not really possible, as we will see. The role of criminal law, even though both its adjudication and its legality are illusory, is to give the appearance of legitimacy and reality to lies such as justice, right and wrong, and a series of other more particular elements of morality and duty. However, the lies is useful because of its effect on the sphere of moral inhibition introjected into the individual psyche, the sphere that once established (as Superego), cannot be undone by mere rational and persuasive argument. Ultimately, this helps in integrating shared values and consequently better social cohesion.

Moreover, we will examine the central paradox that has intrigued theorists in the area of criminal law, perhaps since Cesare Lombroso published his *L'Uomo Delinquente*, namely, the apparent contradiction between the professed social role of punishment (special and general prevention, social control, reformation, deterrence) on the one hand and the actual rigid formalism of the criminal law on the other. Since criminal law is so intimately intertwined with the idea of blameworthiness and punishment, it is usually assumed that the policies underlying punishment must be the same as those underlying criminal law. And while in particular it is often true that distinctions are made by criteria of blameworthiness, e.g. between a possible and an impossible attempt, between a reasonable and an unreasonable mistake of fact, if criminal law is seen as a whole, it does not exist in order to further the social practice of punishment; rather it exists to inhibit it. The same is true of criminal procedure. The simple proof of this lies in the fact that punishment would be possible without criminal law and criminal procedure, whereas its inhibition would not.

Thus, when the accused enters into a controversy with the state, the inequality of power between the two parties necessitates that the accused be aware not just of procedural safeguards but also about likely punishment through the principle of legality. Beccaria, in his 1764 *Essay on Crimes and Punishments* had indicated the necessity of predetermination through his principle of 'geometric precision' and his emphasis on punishment not exceeding the crime. Through an analysis of Beccaria's principles, we will show how many of his insights on the function of criminal law have survived in the modern criminal law system.

Furthermore, in this section, we will attempt to show the paradox inherent in the practice of punishment – the contradictions between its crime deterrence goal and its moralistic, retributive aspect. Here, we will attempt to show how both these extremes overlook the importance of punishment in the process of normative integration through the creation of a social conscience.

Next, we will show that the principle of legality is mostly an illusion, by proving that the belief that it is possible to have legal rules in criminal law that decide compellingly most of the cases in advance by virtue of their conciseness and strict interpretation thereof, is a myth, but a necessary myth, so to speak.

CHAPTER EIGHT

Beccaria: Theories on Punishment and Legal Formalism

Beccaria, in his *Essay on Crimes and Punishment*, postulated for the first time – at least in the realm of social policy – the ideal of 'geometric precision' and first advocated the view that arbitrariness is due solely to the absence of concise rational criteria of judgment. Beccaria crystallised his ideas in a short and precise manner in his book, as if he wanted to prove the possibility of 'geometric precision' and thereafter his ideas remained the Bible of criminal law.[1] His influence was largely due to precise timing: when his *Essay* was published, the Western societies were ready for a radical change in the mode of perception of criminal law. His ideas represent a retotalisation of the postulates of criminal law upon a rationalistic basis: a new and newly organised system of justification of punishment. This retotalisation may well have been conceived in reaction to the arbitrariness of aristocratic criminal justice, but the range of the doctrines he proposed goes well beyond the scope of the 18th century. In fact, with Beccaria, punishment and criminal law reached the objective limits of justifiability because Beccaria was perhaps not only the first, but also the foremost rational legitimiser of the practice of punishment.

[1] Ancel & Stefani, *Introduction to Beccaria: Traité des Délits et des Peines*:

> L'œuvre de Beccaria, en effet, ne marque-t'elle pas l'avènement du droit pénal moderne? La science pénale tout entière, *telle que l'a construite le XIXe siècle, n'est-elle pas largement dérivée de ses doctrines* et même n'a-t-on pas pu ranger leur auteur parmi les 'pionniers de la criminologie?' Enfin, à l'imitation de celui qu'il a souvent nommé 'son maître,' Montesquieu, ne fonde-t-il pas son examen critique du système en vigueur et ses propositions de réforme sur une recherche que, sans trop d'anachronisme, on peut déjà considérer comme une application de la méthode comparative?

Beccaria's connection of his pleasure-and-pain principle with punishment as a negation of pleasure and the creation of pain was persuasive enough to seduce Bentham as well, who later elaborated on Beccaria's theory. Beccaria saw in this principle the vehicle towards the postulate that 'reasoning rather than force' ought to prevail among men. He thus opened the Pandora's box of rational justifications of the practice of social punishment which up to that time prevailed on a more or less intuitive basis. He was able, with one sweep, to throw overboard all the theological justifications on which the heretofore accomplished concepts of the subjective elements of criminal responsibility were based.

The ideal of both Beccaria and Bentham was 'geometric precision' or "moral arithmetic by which uniform results may be arrived at." Beccaria's geometric precision evolved into the *felicific calculus* of Bentham who brought the theory of utility to bear – apparently at least – on every single aspect of legislation. This theory represents a triumph of discovery – reason can be applied to questions of morality too, only to be immediately suffused into the circularity of the definition of pains and pleasures: "Nature has placed man under the empire of pleasure and of pain. We owe to them all our ideas; we refer to them all our judgments, and all the determinants of our life. He who pretends to withdraw himself from this subjection knows not what he says."[2] However, the fact that he posited the kind of humanitarian and utilitarian argument he did was more important than the fact that his 'geometric precision' was rather superficial.

Today when Beccaria and Bentham are compared, we tend to think of Bentham as the more serious and scholarly, but let us not forget that the idea was originally Beccaria's. Bentham merely elaborated on Beccaria's theory, and that required much less genius than drawing the co-ordinates for a whole new definition of criminal law. In a very important sense, Bentham can be considered the bridge between Beccaria and the practical application of his ideas to legislation.

Benthamian philosophy (based on Beccaria's philosophy), derided as it was and is, has nevertheless, left a deep imprint on the modern bourgeois mind; decision-making has hardly departed from it, and the dominant social consciousness in capitalism constantly propagates the utilitarian method of reasoning.

[2] For further explication of this concept, see Bentham, *An Introduction to the Principle of Morals and Legislations*, Chapter I.

1. On Punishment

1.1. The Origin of Punishments and the Right to Punish

Before analysing Beccaria's views on punishment, we will first weigh the three major types of justifications of punishment that already existed. First, (chronologically at least) there is the talionic justification. It may be concrete (blood-revenge, retaliation) and limited in its use to crimes with specified victims and therefore inapplicable in cases where the victim is either non-existent or too abstract to be pointed out. It may be an abstract extension of the basic retaliatory attitude, as for example in Roman law's *crimen laesae majestatis*. Characteristic of the talionic doctrine is the proximity of the victim to punishment. Its formula is retrospective: *quia peccatur*.

Second is the pragmatic justification. It emphasises deterrence, reformation, resocialisation and treatment, rather than retribution. It is not retrospective, it is turned toward the future: *ne peccetur*. This doctrine was not introduced by Beccaria, because it is a necessary compound of every organised State where punishment represents a means of social control. In fact, Roman criminal law (although it was not devoid of talionic doctrine) was primarily concerned with this policy of punishing.

Third, the categorical (denial of the need for) justification includes not merely the explicit philosophies to that effect (Kant, Hegel), but overlaps on the one hand with the doctrine of atonement where the transcendental reference to the offended God means that the sin (crime) must be punished with no respect to social utility, and on the other hand with the more sophisticated kind of pragmatism such as that of Durkheim's emphasis on the role of punishment as a support to the collective sentiments. This means that this type of justification extends the pragmatic notion of general prevention into the area of the anti-anomic (supportive of normative integration) function of punishment and thereby comes close to asserting that punishment must exist because value deprivation should be vindicated a priori.

A common denominator to all three doctrines is the assumption that (1) crime is unavoidable and that therefore (2) punishment is likewise unavoidable. The essence of all three doctrines is the same: they represent the elements of the rationalisations of what is happening anyway and offer no alternative because they cannot see beyond the limits of the social order. Thus, the differences between the three modes of justifications are really not that important: they are only differences in *ex post facto* explanations of the utilities of punishment and do not go deep enough to do away with the question why we punish in the first place. In other words, punishment would be here whether or not Gratian, Beccaria, Kant and Hegel and others had

rationalised it. They are not in any serious sense explanatory, because they do not offer an alternative beyond punishment. All three of these theories are merely supportive legitimisation of this particular social practice.

There are, however, a few differences between the talionic and categorical doctrines on the one hand, and the pragmatic doctrine on the other. *The talionic and the categorical doctrines block the reasoning at a certain point either by asserting simply that right is might, or by saying that the* a priori *non-questionable and axiomatic nature of the imperative precludes rational attack*. In Roman law as well as in the 19th century English law, the offences were grouped at the highest level of cruelty. In 1825, England was still punishing nearly 200 offences by capital punishment, one reason for this being the lack of rational policy and the prevalence of simple talionic and categorical reasoning.

The pragmatic doctrine, although still only a justification, at least opens the possibility of discussing the functionality of the different forms of punishment for different acts, and in different social contexts. Being relative, the pragmatic doctrine is more flexible and affords more differentiated and articulable criteria of what is useful, and what not, whereas the categorical and talionic doctrines operate with absolutes which make a detailed analysis impossible and therefore not articulable, and that in turn gives more place for pure arbitrariness.

Beccaria's theory mainly subscribes to the pragmatic doctrine. Starting from the most logical point, i.e. assuming that punishment is just a part of the pleasure and pain system upon which society is erected, Beccaria advises the enlightened despot to take advantage of this process, the basis of which is the "ineradicable feelings of mankind."[3] Opposed to dogmatism, which superimposes an imperative whatever the situation, disregarding the given and irreducible mechanisms that govern society, he predicts that any law "that deviates from these [ineradicable feelings] will inevitably encounter a resistance that is certain to prevail over it."[4] This position is in itself revolutionary: it is exactly the reverse of the theological presumption that God and his principles are given, and that humanity will simply have to adjust to it. In other words, he proposes that we treat the people, for him this is the same as society, by taking into account their own idiosyncrasies, which we cannot change no matter what, but can take advantage of, just as in geometry there are laws which cannot be changed but can be taken advantage of.

Meanwhile, the limits of punishment for Beccaria are embedded in the social contract, whose central dialectic is the conflict of two postulates: 1) the tendency of the individual to make himself the center of his whole world, and 2) the need to associate in order to enable the individual to exist at all.

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[3] Beccaria, *On Crimes and Punishments*, at p. 9.

[4] *Id.*

These are two conflicting postulates, and Rousseau himself recognises that when he says: "The fundamental problem of the social contract is to find a form of association which will defend and protect the person and property of each associate, and wherein each member, united to all others, still obeys himself alone, and retains his original freedom."[5]

Thus Beccaria, faithful to his balance of pleasures and pains, logically concludes that one cannot be presumed to have alienated more than the difference in these balances between the point before he enters society and after that: "no man ever sacrificed a portion of his personal liberty merely on behalf of the common good."[6] Hegel[7] disagrees on the grounds that since man without a society is not even a man, and, therefore, everything that he is and has, he owes to society, the society can ask just about any price from the individual, including his life.

Thus Beccaria's argument that "no man ever freely sacrificed a portion of his personal liberty on behalf of the common good" becomes incorrect the moment we abandon Beccaria's implicit assumption that man can exist as man before he 'joins' as an associate of the social contract. On that point matters were clearer to Aristotle, who called man a political animal – *zoon politikon.*

Beccaria, however, goes on to say that "the sum of all the portions of liberty sacrificed by each for his own good constitutes the sovereignty of a nation." The reasoning here is superficial even in terms of social contract theory because considering an individual's pleasures where he joins the society are 1) presumably quite different from the pleasures he can have outside the society (assuming that were possible) so that we are really comparing the incomparable, and 2) obviously if the individual is not a member of society he cannot kill or otherwise harm people, cannot steal, or really do any wrong whatsoever; therefore, what does this sacrificed 'liberty' really consist of?

It is true that the individual feels constrained by social norms and would not feel constrained were he alone. But this latter feeling of freedom is a simple imaginary projection of the kind of freedom which never existed because man would have never become man were it not for his associations. The feeling of constraint, however, derives from structural social conflicts of interest, in principle traceable back to need-scarcity dialectic. This is the basic flaw in the social contract theory: imagining that constraints are due to mere association rather than to that which the association is intended to fight – namely scarcity. The fallacy of this intuitive judgment concerning constraint

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[5] Rousseau, *Social Contract* (I, 6), cited in Beccaria, *supra* n. 3, at p. 11, n. 13.
[6] Beccaria, *supra* n. 3, at p. 11.
[7] Hegel, see *infra* n. 34.

invalidates the whole series of Beccaria's logical deductions from it, such as the proportionality of punishment, abolition of capital punishment, etc.

His conclusion, therefore, that "the aggregate of the least possible portions [of freedom sacrificed in entering the social contract] constitutes the right to punish," means that justice for Beccaria was not what it had been for say Gratian who said that one punishes for the love of justice. No, for Beccaria it is "a human way of conceiving things, a way that has an enormous influence on everyone's happiness."[8]

This little statement – insofar as it is representative of the prevalent attitude thereafter concerning justice and law – was the beginning of the end of criminal law as a field of autonomous legal reasoning; autonomous because norms derived from revelation and undifferentiated 'love of justice' could not be questioned, they were a priori given categorical imperatives, whereas norms derived even from only apparently reasoned utilitarian judgment could always be challenged on their own grounds. And the moment they are challenged, what matters is not the rule *qua* rule any more, but the underlying social policy. Thus the discussion centers around social policy rather than around a rule, and the reasoning becomes clearly purposive instead of autonomous.

For the first time in history punishment was seen as an instrument of social control, which it really is, except in a sense much wider than Beccaria imagined. For Beccaria "the purpose [of punishment] can only be to prevent the criminal from inflicting new injuries on [other] citizens and to deter others from similar acts."[9] Modern criminology has not yet transcended this simple and clear statement of goals of general and special prevention.[10] Yet we know that punishment as a social practice is not really reducible to such a simple goal; we also know that the general preventive effect of punishment would be severely hampered if morality could indeed be reduced to utility.

This is one of the most basic antinomies of the pragmatic doctrine. Beccaria reduces morality to utility, yet he explains how the masses should be manipulated to believe (their "senses must be impressed") that morality is something else than just utility. The utilitarian justification of punishment, insofar as it has been accepted, is a symptom indicating that punishment in all its medieval cruelty is no more taken for granted and that *it therefore needs more than an* a priori *justification*. The utilitarian rebuttal of the transcendental

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[8] Beccaria, *supra* n. 3, p. 13.

[9] Cf. Yugoslav criminal code, 1951, art. 3:

> The purpose of punishment is to prevent socially dangerous behaviour, to prevent the offender from committing criminal acts and to better him, to influence others so that they will not commit criminal acts and to influence the development of the social morality and social discipline of the citizens.

[10] See, for example, Andenaes, *The General Preventive Effects of Punishment*.

reference in justifying punishment is perhaps the beginning of the end of criminal law. In fact if sheer instrumental rationality prevailed today, punishment would be abolished, since it is impossible to make a case for it on purely rationalistic grounds.

Moreover, it is not so clear that we can indeed divorce criminal law and punishment from morality, moral indignation and teleology because first, the existence of punishment cannot be reduced to its utilities, and second because it is clear that utilitarianism is not less teleological than teleology itself and insofar as this is true, the utilities covering up latent value judgments can indeed function as a 'valid' rationalisation.

The conscious philosophy of criminal law has not qualitatively changed since 1764. It has been developed and differentiated, made more 'calculative' and more 'contextual' than it was in Beccaria's *Essay*; it has been more widely accepted, it permeates modern criminal legislation, but the underlying myth is exactly the same: 1) there is a 'rational basis' for punishment and 2) this rational basis can be examined, discussed, widened and on it we can base the administration of criminal justice.

With Beccaria, reason becomes an objective principle. Such an attitude differs from both the more honest doctrine of pure vengeance and from teleological atonement. The first split between crime and sin – already evident in Hobbes[11] – thereby comes to be taken seriously. Later writers such as Liszt, for example, advocated a total separation of criminal law and morality under the illusion that it is possible to establish social values (*not* values and interest of particular classes) by pure ratiocination. In the beginning the discrepancy was between criminal law and religion (Frederic the Great); thereafter the split between morality and criminal law followed as a natural extension. This trend culminated in the Italian positivist school (Ferri) which postulated only one rational goal, i.e. the protection of society. *Reliquiae reliquiarum* of this movement are now represented in the so-called *Mouvement de la défense sociale*,[12] but the idea originated with Beccaria.

Modern criminology, whether that of Barbara Wooton,[13] of the rational moralists such as Herbert Hart,[14] or Alf Ross,[15] or that of the modern

[11] "A punishment is an evil inflicted by public authority on him that has done or omitted that which is judged by the same authority to be a transgression of the law; to the end that the will of men may thereby the better be disposed to obedience." Hobbes, *Leviathan*. This is clearly a purely formal definition in which it is the power to impose punishment which also determines the parameters of justice in the substantive sense.

[12] See, for example, Ancel, *L'Évolution de la Notion de la Défense Sociale* and Kinberg, *Basic Problems of Criminology*.

[13] Wooton, *Crime and Criminal Law* and her *Social Science and Social Pathology*.

[14] Hart, *Punishment and Responsibility: Law, Liberty and Morality*.

[15] Ross, *On Guilt, Responsibility and Punishment*.

sociologists of deviance, is faced with the realisation that, after all, reason can only move within the manoeuvre space allowed for it by given values; that reason makes sense only as an instrument for the promotion of given values, but that by itself it is essentially incapable of creating values.

Moreover, from his interpretation of the theory of the partial relegation of liberty according to the social contract doctrine of Rousseau, Beccaria derives his principle that "only the laws can decree punishments for crimes,"[16] a principle of the utmost importance for the whole social role of criminal law. *Le principe de légalité*, and its transformation into the principle of negation of crime concerning everything that is not prohibited in advance represents a total metamorphosis of the social role of criminal law: before that it was there to punish, after that it was there to prevent punishment. In time it developed into an elaborate system of negotiations of the right to punish (safeguards) extending its protective role in the modern welfare state even in the area of 'insanity' and the protection of those who are 'insane.'

To this Beccaria adds the idea that the sovereign can promulgate only general laws whose application must be left to the judiciary as the third party not involved in making them. And, to conclude, he says that the right to punish is not based only on one necessary condition – namely that of the partial relegation of liberty and its adequate following via the separation of powers – but also on the condition of rationality: "if it were possible to prove merely that such severity (of punishments) is useless … it would be contrary to justice itself and to the very nature of social contract."[17] This brings us to his ideas about punishment being rational only when it is equal, not more or less, to the amount of damage caused by the offender.

1.2. Mildness of Punishments

The pragmatic doctrine establishes why punishment is inevitable (in the given social order) and thus it offers explicit criteria for the measurement of the appropriateness of punishments, the principle being that everything which goes beyond the necessary utilitarian minimum is simple cruelty. The doctrine of talion is predicated upon emotion, the doctrine of categorical imperative is predicated on absolute principles, and while both are capable of giving a justification and a general 'yes' to the question of punishment, they cannot say why a thief must be punished by x+n years in prison, if a murderer is punished by x years of imprisonment. The pragmatic doctrine, in other words, introduces the principles of calculability and contextuality, besides articulating the strategic goals of general and special prevention.

[16] Beccaria, *supra* n. 3 at p. 13.
[17] *Id.* at p. 14.

However, even though subjectively Beccaria was a humanitarian attacking cruelty and arbitrariness, objectively he in fact provided a formidable support for the continuation of punishment practices because he had shown that it is – after all – defensible on rational grounds. Beccaria applied to the area of crime and punishment what later became the motto of economics, i.e. the greatest profit with the least possible sacrifice: "the strongest and the most lasting impression on the minds of men … with the least torment on the body of the criminal."[18] Bentham said later that if the fine of one shilling were sufficient to deter murderers, anything beyond this one shilling would be unnecessary and cruel.

Moderation of cruelty is in fact a concession the structure of power has to make. "To the extent that spirits are softened in the social state, sensibility increases and, as it increases, the force of punishment must diminish if the relation between object and sensory impression is to be kept constant." In another context, he said: "[F]rom the lap of luxury and softness have sprung the most pleasing virtues, humanity, benevolence, and toleration of human errors."[19] But, of course, such a minimum of oppression at the same time keeps the particular social order together and betrays that it otherwise would not stay together. When this minimum is reached it ceases to be a question of moderation of oppression (threat of punishment) and it again becomes the *aut-aut* problem: the choices are again polarised, i.e. either the minimum oppression and the State, or, no oppression and therefore no State and (at a lower level of development), perhaps no society either.

After this lower limit of 'mildness' is reached this means that the system, without falling apart and reconstructing itself into a new system, cannot afford further concessions. Its flexibility has reached the limits of preservation of the identity of the system; there, the defense of the State again becomes more oppressive, because the system realises that no further concessions are possible and that the prolongation of its life now depends on not making further concessions.

Generally speaking, the important thing is to realise that what we are talking about here is not the 'mildness of punishments' but rather the intensity of the physical threat the social order is forced to maintain in order to survive. The further removed from the people in terms of interests, the stronger the threat it has to make in order to survive.

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[18] *Id.*

[19] Skinner's theory of 'automatic goodness,' in his *Beyond Freedom and Dignity*, at p.18. Needless to say, Skinner does not refer to the one necessary condition for this: the absence of conflict of interests, i.e. the absence of (perceived) scarcity.

1.3. Promptness and Certainty of Punishment

Beccaria's social philosophy is a psychology of passions. "To impress the senses of the crude and vulgar people," was for him the most important aim of punishment. In this respect he was not a rationalist at all, since his kind of policy seeks to manipulate the passions rather than to enlighten the reason. The presupposition, of course, was (and still is) that the non-vulgar (enlightened) mind is capable of taking advantage of reason in order to play with the passions of those hitherto unenlightened.

Consequently, Beccaria's philosophy is not only manipulative, but also elitist, aristocratic and, therefore, undemocratic. The tacit assumption is that the allocation of talent in society is limited to the few, the masses being inherently stupid and consequently subject only to the passions and 'senses.'

Since some are capable of being more enlightened than others, they ought to wield power, too, according to Beccaria. It is then only logical that criminal law should be interpreted as a tool in the hands of the 'enlightened ones.' Reason is reason for the legitimate use of power. This explains why the Rationalists lionised Reason as an objective principle, a pre-eminent and given common denominator of all humanity, as if it were the independent standard, i.e. not a mere tool for promoting particular interest.

However, the above cited aim of punishment – necessarily eclectic without a firm moralistic basis of either Reason or atonement – is a natural outgrowth of the degrading effects of pragmatism. It must be contrasted to Kant's and Hegel's much more elevating and humane, although solipsistic, postulate of criminal law. It should, therefore, come as no surprise that there are some striking similarities between Beccaria and behaviourist psychologists.

In the sections of the *Essay* we are referring to here, Beccaria deals with two assertions. First, he says, the time lag between the perpetration of the crime and the imposition of punishment ought to be as short as possible; second, the high probability of punishment is more important than its harshness.

In a very real sense punishment is conditioning. Its purpose is not to explain – perhaps by moral reprobation – that what the offender has done was wrong. The offender knew that it was wrong, or else he could not have been punished in the first place (insanity). Punishment is not an appeal to reason; it is an appeal to passions. Conditioning, directed towards the modification of these passions, is a sort of alignment of two sensations within the proximity of time and space. It is an association of two stimuli.

Time, therefore, matters. In most natural situations involving the processes of learning through positive and negative reinforcement (trial and error) there is an intimate connection between the act and the pain. The act always comes first and, ideally, the pain immediately follows. The child touches a hot oven

and experiences the pain of burning. For the pain to have a modifying effect upon the behaviour of the subject it must be connected in his mind with the act that caused it.

The closer the connection, the more reflexive the modification of the behaviour. A looser connection, i.e. where the pain follows only after a time lag and is not *prima facie* connectable to the act, demands a more intellectual understanding of the connection. But the same intellect also provides ways and means to commit the act and yet avoid the pain. Typically, the offenders see punishment as a consequence of their being caught, not of their act. It follows, that it is much easier to condition animals, where there is little understanding involved than it is to condition adult human beings.

Beccaria's underestimation of the 'vulgar masses' induced him, as well as most of his followers, to overestimate the possibility of deterring by means of punishment. Society, for Beccaria, is a giant circus where the 'enlightened ones' are the tamers, and the 'rabble' the beast to be tamed. Of course, it is absurd to reduce either society or individuals to such a crude analogy which is neither rational (because simplistic), nor rationalistic (because idealistic).

The real motors of human existence are the attitudes formed in early childhood. Some of them are a result of deliberate conditioning by parents, but most of them are a product of the trial-and-error interaction with the environment, social and natural. The child grows and develops his moral attitudes (aspirations and inhibitions) not by rational persuasion, but by natural and deliberate rewards and punishments. It is important for our discussion here, however, that the child models his Superego not on the actual behaviour of the parents, but on their own Superego, irrespective of the extent to which they live up to it.[20]

Beccaria's rather retrogressive application of the model of punishment (negative reinforcement of undesirable behaviour-conditioning), as if adults, like children, were to be spanked for their misdeeds, presupposes an essential and actually nonexistent similarity between the child and the adult. It is clear without further discussion that the child's mind is not only receptive to environmental stimuli, but that it is in fact constituted by them, whereas the already articulated adult mind will be less receptive, i.e. the same stimuli will have at best a modificatory influence on it. The constitutive natural

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[20] The Superego of the child is not really built on the model of the parents, but on that of the parents' Superego; it takes over the same content, it becomes the vehicle of tradition and of all the age long values which have been handed down in this way from generation to generation.

Freud, *The Anatomy of the Mental Personality,* Lecture 31. Also see, Nietzsche, *The Will to Power*, sec. 262.

conditioning of the formative years of growth can never be undone by subsequent impositions of punishment *qua* conditioning.

Beccaria's intuitive understanding was that it should be possible to cause the formation of new aspirations and new inhibitions in an adult psyche if only the whip of punishment is applied wisely. However, later developments in criminal law and criminology, linked with names such as Lombroso, Ferri, Liszt, Gramatica, Garofalo, Ancel, Kingbert[21] testify clearly to the hopelessness of the attempt to transform (reform, resocialise, treat) the basis of the human personality and character by means of punishment.

Now that we have at least sketched the parameters of behaviourism relevant here and the underlying assumptions, we can return to the more particular point Beccaria is trying to make here.

> I have said that the promptness of punishment is more useful because when the length of time that passes between the punishment and the misdeed is less, so much the stronger and more lasting in the human mind is the association of these two ideas, *crime and punishment;* they then come insensibly to be considered, one as a cause, the other as the necessary inevitable effect.[22]

This can be compared to a text written ca. 200 years later:

> In addition to the fact that delayed punishment may affect the wrong behaviour, delay is also ineffective because it increases the possibility of the undesirable response to be reinforced in some way. We can see this fact too, in the criminal case. If capture is not immediate, then there is indeed a good chance that the act of breaking law will be immediately reinforced. No matter what the long range consequences turn out to be, from the criminal's point of view the fact may still remain that sticking a gun in someone's face *was* followed by the acquisition of money; ergo, armed robbery obviously works, the problem being not to get caught later.[23]

Beccaria, however, goes further than that. He extrapolates this idea into the realm of general prevention:

> Of utmost importance is it, therefore, that the crime and the punishment be intimately linked together, if it be desirable that, in crude vulgar minds, the seductive picture of a particularly advantageous crime should immediately call up the associated idea of punishment. Long delay always produces the effect of further separating these two ideas; thus, though punishment of a crime may make an impression, it will be felt only after the horror of the particular crime, which should serve to reinforce the feeling of punishment, has been much weakened in the hearts of the spectators.[24]

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[21] Perhaps the only thing all these authors seem to have in common is the illusion about the possibility of the separation of criminal law from morality.
[22] Beccaria, *supra* n. 3, at p. 56.
[23] Lawson, *Learning and Behaviour*, at p. 281-282.
[24] Beccaria, *supra* n. 3 at p. 57.

Needless to say, whether the spectators will indeed be conditioned in a manner analogous to that of the offender who is actually punished is quite a separate problem since it involves a paring of two much less palpable stimuli. The criminal *de facto* commits a crime. He is *de facto* punished. The spectator only comes to know that X has committed a crime and was punished for that. It simply is not possible to say that this process involves learning in the behaviourist sense because no immediate experience (stimulus) is involved. However, here Beccaria is already hinting at the importance of punishment in normative integration.

In terms of aversive conditioning the consistency of punishment is a *sine qua non*. Skinner and others have empirically shown (through animal experiments) that the ration of undesirable responses will not decrease unless every instance of undesirable behaviour is consistently punished. Certainty of punishment, therefore, is essential.

Here again we distinguish between automatic (natural) punishment and deliberate punishment. If we drank too much the previous evening, we will have a headache the morning after. This negatively reinforces the behaviour of drinking and it represents an automatic and inevitable aversive conditioning. However, where punishment depends on a deliberate human reaction to undesirable behaviour, it is less probable that a similar consistency will ever be achieved. The social success of punishment, therefore, cannot be explained only by the negatively reinforcing impact it is intended to have.

> The certainty of punishment, even if it be moderate, will always make a stronger impression than the fear of another which is more terrible but combined with the hope of impunity; even the least evils, when they are certain, always terrify men's minds, and hope, that heavenly gift which is often our sole recompense for everything, tends to keep the thought of greater evils remote from us, especially when its strength is increased by the idea of impunity which avarice and weakness only too often afford.[25]

The idea is Montesquieu's and its essence lies in the deterrent effect punishment was presumed to have. But let us imagine that every breaking of the rules of criminal law would indeed be consistently and inevitably followed by the 'deserved' punishment. Would that make for a lower crime rate and a society with a greater respect for the precepts of criminal law?

The answer must be on two levels, because the subject matter here is bifocal. On the first level, it is clear that the direct countermotivation supplied by the certainty of punishment would prevent many a crime, but then again it would not prevent many others, although the perpetrators would be caught.

[25] Montesquieu at p. 58, *infra* n. 26 to Chapter 9.

Here we are in perfect accord with Beccaria and Bentham and their counter-motivation tariff-theory of deterrence. But the currents of criminal law run deeper than that.

On the second level, the certainty of punishment would cause a total breakdown of the delicate fabric of normative integration based on a negative identification with the punished offender. The law-abiding attitudes in society depend on the powers of introjected morality (Superego) rather than on a policeman at everyone's elbow. That should be clear to everyone who has wondered why people respect the law, instead of asking why they break it. It is the physiology of law-abiding behaviour that matters here, rather than the patophysiology of the criminal violations of the law. We will discuss this issue further in the next chapter dealing with punishment and its influence on normative integration.

2. On Legal Formalism and Interpretation of Rules

In Chapter VIII[26] of the *Essay*, Beccaria touches upon the question of formalities and pomp in legal procedure. His opinion is that they are necessary for three reasons:

1) they force a determination of all the relevant issues in advance and thus force upon all the participants to deliberate through predetermined stages and in a given direction: "They leave nothing to be determined arbitrarily by the administrator;"[27]
2) they inspire trust in the people who see that they cannot be easily deprived of their rights: "That the judgment is not rash and partisan, but stable and regular;"[28]
3) they reiterate the belief that "things that impress senses make a more lasting impression than rational arguments."[29]

Beccaria's exposition of the utilities of the criminal trial's pomp and ceremony is very useful, but it does not represent the whole truth; a presumption runs throughout his writing that reason exhausts the meaning of reality. Here, again, the difference between deontological and pragmatic reasoning becomes obvious. A deontological writer would never have reduced the reasons for legal formalities to these essentially manipulative goals. Rather, he would have ascribed to them a symbolic value: the form is not there to achieve some general preventive, trust inspiring, and other pragmatic goals; it is an

[26] Chapter entitled 'Witnesses,' in Beccaria, see *supra* n. 3.
[27] Beccaria, *supra* n. 3, at p. 23.
[28] *Id.* at p. 23.
[29] *Id.* at p. 23.

expression of the value placed upon the subject dealt with, it is a ritual, but not because of the ritual's influence upon normative integration, although this may be its by-product. The form is there a priori only because of the importance of the transaction itself, of which it is a mere manifestation. In Hegel, we often detect this disgust with simplistic *reductio*, not *ad absurdum*, but *ad rationem*.

Indeed, the ritualistic nature of the criminal trial, although it undoubtedly has the utilities ascribed to it by Beccaria, would never have come into being solely for these reasons, nor does it remain in existence for them.

2.1. Interpretation of the Laws

"For every crime that comes before him, a judge is required to complete a perfect syllogism in which the major premise must be the general law; the minor, the action that conforms or does not conform to the law; and the conclusion, acquittal or punishment."[30] In this, Beccaria is overreacting against the arbitrariness of the medieval justice by proposing that "judges in criminal cases cannot have the authority to interpret laws" because they are not legislators who represent the relegated portions of liberty of all the members of society through the national sovereignty.

Typically enough Beccaria's thirst for logic and reason and the fact that he is a harbinger of the ascending class, which demands protection against the arbitrary aristocratic use of power, synthesise into the rather naïve idea that "the legal system will dictate a single correct solution in every case … as if it were possible to deduce [logically] correct judgments from the laws by an automatic process [and] through a technique of adjudication … disregard the 'policies' or 'purposes' of the law." Here it becomes evident that Beccaria was not trained in and never practiced law.

Everyone who has ever practiced law knows how little in a particular case is ever determined by the mere letter of the law: *parum est enim ut non subverti*

[30] Ironically enough, Italy today – apart from Scotland's ancient Scots law verdict of 'not proven' – is the only country in the world which does not, even in formal appearance, follow Beccaria's *tertium non datur*: Its art; 27, sec. 1, of *Constitutione della Republlica Italiana*, does know the presumption of innocence, but art. 479, sec. 3 of its *Codice di procedura penale* (Codice Rocco) knows the Italian kind of not proven, *non lizuet*, called *el assollutione per el insufficienza di prove*, saying in effect that if there is not sufficient proof to convict on legal grounds it is logically impossible for the court to acquit. The accused can be released (absolution, assolutione), but a new procedure can be initiated against him at some later date if there is new evidence against him. This in effect means that the presumption of innocence is not operative in criminal procedure. The presumption of innocence is thus not a logical anticipation of statistical probability: it is a political postulate not carried over into the Fascist code of criminal procedure still valid in modern Italy.

posset: and yet in many European law schools the reasoning taught today concentrates on the legal syllogism, and Beccaria's influence is still felt. Not that the question of the possible extent to which the legal definition of crime can be fixed and determined concisely would not be legitimate. However, it is clear that life cannot be pigeonholed into legal rules, and that legal rules are not their only essence. They are an expression of the postulates behind them, in our case the conflicting postulates of the control of 'society' on one hand and on the other, the residual postulate of concessions the feudal state was forced to make in order to accommodate the demands for protection against arbitrariness that the rising bourgeois class was making. The idea of the 'perfect syllogism' is just not very relevant, when one considers all the 'causes' and all the actual 'consequences' of a particular legal decision of a criminal case.

Lawyers tend to reduce this question of perfect syllogism to one of formal logic, to which it is in fact irreducible. Problems such as the extent of the sharing of values and interests; the fact that once launched into the social arena the norm tends to live a life different from the one intended for it by the legislator, etc. are necessarily and incorrectly left out of such a discussion. The problem may present itself in the form of the extent of interpretation the society is willing to allow, but this is a false dilemma. It presents itself as both the result and an apparent problem in a particular case or in an abstract jurisprudential debate.

Many factors converge in producing the resultant single perfect syllogism. Moreover, if one admits, as many lawyers are willing to, that most of legal reasoning proceeds in the fashion exactly the reverse of Beccaria's perfect syllogism, so that the conclusion of guilt and punishment is reached first and then reasoned out in terms of law just to repel the danger of reversal on appeal – then it becomes clear how simplistic and naïve Beccaria's proposal in fact was.

2.2. Obscurity of the Laws

Beccaria says, "If the interpretation of the laws is an evil, another evil, evidently, is the obscurity that maples interpretation necessary …. Ignorance and uncertainty of punishments add much to the eloquence of the passions."[31] Beccaria touches here upon two issues: (1) the question of the law made clear and transparent if it is to have the preventive effect and (2) the question of the fixity of the law.

He further says, "Our understandings and all our ideas have a reciprocal connection; the more complicated they are, the more numerous must the

[31] Beccaria, *supra* n. 3, at p. 17.

ways be that lead to them and depart from them. Each man has his own point of view, and, at each different time, a different one. Nothing can be more dangerous than the popular axiom that it is necessary to consult the spirit of the laws. [T]he 'spirit' of the law would be a product of a judge's good or bad digestion."[32] When Beccaria said that, he meant exactly the same thing as Iavolenus when he wrote "*parum est enim ut non subverti posset.*" However, the remedy in Roman law was exactly the opposite of that proposed by Beccaria: "*Omnis definitio in iure civili periculosa*," whereas Beccaria insists precisely on definitions and their clarity: "The disorder that arises from rigorous observance of the letter of penal law is hardly comparable to the disorders that arise from interpretations. The temporary inconvenience of the former prompts one to make the rather easy and needed corrections in the words of the law which are the source of uncertainty, but it curbs that fatal license of discussion which gives rise to arbitrary and venal controversies." Let us discuss both the concepts of conciseness and fixity of law from Beccaria's point of view:

2.2.1. Conciseness

The ideal of the Continental criminal law, ever since Beccaria, has been to make the criminal code a logically coherent matrix of apophthegms, which, even while condensing the meaning of the norm in as few words as possible, would still be intelligible to the man on the street. And indeed those two goals go hand in hand since this forces the legislator into a clarity of thinking: *qui bene distinguit bene docet*.

This ideal stems from the idea, prevalent during the Enlightenment, that crime, to a large extent, was the product of ignorance. If the mass of people could only be educated or enlightened, crime would decrease. This enlightenment process was to take two forms, each requiring clarity and fixity of the law. First, the laws were to be prescriptive in that the criminal code was seen by many enlightened despots of the 18th century as a book of instructions, an outline of proper and improper behaviour (a minimal moral code). Frederick the Great, for example, believed just that and the criminal portion of the "General Prussian Territorial Code" prescribed acceptable and desirable modes of behaviour in even the most trivial aspects of domestic life.[33] Clarity was desirable not because of a desire to achieve justice or ensure

[32] *Id.* at p. 16.

[33] Von Bar, *History of Continental Criminal Law*. Von Bar points to a few sections of the code in particular:

> § 906: Any person to whom an unmarried pregnant woman communicates her secret must not reveal the same, under pain of discretionary but substantial penalties (§§ 34, 35) as long as there is no reason to anticipate an actual crime by the woman.

against the abuse of power by the state; clarity was required so that the rules could be understood, so that the code could function as a book of instruction. Secondly, the law should be clear so that people would be aware of the price they would be forced to pay if they broke the law.

If all the people were acquainted with the punishments they were to receive for particular offenses, Beccaria thought that the chance that they will in fact commit the offense would be much smaller. Characteristically, he fails to differentiate between knowledge of the law and knowledge of the probability that one will actually be caught, tried, and punished. Thinking of morality in terms of a market, wherein the prices for all immoral items are known and therefore everybody is well informed and a rational 'buyer,' he presumed that this would have a general preventive effect. But, of course, the realm of misbehaviour is not a market as simple as this: the prices attached to different offenses are one thing, and the actual probabilities that one will be punished something else again.

Moreover, in the construction of the code, there is a general part of the code which defines the parameters of criminal responsibility possibly applicable in every specific incrimination. Instead of iterating every single issue as many times as is the number of particular incriminations, these rules are articulated in the so-called general part. Obviously their applicability will occasionally represent a problem not capable of being solved without interpretation. But the other alternative would be to have a code many times larger. This too, however, would lead to obscurity – an obscurity which would allow for even greater arbitrariness.

The irony here is that we find very obscure laws in what are often considered to be the most democratic countries. This is ironic because, as Hegel pointed out, obscurity is both unjust and undemocratic. It is unjust because individuals within the society are not aware of what constitutes prohibited behaviour, or if they are aware of what is prohibited they may not be aware of the amount

§ 929: It is also incumbent even upon persons who do not occupy a special relation to said woman, if she has communicated to them her pregnancy or has confessed, to admonish her to observe the statutory provisions (§§ 901 *et seq*.).

§§ 1308, 1309: Anyone who with a view to his own profit shall by means of slander promote discord among near relations or married couples shall suffer a substantial fine or corporal penalty proportionate to the malicious intent and the harm resulting therefrom.

Anyone who promotes this discord with a view to deprive the natural heirs of their inheritance or legacies and to direct such to himself or others, shall be punished as a swindler.

§ 933: No one shall commit against or in the presence of a person, whose pregnancy is evident or known to him, acts which are likely to arouse violent emotions.(!)

of punishment which will be handed out for a particular crime, and as such, there is no guarantee against the abuse of power by the state. Obscurity is undemocratic because knowledge of the law is possessed by only a few rather than by the community as a whole.[34]

2.2.2. The Fixed Nature of the Law

Beccaria talks in his section on 'Obscurity' about the importance of the law being written. He notices correctly that without fixed "writing a society can never acquire a fixed form of government with power that derives from the whole and not from the parts."[35] He was probably the first to perceive the warranting importance of writing and its fixed form in criminal law.

In contract law, this was already clear to the Roman jurists: the form is indeed essential, because a stipulation is made at present to govern the behaviour of the parties in the future. The form thus represents a bridge

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[34] Hegel's *Philosophy of Right*:

> To hang the laws so high that no citizen could read them (as Dionysius the Tyrant did) is injustice of one and the same kind as to bury them in row upon row of learned tomes, collections of dissenting judgments and opinions, records of customs, and in a dead language too, so that knowledge of the law of the land is accessible only to those who have made it their professional study. Rulers who have given a national law to their peoples in the form of a well-arranged and clear-cut legal code – or even a mere formless collection of laws, like Justinian's – have been the greatest benefactors of their peoples and have received thanks and praise for their beneficence. But the truth is that their work was at the same time a great act of justice. [A.] (notes omitted)

Hegel also says at pp. 135-136:

> English national law or municipal law is contained, as is well known, in statutes (written laws) and in so-called 'unwritten' laws. This unwritten law, however, is as good as written, and knowledge of it may, and indeed must, be acquired simply by reading the numerous quartos which it fills. The monstrous confusion, however, which prevails both in English law and its administration is graphically portrayed by those acquainted with the matter. In particular, they comment on the fact that, since this unwritten law is contained in court verdicts and judgments, the judges are continually legislators. The authority of precedent is binding on them, since their predecessors have done nothing but given expression to the unwritten law; and yet they are just as much exempt from its authority, because they are themselves repositories of the unwritten law and so have the right to criticise previous judgments and pronounce whether they accorded with the unwritten law or not. (notes omitted)

All of the above, with the exception of the first sentence – a translation from Hegel's *Naturrecht und Staatswissenschaft im Grundrisse* and *Grudlinien der Philosophie des Rechts*.

[35] Beccaria, *supra* n. 3, at p. 18.

over the element of time, and this is why, for example, the Romans were very particular in the stipulation ceremonies, especially if the contract concerned chattel, or land, or the so-called tradition requiring a participation of seven people (witnesses, parties, the person concerned with weighing money). Thus, form in law was and still is intended to preserve the informational essence of the stipulation in the memories of as many people as possible, anticipating that if future disputes arise as to the precise content of the stipulation, then simply the memories of those involved would not be very helpful.

In more philosophical language, the fixed form and ceremony in law usually serves the purpose of carrying over to the future a development of a human relationship concerning things and even people (e.g. marriage) as they are in the present. Probably the most central problem in contract law, as well as criminal law after Beccaria, is the interpretation of a clause stipulated in the past and *in abstracto*, whereas its 'interpretation,' i.e. the concretisation of this abstract rule occurs in the future and is usually connected with a dispute since otherwise there would be no need for adjudication and concretisation.

Until Beccaria, criminal law was never conceived of as a contract between the state and individuals, and criminal legislation never paid respect to this element of fixity, which allows for a degree of predictability with respect to what the state will do. Beccaria noticed the preventive effect of that, and as we said, believed that by making the writing available to the masses they would be deterred from crime, knowing the price to be paid for the violation of criminal provisions.

But more important than this general preventive aspect is the fact that Beccaria for the first time emphasised the other side of the coin, namely that the fixed form of criminal legislation prevents the punishment of acts not viewed as punishable at the moment of promulgation. Clearly, Beccaria derived this from the analogy with the social contract, noticing that the function of writing in the contract has that guaranteeing role to play.

When he drew this analogy, he introduced into criminal legislation, for the first time, the idea that the role of criminal law is not just to be a manual of instruction to the judges (instrumental roles), but that it is a part of public law, an element of the separation of powers and as such a contract of concession between the legislator and his subjects (prescriptive rules). In the 19th century there emerged the formula "*Nullum crimen, nulla poena sine lege praevia.*" "No magistrate [who is part of society] can, with justice, inflict punishments upon another member of the same society. But a punishment that exceeds the limits fixed by the laws is just punishment plus another punishment."[36] (emphasis added.) The idea of the law "fixing the limits of punishment" was never

[36] *Id.* at p. 17.

detected before in this articulated form. It was an invention of Beccaria and it is obvious what an enormous change in the function of criminal law resulted from it.

The idea itself is a logical consequence of the analogy with the contract law; nevertheless, it was Beccaria who was the first to apply it to the realm of criminal law where it remains one of the most powerful principles. Consider, for example, the protective role of the safeguards of the criminal law's drawing upon the Constitutional Amendments in the United States; the prohibition of the use of 'analogy' in criminal law all over the world; principles such as "*ne bis in idem*" (or in the United States 'double jeopardy' principle); the presumption of innocence – all these are an expression of the protective role of criminal law; 'protective' against the abuse by the police, by the judiciary, by the prosecution, even by institutions such as the parole board, or psychiatrists in cases of detention, etc.

Today this is taken for granted, but it was not until Beccaria that this new role became fully central to criminal law. Indeed, *Constitution Criminalis Carolina* was in fact promulgated in response to the prevalence of abuse of judiciary power and in fact all the subsequent codifications can be seen from this point of view. Beccaria, thus, is the great ideologue of the modern criminal law.

Thus we return to the question of clarity and the need for clarity in the law – not so that the laws can be understood and be known, and then serve as a book of instruction for the common man, but so that the laws can be understood and known in order that they might provide a degree of security for the individual. The question then becomes not whether clarity is desirable, but whether or not it is achievable.

If clarity did in fact exist in a particular criminal code, every case would be decided by simply looking at the facts and then deciding which category of criminal behaviour the activity should be placed in. There would be one correct decision in every case. This concept of clarity, however, is dependent on a view of rules which presupposes intelligible essences within the law, and Professor Unger has revealed the flaws in this notion, which we will examine later.

In conclusion, we can say that clarity can, in reality, never be more than an illusion, and if it is an illusion, rules can never serve as a true guarantee against the abuse of power by the state, for the moment interpretation is required – and it always is required – the rule ceases to be such a guarantee.[37] These ideals of Beccaria and their influence on modern criminal law will be revisited in the chapter on legal formalism and the principle of legality.

[37] Unger, *Knowledge and Politics*, especially the section entitled 'The Antinomy of Rules and Values: The Problem of Adjudication,' at p. 93.

3. Conclusion

We have discussed most of Beccaria's proposals quite extensively. The motive behind this discussion was primarily to show that we have not since 1764 moved further along this line of development. Beccaria's surprisingly modern, realistic, calculative – in one word 'enlightened' – work still evokes admiration. This shows his genius – or our backwardness, probably both. Without a doubt, criminal law, being both a symptom and barometer of social damage in several different senses, fails today to reveal a philosophy more enlightened than that of Beccaria.

On the contrary, a detailed analysis reveals that while the form of his reasoning, the nature of his argument, and the thrust of his philosophy became – with ample help from Jeremy Bentham – part of the social consciousness of our time, the humanistic postulates are far from achieved.

But apart from this form, the postulates he advanced, the ideal of formal justice, abolition of arbitrariness, mildness of punishments, abolition of the death penalty promptness and certainty of punishments, remained largely unattained. While his maxim became the guide to social policy, the criminal justice today is not less arbitrary, not more certain and prompt and mild, and the death penalty is not abolished.

How do we explain this discrepancy between the success of form and the defeat of substance?

There are several reasons for it. First, Beccaria's pragmatic concept of justice involuted the previously compact notion of justice into a vacillation between retribution (previous transcendental atonement for the sake of God's revenge) and future reformation and rehabilitation. And while even today the latter remains secondary to retribution, the split caused by Beccaria engendered the growing ambivalence of society – eager to prevent crime it pretends to reform, and vice versa, eager to pretend through fictitiously long sentences that it revenges whereas in fact it soon releases criminals into the hands of the probation and parole officials. Steering between this Scylla of revenge and moralisation and this Charybdis of moral indolence with the ambition to prevent crime, the ship of criminal law has in the last two centuries been rolling and pitching in dangerous straits.

Second, the Enlightenment definitely demystified the transcendental retaliation of common criminal law, but its purport to have replaced it with Reason is not convincing. It merely replaced one god with another and the fact that the latter was less irrational still doesn't make it rational.

Third, the possibility of quantitative, as opposed to qualitative change in criminal law is relatively limited. There is only so much that can be done in the realm of crime control – and still retain punishment. This punishment may come to be called treatment, reformation, rehabilitation, and resocialisation.

It may involve all kinds of more active concerns with the fate of those thus treated and reformed. Yet basically there is still the inevitable deprivation of freedom. No matter what the proclaimed, or even realised intentions behind it, for the convicted man this is nevertheless simple punishment. So long as this at least objectively hostile reaction against the deprivation of values is retained, the scope of progressive modification is limited. The answer to this is not, as Mead thought in 1918, simply to change from the hostile to the friendly attitude. A qualitative change here requires a new social restructuring akin to the one which Beccaria lived.

The layers of justifications of punishment – theological, utilitarian, political – tend to obscure the real nature of the social practice of punishment. Given that the latter is patently incompatible with whatever idealistic philosophy a particular society may substitute to, elaborate justifications were needed to cover up the rather barbaric reality. The fact that today we witness, at least in the United States, a revival of the straightforward Kantian sort of retribution, should be attributed to the collapse of ideology, rather than to some new found calculative attitude.

The utility of the rationalisations themselves, be it Beccaria's or anybody else's, is extremely doubtful. Like any self-deceptive attitude it prevents the social consciousness permeated by these 'philosophies' from seeing reality, changing when the reality changes and from reacting accordingly where the reaction of the system of philosophy does not correspond to the realistic reaction. This ideontological self-deception is part and parcel of criminal law. A society which does not need to deceive itself as to the social utility and moral necessity of punishment, will not have criminal law, although it will have punishment. Self-deception, thus, may be quite functional.

Last, but by no means least, we ought again to emphasise as strongly as possible, that the philosophy of criminal law has not changed since 1764. The usual textbook on criminal law or criminology espouses values professed first by Beccaria. This does not mean that nothing happened in the last two hundred years. On the contrary, the whole codification of criminal law evolved and the whole attitude toward the administration of criminal justice changed. In 1764, Beccaria's *Essay* was a *rara avis* philosophy, today it is more of less commonplace. The perception of the social function of punishment and criminal law has not changed – it was merely brought into closer accordance with Beccaria's postulates. The nature of this process, interesting as it is from the point of view of comparative legal history, can be clearly extrapolated from Beccaria's program.

CHAPTER NINE

Punishment and its Influence on Normative Integration

1. Introduction

As discussed in the previous chapter, the age of modern criminal law starts with Beccaria and his *Essay on Crimes and Punishments* in 1764. His book represents the introduction of a new mode of reasoning into criminal law and especially into the policy of punishment. It represents a shift from deontological reasoning which admitted of no immediate calculative purpose of punishment to a pragmatic evaluation of punishment as a social practice.

Since its introduction, this mode of reasoning has remained in criminal law. It godfathered the emergence of criminology with Lombroso. It was capable of rebutting such challenges as the philosophies of Kant and Hegel through its consideration of (and reduction to) the utility of punishment. But, by and large it remained the apparently rationalistic calculative reasoning without a serious challenger, except perhaps the reality of crime itself. It still remains the basis of policy decision-making in criminal law today very much in the manner as expounded by Beccaria in 1764.

But, there are two basic problems with this utilitarian approach. First of all, it goes against the very origin of criminal law: it reduces the irreducible psychological attitude of guilt and transcendental retaliation to a simplistic tariff of crimes and punishments according to a theory of counter-motivation based on Bentham's *felicific calculus*. It reduces the moral reprobation essential to the function of criminal law and to the manipulation of the motives of human behaviour. It thus separates utility from the origin and the reason for criminal law's existence and, consequently, introduces an irreconcilable

conflict into the very nature of punishment. This antinomy makes criminal law eclectic and split apart: on the one hand it still serves instinctive responses, but on the other hand its function is rationalised in terms pretending to have nothing to do with aggression, vengeance, and transcendental reference (guilt). This paradox will be further elaborated here.

The internal contradiction in the justification of punishment, of course, did not occur by chance. The 'cause' for this shift is to be found in the impossibility of having punishment justified in aprioristic and axiomatic medieval postulates, which were possible only because they were founded on a sharing of unquestionable beliefs. Only the weakening of these values made the necessity of a different, more explicit rationalisation obvious.

Because of that, once the parameters of the rationalistic justification were made explicit (even though they were false), it fostered an explosion of codification, discussion and differentiation of concepts growing into a relatively consistent matrix of concepts which enabled the participants in this discussion to further detach themselves from the socio-psychological reality of punishment.

This brings us to the second problem. Because of this release of 'reason' and 'rational discussion' within the growing matrix of the concepts of criminal law, criminal law occurred as a special branch of public law. The introduction of a rationalistic discussion into the area of criminal law represents at the same time criminal law's culmination and the beginning of its end. This is so because the very need for the introduction of rational justification into the question of punishment testifies to the fact that the instinctive basis for punishment was (and is) no more sufficient for its persistence. It betrays the need of Western society to invent essentially false reasons for punishment in order to convince itself that it cannot do without it. Thus, it anticipates a future in which punishment as a social practice will no longer be taken for granted.

Moreover, Beccaria's theories prepare the path for this future, by introducing into criminal law the idea that it ought to be the Magna Carta Libertatum of the defendant. The introduction of this new protective postulate of criminal law, which changes its social function from the instigator of punishment to the barrier to it represents a negation of the very essence of punishment. Because of this new development, quite apparent in Beccaria, criminal law becomes a system of rules which prevent punishment. It becomes clear that it is possible to punish without law, but impossible to restrict punishment without criminal law.

The split between criminal law and punishment, the beginning of their mutual disconfirmation, has its origin in Beccaria and Bentham and their attempt to introduce 'geometric precision' into the social conclave which can no longer be satisfied with the belief in transcendental retaliation.

Moreover, with Durkheim's theory that punishment has an impact on the collective conscience of society of which the State is a representative (deontologically pragmatic perspective), the relationship between criminal law and punishment again underwent a shift. Such a pragmatic revaluation of criminal law aspires to do the impossible: to couch punishment in rational terms and at the same time to serve the subconscious irrational powers of punishment as a means of normative integration. After delineating the paradox inherent in the concept of punishment as a result of the pragmatic perspective, we will show how punishment, when taken as a moral reaction rather than merely as a rationalisation, does help in normative integration and social cohesion.

2. The Paradox of Punishment

The institution of punishment in our society seems from a moral point of view to be both required and unjustified. Usually, such a statement would be another way of saying that the practice is a necessary evil and, hence, justified. However, such a reduction is not so simple as far as the moral justification for punishment is concerned when viewed from the intuitive plausibility of two theses – one associated with a retributivist point of view and another associated with a utilitarian justification of punishment.[1]

In retributive theory, punishment is only justified by guilt. But this doctrine is normally held in conjunction with some or all three other doctrines which are logically, if not altogether psychologically, independent of it: these are that the function of punishment is to negate wrongdoing, that punishment must fit the crime, and that offenders have a right to punishment and as moral agents they ought to be treated as ends not means.[2]

A retributive thesis may be posited upon an ultimate concern about the amount of punishment justifiable in particular cases. By violating the rights of others through their criminal activities, wrongdoers have lost or forfeited their legitimate demands that others honour all their formerly held rights. Since having rights generally entails having duties to honour the same

[1] Some philosophers have sought to make these two theories of punishment compatible by making both retributive and utilitarian criteria necessary for the justification of punishment. Utilitarian criteria could be used to justify the institution of punishment, and retributive to justify specific acts within it; or utilitarian to justify legislative decisions regarding punishment, and retributive to justify enforcement decisions. Goldman, *The Paradox of Punishment*. For classic statements of these mixed positions, see Rawls, *Two Concepts of Rules*; Hart, *Prolegomenon to the Principles of Punishment*, in Punishment and Responsibility: Essays in the Philosophy of Law, at p. 1-13.

[2] Quinton, *On Punishment*, at p. 293-294.

rights of others, it is plausible that when these duties are not fulfilled, the corresponding rights cease to exist.[3] From this perspective, a retributivist could conceive that criminals are not being treated unjustly when punished.

In this retributive thesis, when a person violates the rights of others, he involuntarily loses some of his own rights, and the community acquires the right to impose a punishment.[4] It would be difficult for a wrongdoer to complain of injustice when we treat him in a way equivalent to the way in which he treated his victim. If the wrongdoer cannot demonstrate a morally relevant difference between himself and his victim, then he cannot claim that he must enjoy all those rights that he was willing to violate. The prior wrongdoing of the guilty enables the community to harm the wrongdoer without treating him unjustly, but this may be accomplished only to the extent of treating the wrongdoer as he treated his victim. If the community inflicts greater harm than this, it becomes like the wrongdoer, a violator of rights not forfeited. Punishment requires that wrongdoers be made to suffer harm only equivalent to that originally caused to their victims.

Punishment justly imposed by the community is distinct from compensation owed to the victims. Compensation may require wrongdoers to restore their victims as far as possible to the degree of well-being that the victims would have attained had no injustice occurred. That is, compensation returns the involved parties to a just status quo.

To illustrate the paradox in the above justification of punishment, we need to combine this retributive premise with another equally plausible premise

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[3] This partial, moral justification of punishment is retributive in spirit, but not identical to the classic theories of Kant or Hegel. Nor does this thesis view punishment as removing some benefit unfairly enjoyed by the criminal in an effort to restore the distributively just balance of advantages between the wrongdoer and the law-abiding. For a discussion of how punishment can be viewed as rectifying the disturbed pattern of distribution of advantages and disadvantages throughout a community by depriving a wrongdoer of what he gained in his wrongful act, see Finnis, *Natural Law and Natural Rights,* at p. 262-264 and Morris, *Persons and Punishment*, p. 477-478.

A moral analysis that views punishment in terms of balancing social burdens and benefits throughout a community faces two objections. First, this balancing process, to be fair, would have to take account of relative burdens and benefits over each citizen's lifetime and consider them in relation to those of every other citizen. A span of time which extends from before the crime until after punishment does not suffice. Second, balancing burdens and benefits produces counterintuitive implications regarding amounts of punishment for particular crimes. Defining what the wrongdoer gained in his wrongful act as the exercise of self-will by depriving the wrongdoer of his freedom of choice, proportionately to the degree to which he had exercised his freedom in the wrongful act, misses the point. This focus ignores the material content or consequences of wrongful acts through which crimes against property often bring more pecuniary benefits to their perpetrators than do more serious crimes against persons.

[4] See e.g. Ross, *The Right and the Good*, at p. 56-64.

from the utilitarian theory. In utilitarian theory, punishment must always be justified by the value of its consequences. This doctrine holds merely that the infliction of suffering is of no value or of negative value and that it therefore is not justified by further wrongdoing, compensation of victims, and reformation of wrongdoers.[5] In this view, utility is the morally necessary or sufficient condition, or both, of punishment. These are two distinct moral attitudes. The first (utilitarian) asserts when the community may not punish, but not when it ought to punish, while the second (retributive) posits when the community ought to punish, but not when it may not punish.

A utilitarian thesis may be posited upon an ultimate concern about the utility of punishment in particular cases. The administration of punishment by the community can be justified only in terms of the goal of reducing crime and the harms caused by it to a tolerable level and only so long as the wrongs in question are so grave that the social costs of official interference do not exceed the benefits in terms of reducing these wrongs. That a wrongdoer deserves to be punished, or that such a person cannot complain of injustice at being punished, does not in itself mean that the community ought to take it upon itself to punish him. At least one other prerequisite is necessary for the utilitarian community to be justified in punishing a wrongdoer: the social benefits derived from the punishment must outweigh the costs, including the harm imposed, especially when these harms are undeserved like the occasional punishment of the innocent and the excessive punishment of the guilty. This theory is largely based on Beccaria's postulates of maximum benefit from minimum suffering. The community is not concerned with ensuring that all its members receive their just positive and negative desserts in some abstract moral sense. Nor is the community concerned with proportioning burdens to benefits between the law-abiding and the criminal, nor with protecting all moral rights.

Rather, the deterrence of wrongful behaviour by punishment is the primary source of the justification of punishment here. Deterrence theory is rooted in a utilitarian view of a human being as a profit maximiser who calculates profit by estimating his gain and cost resulting from a contemplated act.[6] When deciding to commit an illegal act, this utilitarian, rational actor estimates the probability of receiving a legally imposed penalty – perceived certainty of arrest, the magnitude of that penalty and perceived severity of punishment if arrested. This potential cost is added to other potential costs which the wrongdoer compares to potential gains from the contemplated act.[7] Thus, in order to deter, actual threats of punishment must be communicated to

[5] Quinton, *supra* n. 2, at p. 302.
[6] Geerken & Gove, *Deterrence: Some Theoretical Considerations*.
[7] Grasmick & Bryjak, *The Deterrent Effect of Perceived Severity of Punishment,* at p. 471-472.

the wrongdoer. In the communication process, the wrongdoer's perceptions mediate these threats before the threats influence behaviour.[8]

In the mediation process of calculating potential costs and rewards from contemplated acts, moral commitment[9] is another source of resistance from maximising prospective profits through illegal acts. Even among the morally committed, the perceived certainty and severity of punishment have a deterrent effect on illegal behaviour.[10] Thus, perceived punishment threat has a deterrent effect at all levels of moral commitment. Therefore, perceptions of the severity of punishment are part of the social control process.[11] The effects of moral commitment and punishment threat are additive. That is, each operates as a mechanism of social control regardless of the level of the other.[12]

If we combine the two theses (retributive and utilitarian) now, we produce a hybrid theory of punishment that views the social goal of punishment to be deterrence and that recognises that the community is entitled to pursue this goal only when it restricts the deprivation of rights to those forfeited through wrongdoing.[13] This hybrid theory is premised upon two proscriptions: first, that the innocents are not punished. Second, that the guilty are not punished excessively. In terms of the broader principle that no one ought to be deprived of rights not forfeited, excessive punishment of the guilty is at par with punishment of the innocent. For officially imposed punishment to be justified, a wrongdoer who is punished must have forfeited those rights of which he is deprived, and the community must be entitled to punish by appeal to the social benefit of deterrence.

The paradox of the justification of punishment is that, while the hybrid theory can avoid punishment of the innocent, it is doubtful that it can avoid excessive punishment of the guilty if it is to have sufficient deterrent effect to make the social costs worthwhile. The severity of punishment perceived by a wrongdoer if he is arrested is a significant variable in the social control process, having an inverse effect on his involvement in proscribed behaviour. That effect is concentrated among those people who believe the certainty of punishment is relatively high. The deterrent effect of perceived certainty of arrest varies according to the level of perceived severity of punishment if arrested.[14] Therefore, a wrongdoer is more influenced by his perceptions of

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[8] Geerken & Gove, *supra* n. 6.

[9] Moral commitment may be defined as the internalisation of legal norms in the socialisation process. See e.g. Toby, *Is Punishment Necessary?*, at p. 333.

[10] *Id.*

[11] Kraut, *Deterrent and Definitional Influences on Shoplifting.*

[12] Blake & Davis, *Norms, Values and Sanctions*, at p. 478.

[13] See e.g. Lessnoff, *Two Justifications of Punishment.*

[14] Grasmick & Bryjak, *supra* n. 7.

the certainty of arrest if he believes the penalty if arrested would be severe than if he believes the penalty would be trivial.

In our society, the chances of apprehension and punishment for almost every class of crime are well under fifty per cent. A wrongdoer engaged in criminal activity because he considers such behaviour to maximise prospective benefits for him may not be deterred by the threat of punishment whose severity is merely equivalent to the violation of the rights of his victim. If threats of such punishment are not severe enough to deter the wrongdoer, they would probably fail to reduce crime to a tolerable enough level to make the social costs of the punishment worthwhile. On the other hand, in order to deter crime at all effectively, given reasonable assumptions about police efficiency at bearable costs, punishment must be threatened and applied which goes far beyond the equivalence relation held to be morally justified. Thus, the community cannot pursue its social goal of deterrence without severe enough punitive threats which deprive wrongdoers of more rights than those forfeited through wrongdoing. In short, the effective pursuit of the social goal of deterrence is impossible without the excessive punishment of the guilty. This paradox creates a moral dilemma for our society.

3. Anomie, Punishment and Effects on Normative Integration

The question of morality, as seen above, creates a paradox between the goals of crime deterrence and retribution. So the idea of punishment gradually becomes more and more eclectic and internally inconsistent because goals of retribution, deterrence and reform are certainly not compatible with one another. However, punishment needs to be understood not in its deterring (which would be drained of all morality) or retributivist justification (whose moralistic excess sometimes becomes irrational) but as having the moral function of creating social cohesion and stability by introjecting a social superego or conscience, thereby promoting normative integration, and at the same time, discouraging anomic processes. We will discuss the effects of anomie and punishment on normative integration below.

Anomie is the counterpart of normative integration and its apparent negation. It cannot be defined as an absence of norms because there still exists the enforced normative system. But this system is not internalised any more because of the disjunction between the social and cultural structure.[15] However, anomie is normlessness only from the standpoint of the officially enforced normative system. Apart from that, it is an expression of a definable

[15] Merton, *Anomie.*

set of norms which is opposed to the norms of social structure. Anomie is therefore only a particular kind of morality.[16] The criminal population, for example, has very well defined aspirations and criteria of good and bad. The fact that this morality is contrary to the legal system does not mean that the criminal population does not have any norms at all. Their morality is in fact the only logical response to the social conditions in which they live. If they behave according to the dominant social consciousness, they often renounce their own interests.

This morality, incongruent as it is with the socially proclaimed one, is perceived from the standpoint of the existing social order only as a negation and not as an attempt of constructing a new positive normative structure. Anomie is diffuse, negative in its manifestation and there are no social institutions that would express it. It is not structured in itself. Nevertheless, it is an anticipation of the new morality and its function is to diminish the influence of the old one.

Usually, the stronger the previous normative integration, the stronger the following anomic reaction. This is so because the intense normative integration petrifies the social contradictions inherent in the existing social order. The collective sentiments become conditioned to certain responses and the ideology is internalised to a greater extent.[17] When this response, which is also manifested in the law, becomes inadequate, it amplifies the dimension of its own incongruity with actuality. The anomic reaction[18] becomes more acute when the social structure and the dominant social conscience do not correspond to the stage of development of society. The strength of the

[16] Erikson, *Identity, Youth and Crisis*, at p. 174-175 describes the concept of negative identity, which as an individual phenomenon is but an analogue to anomie as a social process. Nevertheless, the rejection of identification with the existing social institutions logically implies an underlying set of unexpressed and not articulated values which are in conflict with those offered by the society.

[17] Chomsky, *infra* n. 47, has elaborated on the processes that make intellectuals internalise and legitimatise ideology although they could be aware of its inadequacy.

[18] Merton, *supra* n. 15, at p. 460-465 describes three responses to anomie or the inadequate and dysfunctional residual values. Ritualisation through all kinds of social rites re-confirms attachment to old values; resignation is an inner emigration and denial of unacceptable social and political reality. However, it is the rebellion and the revolt of the young, which instigates the creative social conflict. The more the traditionalist, conservative and entrenched values are cemented, the more their change is inhibited and postponed, the greater the probability, indeed the need, for revolution or revolt. (For an outstanding literary essay and illustration of this need, see Camus, *L'Homme Révolté*). It paves the way for the assimilation of more or less radical, new and possibly more adequate values. Because of this, it seems to be necessary to sustain the existing normative structure by fostering normative integration until the old can be replaced by a more suitable new normative structure. For details about Merton's three reactions to anomie, see n. 8 to Chapter 1 of this book.

old inadequate consciousness prevents the positive reaction to arise and consequently the individual and the society inevitably react negatively to the extent the previous internalisation of values conflicts with the existing social conditions. Therefore, the more constructive the previous normative integration, the more destructive its anomic reaction. The more homogeneous the society is in the phase of normative integration, the more heterogeneous it is in the time of anomie.

But even though we accept the inevitability of this trend of development, we are still concerned with the defense of certain norms against the threat of their anomic negation. But since it is impossible to select some norms which ought to be defended and exclude others, we have to defend the system as a whole. The legal system is a highly articulated system of interdependent rules and it expresses the normative structure of a certain social order. It is not possible to change only certain values and rules without changing the system as a whole. The normative structure, therefore, has to be defended as a whole, especially because the anomic processes are not selective and attack it as a whole.[19]

Anomic processes, therefore, indicate the necessity for change in the normative structure of society. However natural the anomic response may be, it is indiscriminately destructive towards all the norms. Therefore, it is desirable to keep it under control. Thus, to control the destructive effect of anomie on normative integration, punishment comes into play. However difficult it may be to find or construe the moral base to punishment, this is the postulate of the administration of criminal justice.[20]

Punishment as a moral reaction, that is, as the morally understood criminal responsibility, has a positive effect on the sustainment of normative integration and therefore a negative, a diminishing effect on the anomic processes.

Criminal law is enforced upon the presumption of punishment as an effective means of control of human behaviour. Therefore, the nature of punishment and its influence upon the human behaviour has to be examined first in order to prove that punishment has psychological and sociological effect on normative integration. Normative integration is both an individual and a social process. Punishment, on the other hand, is always inflicted upon the individual; it cannot be otherwise, therefore it is important to see how it influences the acceptance of social values in those punished and also in those who only know that somebody was punished for certain behaviour. Here the

[19] Erikson, *supra* n. 16, at p. 173.

[20] Szasz, *Law, Liberty and Psychiatry*, at p. 97: "Bazelon offered another reason for not wishing to punish offenders. He dislikes blaming people, and *does not wish to pass moral judgments* on their conduct. As I understand the judge's job, however, this is precisely what he is expected to do." (Emphasis added) (Szasz refers to Judge Bazelon's Isaac Ray Award Lectures: Bazelon, *Equal Justice for the Unequal*, 1961).

process becomes social and becomes different from the one going on in the individual consciousness. Punishment is much more important in relation to those who obey the law than in relation to those who violate it.

This is because in every society, punishment is associated with moral stigmatisation and while this stigmatisation is in itself a part of punishment it is also an expression of the law-abiding citizen's individual reaction to punishment. It indicates the successful internalisation of moral norms. Moreover, when people communicate with one another, there develops a social conscience which is more than a simple sum of individual consciences. It is less flexible and relatively independent. It contains the same moral inhibitions and since it is more difficult to change, it is important for the criminal law to rely on it and to sustain its moral functions. If we want punishment to have a positive influence upon normative integration, if we want punishment to sustain or enhance collective sentiments, the moral connotation of punishment must be preserved.

Thus, criminal law influences collective sentiments through punishment. Punishment reinforces collective sentiments inasmuch as they have a sufficient level of intensity. If the level of intensity is not high enough, punishment will only reduce the visibility of anomie or even catalyse the anomic processes. The influence of punishment is, therefore, relevant primarily in relation to the law-abiding population, because it is there that the collective sentiments are sufficiently intense.

We now proceed to answering three questions. First, one has to define punishment and since punishment is always a concrete action in relation to the individual, punishment can only be defined in this connection. Secondly, punishment has its immediate influence on the individual who is being punished, but it also has an influence upon other individuals and supports their moral convictions. Thirdly, punishment influences the social consciousness and it is therefore necessary to examine how and under what conditions this occurs.

Accordingly, this part is divided into three sections: 3.1. Theory of Punishment, 3.2. The Psychological Aspect of Normative Integration and 3.3. The Sociological Aspect of Normative Integration.

3.1. Theory of Punishment

Criminal law differs from other branches of law, not by the fact that it punishes, but by the nature of its punishment. Those areas of social life that are believed to be very important are protected against acts which would harm them, by the kind of punishment which affects not only personal property but also personal liberty. While the aim in other disciplines of law is

to influence behaviour, the aim of criminal law is more absolute. Its postulate is to eliminate certain kind of behaviour.

As it is usually understood, and criminal legal theory does not go beyond this, punishment is *functionally defined suffering*. The function is twofold: first, it is a retribution for the behaviour that frustrated the one who inflicts punishment, and second, it is expected to alter this undesirable behaviour in the future. From the standpoint of the one who is punished, punishment is *frustration causally linked to the past behaviour*.

For jurisprudential purposes, punishment may be defined as negative sanction that is intentionally applied to someone perceived to have violated a law, rule, norm, or expectation. Such a flexible definition obviates the need to define a legal act[21] or to choose between 'formal' punishment administered by the criminal justice system and 'informal' punishment imposed by the social group.[22] There are two important implications of this definition. First, punishment must temporally follow the perception that someone has violated a rule, norm, expectation, or law. Second, the term 'sanction' must be broadly interpreted so as to include a deprivation or an unpleasant experience, either of which may be physical, social, or psychological.

Punishment also defines social boundaries, vindicates norms, maintains distinctions between ingroup and outgroup, and strengthens the cohesion of the social group. Although punishment may often be aroused by an injustice and explicitly framed to deter further violations, or to extract vengeance for past ones, it may also fulfil other social functions that are concealed by the rhetoric of justice.[23] Punishment, therefore, may include not only physical acts, such as torture, confinement, fine, or enforced restitution, but also status degradation, such as ridicule, ostracism, or expulsion from the social group.[24] Since punishment entails the purposeful infliction of suffering upon a human being, moral justification is required.

Aggression is another aspect of punishment. Both Durkheim and Mead recognised that "punishment consists of a passionate reaction." In human society, aggression manifests itself through vengeance and punishment

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[21] See Abel, *A Comparative Theory of Dispute Institutions in Society*; also see, Friedman, *The Legal System: A Social Science Perspective*.

[22] See Lindesmith, *Punishment*, at p. 217-221.

[23] Gusfield's analysis of the temperance movement reveals how both the advocacy of prohibition and the punishment of its violators may have been justified by practical and moral arguments but may actually have reflected the attempt by one social group to maintain status and social power that were threatened by another. Gusfield, *Symbolic Crusade: Status Politics and the American Temperance Movement*.

[24] For a further discussion of the meaning of the concept of punishment, see Hart, *Prolegomenon to the Principles of Punishment*, in *Punishment and Responsibility*: *Essays in the Philosophy of Law*, at p. 4-6.

and thereby also serves the need of preservation of society and individual. Subsequently, punishment becomes less and less "passionate reaction" and becomes more and more a rational response to undesirable behaviour. At a certain stage, it passes from the hands of individual vengeance to the societal agencies more free from the instinctive response and therefore in a better position to use punishment rationally. The more aggression there is behind the punishment, and it may well be expressed in "righteous moral indignation," the greater the possibility that it will be irrationally inflicted, rationality being defined in terms of the goal of changing the individual offender. This irrationality may, however, be quite important in relation to the necessary sustenance of the existing moral standards.

Moreover, criminal responsibility, which is the bridge between the criminal act and its punishment, often becomes the center of inquiry due to its legal importance. Criminal responsibility contains all the positive and negative conditions which have to be present in order to warrant punishment (conditions such as *mens rea*, sanity, causal nexus between the deed and the consequence, the correspondence of the act to the abstract definition of the criminal law, etc.) It invites ethical argumentation and is often a barrier to a realistic discussion of the nature of the criminal law.

Socially, however, the essence of the criminal law is not criminal responsibility, but punishment. Punishment and its influence upon the individual and the society is the central question. If punishment proves to be an effective instrument of social control, then criminal law has its *raison d'être*; if not, then it is just an atavistic aggressive response, the attitude of hostility. Therefore, the nature of punishment and of its effects is the preliminary question in defining the role of criminal law.

The only scientific definition available today is the behaviourist definition of punishment. In the behaviourist doctrine,[25] punishment is a phenomenon that influences the process of learning and the process of behaviour modification. Every human behaviour which is followed by suffering is negatively reinforced. Punishment, be it a natural consequence of behaviour or a conscious infliction, is withdrawing the positive reinforcer or the respective behaviour and/or presenting the negative reinforcer.

"A positive reinforcer is any stimulus the presentation of which strengthens the behaviour upon which it is made contingent. A negative reinforcer (an aversive stimulus) is any stimulus the withdrawal of which strengthens the behaviour."

The effect of punishment is not, as it is usually presumed, the opposite of award. While positive reinforcement actually changes not only behaviour but the personality behind, negative reinforcement works only as a counterbalance

[25] See Skinner, *Science and Human Behaviour*.

to positive reinforcement that has already resulted in a certain pattern of behaviour. Consequently, one may say that while a positive reinforcement of behaviour may stand alone and therefore really guide the behaviour, the negative reinforcement is always posterior to positive reinforcement and there is always a conflict between them.

While a positive reinforcement may change the behaviour permanently, the negative reinforcement will be efficacious only if in its strength and duration it counterbalances the positive reinforcers of the respective behaviour. A habitual property offender, for example, would have to be constantly and consistently punished and his behaviour controlled in order to neutralise his behaviour pattern. A murderer, on the other hand, if the murder was committed because of family tension, would not have to be punished at all, if we assume that the positive reinforcement of his behaviour was eliminated with the death of the murdered person.

If we have the combination of consistent positive reinforcement of undesirable behaviour and occasional, inconsistent punishment, the latter will be ineffective: the undesirable behaviour responses tend to re-emerge and, as it was proven in animal experiments, in the long run the total number of undesirable behaviour responses tend to be the same, with or without punishment.

If punishment is to have any effect on the behaviour, it has to be consistent.[26] Every undesirable response has to be punished immediately. Without this consistency, of course, the disappearance of the undesirable behaviour has to be attributed to the absence of its positively reinforcing stimuli and not to punishment. If the social institutions that inflict punishment according to criminal law cannot react as consistently as required, the effect of punishment upon the people with strongly reinforced undesirable behaviour, will not be successful.[27] In fact, this means that unless every crime is uncovered and the offender punished, one should not expect the punishment to have a lasting

[26] This idea was expressed as early as Montesquieu's *L'Esprit des Lois*, Book VI, Chapter 1. He emphasises that it is the inevitability of punishment which can diminish 'human corruption' and not its harshness.

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> Usually the group is not well organised, nor are the practices of reinforcement and punishment consistently sustained. Within the group however, certain controlling agencies manipulate particular sets of variables. These agencies are usually better organised than the group as a whole, and they often operate with greater success … Controlling agencies are concerned specifically with certain kinds of power over variables which affect human behaviour and with the controlling practices which can be employed because of that power.

See Skinner, *supra* n. 19 to Chapter 8, at p. 333-334.

effect upon the offender. This points to the importance of the police and its techniques of uncovering criminal activity.

When it becomes clear that punishment does not, in fact, change the energy behind the undesirable behaviour, the attention is focused on its influence upon the society as a whole. One assumes that it is not by chance that punishment still exists, in spite of the fact that its inefficiency in modifying the behaviour of criminals is proven. This influence of sustaining collective sentiments (Durkheim) behind the repressive law or in Mead's words "the integrative function of the hostile attitude" is then finally revealed.[28]

3.2. Psychological Aspect of Normative Integration

We are concerned here with the question of the genesis of morality in the individual, that is, how the moral distinction between right and wrong becomes part of human mind and behaviour. The concrete contents of this distinction vary from culture to culture, from society to society and from one group in society to another. Nevertheless, on a higher level of generality, the question is how does a child start to distinguish between the acceptable and the unacceptable on a moral basis.

The concept of morality is a social concept. However, there must be something on the individual level that brings social morality into concrete life. Although the essence of the phenomenon of morality in its origin and existence is social, it can express itself only through individual behaviour. Morality, in other words, is something universal which expresses itself through the particular. The fact that certain individuals, notably psychopaths, completely lack certain moral abilities, proves that there must be this particular psychological counterpart to the social entity of morality.

Freudian doctrine explains the development of moral judgment through the concept of Oedipus complex – the child's sexual attachment to the parent of the opposite sex. The suppression of the Oedipus complex is followed at a certain age by identification with the parent of the same sex, which makes him internalise certain standards of behaviour. If the process of suppression is successful, it results in the formation of the ego ideal, the superego. Superego is the seat of both our morality of duty and our morality of aspiration "Our moral sense is the expression of the tension between the ego and the superego."[29] Superego represents parents even if their conditioning by love and punishment is not present anymore. It "… observes, directs, and threatens ego in exactly the same way as earlier the parents did with the

[28] See Andenaes, *supra* n. 10 to Chapter 8.
[29] Freud, *The Interpretation of Dreams,* at p. 201.

child."[30] Through identification, the parents provide the medium between the individual and society and between the past and the present. "The superego of the child is not really built upon the model of the parents, but on that of the parent's superego; it takes over the same content, it becomes the vehicle of tradition and of all the age-long values which have been handed down in this way from generation to generation."[31] The better developed the Superego, the more receptive is the child in the internalisation of moral values.

The formation of Superego does not mean that there will be an immediate introjection of all relevant norms. In this process Superego is merely formed as the child becomes a moral being. Its content and continued growth are more and more formed by the society as the child enters into institutions outside the family. This idea is of paramount importance in understanding the link between the formation of the individual's ability for normative integration and the society's influence in giving the appropriate contents to this form.

The question arises, what is the role of the criminal law in this context? Can punishment stimulate the identification with the norm it protects? There is a positive correlation between the correspondence of the norm to the interests of the particular individual and the chance that this norm will be identified with. There is no need of the subtle support of the Superego for the obvious, concrete interest of the individual. Nobody has to be forced to eat, drink, have a sexual life or communicate with fellow human beings.

Where the concrete, immediate interest conflicts with the more abstract and universal one, the Superego plays the decisive role. The Superego expresses those values which represent the individual's own interests on a higher level of generality: he, for example, has a concrete interest to kill somebody, but his more abstract interest, because he is a member of society, is that there would be no killing, because this would destroy society and him as its member. Accordingly, we have an interaction between criminal law norms and punishment on the one hand and the individual and societal Superego (i.e. morality) on the other hand. This interaction can be one of mutual reinforcement or mutual enfeeblement. In the last analysis this will depend on the intensity of correspondence of different interests within society.

Since the criminal law is in the hands of the power stratum of society, its norms may be in greater or smaller correspondence with the interests of the other parts of the society. In this respect frequency and intensity of the violation of norms of the criminal law will vary in accordance with this

[30] *Id.* at p. 201.

[31] Freud, *id.* at p. 95-96 in 1933 edition; see also Laing, *infra* n. 48 and Jung, *infra* n. 38 at p. 84.

lack of correspondence. This already explains the criminal law's influence on normative integration: crime, obviously, is the pure negation of this influence.

Essentially, criminal law has no independent role in its attempt to stimulate normative integration. By itself, it cannot form the norms of moral weight and the withdrawal of its sanction has no immediate impact upon the norm as it lives in the Superegos of the people. A legislative action can anticipate the formation of a new social practice and new morality, as in traffic legislation, for instance. In this case, the norm of criminal law will easily be accepted and will have its social life. In case of a contradiction between the norm and immediate individual interests, everything depends on the Superego. If the Superego of an individual has integrated the norms to a sufficient degree, this will manifest itself in the lawful behaviour.

The essential question is, under what conditions will the norm reach the Superego. Here, we have to deal with the quality of the norms that enter the ego ideals of the individuals. As we said, this depends on the correspondence of interests. It seems to be true, that the most criminal stratum of society is the one that is least socially integrated. This means that its own culture and interests do not correspond to the values of the larger society. Thus, the intensity of anomic processes varies according to the discrepancy between the interests of the particular interest stratum of society and interests represented in criminal law. This became obvious in the United States when all minority groups went through a period of higher criminality before integration in American society. Another aspect of the same mechanism is the class aspect: the classes that are deprived of the benefits of the productive process feel that the larger society acts against their interests. They have nothing to lose, and they see that social norms work against them, and they become aware that it is irrational for them to conform to them.[32] Thus, less influence can be ascribed to criminal law in those parts of the social structure which cannot succeed in satisfying their interests in the lawful way. If the people of these classes nevertheless obey the rules of law, this can be ascribed only to the restrictive influence of their Superegos. The criminal law and its threat provide the necessary rationality of this influence and the support of their internalised morality.

Punishment and criminal law, then, have a psychological effect on individuals, which facilitates normative integration. Additionally, psychoanalysts have drawn attention to three more psychological aspects of our attitude towards law breakers and criminals which further facilitates normative integration.

[32] In Walpole State Prison, I had an opportunity to speak with a black inmate who had spent fifteen out of thirty-two years of his life in prison, all for property offences. He was very class-conscious, and his philosophy was basically that he has realised the irrationality of abiding with social norms. He said: "They brought me here to change me, but nothing can change my attitude, because it is the only possible one."

In the first place, the criminal provides an outlet for our (moralised) aggression. In this respect, he plays the same role as do our enemies in war and our political scapegoats in time of peace. That some very real satisfaction is to be found in this way is shown by the vast crowds that attended public executions.

In the second place, the criminal, by his flouting of law and moral rule, constitutes a temptation to the id; it is as though we said to ourselves, "if he does it, why should not we?" This calls for an answering effort on the part of Superego which can best achieve its object by showing that "crime doesn't pay." This, in turn, can be done most conveniently and completely by a demonstration on the person of the criminal. By punishing him we are not only showing him that "he can't get away with it" but holding him up as a terrifying example to our tempted and rebellious selves.

Last is the danger with which our whole notion of justice is threatened when we observe that a criminal has gone unpunished. The primitive foundation of this notion lies in an equilibrium of pleasures and pains, of indulgence and punishment. This equilibrium is disturbed, either if the moral rewards of good conduct are not forthcoming or if the normal punishments of crime are absent or uncertain. It is to prevent disturbance of the latter kind that we insist that those who have broken the law shall be duly punished. Through their punishment, the equilibrium is re-established; without it, the whole psychological and social structure on which morality depends is imperiled.[33]

3.3. Sociological Aspect of Normative Integration

3.3.1. Durkheim's Theory of Collective Conscience

Durkheim's theory of division of labour distinguishes between mechanical and organic solidarity. Mechanical solidarity, while we cannot simply detach it from organic solidarity, is 'mechanically' enforced. It is practically synonymous with what we call 'law and order.'[34] Mechanical solidarity, typical of ancient societies, is sustained by repressive law.

Organic solidarity between people, as the term almost anthropologically suggests, involves the spontaneous and natural cohabitation as well as

[33] See Flugel, *Man, Morals and Society*.

[34] This is not the same 'law and order' as the one posited by Malinowski. For him, 'law and order' is a composite term signifying social peace and stability. For us, the term indicates the social discipline instilled by the fear of sanction. For Malinowski, insofar as social anthropology would deal with issues such as 'democracy,' the 'rule of law,' etc, there would be no contradiction with 'law and order.' We shall, on the contrary, juxtapose 'law and order' as a mechanical means of maintaining social peace to the subtler (more democratic) apparatus of the 'rule of law.'

undisturbed division of labour. Sustained by restitutive law, it is characteristic of modern societies, where the division of labour has developed and where, accordingly, there is less need for exertion of force because of greater structuralisation and integration idiosyncratic for the organic structure of division of labour. The more the division of labour is developed and the more interdependent are the organic parts of society, the less need is there to keep society together by force or repressive law.

This aspect of human collaboration is free of conflicts. The more values are shared, the more organic the solidarity. If most common values were genuinely shared, i.e. in total absence of anomie, one would have the kind of organic solidarity anthropologists used to describe as prevailing in primitive tribal communities.[35] In a developed stage of social growth, organic social solidarity also refers to the harmony between institutionally promulgated values (the mechanically enforced legal norms) on the one hand and moral norms people have genuinely internalised on the other. Modern anthropology no longer hypothesises this absolute sharing of values. But inasmuch as the repressive law is still needed, the 'directive power,' i.e. the organs of the State, represent the collective sentiments, react on their behalf, enforce them and defend them. The directive power is "the collective type incarnate."[36]

Furthermore, Durkheim's definitions of crime, punishment, and normative integration are logically derived from the concept of collective conscience.[37] The collective conscience is more than the sum of individual consciences, even though it lives through individuals. These, when brought together, live in an interplay in which they mutually influence one another.

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[35] See for example, Margaret Mead, *Coming of Age on Samoa: A Psychological Study of Primitive Youth for Western Civilisation*. See also her *Growing up in New Guinea: a Comparative Study of Primitive Education*. The myth of the idyllic coexistence ('organic solidarity,' pure and simple), however, is not a modern invention. The Roman poet Ovidius Naso (43 BC-18 AD) begins his Metamorphoseon Libri with the famous hexameter praising the imaginary golden age in which there was no need for a judge (adjudication) and in which justice was cultivated without law and through 'bona fides:' "Aurea prima sata est, aetas que vindice nullo, sponte sua sine lege fidem rectumque colebat …" Clearly, this is a myth, but an archetypal and a powerful one. Through assumption that it is the private property over the means of production, which caused the collapse of organic and the need for mechanical solidarity, the same myth inspired the whole ideology of Communism. For a naïve rendering of this, see Fromm, *The Anatomy of Human Destructiveness*, Chapter I.

[36] Durkheim. *The Division of Labor in Society*, p. 84.

[37] Durkheim, *supra* n. 36, p. 79:

> The totality of beliefs and sentiments common to average citizens of the same society forms a determinate system which has its own life; one may call it the collective conscience or common conscience … It is by definition diffuse in every reach of society … It is, in effect, independent of the particular conditions in which individuals are placed.

The collective conscience is transferred from one generation to another and is relatively independent of the immediate social situation. Society has its own psyche which is essentially the same in all its strata, in all geographical parts of the country where it exists, and in all professions.[38] Collective conscience is also given the attribute of transcendence, which in effect manifests its independence.

Crime is a violation of collective conscience.[39] It must not be defined in relation to social needs because such a theory "accords too large a part in the direction of social evolution to calculation and reflection"[40] and besides, there are crimes that are not harmful to the society at all. However, Durkheim acknowledges that collective conscience essentially depends on the social needs, when he refers to social utility. Unless, therefore, we assume that Durkheim contradicts himself, we have to modify his own definition of crime: crime is violation of social needs, present and past, as expressed through collective sentiments. The theory of collective conscience does not differentiate the various strata of society. Consequently, all incriminations manifest the psyche of the society as a whole.

Punishment, for Durkheim, is a passionate reaction. The more primitive the society, the more this is evident.[41] Punishment is not necessarily in accordance

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[38] It is interesting to see how this perception by Durkheim penetrated into psychology. It was taken over by Jung who invented the notion of 'collective unconscious,' by which he denotes the archetypes which are transferred independently even of society and are shared by the whole humanity. See Jung, *Analytical Psychology*.

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> … the collective type is formed from very diverse causes and even from fortuitous combinations. Produced through historical development, it carries the mark of circumstances of every kind which society has gone through in its history. It would be miraculous, then, if everything we find there were adjusted to some *useful end*. But it cannot be that elements more or less numerous were introduced without having any relations to *social utility*.

Durkheim, *supra* n. 36, at p. 170 (emphasis added).

[40] Durkheim, *supra* n. 36, at p. 72.

[41] As we said before, the core of Durkheim's theory in *The Division of Labour in Society*, is the distinction between the primitive and advanced society. The primitive society is characterised by its inorganic character, i.e. parts of society can be added and taken away without essential damage to the functioning of society. Small geographic and demographic extension is characteristic of primitive society. Consequently, the dominant form of consciousness is mechanical solidarity. To this corresponds the repressive law. The advanced society's structure is organic, the units are interdependent, the geographic and demographic extension are greater, solidarity becomes organic too. Consciousness becomes increasingly personalised, and the influence of collective consciousness decreases. This society is defined as an association of traders, and consequently the restitutive law becomes its characteristic. Although Durkheim contrasts his theory to the utilitarian one, in the last analysis, his own theory rests on the organic solidarity i.e. complementariness of interests, which is exactly the position taken by

with the act, it is often too harsh, and it, moreover, extends even to persons linked to the offender.[42] "It expands in quite a mechanical fashion. The passion which is the soul of punishment ceases only when exhausted."[43]

According to Durkheim, this essential quality of punishment has not changed in the modern societies. Punishment has always been a social reaction, even though realised through individual conscience. What has changed over the years is but the form through which this passion expresses itself: in a more structured society punishment itself becomes subject to division of labour, and though it remains vengeance, it is enforced through the organs of the State, through the tribunals. Because society has become more conscious of the purpose of punishment, it tends to restrict the passionate component of it. Nevertheless, the correlation expressed in the maxim that 'punishment must fit the crime' still points to the irrational correlation between the strength of sentiments the act offends and the punishment. If totally rational, punishment would only correspond to the degree of the corruptness of the criminal, which is not necessarily implied in the crime committed.

The second proof of the passionate nature of punishment is the spontaneous social reaction to the crime "which often serves no purpose" and doubles the punishment. This is how the collective sentiments spontaneously reinforce themselves.[44] Moreover, since the punishment has been delegated to an official organ, it is somehow alienated from the society and the collective sentiments do not exhaust themselves through official punishment so that they have to sometimes express themselves in a spontaneous aggressive reaction. Therefore, even if punishment is a passionate reaction and seems irrational in relation to the particular offender, it still serves a very important function; *it reinforces the same collective sentiments that have produced it.*

Durkheim recognises the important effect punishment has upon the preservation of social cohesion. The natural inference to be made from the Durkheim theory is that the enforcement of the criminal law is far more important for those who respect it, than it is for offenders. It has much more influence on the law-abiding population than it has on the criminal one. The

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the utilitarian philosophy. On the basis of shared interests, organic solidarity is added to the mechanic one. Social order is rendered possible on two conditions: a) Occupational groups must mediate between the individual and society; b) The sanctity of social norms must be recognised and preserved.

[42] This mechanical extension of passion is not limited only to primitive societies. It is well known that during World War II the Italians and Germans used to take hostages and execute them in the event one of their people was killed. Soviet Union also used to enforce the law, which prescribed punishment for the members of the family and even of the household of those who defected.

[43] Durkheim, *supra* n. 36, at p. 86.

[44] *Id.* at p. 83-84.

chance that the offender will be transformed is relatively small; however, this does not render the punishment purposeless. Since collective sentiments live through mutual reinforcement, it is important that every violation be punished.[45]

For Durkheim, then, the really important role of the criminal law is to protect social cohesion "against all enfeeblement." The criminal law achieves that through demanding from each of us a minimum of resemblances without which the individual would be a menace to the unity of the social body, and in imposing upon us "the respect for the symbol which expresses and summarises these resemblances at the same time it guarantees them."[46] He assumes that all the values protected by the criminal law are the manifestation of collective sentiments and that every act which violates these norms is a threat to social cohesion. Obviously, the underlying presumption must be that society is a homogeneous structure and that the criminal law with its enforcement agencies is merely an organ of these collective sentiments.

Even those crimes that do not offend the collective sentiments directly, but offend the organ which represents them (*mala prohibita*), it is, according to Durkheim, the same force that is offended here as well: collective social sentiments. This is because the force "is the product of the most essential social likenesses." For him, then, criminal law enforces the minimum of

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[45] Kant, *Metaphysic des Sitten*, at p. 15:

> Judicial punishment … can never serve merely as a means to further *another* good, whether for the offender himself or for society, but, must always be inflicted on him for the sole reason that he *has committed a crime* … The law of punishment is a categorical imperative, and woe to him who crawls through the serpentine windings of the happiness theory seeking to discover something which in virtue of the benefit it promises will release him from the duty of punishment or even from the fraction of its full severity.

Kant, *Eléments Métaphysiques de la Doctrine du Droit*, at p. 35:

> L'impératif catégorique, qui en général n'exprime qu'une seule chose, ce qui est obligatoire, se formule ainsi: agis suivant une maxime qui puisse avoir en même temps la valeur d'une loi universelle. Ainsi, après avoir considéré d'abord tes actions dans leur principe subjectif, tu ne pourras reconnaître qu'il a aussi une valeur objective …

Kant's theory of punishment as a categorical imperative has often been considered intuitive and impossible, either to prove or to deny, if not irrational.

But here we see how well it corresponds to Durkheim's theory. Both Kant and Durkheim, deny the importance of social needs, but while Durkheim takes them into account through his concept of social utility (p. 107) and so tries to consider them at least indirectly, Kant writes as a spokesman for collective sentiments without trying to explain them and taking essentially an agnostic point of view (p. 36).

[46] Durkheim, *supra* n. 36 at p. 106.

conformity required from the individual. Conformity, here, is not directly related to social needs, but to collective sentiments that express them more or less accurately.[47]

Even those collective sentiments that serve no apparent social need must be protected because they are social links and if they are destroyed this would harm social cohesion. Punishment, consequently, is not only the consequence of living collective sentiments, but also their cause, since it brings them back to life. There is a dialectical relationship between social conscience and the enforcement of the criminal law.

Durkheim's theory, however, presents a problem if we embark on a discussion of the relationship between collective conscience and reality. Durkheim invents a fiction that even *mala prohibita* offend collective sentiments, simply because they offend their truly representative organ. If we accept Durkheim's doctrine the criminal will necessarily be defined as 'deviant,' 'abnormal,' 'insane,' because according to Durkheim, the moral conscience of the nation is *datum*, is right, and all that diverges from it is wrong. This fiction enables him to say that the entire criminal law is a manifestation of collective conscience. This would be true if his previous assumption of the society as a homogeneous structure in respect of interests were also true.

Society, however, is no homogeneous entity. It is stratified according to inequalities produced by the right to equality. Social conscience is not pervasive, it is different for different interest groups. Crime appears in various degrees in different social strata. Obviously, it is the upper power strata that dictate the stronger social conscience and have the means to make it the only one that can be publicly defended. Criminal law and its rules express these sentiments and interests, and not the sentiments and interests of the other social strata or of the society as a whole. Inasmuch as these differ from the sentiments and interests of other social strata, crimes will occur as a regular phenomenon.

Durkheim tries to find a common denominator to all the crimes. He tries to define crime through punishment, because he says, the common consequence means the common cause. Apart from the fact that this is a

[47] There are two basic mistakes in Durkheim's theory. First, he takes the society as non-class structure. Second, consequently, he sanctifies the social norm. Sanctification of actuality appears in almost all of the principal classical social theories. Even in Hegel, critical thought is abandoned in the last analysis and the State is rationalised in its function. The same happens in Durkheim's theory, where the directive power is the true representation of collective sentiments. Today, however, this view is largely criticised, the social norms are critically examined and consequently the problem of the relation between the consciousness and actuality, essentially a metaphysical question, is re-emerging (see Chomsky, *The Intellectuals and Ideology*). Durkheim ignores these questions, and therefore his theory, as a whole, although he offers concepts with great explanatory powers, is not correct.

logical fallacy, it is not true that the punishment in all the cases is the same expression of collective conscience. Moreover, since anomie is actually the absence of certain collective sentiments, it would follow from Durkheim's doctrine that they can be brought back to life by punishment, which is simply not true in reality.

Crime would be an exceptional phenomenon of the individual pathology, if there were an overall moral agreement in the society. So we may use this theory only to the extent that collective sentiments really exist; their absence cannot be explained.[48] Durkheim claims to use only a descriptive approach in his sociological writing. But he becomes normative and prescriptive the moment he assumes that 'the organs' truly represent collective sentiments even though they may not exist in the apparent reality.

3.3.2. Mead and his Theory of Punitive Justice

The basic question presented in Mead's theory is, how to find the way in which the hostile instincts could express themselves without causing social damage. Social damage is manifested by the fact that the hostile attitude makes it impossible to resocialise the offender. Punishment as an expression of the hostile attitude is incompatible with the goal of resocialisation. Emotional attitude expressed in the "majesty of law" in the legal battle, corresponds to the hostile instinct. It serves 1) "to exile the rebellious individual from the group;" and 2) "to awaken in law-abiding members of society the inhibitions which make rebellion impossible to them. The formulation of these inhibitions is the basis of criminal law."[49]

He hypothesised that there was no need to subject the criminal offenders to the hostile attitude evinced by the normal adversarial procedure, i.e. that

[48] The criticism of the dominant form of collective consciousness is evident in the works of Laing, *The Politics of the Family and Other Essays*. He often assumes that the social conscience is inadequate and if the individual reacts to it with a distorted perception of reality, this is an adequate reaction.

Fromm also takes the same standpoint.

> It is naively assumed that the fact that the majority of people share certain ideas or feelings proves the validity of these ideas and feelings. Nothing is further from truth. Consensual validation as such has no bearing whatsoever on reason or mental health. Just as there is a 'folie à deux' there is 'folie à millions.' The fact that millions of people share the same vices does not make these vices virtues, the fact that they share so many errors does not make the errors to be truths, and the fact that millions of people share the same forms of mental pathology does not make these people sane. (Fromm, *The Sane Society*, at p. 23.)

[49] Mead, *The Psychology of Punitive Justice*.

the criminal justice system could revert to the 'friendly attitude.' We could say that he ventured beyond the 'power of logic,' i.e. to the power of 'organic solidarity.'

> [T]he interest shifts from the enemy [scit: the criminal offender] to the reconstruction of social conditions. The self-assertion of the soldier and conqueror becomes that of the competitor in industry or business or politics, of the reformer, the administrator, of the physician or other social functionary. The test of success of this [different] self lies in the change and construction of the social conditions, which make the self possible, not in the conquest and elimination of other selves. His emotions are not those of mass consciousness dependent upon suppressed individualities, but arise out of the cumulative interests of varied undertakings converging upon a common problem of social reconstruction. This individual and his social organisation are more difficult of accomplishment and subject to vastly greater friction than those, which spring out of war [scit: the hostile treatment of criminal offenders]. Their emotional content may not be so vivid, but they are the only remedy for war, and they meet the challenge, which the continued existence of war in human society has thrown down to human intelligence.[50]

The influence of Durkheim's ideas upon Mead is obvious and the aspect of 'social reconstruction' shows similarity with the radical Marxist ideas. However, Mead focused simply on the psychology of criminal justice postulating that the 'hostile attitude' could be dealt within the narrow confines of the replacement of the retribution and the general preventive intentions of punishment with what later came to be called 'treatment.'

According to Mead, the impulses which identify us with the predominant group are concrete although the values they protect and represent may be abstract, that is, "are negatively and abstractly conceived."[51] Here, the difference between Mead and Durkheim becomes obvious. While Durkheim deals with the problem of normative integration on a higher level of abstraction and allows more abstract conceptions to support his theory of reinforcement of collective conscience, Mead deals with smaller groups and individuals and does not accept the possibility that social conscience could be influenced by specific mechanisms of its own. For Mead only the concrete impulses, concrete emotions are capable of reinforcement of our feeling that we are part of the predominant whole.

Therefore, we may say that both Durkheim and Mead recognise the influence of criminal law upon normative integration, only on different levels of generality. What Durkheim described as the progress from mechanic solidarity to the organic exists in Mead's theory as the progress from the hostile attitude to the friendly one. However, Durkheim is more explicit

[50] *Id.*
[51] *Id.*

as to the causes of this progress: the mutual interdependence caused by shared interests and enhanced by the mediation of occupational groups and sanctification of the norm.

Mead has a less rigid approach. Durkheim defends the function of punishment almost unconditionally, whereas Mead saw very well that there is an inevitable incompatibility between reinforcing the collective conscience and the concrete aims of punishment. It is true that punishment unites "members of the community in the emotional solidarity of aggression."[52] But this hostile attitude provides no "principles for eradication of crime."[53] It is true that society in fact profits from the criminal, because the hostile attitude "reveals common universal values" and "seemingly without the criminal the cohesiveness of society would disappear."[54] On the other hand, there are more and more interests that the members of society have in common and the growing consciousness about them tends to modify this hostile attitude. It is important to see here that Mead deals with interests.

In a society where the members have no interest in common, there can be no law, because there can be no agreement as to the procedure of arriving at the rules, and there are no common criteria for the interpretation of rules. In a society where all the existing interests would be common interests, where there would be no conflict between the private interests and public interest, no law is needed. In a society where some interests are shared and some are not, the law will determine the limits of every interest. Mead is, then right to say that the more interests are shared the less need is there for the hostile attitude.

From this conflict of interests derives another antinomy. Social solidarity rests on the hostile attitude. The hostile attitude is therefore the basis of social organisation. The same hostile attitude produces crime and tries to eradicate it. The system of criminal justice illustrates this proposition well. We want the criminal punished and bettered at the same time. When, however, we have to choose between these two alternatives, we invariably choose punishment. This makes it easy to understand the enormous dimension of social hypocrisy which tries to interpret punishment as treatment. We have come so far that often, under the name of human rights protection, we prefer punishment to treatment.[55]

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[52] *Id.* at p. 591.

[53] *Id.* at p. 590.

[54] *Id.* at p. 591.

[55] See Cohen, *infra* n. 76. See also Hegel, *supra* n. 34 to Chapter 8, at p. 71:

> Punishment is regarded as containing the criminal's right and hence by being punished *he is honoured as a rational being*. He does not receive this due of honour unless the concept and measure of his punishment are derived from his own act. Still less does he receive it if he is treated either as a harmful animal who

Mead saw a great hope and a good sign in the juvenile proceedings which started to develop in his time. "There is evidence, in fact, that there may be grounds for concern that the child receives the worst of both worlds: that he gets neither the protections accorded to adults nor the solicitous care and regenerative treatment postulated for children."[56] He would be disappointed to see how the treatment attitude towards delinquents degenerated into punishment and how in the end the hostile attitude prevailed.[57]

Initially, the durable effect of Mead's ideas was a considerable alleviation of the harsh punitive reaction due to the realisation that a criminal offence is sooner a particular outcome of universal anomic pressures exerted upon the criminal offender than, as previously, a hybrid between tort and sin. The ambitious scheme collapsed in the 1960s when it became clear that the 'friendly attitude,' e.g. in cases of juvenile delinquents and concerning the civil commitment (involuntary hospitalisation) of dangerous mental patients where the 'friendly attitude' had been particularly called for – naively ignored the elements of the remaining and very real conflict between the 'law and order' on the one and the individual offender on the other hand. Through application of the treatment idea, the latter had been reduced to the position of an object of manipulation. This, in turn called all over again for impartial adjudication and for authoritative involvement of the 'rule of law' and the judiciary branch. In the European Court of Human Rights there has been, under article 8 of the Convention, a series of cases testifying to the well-placed mistrust of the *parens patriae*.

Mead's basic thesis that "as the field of constructive social activity widens, the operation of the hostile impulse decreases" is entirely acceptable. His excellent presentation of the double role of criminal law, that is, its attempt to achieve positive results with negative means, is confirmed today by many critics in theory of criminal law. Meanwhile, the eclectic and disoriented nature of criminal law, undecided whether to punish or to treat and trying both at the same time, is evident through his theory. Mead's analysis also proves, as does that of Durkheim, that we must not embark unconditionally on the ideal of treatment forgetting at the same time the moral influence of punishment upon the social conscience.

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has to be made harmless, or with a view to deterring and reforming him. (Emphasis added.)

[56] *Kent v. U.S.*, 383 U.S. 541 at n. 23.

[57] *In re Gualt*, 387, U.S. 1 (1967).

3.3.3. Social Stability Through the Intercession of Punishment

It has been established that real learning processes are always a result of positive reinforcements (rewards) and never of negative reinforcements (punishments). If one wants to change the attitudes of a dog, child, or adult, one is only successful if one rewards many single instances of desirable behaviour. If undesirable behaviour is insupportable one can punish it, but thereby one has achieved nothing but a temporary suppression (i.e. not elimination) of this behaviour. Thus, punishment is useful only insofar as it 'makes a place' for a positive reinforcement of desirable behaviour which may temporarily replace the undesirable one.[58]

Can punishment be seen as a reward? If it can, that would explain its modificatory impact on the behaviour of people. In our opinion the real effect of punishment lies in the positive reinforcement of the righteous self-perception of the law-abiding citizen. The idea of both justice and guilt is derived from the fact that everyone of us has been punished as a child for mischiefs he has done at that time. One therefore expects that others 'deserve' the same if they do what we have been punished for. This is retributive justice and it is based on nothing but the idea of equality: if we have been punished for doing this, why should somebody else get away with it? The elements of vengeance and indignation are scarcely concealed in this psychology, but the point lies in the fact that the practice of punishment exists in the first place. If it did not, there would be no need for this vengeful equality and therefore no notion of retributive justice. The question here is not whether it is inherently just to punish; the question is that if A was punished (justly, or not), why should B get away with it. Pure form, no substance.

Thus, all the discussions as to the problem of proportionality of punishments to crimes are sterile because the proportion of punishment is an arbitrary decision and the logic of justice becomes a question only after we have made the first decision to punish. Only after we have decided to punish theft is the question raised why the murderer should not be punished. Only after a mother has punished one of her children will others call it 'unjust' if her favourite is not punished for the same act. Like cases should be treated alike – this maxim becomes useful only after the first case has established the first precedent. The real question is, however, raised with the first case of punishment. All the rest is comparison. Therefore, retributive justice (as well as distributive) is always a comparative justice. It is inherent in this notion of comparison that the substantive questions are not raised, because of the noise of comparison. Most often the really relevant first case is never discussed because it is taken for granted.

[58] Zupančič, *Behaviour Modification and Punishment*.

This points to a very important inference. Just as children cannot argue with their mother about whether she should punish at all, so citizens cannot argue with the State about whether it should punish or not. This primordial fact is simply given. But once the practice is established, there is plenty of room for comparative arguments, i.e. why would this be punishable if that is not punishable, or vice versa.

Moreover, criminological studies have shown that there are very few individuals who could claim that they have never committed a crime. In everyone's life there are at least a few instances in which he has engaged in something which could be labelled criminal – were he indeed caught, prosecuted and convicted.[59] Because law enforcement agencies pick a criminal here and there and stigmatise him and moreover precisely because they do not punish every transgression, it is possible for the large majority of people to define themselves as 'law-abiding.' It makes – psychologically speaking – little difference that this is an illusory process, because the fact that people have at one point in their lives committed a crime is irrelevant so long as they were not pronounced guilty and punished. In a word, what matters is not whether somebody committed a crime; what matters is only whether one was punished. People's respect for the law, especially criminal law, depends very much on their being able to see themselves as being on the side of the law.

This guilt-relieving and morality-reinforcing function of criminal law[60] represents the positive side of the conditioning impact of criminal punishment. In this context it becomes clear that the righteous and self-congratulating citizen, although most surely not less immoral than the average criminal who is in fact stigmatised as such, will define his own identity in contradistinction to that of a 'common criminal.' This negative identification, by the very contrast it provides, allows for enhanced self-image and greater self-respect. The process accounts for the enormous positive reinforcement 'law-abiding' citizens derive from their comparisons with punished offenders.

However, the subjective identification which underlies the process (and is quite apparent in the popularity of criminal films and stories), is in itself

[59] See Merton, *The Criminal in Society*.

[60] Function of law is also protecting the people from feelings of unconscious or unexplained guilt. It does so by allowing those who are innocent to reassure themselves. They can say something like this: "We are God-fearing law-abiding citizens. If we were guilty, we would be apprehended, prosecuted and punished. Since this has not happened, we need not feel guilty." This aspect of the law highlights its psychologically defensive, ego-protective functions and the same thing happens in court where the judge, jury, etc. are afraid of being guilty for sentencing somebody and so they transfer the responsibility on the shoulder of psychiatrists. And that is why they almost always find the defendant mentally ill and irresponsible. If we wish to have more rational and human jurisprudence we must experience, contain, and tame guilt, not deflect and vent it in substitute action.

instructive. The spectator here is often offered a hero-criminal model for identification, and yet in the end, when the hero is punished, the spectator is satisfied that this has happened. Psychologically this temporary identification with the criminal ennunciates the impulses of the Id, whereas the subsequent punishment imposed induces the spectator to shift his identification to the Superego, i.e. justice. Of course, to say generally that such artistic creations either increase or decrease the crime rate is impossible, because every spectator projects his own personality into the story and thus the very same film is in fact as many different films as the number of different spectators. Those with a strong Superego will place emphasis on the justice of the happening; those with lesser inhibitions will tend to perceive the less moralistic elements in the story. The same film, for example, will make the criminal more criminal and the moralist more righteous.[61]

In the same fashion a criminal relieves people of the burden of their guilt, because it is clearly demonstrated that one is not guilty unless one is punished. At the same time, this process reinforces the powers of the Superego of the law-abiding citizen, since he must be relatively consistent in his contrasted self-perception. He says: "I will not do something like this. After all, I am not a criminal." But the condemned man also becomes a target for all those aggressive tendencies the Superego of the law-abiding citizen imposes on his Ego. By being aggressive against the punished offender, by demanding his punishment, he (the law-abiding citizen) is in fact aggressive against his own repressed aggressive tendencies. This can be seen as pathological, but its by-products are the positively reinforced righteous attitudes and the greater probability of obeyance to authority (i.e. law). By the same token the probability of criminal behaviour is reduced.

This continuous social process in which punishment gives a rubberstamp of reality to the notions of justice, responsibility, guilt, morality[62] accumulates its effects through generations until a homeostasis is achieved, i.e. a balance between the structural conflict of interests and the inhibitions necessary to keep the society together. The actual punishment of criminals, whose selection for punishment has little to do with justice, is nevertheless a powerful catalyst of these processes and without it the tender fabric of the social Superego would be destroyed.

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[61] As to the general theory of information where the main objection to behaviourist psychology seems to be that it takes the stimulus (*qua* information) as an objective fact, the stand of the informational theory is that the piece of information does not have an objective reality but becomes what it is intended to become only after it has been incorporated by a particular substystem (i.e. mind). See Buckley, *Sociology and Modern Systems Theory*, and Schopenhauer, *World as Will and Representation.*

[62] Ross' *Tû-Tû* expounds on a similar projective thesis.

This positive reinforcement caused by punishment is, in our opinion, immensely more important than its rather ineffective deterrence. The very fact of human association presupposes certain rules of interaction (moral constants), much as the game of chess cannot be played without rules. But these rules written on paper and even enforced by physical force are meaningless so long as they do not become part and parcel of the individual's Superego. It is therefore absurd to say that in the short run the introjection of moral precepts is based on deterrence, although it is equally clear that in the long run the internationalisation of moral norms is based exclusively on precisely that.

Criminal law's general preventive function is based on this positive self-identity people derive from their differentiation from a criminal. If punishment is highly selective and random to the extent that only a minority comes under its hammer, the distinction between the 'common criminal' and the 'law-abiding citizen' is thereby preserved; if the majority is being punished, the stigma turns into its opposite, and the previous 'criminal' now becomes a hero with the power of attracting positive identification.

It is the criminal justice system itself that literally creates crime and criminals. But by producing them, the byproduct is the law-abiding identity.

If criminals were to vanish into thin air, we would have to invent new ones just to remain more law abiding than them. In a society where there is an inherent contradiction between sheer instrumental reason and the historical interests of the whole, there has to be crime. If there is none, it has to be invented.[63]

Thus, it is precisely the uncertainty of punishment that supports the useful distinction between right and wrong. The very inefficiency of the enforcement of the rules of criminal law is a necessary condition of its less palpable, but more real, efficacy in terms of normative integration.

3.3.4. Normative Integration Through the Intercession of Legal Process

It is now patent that normative integration is a social process in which social norms get accepted, that is, integrated through the processes of punishment and other adjudicative methods. Legal adjudication, as we saw, is central to Durkheim's mechanical solidarity and to the systematic imposition of institutionalised values. In adjudication and generally in the administration of justice, the judge interjects – cogently – the legalised values. These legalised

[63] Such was in fact Durkheim's theory of crime as a normal phenomenon. But this, of course, presupposes that such psychological processes are immutable – which is by no means true. This is just an aspect of alienation and as such a dependent variable. It is one thing to describe these processes as they exist today and another to say that they will never change.

values thus constitute the substantive criteria (the logical major premise) for the enforceable resolution of the legally defined subject matter.

Thus, in the world of globally branched out and fully diversified division of labour, more than ever before, quick, legitimate and persuasive resolution of all types of conflicts – between private individuals, between different groups, between the individual and the state, between the states themselves – is a prerequisite for social, economic, political and international stability. Law as an art of conflict resolution occupies itself with well-defined individual conflicts. It does so in private law, in conflicts between different social groups in constitutional law, in conflicts between the individual and the state in constitutional law as well as in the law of human rights, and with interstate conflicts in international law. Since one cannot, even if we were to attain the utopian stage of total saturation of material needs, imagine a society entirely free of conflicts, there is an inherent, manifest, and unavoidable need to provide an effective service for their continued peaceful and binding resolution.[64] This is because conflicts imply the lack of shared values.

The more 'disorganised' the society, the more profoundly disrupted the institutionalised as well as the organic relationships in it, and the greater the burden on the central power to continually re-establish 'justice' through a trustworthy process of conflict resolution. The opposite of Durkheim's famous 'disorganisation' and anomie[65] are social stability and shared values or in other words, peace, rational and productive collaboration, interpersonal harmony – in short everything practically synonymous with and conducive to

[64] The Marxist – and more specifically Pashukanis' notion – that a litigious society is one in which there is scarcity of material goods, is of course, refuted by the now obvious inverse correlation between modern opulence and the rising litigiousness. While poverty and crime in fact remain in positive correlation in particular Western societies, inter-societal comparisons would show no such correlation. There are poor societies where both litigiousness and crime rates – because traditional values are intensely shared – remain low.

Yet the deeper question as to why values are or are not shared in a particular society cannot be entirely disconnected from the fact that some social structures are more conducive to antagonism. The differences in this respect between the litigiousness and high crime rates in the United States and the lower respective rates in the West European societies have to do with 'culture,' i.e. with the inhibiting effect of what Raymond Williams calls 'residual values.' History produces the 'residual culture' with its ingrained 'residual values' that continue to inhibit despite the fact that the values in question are no longer up to date. See Williams, *Base and Superstructure in Marxist Critical Theory*. Conversely, the lack of history, of residual culture and of residual values tend to reduce the personality, of which the internalised values are an integral part, to what Herbert Marcuse has called a 'one-dimensional man' and what Erich Fromm has called 'the prototypical character.' See, Marcuse, *The One-Dimensional Man: Studies in the Ideology of Advanced Industrial Society* and Fromm, *Man For Himself: An Inquiry into the Psychology of Ethics*.

[65] See 'Anomie, Punishment and Effects on Normative Integration' in this chapter.

economic and social progress. Shared values provide the cement of human relationships, the stuff that constitutes the society. Without internalised common values, no social co-operation, according to Durkheim, is possible. The society disintegrates into the atomised dust of isolated individuals.[66] If it came to complete atomisation this would completely preclude the collaboration and division of labour.[67] Consequently, disorganisation and anomie (the decline in shared values) imply the breakdown of the division of labour, the disintegration of social institutions and the general regression to disorder and anarchy.

Generally, the geometrically rising curve of litigation in all Western as well as in former Communist societies evinces the geometrically dropping curve of the intensity of the values shared by all members of society. A litigious society is the one in which the resort to legal resolution of conflicts is the surrogate of the moral agreement as to what is right or wrong. If the difference between right and wrong in antagonistic inter-personal situations were clear, the party admonishing what is wrong would morally – not legally – prevail over the party acknowledging that it is in the wrong. This is not an intellectual exercise, alas, but requires the feeling of genuine identification with intimately shared values. This feeling makes one admit that one is wrong and to cede to him who is right. Only if the particular antagonism does not resolve itself in this informal manner, will there be resort to cumbersome transposition of the disagreement into the formal legal context of adjudication.

The shared values induced by social processes of normative integration are the derivatives of extremely complex and long-term (generational) social and socio-psychological processes.[68] Ultimately, the integration of values

[66] For an excellent sociological presentation of the rising alienation and atomisation, see Putnam, *Bowling Alone: America's Declining Social Capital* and his *The Prosperous Community*. Also see, Putnam, *The Strange Disappearance of Civic America*.

[67] The 'complete atomisation' of any social community – a contradiction in terms! – is of course impossible, i.e. it is a hypothetical extreme point of anomie.

[68] The psychological transmission of values is 'generational' because it occurs in transition from one generation to another. See for example, Fromm, *The Sane Society*, at p. 79:

> The family […] may be considered to be the psychic agency of society, the institution which has the function of transmitting the requirements of society to the growing child. The family fulfils this function in two ways. First, […] by the character of the parents and […] in addition through the methods of childhood training, which are customary in a culture. These have the function of moulding the character of the child in a socially desirable fashion. (Emphasis added.)

The more a particular value, e.g. 'a conviction,' is psychologically adhered to, the more it is taken for granted, i.e. the less conscious is it. An individual is therefore not simply free to change his 'convictions,' the way he may for example change his 'opinions.' These changes of convictions can occur only with the change of generations. The possibility for the modification

depends on the operative adequacy of the proclaimed, institutionalised, and enforced values. The greater the discrepancy between the institutionalised (legally maintained) values on the one hand and the values that would be adequate and socially functional, the less the institutionalised values would be intimately identified with and shared.

Anomie, due to the inevitable time lag of societal mores and morals, also results from the discrepancy and consequent friction between the given current hierarchy of values and the one that would be adequate in the present stage of development. On the one hand, this implies that the values necessarily change only in leaps and bounds and that the alternation between social evolution and revolution is inevitable. On the other hand, the progressive speed of technological and economic development implies that this time lag of social values and mores given that they are constrained to slow generational changes, is growing larger. One important question today is, whether – purely in the perspective of the passage of time – Western societies are not becoming more anomic, i.e. more amoral.[69]

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of societal mores and morals is consequently limited in time as well as in space. In terms of time, there is of necessity a delay of at least one generational phase between the objective needs of society and its current mores. In terms of space, the so-called 'cultural conflicts' within society (different social classes) and between different societies are inevitable. See for example, Goodell, *The Elementary Structures of Political Life: Rural Development in Pahlavi Iran,* and Huntington, *infra* n. 69. Goodell's work is especially interesting because she has shown that the developmental lag cannot be overcome by progressive legislation. The discrepancy between the actual (rural) values and the Shah's overly ambitious legislative attempts at reform had in the end caused his downfall.

[69] In the wake of the September 11 attack, it is interesting to note the typical fundamentalist reproach concerning the purported amorality of Western societies. The fundamentalist attitude incapable of adaptation to the new demands for new social values (attitudes) represents a regression to entrenched values. Sociologically, this is ritualization as a response to anomie. See Merton, *Continuities in the Theory of Social Structure*. Huntington apparently foresaw these attitudes:

> Far more significant than economics and demography are problems of moral decline, cultural suicide, and political disunity in the West. Oft-pointed-to manifestations of moral decline include: 1. increases in antisocial behaviour, such as *crime, drug use, and violence generally*; 2. *family decay, including increased rates of divorce, illegitimacy,* teen-age pregnancy, and *single-parent families*; 3. at least in the United States, a decline in 'social capital,' that is, membership in voluntary associations and the interpersonal trust associated with such membership; 4. general weakening of the 'work ethic' and rise of a cult of personal indulgence; 5. decreasing commitment to learning and intellectual activity, manifested in the United States in lower levels of scholastic achievement. The future health of the West and its influence on other societies depends in considerable measure on its success in coping with those trends, which, of course, give rise to the assertions of moral superiority by Muslims and Asians.

Despite the common feedback lag between the changes in the society's infrastructure and the ensuing changes in the cultural supra-structure, the institutionalised values being an integral part of it, if this delay is too long and the disagreement too large, anomie and disorganisation will of necessity result. The absence of socially adequate – intimately identified with and widely shared – institutionalised values, or to be precise, their dysfunctional inadequacy, is an impediment to peaceful and beneficial social evolution. There is then probability of disorganisation, anomie or to put it in terms of the third law of thermodynamics, of social entropy. Intolerance is largely a consequence of such erstwhile, passé and obsolete – but often institutionalised – values.

On the other hand, the best way to promote tolerance is to promote new and more adequate social values: values that people can positively identify with, values that appear on the horizon of the progressive social change, values that give people hope that the society of tomorrow will be better than the society in which they live today. When there is hope that the society of tomorrow will be better than the society of today, people do accept social change and are ready to make sacrifices to adapt to it. Of course, new values are not easily created. Moreover, their social integration takes place during the passage from older to younger generations. Thus, the important changes in the hierarchies, in the structure of priorities concerning integrated and institutionalised values happen only over generations.

Since the true attachment to values, i.e. their inner assimilation and integration is not only a cognitive process – it calls for positive identification that is all the more deep-seated the less it is conscious – it can happen only in the passage to younger generations. Therefore, values instilled in the educational process and especially so of the very young will hold fast if only they are socially more feasible and more adequate than the values of the children's parents and grandparents. Likewise, the impact of the media on the impressionable young and the deliberate promotion of a certain hierarchy of values are more compelling when compared to their impact with regard to the older generations.

It would be for sociologists to assess to what extent this process of institutionalising new values, after World War II and up to today, has in fact reduced the anomie-generating discrepancy between the old institutionalised and the actually required value hierarchies. Legal retrospective reveals that profound changes in the philosophy of adjudication were the major ingredients of this process of institutionalising new values. In the first half of the 20th century, most jurists had still perceived legal procedure in general and adjudication in particular as something 'adjective' or 'ancillary' to the

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Huntington, *The Clash of Civilisations*, esp. Chapter 12, at p. 304 (emphasis added). The problems emphasised lend themselves directly to adjudication.

enforcement of substantive law. Thereafter, in the second half of the 20th century we have witnessed the critical change in this attitude: the ideal of 'fair trial' has imperceptibly merged with larger ideals such as the 'rule of law' and 'human rights.'[70] Similarly, the ideological aspect of human rights also is an integral part of the typically Western attempt to introduce and to institutionalise new values. That in the present day, we take many of these values, e.g. those concerning 'fair trial,' for granted testify to the colossal success of the previous generations and to their historical battles for the initial institutionalisation of these same values.

Should the necessary changes in social attitude procrastinate, should they delay this progress, the national and evermore the international, legal systems will intervene. Here we speak of more aggressive as well as regressive, archaic violations of human rights. Since these interventions inexorably do go in the right historical direction, they inevitably do speed up and do intensify the process of normative integration, i.e. creation of new and truly shared values. These new values, when assimilated, also provide for a much higher level of social cohesion. The abandonment of *passé* residual values with their detrimental inhibitory influence is perhaps a small price to pay in order to open the horizon of a new and better community of internally free and more original and creative individuals.

The legal system functions as an integrated whole. The system will interject its 'institutionalised values' from the very moment the factual pattern in question becomes subject to legal definition. In turn, this means, for example, that the top echelons of the judiciary may restructure their value hierarchies as much as the system will permit them – for they, too, are determined by the past – but that it takes much time for these new values to trickle down to the bottom of the judicial pyramid. Even the hierarchically structured system of procedural appeals is therefore cumbersome due to the complexity of systemic changes the introduction of new values will require. Again, however, the *Miranda* series of cases testifies to the fact that this *is* – and *how* it is – possible.

[70] In the United States, the Supreme Court introduced these revolutionary changes. In Europe, many of these procedural innovations occurred under the auspices of the European Court of Human Rights (ECHR) in Strasbourg. It is fair to say that it was the former, which provided the radical leadership in the field, and it was the latter, which followed suit. To prove this is easy. Compare, for example, *Katz v. United States* (1967) and *Hallford v. U.K.* (1997). The former had introduced the principle of the 'legitimate expectation of privacy' in 1967, which was appropriated by the ECHR thirty years later. Yet while *Katz* was followed-up by a whole series of cases further differentiating the doctrine, not an iota followed *Hallford v. U.K.* This also says something about the difference in the dynamics of constitutional and international law. For more on this issue, see the first essay in Section III of this book.

The result of the changes – there can be no doubt about it, since it reduces the discrepancy between the actually needed and the obsolete ethics – contributes resolutely to social stability. The imposition of progressive norms through 'fair trial,' for example, will enhance the integration of moral norms. It will further the normative integration in society. Conversely, the trial that is seen as substantively and procedurally unfair will foster negative identification with formally institutionalised moral norms (anomie). Consequently, in certain societies saying that somebody is a 'law abiding citizen' is a compliment. In other cynically deformed (anomic) societies, the attribute smacks of naiveté.[71]

The delay in 'shared values' also implies that adjudication, cannot, if it would be socially relevant, remain formalistic, 'value neutral,' politically and ideologically static. Old hierarchies of values need to be changed and new moral principles introduced. While this may be happening everywhere in the judicial system, this is especially true on the top, constitutional plane of adjudication. This level cannot linger and remain bound by the formalism of strict legality, which is always static and morally retrospective. The role of the supreme, the constitutional or the international court is to provide 'moral leadership,' i.e. we judge the quality of its judgments by the ethical adequacy of the new legal criteria it introduces. This 'ethical adequacy' usually stands for the introduction of the hitherto uncharacteristic and even entirely new legal criteria concerning burning social issues such as bioethics, environmental protection, euthanasia, abortion, race relations, the balance of power in criminal process, and equality of marginal social groups.[72]

[71] This would most certainly be true of 'post-Communist' societies.

[72] Especially to the French juridical ears, this sounds sacrilegious. But, see Pradel & Corstens, *Droit Penal Europeen*, para. 7, at p. 13:

> La Convention affirme l'existence de droits. Ceux-ci ne sont pas créés par la Convention, mais seulement reconnus par elle: en effet selon l'article 1er de la Convention, 'Les Hautes Parties contractantes *reconnaissent* à toute personne relevant de leur juridiction les droits et libertés définis au titre I de la présente Convention.' Ce qui signifie que les droits sont *protolegal, ont une valeur permanente et antérieure à la Convention qui a un effet déclaratif et non constitutif*. (Emphasis added.)

The question is, of course, declaratory of what and who is empowered to discover these anterior and permanent values. The judges? Does this mean they are the embodiment, the personification of these values? The separation of powers then means that the legislative branch electing them personally, in addition 'elects' certain values. While most of this is certainly true and realistic, why is it that the political and the legal system is 'acoustically separated' from these realities? Seemingly, the system is obliged to pretend that it is bound only by the impersonal formal logic. In the end, of course, we speak of Ciceronian distrust – *non sub hominem sed sub deo et lege* – but trust, in turn is again a matter of shared values. See for example, Fukuyama, *Trust: The Social Virtues and the Creation of Prosperity*. In the end, we are

In the process of deciding a concrete case, these high instances of adjudication translate new values into new legal standards. They 'institutionalise' these new values. In turn, through consistent application by lower instances of adjudication, these values if adequate, quickly take root and become assimilated. As Paul Valéry would have said, nothing is more powerful than the idea whose time has come.

Because these values, whose time has come, are not a fancy figment of imagination – and one hopes not of judicial arbitrariness – but are socially indispensable at a given stage of development, their introduction brings about social appeasement and reconciliation. The United States' Supreme Court in the 1960s, under Chief Justice Warren and especially in the field of revolutionary changes it had introduced in criminal procedure, is an excellent example of the kind of socially progressive contribution constitutional adjudication can make to social stability[73] More timidly and more incrementally, the European Court of Human Rights in Strasbourg, too, has lived up to its post World War II mandate. The critical importance of persuasive and credible, i.e. of objectively legitimate and subjectively honest solution of all kinds of social as well as individual conflicts for instituting social stability is intuitively obvious.[74]

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again circularly entangled in Unger's antinomy of rules and values. If values are not shared, we need rules. But clearly, the rules cannot perform, unless underlying values determine their interpretations and their application. One can unmask this contradiction, but the real question is how to transcend it. Cf. Unger, *supra* n. 5 to Chapter 1, p. 88-100.

[73] Politically, cases such as *Brown v. Board of Education* (1954) 347 U.S. 483, 74 S.Ct. 686, 98 L. Ed. 873, dealing with racial discrimination are of course the most obvious examples. In constitutional criminal procedure, however, the progression from *Massiah v. United States,* 377 U.S. 201 (1964) to *Spano v. New York*, 360 U.S. 315 (1959), 79 S. Ct. 1202, 3 L. Ed. 2nd 1265 to *Escobedo v. Illinois*, 387 U.S. 478 (1964) 84 S.Ct. 1758, 12 L. Ed. 2nd 977 to *Miranda v. Arizona,* 384 U.S. 436 (1964), 86 S.Ct. 1602, 16 L.Ed. 2nd 694 and finally to *Brewer v. Williams*, 430 U.S. 387 (1977), 97 S.Ct. 1232, 51 L.Ed. 2nd 424 – is also quite clear. In Europe, the privilege against self-incrimination was affirmed only thirty-two years later in *Saunders v. U.K.*, Eur. Court H.R., 17.12 1996, Reports 1996-VI and in *John Murray v. United Kingdom*, Eur. Court H.R., 8. 2. 196, Reports 1996-I. For a clear succession of relevant cases see Zupančič et al, *Constitutional Criminal Procedure* [*Ustavno kazensko procesno pravo*].

This evolution, however, was due to nominations of conservative judges by conservative presidents, callously discontinued approximately at the time of *Leon v. United States*, 468 U.S. 897 (1984). The 'moral leadership' of the United States' Supreme Court under Chief Justice Rehnquist not only came to nothing, it regressed and fell so low as to consider seriously (Justices Rehnquist, Scalia and Thomas) the execution of mentally retarded convicts.

[74] Especially in the Continental cultural context, the objection to this complete line of reasoning will be that it is not for the judicial, but for the legislative (electorally responsible) branch of power to make these general value determinations. Two kinds of responses to this objection are in place here. First, it is empirically clear that the 'electorally responsible' politicians, made to surface by the democratic majority, are *in fact not* providing answers to many burning social

4. Safeguards: Human Rights and the New Methods of Punishment

The demand for protection of society and the demand for protection of fundamental human rights are two conflicting aims of criminal law. The more the problem of crime becomes pressing, the more is the demand for protection of society. This, in turn, leads to more offensive punishments, in the process, offending human rights.

From the development of behavioural psychology emerges the idea that punishment in a more sophisticated form (behaviour modification programs, electronic surveillance, operant conditioning, aversive suppression techniques, electronic monitoring, etc.) can be the way of transforming the undesirable behaviour if it results in criminal activity. What is really new in these techniques is that they provide means of consistent negative reinforcement and control, while the old 'techniques,' whether called punishment or treatment were far less consistent. Punishment, as it is traditionally inflicted, is a comparatively primitive tool of negative reinforcement, too remote in time from behaviour it is supposed to prevent in the future, and it is also not connected closely enough with the respective behaviour to establish the instinctive and automatic repression of the undesirable behaviour. The new technique may actually require less suffering but have a greater effect. In other words, we still speak of punishment, only that it is more economical: smaller effort and greater effect.

These new techniques require less money, promise more effect, abolish the need for a long confinement, erase the distinction between punishment and treatment, merge the hostile attitude with the friendly one[75] and seem to be horrible enough for the general public to satisfy the same requirements

issues, dilemmas, etc. If they were, they would pre-empt adjudicatory solutions. The burning social issues would then never float up to the top constitutional instances of adjudication in the first place. Clearly, the mainstream-majority logic of the democratic process, for example, in unlikely to turn out justice for the particular social minorities. Second, when a provocative question does reach the top level of adjudication, it is usually because the hitherto given legal criteria had not been providing clear answers to it. This is why the top level of adjudication *a priori* cannot resolve the issue with reference to simple formal logic. The supreme or constitutional court cannot simply subsume the facts of the case to the previously given major premise of the established legal norm. No, the courts of last instance are in fact asked, while deciding the case, to *create* a new major premise. In order to do this, they cannot refer to positive rules, except to the abstract and laconic language of constitutions or international conventions. These then figure as the tip of the vast hermeneutic pyramid subject to historical, teleological and other open-ended kinds of interpretations. See more specifically, Zupančič, *From Combat to Contract: What does the Constitution Constitute?*

[75] Mead's distinction, *The Psychology of Punitive Justice*.

as punishment does, and yet the offenders are willing to accept them. In addition to that, the society which is not able to eradicate the conditions which produce crime and other social pathology, and is furthermore not able to abandon punishment as retribution, while the demand for efficacy is constantly growing because of the growing problem of crime, will welcome these new techniques.

The problem, however, is that these new techniques still conflict with the demand for the protection of fundamental human rights.[76] The liberal political philosophy, which is still the essence of the modern State and social consciousness, emphasises strongly the protection of human liberty. Legal rules are formal, impersonal, and general in order to guarantee the equal protection of human rights. While this equality is formal, not substantial, because it allows for *de facto* differences between people, it nevertheless restricts the State in political abuse and arbitrariness of substantively irrational justice.[77]

In the end, the new techniques of treatment cannot really be separated from the question of punishment because every treatment is *perdefinionem* an intrusion of privacy. From the sociological and psychiatric standpoint, punishment cannot be clearly distinguished from treatment. Obviously, the person treated will always understand treatment as punishment, even if he has only to report occasionally to some authority. Psychiatrists speak about 'milieu therapy' and about 'consciously structured environment,' but whoever has been to a mental hospital for the criminally insane can see that it functions essentially as a human warehouse and that there is no treatment different from the 'treatment' that inmates receive in the ordinary prison. Hospitals as well as prisons are understaffed and this means that an inmate does not receive sufficient attention to justify the term 'treatment.'

In general, one can say that treatment simply is not successful. If there were really effective means of changing the criminal behaviour patterns without intrusions of privacy[78] punishment would no longer be necessary.

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> Behavioural modification programmes and electronic surveillance devices are off the drawing board and await only the failure of community-based treatment programmes. Operant conditioning and aversive suppression techniques along with electronic monitoring of an individual's behaviour obviously raise *the gravest sort of questions concerning human dignity and liberty*. In addition to high claims of efficiency, proponents of their adoption need only argue that offenders have very few rights now and in the light of the failure of all other techniques we at least deserve a chance.

Cohen, *The Discovery of Prison Reform*.

[77] Weber, *On Law in Economy and Society*.

[78] See Brody, *Psychosurgery Will Face Key Test in Court Today*.

If there were effective means of treatment not requiring confinement, there would be a very low rate of recidivism, and today a high proportion of the prison population are habitual offenders.

In addition to that, the criteria for punishment stem out of the social harm done by the act, while the criteria for treatment do not depend on a single act, but on the diagnosis of the offender's personality. Sometimes both of these criteria will result in the same required time of confinement, but often they will not. Then the compromise between the two is the criterion of dangerousness. If the person has committed a serious crime or even repeated it, then he allegedly needs more treatment, but he also deserves more punishment. And since there are no firm standards for the prediction of future dangerousness, the lawyers and psychiatrists are better able to come together. Here the problem emerges only when the act committed is really trivial but the person is found highly dangerous and so we get a long sentence for a trivial act. But this possibility is much smaller than if we had no compromise criterion of dangerousness.

The most important requirement concerning the distinction between punishment and treatment, is the requirement of the act.[79] Treatment is not required for the act but for the personality, yet it seems that the requirement of an unlawful act will remain a condition for treatment as well as punishment. The requirement of the act before any criminal or commitment proceedings can be started is the traditional limitation of the State's right to intrude the sphere of privacy. This requirement, however, is often a barrier to the application of the criterion of dangerousness. For example, in the case of indecent exposure an exhibitionist may be psychiatrically examined and found potentially dangerous of more serious offences and violence. But indecent exposure is a misdemeanor for which the person will usually be given only a ninety-day sentence. The State will have to wait until he commits a more serious crime before it will be able to commit him for a longer period of time and start a treatment. From a different standpoint, this could be understood as if he had the right to commit this more serious crime. *Robinson v. California* was a decisive case in this respect, where the Supreme Court decided that a person cannot be punished of mere status (of being a drug addict in this case). Civil commitment laws tried to bridge this gap (Maryland's Defective Delinquency Act, for example) but this trend was reversed in *Lessard v. Schmidt.*[80]

Today the treatment can only be started when the person has committed a criminal act.[81] Therefore, from the legal standpoint, treatment and punishment are increasingly understood in the same way, that is, as a deprivation of

[79] *Robinson v. California* (370 U.S. 660) (1962).
[80] U.S. Court for the Eastern District of Wisconsin, August 10, 1972.
[81] *Robinson v. California*, 370 U.S. 660 (1962).

liberty. The 'euphemistic trend' of substituting the old wine in a new bottle by giving punishment the names of treatment and reformation has been largely reversed.

5. Conclusion

We have examined some of the conditions upon which, if we accept the hypothesis, criminal law will have an influence upon normative integration. The basic condition is that there already should exist a certain intensity of normative integration, if criminal law is to influence its further reinforcement, or at least to sustain it. Criminal law cannot create norms that would actually function in society, unless there is an essential correspondence between these norms and social needs. In other words, criminal law can play the role of catalyst but not the role of creator of normative integration.

"In the case of *mala per se* the law supports the moral codes of society … in the case of *mala quia prohibita* the law stands alone."[82] The pure Skinnerian interpretation can only be applied in the case of *mala prohibita*, where there, in fact, is no normative integration yet. In *mala in se*, as the term suggests, there already is some social acceptance of the norm and the function for the criminal law to perform is to make it clear that the norms cannot be violated and thereby to reinforce already existing moral feelings in the law-abiding citizens. We may complain about the negative influence of the social stigmatisation because it hinders the reintegration of the offender into society, but this negative social reaction is a sign that the respective norm is still alive.

The restraint created by the social norm may function on the conscious or on the unconscious level. In the case of *mala in se* the potential offender is not restrained by internalised inhibitions, therefore his 'decision making process' operates on the conscious level. He has to decide what chance there is to be caught and punished and what kind of punishment he risks, and weigh this against the 'profit' expected from the act. Obviously, in this case it is important that he knows the prescribed penalty, although it might be better if he does not know the chances that he will be caught, because they are often so low. In the case of an integrated norm these psychological mechanisms do not operate, because rational considerations are inhibited by moral standards internalised by the potential offender.

It is difficult to see how the complex processes of normative integration could be empirically measured and hypotheses, as the one described above, verified. Apart from the general problem of quantification of social and

[82] Andenaes, *supra* n. 10 to Chapter 8, at p. 81.

psychological phenomena and the fact that both in the sociological and psychological field the majority of theories are still in the hypothetical stage of development, there is an enormous complexity of different factors, complexity which is almost impossible to be understood in a static way.

The process of normative integration is the interaction of virtually all the factors of social life. Statistical techniques of finding correlations between the different factors suffer from the fact that the factors are in majority of cases impossible to quantify and that many of the factors are simply not yet discovered.

The intensity of the influence of criminal law upon normative integration corresponds to the amount of social norms that were not yet affected by anomic processes. Criminal law inhibits those processes in the areas where social norms correspond to social needs. Where it defends the interests of one interest group against another, criminal law "stands alone" at least in the group in which it is against group interests. And since normative integration is mutual reinforcement, a dialectical process between official enforcement of the norm and the interest, criminal law can have an enhancing influence on the normative integration if there is the needed correspondence, or it may even speed up the anomic processes in the case of the lack of this correspondence.

CHAPTER TEN

On Legal Formalism: The Principle of Legality in Criminal Law

1. Introduction

The practice of social control requires no law and no formal criteria as to whether one should punish. When a father punishes his child or when a dictator orders political repression, he need not do it in accordance with any rule. The only 'rule' to be followed is one's purpose, be it benevolent, be it malevolent. If the purpose is benevolent and perceived as such, there is no conflict and no need for formal criteria of adjudication. This happens not only in parent-child relationships, but elsewhere in society where such relations are imitated (juvenile cases, civil commitment cases), or where it is otherwise obvious that the frustration of one party by another (as in psychoanalysis) is to the benefit of the party frustrated.

On the other hand a malevolent despot will not relent and will not allow for impartial formal adjudication of his claim that someone has to be punished. For, his method of 'social control' would be inhibited by the formalisation of punishment. Functions given, for example, to police (and especially to secret police) are of such a nature that they do not per se require any regulation. The police know what they want, and they can easily get it without or even in spite of rules.

Thus, legal criteria or criminal law becomes important when one realises that punishment *is* possible without criminal law, whereas the restraints on its arbitrary use are not; at that point, formalism becomes the only theory which fits the essence of criminal law. Beccaria's influence in the metamorphosis of the social function of punishment from the affirmation of punishment to

its negation is apparent here. Criminal law becomes a system of rules which prevents punishment through its formalism.

There are two preconditions to the invocation of the ideal of the rule of law. First, there must be a conflict of interest (or at least a perception of it, as in civil commitment cases); second, there must be such a balance of power between the parties in conflict that one party cannot simply impose its will on another. The idea behind adjudication is to resolve conflicts without resort to the use of power or force. The resort, instead, must be made to the general and formal criteria of the law. Clearly, the resort to law will be a genuine alternative to power and force only to the extent that legal criteria are clear and logically compelling, and thus perceived as legitimate.

If the criteria of law are clear and concise, the chance that extrinsic[1] criteria will find their way into adjudication is diminished. Since parties are coerced not to use coercion in their relationship, but to let a third party decide the conflict, it is all the more essential that their trust in the rule of law be maintained, or else they will view the imposition of adjudication as just another arbitrary use of power and force. The parties to the conflict will only accept the adjudication by law as an alternative to war if these criteria are general, uniformly applied and known in advance.

If the criteria of law do not dictate a single correct solution to every fact pattern, then there is place for other criteria, which are not known in advance by the parties that submit themselves to adjudication. The adjudicatory process theoretically works only to the extent that decisions are based on a norm known and thus accepted in advance. Otherwise, submission to adjudication becomes the mere substitution of one arbitrary force by another. Also, the greater the stake in the adjudication, the more important that the decision be made according to law and not according to criteria that are *praeter* or *contra legem*.

Again, Beccaria's influence on modern criminal law is obvious. His ideas about 'geometric precision' i.e. the idea of every case having a single solution;

[1] The distinction between extrinsic and intrinsic substantive criteria of adjudication is defined on two different levels. First, one cannot decide according to the criteria of power and physical force. If for no other reason, these criteria are extrinsic because one does not need impartial adjudication in order to apply them. The society, for example, in which justice would be so defined that the more powerful would by the same token be also more 'just,' would need no judges. Second, once legal criteria do in fact replace the 'natural' criteria of prevalence, then again much becomes extrinsic, because the law clearly decides what is intrinsic. For example, theft cannot result in a valid transfer of ownership because furtive and forceful deprivations cannot be deemed legally intrinsic. However, once it is clear that such use of force or trick is legally irrelevant for the purpose of the transfer of ownership, the next task is to define theft itself. By the latter criteria, then, for example, the motive of the thief is also extrinsic, because the law maintains that the intent to deprive permanently will suffice.

his emphasis on the 'advance notice' of laws and the importance of their written form as well as the importance of laws being concise and precise have survived even in modern criminal law. The written word in law generally, and especially in criminal law, is intended to guarantee something. The written word in law is an attempt to preserve through time human relationships that are likely to change from concordance to conflict. Superficially speaking, this preservation is achieved by means of logical compulsion. But the compelling force of reason itself generally, as well as in cases of private disagreement, derives from deeper, more existential layers of agreement.

Here, I would like to put this simple proposition into the context of legal theory to show that the notion of legal formalism is neither quite as simple-minded as it is often believed to be, nor as reliable a guarantee as criminal law theory often assumes.

Legal formalism, as it is usually understood, maintains that if law is to govern, it must by virtue of logic guarantee certain outcomes in legal cases. The principles of formal logic are expected to determine the individual decisions and these decisions in turn can be anticipated by virtue of being logical. Law is different from ethics or wisdom. It provides criteria not for the determination of right and wrong in general, but for the purpose of the resolution of conflicts. Since these criteria have to be known in advance, it follows that the words in a contract or in a statute must have a reasonably stable meaning. Moreover, if they are to guarantee anything, their import must be governed by objective, rather than subjective criteria.

This 'advance notice' is the professed principle of legality. The doctrine presupposes that single and simple legal norms, purportedly clear, will figure as straightforward major premises of legal syllogism in the forthcoming accusation and in the subsequent judgment. It is easy to show, however, that each major premise in any legal judgment is a combination of at least two other rules, e.g. in criminal law one rule from the general part of the criminal code (level of liability) and another rule from the special part of the code (the definition of offence). In reality, of course, it is the combinations of rules, which are chosen and which then determine the outcome, because single rules are not what governs the application of criminal law. It is curious that legal theorists today entirely overlook this, although this had been entirely clear to the first framers of the (civil) codes:

> Dans cette immensité d'objets divers, qui composent les matières civiles, et dont le jugement, dans le plus grand nombre des cas, est moins l'application d'un texte précis que la combinaison de plusieurs textes qui conduisent a la décision bien plus qu'ils ne la renferment, on peut pas plus se passer de jurisprudence que des lois.[2]

[2] Portalis, *Projet de code civil, Discours préliminaire*, 1804, p. xix as quoted and cited in von Savigny, *Of the Vocation of Our Age for Legislation and Jurisprudence*.

It is usually assumed that the inherent limit upon semantic conciseness precludes legal guarantees from being entirely predeterminate. What is overlooked is the fact that the major premise in a legal syllogism is not made of rules, to which facts are simply subsumed. I will show that a criminal code comprised, for example, of some three hundred sixty articles yields a number of possible normative major premises that well exceeds fifty billion. This casts serious doubt upon the workability of the legal principle that adequate notice must be given in advance as to whether certain behaviour is criminal or not.

I shall begin by describing the nature of the norm and show its deontological tension with reality; next, we will review some other theorists' views on the relation between the norm/concept and reality. With this background, we will be able to propose the paradox inherent in legal formalism that while the principle of legality cannot be done away with, its idea of predetermination is not viable – not just because of the lack of intelligible essences as Unger pointed out but due to the impossibility of having a single major legal premise. Through the instances of purposive legal reasoning (mistake of law, *ex post facto* laws and analogy), we will establish that criminal law cannot do away with formalism per se. Moreover, we will show that the premise of the legal need to guarantee the meaning of words derives from private controversy, while in criminal law this guarantee depends on the willingness of the state to restrain itself in its power and thus to enter into an adversarial relationship with the otherwise powerless individual. But even under such favourable procedural conditions the principle of legality functions in a manner that is epistemologically much more complicated than is usually assumed.

If formalism, expressed in the formula *nullum crimen, nulla peona sine lege praevia*,[3] is as arbitrary and irrational as some authors suggest, why does it persist in the face of all attempts to introduce purposive reasoning into the law of crimes? How can the guaranteeing role of criminal law ever be reconciled to the purposive perspective of punishment and treatment, if we do not understand the actual origins of the legal reliance on the word and formal logic? George Herbert Mead suggested in 1918 that criminal law should metamorphose from its 'hostile' into a 'friendly attitude.'[4] The latter would not require any guaranteeing and thus no formalism. Why has this not happened?

I do not propose to answer all these questions. My only intention here is to articulate the problem, to suggest that it is legitimate and to demonstrate that the issue of legality should not be taken as settled either philosophically or technically. There are, however, two fundamental problems that present

[3] "No crime, no punishment without previous law."
[4] Mead, *The Psychology of Punitive Justice*.

themselves in writing about the principle of legality. If the discussion is to be maintained strictly within the conventional assumptions, it becomes sterile because these assumptions contradict one another. If assumptions themselves are discussed, the discussion ceases to be 'traditionally' legal and is likely to be dismissed by traditionalists as 'mere literature.'

2. The Nature of Legal Concepts, Norms or Rules

2.1. Scientific Norms vs. Legal Norms

The illusion based on the 19th century perception of causality in science was that since in science the inexorable laws govern the events, in society the same should be possible. If in nature the laws can exist above and beyond the events, why not in society? The analogy was problematic even at its inception. Assuming there are empirical laws that 'govern' events, are these laws pre-eminent to events? Do events merely manifest empirical laws? Are the laws really 'hidden' in the events the way a common denominator is hidden in denominators which it describes? Do the 'empirical laws' exist apart from events at all? Are they not merely a pedagogical tool, an instrument of explanation? Are not concepts in general mere means of communication? These questions can be answered by describing the difference between a legal order of concepts and the conceptual system of science.

The central difference lies in the role of the concept. In science, the concept is seen as a functional aspect of reality. It does not describe reality as such, but it describes one of its aspects, while abstracting from others. These descriptions do not essentially differ from descriptions carried by words in everyday life. They may be more complex, more narrowly functional, most specifically pragmatic, but what every word does is what every concept does: it explains, it communicates. Even if object-events do not have intelligible essences, even if concepts do not describe reality because even the scientific perception of the world is anthropocentric (anthropofunctional; Nietzsche: "Truth is a life supporting lie") the role of science is still to explain and thus enable a greater number of people to apply knowledge that would otherwise be restricted to those who are capable of inventing it anew. In this manner, too, the accumulation of concepts is possible, and future generations, by retrieving the explanations of former generations, can proceed further in their exploration.

In law, however, the possibility of conflict is the main reason in view of which words and concepts are used. In a contract, the parties do not formalise their agreement on paper in order merely to communicate it to one another; parties put it on paper because they trust the word on the paper more than

they trust one another. They suspect that at some future date their agreement will turn into disagreement. Were it possible to guarantee in advance that there would be no disagreement later on, there would be no need for a written form in contracts. Likewise in criminal law were there no disagreement about values, threats of punishment would not have to be fixed on paper in order to prevent one party from exercising its subjective judgment. Mistake of law is punishable in criminal law even if genuine. Therefore, even if the threat is not communicated, it is nevertheless valid.

Moreover, in science the human purpose determines the concept; in law the concept is to determine the human purpose. In science our shared interest determines which aspect of reality we shall explore and which conceptual constructs we shall use for the purpose; in law the 'conceptual construct' is committed to the substantive impartiality of a written word and the procedural impartiality of impartial adjudication in order to be able to imagine that it does determine the action of a particular human being.

The validity of a concept in science is determined through experimentation. In law the concept or the norm is the independent variable which determines whether the reality is authorised, commanded, prohibited. The objectivity of this determination is accomplished through adversary adjudication. Experimentation and its results are the product of reality speaking directly to the scientist; adjudication and its results are a product of human will speaking directly to the legal subject. The essence of science then is understanding; the essence of law is subjection to another's will.

To say in science that such and such concept says so and so, the reality must be so and so, is 'dogmatic;' a scientist must always doubt. To say in law that since such and such reality is different from the legal concept, the concept should be changed, is naïve and plain wrong. Law is not about reality, it is about man's will to change that reality – including other men's wills.

A rule, insofar as it is descriptive of reality, is redundant and unnecessary. Unless there is a difference between the situation prescribed in the rule and the situation as it exists in reality, there is no rule. There must always exist a deontological tension in the rule. Even if the rule is totally effective – i.e. if there is no discrepancy between the rule and the reality – the rule may still be a response to a potential discrepancy. The question is, would the reality still conform to the disposition of the rule should the rule be abolished?

In science the laws are at best descriptive and are arrived at by induction. (Imagine a scientist who would claim that his laws are correct but that the empirical reality somehow does not live up to them.) In legislation the process of arriving at law is precisely the reverse: the laws are prescriptive and they function deductively. In science one looks for what *is* and then invents the formula that explains and describes it; in law one looks for what *is not* and then invents a rule that creates the deontological tension between *what is* and

what ought to be. A scientific law is more genuine (descriptive) the more the events conform to it. A legislative law is more genuine (prescriptive) the more the reality differs from it. A scientific law insofar as prescriptive is simply not a law; a legal rule insofar as descriptive is redundant. It is thus literally true that (legal) laws exist to be violated.

In science, if the events differ from the way a scientific law describes them – the law is invalid. In law, if the events (behaviour) depart from the rule – the law becomes valid, i.e. the sanction is applied. In science, reality is the master and the law a servant. The scientific laws tend towards reality. Legal rules only make sense when they differ from reality. In this respect one is surprised to discover that legal concepts exist not because of what the reality is that they address, but precisely because of what it is not. Legal and generally normative concepts describe something that is different from, and negates, reality as it is. Now this reality that is to be negated – and a legal norm, as we have seen, is necessary only insofar as it does negate reality – can be a future or a present reality. Law, in other words, can intend to change reality as it now exists and can attempt to prevent future change; it cannot, however, attempt to change past reality. Therefore, all normative concepts negate a present or future reality.[5] Normative concepts are thus descriptive of desire rather than of reality.

In linguistics, it has been said, the grammar does not only say how the people ought to use the language, but actually describes what is happening when the people speak and write. The same holds true for the games in the sense that there would be no game should the players not obey the rules from the very beginning. However, in the area of law, the norm was traditionally regarded as a prescription of how the people ought to behave. Throughout history the norms of the law derived their justification from a moral ideal, most often from a religious one (the doctrine of natural law is the latest example). This had as a consequence, an exclusively deontological concept of the legal norm.

Legal rules address reality from an unreal point of view: if they do not describe reality, they must differ from it; if they differ from it, they of necessity are descriptive not of reality, but of something else. What is this 'something else?'

[5] It cannot be overemphasised that each legal concept can at the same time be descriptive and prescriptive. Insofar as it describes what is already true, however, it is redundant and thus not legal (normative). Insofar as reality is different from the one desired by the norm, the norm represents an attempt to change it. A third possibility, however, is also given as mentioned above: the norm may mandate the reality as it presently exists in order to prevent future change. The Marxist doctrine holds that this is the main purpose of the law: to maintain the societal status quo, to prevent structural changes.

What do the legislative laws describe through their prescriptions? If I say "murder shall not be committed" I am clearly not referring to reality of the events. It could be said, however, that I am talking of an 'ideal reality.' But what precisely is this?

Here one can say that human law and its rules are like any other human act. Its essence is to change the reality as *is* into something different.[6] Thus, law is turned into future: it does not describe what is, but it is possible to hope for the best in the future. Deontological statements only make sense if we look into the future. It is this human ability to understand the concept of 'future' that makes law and morality possible at all. If time were to stop now, law and morality would lose all their deontological tension, which is so essential. Only the past can be addressed in a descriptive fashion. Prescription is simply a particular description of future. Laws are all created in the past in order to govern the future. Every rule is therefore a bridge over time.

The deontological tension between the rule and reality, between the norm and normality, could, therefore, also be described as the present tension between past and future. And since many rules, norms, and commands address a reality that is unlikely to conform to the future, the future remains future and is indefinitely postponed. (Much like the tavern owner who hung out the sign: "Tomorrow all beverages and food will be given gratis") In other words, if the deontological tension remains between the rule and reality, the rule's fulfillment is indefinitely postponed into the future. Thus with rules – as long as they remain that – future never becomes present.

2.2. Extrinsic and Intrinsic Norms

Roman law included a rule which presents a good example of the mode in which the majority of non-criminal legal norms constitute themselves. It was called *Lex Rhodia de jactu*[7] and it held that the damage incurred by the owners of goods thrown overboard by the captain of the ship transporting them (in

[6] See Kojève, *Introduction to the Reading of Hegel,* at p. 130-149.

[7] Corpus Juris Civilis, *Digestae* XIV 1.2, ed. T. Mommsen, 1911.

> [T]he adjustment was made by the use of the *actio locati* or *conducti*. The person whose goods had been thrown overboard brought his *actio locati/conducti* against the *magister navis* to recover all beyond his own personal share of the loss and the Captain would then proceed by his own contractual action against each of the other persons liable for their respective appropriate contributions.

See, Thomas, *Textbook of Roman Law*. It is possible, however, that this circuitous and possibly extensive litigation might have been avoided because there is mention of a right of the master to retain goods unless those liable to contribute paid their share and that doubtless, expedited compliance.

order to save the vessel in a storm) should be shared by the owners of the goods not thrown overboard. This *ex post facto* sharing of the risk is a solution which dictates itself logically to any perceptive mind. It is not the rule which dictates the solution; it is the situation itself which is characterised by a certain intrinsic transactional logic. The rule is, as it were, epiphenomenal, i.e. an organic outgrowth of an idiosyncratic exchange in peculiar circumstances.

On the other hand, the *Lex Julia* punished all talk offensive to the Emperor.[8] Such a rule cannot be said to be logical in the same sense as the *Lex Rhodia de jactu*. If not enforced, the freedom of speech will not impair the political situation to the point where it would seem patently illogical not to have such a rule.

Thus, there seem to be two kinds of rules: those dictated by life itself, and those dictated by somebody's will and power.[9] In relation to life itself the former can be called intrinsic and the latter extrinsic rules.[10] The more extrinsic the rule, the more precarious its existence and the more self-dependent, self-referred and apodictic the interpretation of the norm. The intrinsic rules, being epiphenomenal, can easily be adapted through the use of teleological

[8] "The law had once punished as '*lèse-majesté*' even the removal of one's clothes or the chastisement of one's slave in the vicinity of the Emperor." von Bar, *supra* n. 33 to Chapter 8, at p. 42, n. 4.

[9]
> [C]ommon to all social orders designated by the word 'law' is that…they are coercive orders. This means that they react against certain events regarded as undesirable because detrimental to society, especially against human behaviour of some kind, with a coercive act; that is to say, by inflicting on the responsible individual an evil.

See Kelsen, *The Pure Theory of Law,* p. 33.

[10] Integral to Durkheim's concept of collective conscience is his distinction between mechanical and organic solidarity. In short, mechanical solidarity is sustained by repressive law, while organic solidarity, characteristic of the modern world with its increased division of labour, is sustained by restitutive law. The more the division of labour is developed and the more interdependent are the organic parts of society, the less need there is to keep society together by force of repressive law. When repression is required, and this is most characteristic of criminal punishment, the danger of personal domination through the enforcement of 'extrinsic' norms is enhanced. Durkheim writes that "inasmuch as the repressive, i.e. the penal law, is still needed, the 'directive power,' i.e. the organs of the State, representing the collective sentiments react on their behalf, enforce them and defend them. The directive power is 'the collective type incarnate.'" Thus, the enforcement of 'extrinsic' norms, particularly criminal norms which cannot be said to derive from the logic of the organic circumstances, is in Durkheim's view 'directed' by the historical and cultural reality defined by the 'collective conscience.' Without its enforcement the norm would dissipate as its lack of enforcement cannot render quantifiable remedial lacunae. Its existence is entirely its enforcement; and amounts, curiously, to an 'acceptable' form of domination. See Durkheim, *The Division of Labour in Society,* at p. 89.

(purposive) interpretation. There is an evident underlying purpose which informs their application. They are instrumental to this purpose, because it is the purpose itself which is being enforced.[11]

The extrinsic rules, however, may be clear commands, such as "Do not slander the Emperor!" yet their interpretation cannot readily refer to the underlying purpose unless a direct reference is made to the arbitrary will of the Emperor. In this sense the extrinsic rules tend to overlap with the prescriptive rules, inasmuch as the latter do not lend themselves to purposive interpretation but should be mechanically applied in their 'as is' status.

The contrast between these two types of rules helps us discuss three aspects of the norm. It refers to the origin of the norm and tells us something about its long term viability; it helps us understand the rationality, *vel non*, of its application; and it determines the norm's dependence upon its enforcement.

With regard to normative viability, it should be noted that an intrinsic rule, which originates in the logic of life itself, may metamorphose over the long run, and yet continue to address the same concrete problem. For example, the rules of insurance today would perhaps preclude the need for an *ex post facto* risk-sharing akin to *Lex Rhodia*, yet the underlying risk-sharing would

[11] See Unger, *Knowledge and Politics*, at p. 68-69. Unger notes that "instrumental rules are guides for the choice of the most effective means to an end." Such rules are hypothetical in that they depend upon the presupposition of a condition, i.e. if you desire x then do y. Consequently, they operate on behalf of a particular social desire or purpose. Unger cites an illustration in the case of Puffendorf's surgeon who violates the prohibition against spilling blood on the street in order to save a life. Puffendorf, *De Jure Naturae Et Gentium Libri Octo*, at p. 802-803. If the court, in its sound judgment, decides not to punish the surgeon it will reflect a victory, in part, of purposive reasoning with its correlative instrumental decision making, over formal adjudication. As Unger notes, the purposive theory requires that in applying the law, a judge "must consider the purposes or policies the law serves." Thus, he continues, "the decision not to punish the surgeon turns on the determination that the objective of the law is to guarantee safety in the street and that this objective would be more hindered than helped by the punishment of the surgeon."

Conversely, the formalist's attachment to the 'plain meaning' of words will require the enforcement of norms regardless of how detached or, indeed antagonistic they are to the policies from which they spring. In fact it is because the perpetual disagreement, on a subjective individual level regarding policy ends, that prescriptive rather than instrumental rules are utilised by the state within the framework of a formal normative system. Such rules prescribe to each individual what conduct he may or may not engage in, regardless of the particular purposive interpretations of the norm.

There is also a third category of rules discussed by Unger which are constitutive. These rules "define a form of conduct in such a way that the distinction between the rule and the ruled activity disappears." The game of chess, for example, is governed by constitutive rules since a player who moves a Queen like a Bishop is no longer playing the game. On the distinction among the various types of rules, see generally von Wright, *Norm and Action*, at p. 6-16.

still be the same. On the other hand, an extrinsic rule has no such flexibility. Thus, *Lex Julia de laesae majestatis* has reverted into a freedom of speech doctrine exactly contrary to Augustus' imperial 'logic.' The history of human civilisation sometimes separates the chaff from the wheat of justice.

The application of the intrinsic rule will tend to be uniform since the judges take notice not only of the rule itself, but also of the whole organic context which generates it. Thus, it is not the judges' formal agreement or the procedural overview of the appellate court which keeps the practice uniform, but the organic justice (the logic of exchange itself). In contrast, criminal law's discrepancies in sentencing, for example, testify to the fact that even the negative feedback mechanisms of appellate procedure cannot prevent arbitrariness and comparative injustices.

Lastly, the existence of the arbitrary extrinsic norm is precariously dependent on its rigid formalist interpretation and consistent enforcement, since a liberal interpretation and the lack of enforcement will leave in their wake an unremedied social controversy spontaneously calling for self-help or other less acceptable solutions.[12] Intrinsic norms, if not carried through, produce remedial lacunae. The extrinsic norms do not.[13]

In view of the above discussion, it is then possible to maintain that an intrinsic norm can be seen as an epiphenomenal suprastructure of a certain recurring life-situation. Most norms address an existent or a potential private controversy;[14] they aim at providing an advance abstract answer to the problem presented by the controversy. One cannot simply say that the norm resolves

[12] In societies characterised by social and economic interdependence due to increased divisions of labour there is less need for exertion of force in order to sustain the norms. Durkheim notes that a greater structuralisation and integration of social life produces more readily apparent remedial lacunae which, since quantifiable by reference to a monetary base, can be remedied through restitution. But in less integrated societies where conflict does not produce quantifiable remedial lacunae, the norm must be forcefully sustained or it becomes vulnerable to its own dissolution. See Durkheim, *supra* n. 10.

[13] A word of caution is perhaps appropriate here, else the distinction between intrinsic and extrinsic norms be perceived as too facile. The privilege against self incrimination, for example, may be superficially perceived as an extrinsic norm unexplainable in rational terms. The exclusionary rule as the privilege's alter ego may then follow suit in being discarded upon it. Yet, if one understands that the adjudication of a criminal case loses its very attribute of legality and becomes sheer domination unless the parties to the controversy are kept approximately equal, it is not difficult to comprehend that both the privilege and the exclusionary rules derive from the deep-structure logic of replacing the arbitrary domination in criminal cases with impersonal rules and impartial adjudication. In other words, certain norms will be evidently and simply intrinsic, whereas others will reveal their meaning only through a structural analysis over the long run. For the norm to be able to take advantage of its intrinsic nature, its appliers have to understand it. See Chapter 4 of this book.

[14] Gumplowtiz, *Rechtsstaat und Socialismus,* cited in Pashukanis, *The General Theory of Law and Marxism*, at p. 81.

the controversy; the power of the state has to back them up. Were it left to the norm itself, most controversies would in fact not be resolved.

The infrastructure of the norm, depending on how intrinsic or extrinsic it may be, is always composed of a certain ratio of organic reason dictated by the life-situation on the one hand, and a certain amount of formalist interpretation and coercive power necessary to impose the norm on the other. In pristine private controversies, for example, the organic reason content of the norm is relatively high, whereas the need for formally consistent enforcement is minimal. This is partly due to the simple fact that the state does not want to get involved beyond the minimum measure of keeping the peace in societal transactions.

In public law, such as criminal and administrative law, the norms are purportedly addressed to the conflict between an individual and the state. Thus, because power characterises one of the parties involved, we have an acute imbalance of strength. Such an imbalance often prevents us from speaking of a true controversy; the prevailing force of one party tends to change the controversy into a domination. Of course, this is precisely why the independent judiciary, separated in power from the executive and the legislative branches, is a *sine qua non* of public law. Without an independent judiciary the roles of the rule-maker and the rule applier would merge with one of the parties to the controversy, the end result being the metamorphosis of the conflict into a falsely legitimated domination by the state.[15] Since the rule of law is the antithesis of the rule of force,[16] it is imperative that the state abdicate its power to the judiciary in all cases where the executive branch is a party to the controversy.

Even so, the norms intended to be applied in situations where the state is an aggrieved party tend to have a lower ration of organic reason and a relatively high content of arbitrary will and power. The more arbitrary i.e. the more extrinsic the norm, the more its continued existence relies on its consistent enforcement.[17]

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[15] The importance of an independent judiciary to public law adjudication was recognised by Montesquieu when he wrote that "There is no liberty if the judiciary power be not separated from the legislative and the executive. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge would then be the legislator." Montesquieu, *The Spirit of Laws,* p. 70.

[16] Indeed the very purpose of law is to prevent self-help and thus the war of everybody against everybody. Therefore, it is obvious that the use of force between the parties during and in anticipation of imminent adjudication is likewise antithetical to the very social purpose of law.

[17] See *supra* n. 12 and accompanying text.

Assuming that the violation of the norm represents its negation,[18] the negation of an extrinsic norm originating in the public sphere will affect the very existence of the norm itself. It fulfills the will of the powerful, who, if they choose to disregard the violation of the norm, can silently annihilate it.[19] I say *silently* because a crime, if it goes unpunished, will leave no controversy unresolved.

2.3. The Negation of Norms

As already discussed, norms have both a descriptive and a prescriptive content: they describe what is in fact going on in society when transportation risks are being shared and when people abstain from slandering the Emperor. Yet, if the norms were only descriptive, they would be redundant inasmuch as there is no need to command or prohibit anything which happens as a matter of course, anyway.[20] The very existence of the norm indicates a suspicion, at least, on the part of the rule-maker that the situation might be otherwise. The norm is usually intended to address this problem in two distinct ways.

The prescriptive content of the norm is thus measured in terms of the norm's discrepancy with actual reality. The norm creates a deontological tension between reality and itself. But it is the violation of the abstract norm which generates the need for its forceful application, thus bringing the concrete existence of the norm to life.[21]

But just as these violations may be potential or actual, so the norm's prescriptive aspect of existence may be latent or patent. Inasmuch as the norm's existence is made patent by its very violation, it is possible to say that it is precisely the negation of the norm by the violator which brings

[18] The initial act of coercion as an exercise of force by the free agent, which infringes the existence of freedom in its concrete sense, infringes the right as right; crime is a negatively infinite judgment in its full sense whereby not only the particular (i.e. the subsumption under my will of a single thing) is negated but also the universality and infinity in the predicate 'Mine' (i.e. my capacity of rights). Hegel, *supra* n. 34 to Chapter 8.

[19] Meir Dan-Cohen, in his *Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law*, maintains that the powerful can disregard the violation of any norm by 'selectively transmitting' a decision rule which works to countermand the prescribed norm. See also Poulantzas, *State, Power, Socialism*.

[20] It cannot be overemphasised that each legal concept can at the same time be descriptive and prescriptive. Insofar as it describes what is already true, however, it is redundant and thus not legal (normative). Insofar as reality is different from the one desired by the norm, it represents an attempt to change the reality.

[21] André-Vincent maintains that the process of 'Konkretisierung,' in which the abstract command is translated into concrete reality, *is* law, namely that law lives in its concrete decisions, not in the general and abstract norms. André-Vincent, *L'Abstrait et le Concret dans L'Interprétation*.

about its forceful reaffirmation by the state in the form of punishment. This reaffirmation can in turn be seen as the negation of the previous negation.[22] This negation of the negation of the norm is brought about from its abstract existence on the books into its concrete existence when applied and enforced in a particular case.

Thus, on the one hand, the anticipated potential violation of the norm godfathers its birth at the hands of the rule-maker, and its concrete violation on the other hand triggers the concretisation through its actual application. Cannibalism, for example, is not punishable today since it is very unlikely to occur.[23] Should it tend to spread, however, the practice of cannibalism would first be prohibited *in abstracto* and then prohibition would be applied *in concreto*. The promulgation and the application of the norm are both triggered by its potential or actual violation. Its potential or actual violation, in turn, provides the source for its prescriptive content which makes the norm something other than a descriptive redundancy of real life.[24]

Thus, on the one hand, the very existence of the norm and the threats of its imposition as it were, often suffices to maintain the desired status quo. On the other hand, should violation of the norm in fact occur, the sanction is anticipated (every norm is composed of a disposition and of a sanction) *in abstracto*. It is applied *in concreto*.

We can now reiterate a previously made point in this new language. The deontological discrepancy to which the norm's promulgation and application respond can be either extrinsic to the real and obvious needs of society, or it can be intrinsic to the real and obvious needs of society.[25] Should it be

[22] "The annulment of the crime is retribution in so far as [a] retribution in conception is an 'injury of the injury' …" Hegel, *supra* n. 34 to Chapter 8, at p. 71.

[23] See generally Simpson, *Cannibalism and the Common Law*.

[24] The power to envision things and events the way they should be, rather than merely perceive them the way they are, is the origin of both the prescriptive content of the norm as well as of its consequence, the deontological tension between the actual and the desired reality. This power of the human spirit is usually taken for granted, yet it is precisely the capacity to anticipate different realities, which makes not only for ethics, but also for the whole progress of human history:

> By an increase, by an imaginary generalisation of the moment, by a sort of excess, man, *creating time*, not only constructs perspectives within and beyond his intervals of reaction but, even more, he lives but very little in the present. His principal abode is in the past or the future… Not only does the spirit strive to foresee in the field of phenomena and external events, but it tries to foresee itself, to anticipate its own operations. It seeks to exhaust all the consequences of the data collected by its attention and to grasp their law.

Valéry, *Variety: Second Series* at p. 200, 203. The idea goes back to Hegel. See generally Zupančič, *On Legal Formalism: The Principle of Legality in Criminal Law*, at p. 388-89.

[25] Durkheim suggests the existence of two classes of juridical rules which are recognised by

extrinsic to the real needs of society, it will derive from somebody's arbitrary will – most likely the arbitrariness of the subject in power, whoever this may be. On the other hand, there may be real needs of society which are not covered by the normative prescriptions since they do not coincide with the needs of those in power.[26] It is possible to maintain, then, that a double discrepancy must exist if the norm is to be carried through to its concrete life: *the interests of society and the interest of power must overlap*. The essential point here, however, is that the existence of the norm and its violation cannot really be separated. The rule is the normative mirror image of its own violation.[27]

This discussion should establish the point that the violation of the norm will *not* be its negation if the norm's built-in sanction is carried out. It follows from the facts that the very promulgation of the norm first occurred in response to its anticipated violation, and, also, that this anticipated violation implies an assertive mechanism in the form of the applied sanction. Since the norm, whose violation cannot be imagined, will never be promulgated, it follows that the perfectly adhered-to norms is a contradiction in terms. In other words, all norms are norms to the extent that they are likely to be violated and to the extent to which a consistent concrete application and enforcement are in fact carried out. The paradigmatic norm is the one which is violated, but whose violation is punished.

The negation of the norm followed by the negation of this negation in the form of the applied sanction, then, is the paradigmatic norm. This negation of the negation also tends to show that the true existence of the norm is not in the books, but in the courts where it is being applied.[28]

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the different sanctions attached to them. The first type "consists essentially in suffering, or at least a loss, inflicted on the agent." These are the repressive rules of criminal law.

The second class do "not necessarily imply suffering for the agent, but consists only of *the return of things as they were*, in the re-establishment of troubled relations to their normal state …" Durkheim later notes that in a society marked by organic solidarity "the rule does not, then create the state of mutual dependence in which solitary organs find themselves, but only expresses in clear-cut fashion the result of a given situation." In such intrinsic rules, the remedy is implicit in the rule and affects a return to the equilibrium of the circumstances prior to the rule's violation. Durkheim, *supra* n. 10, at p. 69.

[26] Criminal law cannot create norms that would actually function in society, unless there is an essential correspondence between these norms and social needs. In other words, criminal law can play the role of catalyst but not the role of creator of normative integration. Johannes Andenaes recognised the necessity of integrating the abstract norm with the concrete reality when he noted that "[i]n the case of *mala per se* the law supports the moral codes of society … in the case of *mala quia prohibita* the law stands alone." See *supra* n. 10 to Chapter 8, at p. 81.

[27] "The right is mediated by returning into itself out of the negation of itself; thereby it makes itself actual and valid, while at the start it was only implicit and something immediate." Hegel, *supra* n. 34 to Chapter 8, at p. 64.

[28] André-Vincent advances a theory of law that, according to him, transcends the rupture

3. Concept and Reality

To establish the relationship between the norm and the negation of the norm, we need to explore the relationship between concept and reality. The problem is how to ensure, if at all possible, that the general and abstract norm will predetermine the outcome of specific and concrete cases. The extent of this predetermination is the extent to which the principle of legality can be implemented. As Jerome Hall has pointed out, the relationship between the abstract norm and the concrete case seems analogous to the relationship between concept and reality.[29] Alchourron and Bulyigin,[30] as well as Horowitz,[31] have attempted to show that indeed the rule of law, as opposed to the rule of man, depends on the level of conceptualisation and the proper use of formal logic.[32] Kelsen,[33] on the other hand, maintains that there will always be a discrepancy between the abstract norm and the concrete one – that the concrete norm is always created anew and relatively independent of the abstract one. Engisch and André-Vincent,[34] however, argue that the process of "Konkretisierung," in which the abstract command is translated into concrete reality, *is* law, because law lives in its concrete decisions, not in general and abstract norms.

The very range of these theories testifies to the fact that there is no common ground on which a real discussion can be had. If the question of legality and the concomitant question of legal interpretation go to the heart of the phenomenon of law, then the disagreements about these questions are disagreements about the role and nature of law itself. This indicates that a frankly metaphysical discussion may be in order.

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between its concrete and abstract aspect. He argues that "[a] legal order is concretely structured by a multitude of individual acts." André-Vincent, *supra* n. 21, at p. 135. The reality of the phenomenon of law must be found at its empirical foundation, where things really happen. Thus, there are no abstract norms, only the reality of decided cases.

[29] Hall, *General Principles of Criminal Law,* p. 35: "[O]ne's judgment [here] depends on his opinion concerning the role of the concept in problem-solving."

[30] Alchourron & Bulygin, *Normative Systems*.

[31] Horowitz, *Law and Logic*.

[32] Not only must the conceptualisation be concise, but the concepts must not overlap and there must be no legal lacunae. The system of concepts must be internally integrated; there must be no incompatibilities between the definitions. The best-known challenges to the normative system of substantive criminal law are the 'impossible attempts,' especially the legally impossible ones. The system cannot fully account for them. Hall calls the issue *"La Belle sans Merci"* of criminal law.

[33] Kelsen, *supra* n. 9.

[34] André-Vincent, *supra* n. 21.

We shall briefly explain and criticise the above theories before discussing the assumptions on which they are based. Professor Unger[35] has in this respect provided a framework of exploration, which I shall follow in my exposition. Conclusions from this discussion will then be applied to the general notion of legality in criminal law.

3.1. André-Vincent and Engisch

In his article *L'Abstrait et le Concrète dans L'Interprétation* with the subtitle "en lisant Engisch," André-Vincent advances a theory of law that, according to him, transcends the rupture between its concrete and abstract aspects. "A legal order is concretely structured by a multitude of individual acts"[36] which is anything but a pure and simple application of the laws.

> Le droit est valeur: évaluer ce qui est juste c'est la tache concrète du législateur comme de juge. Une réflexion, un effort d'abstraction accompagne toute évaluation dans l'ordre abstrait de la loi, dans l'ordre concrète de la décision judiciaire. Dans cette réflexion, dans cet effort apparaissent les racines ontologiques du droit (du bien dû à autrui).[37]

André-Vincent's definition of law seems to be a combination of several factors. First, there is a jusnaturalistic idea that is an *ars boni et aequi*; "*le bien dû à autrui*," (Ulpianus' "*suum cuique tribuere*")[38] is an intelligible essence waiting to be discovered. Second, this task of discovering the just and the good cannot be accomplished in the general legislative effort, but must be constantly supplemented by an empirical effort on the part of the judges who engage in what Engisch calls "*Konkretisierung*," which André-Vincent translates as "concrétion." Third, the reality of the phenomenon of law, therefore, must be found at its empirical foundation, where things really happen and where there are no abstract norms. In the final analysis, there is only the reality of decided cases. The abstract level of the legal order is but a reflection of the concrete level of judicial and other legal decisionmaking.

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[35] Unger, *supra* n. 11.

[36] André-Vincent, *supra* n. 34, at p. 135.

[37] *Id.* at p. 145. Law is values, and to evaluate what is just is the concrete task of the legislature, as well as of the judge. The reflective effort of abstract thinking accompanies all valuation within the abstract order of the law as well as of the concrete order of the judicial decisionmaking. It is within this reflective effort that the ontology of law (of the good owed to another) takes root.

[38] Ulpianus-D 1, 1, 10, 1.

To justify the final point, André-Vincent must regress to the problem of concept creation. He charges post-Cartesian epistemology with having separated reality from idea and proposes a return to the Aristotelian 'concept:'

> Le rapport de la norme abstraite au concrète suppose celui du concept au réel. Le problème de l'interprétation contient le problème de la connaissance: il en dépend et, d'une manière critique depuis le doute méthodique injecté par Descartes à la racine de la connaissance. Chez Descartes et dans toute la philosophie post-cartésienne, l'abstraction est rupture avec le réel: elle est création de l'esprit, et elle se termine non au réel mais à l'idée. Le sens même du mot abstraction a radicalement changé; il n'est plus celui d'une opération (à partir du concret), mais d'une entité existant en soi (à partir du réel). On est à l'antipode de l'abstraction aristotélicienne.[39]

The implication is that, first, norms are at least dependent on concepts (if they are not concepts themselves) and, second, that concepts must "adequately reflect" reality. The alienation of the concept from reality, or analogously of the abstract norm from the concrete one, threatens to cause the alienation of law from life. In the extreme that would mean that there are two legal systems: the real one and the abstract, illusory one. André-Vincent emphasises that legal order should not be seen as a system of deduction from more abstract to more concrete premises; that the system should be perceived empirically in a double sense. First, it should be clear that insofar as the law can be formulated in the abstract, this is only possible because inductively, through concrete decisions, it became possible to reduce it to conceptual 'common denominators;' second, even in seemingly deductive legal syllogisms where the abstract norm is the major and the fact pattern a minor premise, the actual mental operation is far from being that simple: "Ce qui est premier dans l'interprétation, ce n'est pas l'application de la loi au cas (la subsumption), c'est la détermination de ce cas. L'individualisation du fait et sa qualification

[39] André-Vincent, *supra* n. 34, at p. 136.

> The relationship between the abstract norm and the concrete reality mirrors that of the concept to reality. The problem of legal interpretation contains within itself the problem of knowledge: it depends upon it in a critical fashion influenced by Descartes' injection of methodical doubt into all consciousness. With Descartes as well as with all post-Cartesian philosophy, the abstraction represents a rupture with reality; this abstraction is a creation of the mind and it ends up not in reality, but in the idea. The very meaning of the word abstraction has been radically changed; it no longer refers to an operation of the mind (which starts from the concrete), but rather to an entity which exists in itself (which starts from the reality). We are at the antipode of the Aristotelian abstraction.

juridique précèdent la subsumption."[40] André-Vincent's position thus suffers from seeming eclecticism.

First, as we have seen, he simultaneously accepts and rejects the idea that concepts are given (eternal), that things have intelligible essences. He accepts the idea when it is helpful to him in supporting his jusnaturalistic position that "*bonum et aequum*" can in fact be discovered.[41] However, if the "réel et l'existant" are constant and there to be explored, they are also presumably there to be properly described in the 'concrete' concepts. If that is true, then the conceptual level of legal order, i.e. the level of abstract norms, is not merely an irrelevant reflection, but an existing reality, too.[42] He would be forced to admit that such a conceptual system could be created and would also be real – no less real in effect than the reality itself. Consequently, his rejection of the idea of intelligible essences, implicit in his refusal to grant any reality to the abstract normative system, shows an inconsistency in his position.

Second, if the "réel et l'existant" and its concrete legal manipulation are truly constant and objective, then the facts are there and should be seen as the independent variable, which are concrete in the interaction with the abstract norm: the facts are given (constant), the abstract norm is chosen to fit them, and the deductive part of the operation (legal syllogism) can be completed.

Yet André-Vincent does not accept the idea that legal apperception influences the perception of the facts. Criteria of what is essential are given by law and they influence the notion of what the facts are. Yet he maintains that "the individualisation of facts and their legal qualification" somehow precedes the logical operation. Although he never makes it entirely clear what he means by "qualification of the facts," by the context one is led to believe that a lawyer ordinarily perceives a particular life situation through a peculiar norm, then "qualifies the situation" (as e.g. 'murder'), and only then 'tests' this hypothesis in the legal syllogism. To be sure, insofar as André-Vincent hints here at the dialectical interaction between concept and reality, one cannot but agree with him. But since the number of available major premises in law is equivalent to the number of combinations of discrete provisions in any legal branch,[43] it is also clear that one can never really be certain that the

[40] *Id.* at p. 138.

> What comes first in legal interpretation is not the application of the law to the case at hand (the subsumption under the major premise of the law), rather it is the determination of the case that one begins with. The individualisation of facts and their legal qualification precedes all subsumption.

[41] "Dans l'opération jurisprudentielle, les concepts concrètes ne partent pas d'autres concepts concrètes, mais du réel, de l'existant." *Id.* at p. 137.

[42] One is tempted to call this position an 'empiricist-idealist' one.

[43] See text accompanying *infra* n. 210-212.

hypothetical qualification of the case is the correct one. If that is so, then neither 'the facts' nor 'the law,' neither the major nor the minor premise of the syllogism is given. Moreover, the syllogism itself does not really test the hypothesis because even though a formally correct subsumption is achieved, that does not exclude the possibility of a more specific major premise, a more detailed combination of provisions. And this, according to the principle *lex specialis derogat legi generali*, makes the operation logically and legally invalid.

To the extent that André-Vincent admits that neither the concept nor reality (i.e. neither the abstract norm nor the 'corresponding' fact pattern) are given – this, too, is inconsistent with his claim that concrete norms are real.

Moreover, he denies the possibility of conceptualisation from the functional point of criminal law because:

> Sans doute la loi peut et dois préciser l'hypothèse du délit; elle indiquera pour divers délits, diverses qualifications, elle graduera les peines en fonction de cette diversité. Mais, elle ne saurai donner toutes les précisions correspondant à toute la diversité des cas; elle ne le peut, et elle ne le doit.[44]

If such a position were reflective of reality, there would be no legislation. I shall try to show that law and its concepts are not just particular articles in the code, but rather that law's major premises, as I have said above, are composed of combinations of discrete provisions. The enormous number of possible combinations[45] provides amply for all the details the law chooses to regard as relevant. André-Vincent's position that it is in principle impossible to require the law to conceptually cover all the possible life situations is unacceptable.

There are three possible solutions to the formalist's problem of discrepancy between *ratio verbis* and *ratio legis*. First, the answer offered by André-Vincent and Engisch seems to be that this impossibility to embrace reality in the concept is somehow inherent in the normative nature of the law, and, moreover, that it represents the source of the autonomy of legal reasoning. Since for them law is beyond conceptualisation it is in this transcendence of formal logic that such theorists look for the essence of law.

The second response to the discrepancy is simply that law is forced to act even though there may not be enough time for proper conceptualisation. Commands are issued not with the purpose of achieving conceptual clarity, but with the purpose of controlling behaviour. If there are conceptual deficiencies or inconsistencies, that is what lawyers in everyday practice are

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[44] André-Vincent, *supra* n. 28. There is no doubt that the law can and must define the elements of the crime. It will indicate different qualifications for different crimes and will determine gradations of punishment in view of that diversity. But the law cannot anticipate concisely all the details of that diversity of cases: it cannot and it does not have to.

[45] Deutsch, *The Nerves of Government,* p. 251-52. Deutsch calls this 'strategic simplification.'

paid to resolve. Teleological interpretation and the essentially similar analogical inference are there to ensure that the norm is applied as intended.

Thirdly, there are theories that have gone so far in their instrumental rationality that they regard norms which are merely symbolic or illustrative "*partes pro toto,*" as symbols of legislative and societal policies. They dismiss formalism as inapposite. These theories, of course, disregard the fact that the phenomenon of law is a response to structural and individual conflicts in society and that the purpose of legal norms is not communication. On the contrary, the purpose of the written norm is to step in when the communication has, because of conflict, broken down. To deny the possibility of judging according to concisely defined rules, to ridicule this as 'mechanical jurisprudence,' however, also means to admit the precarious nature of the guarantees that the formalist believes are embedded in the concise conceptualisation of the abstract norm.

3.2. The Positivist Position

Since the principle of legality stresses the importance of strict obedience to the content of the command of the abstract norm, one might expect positivism to be greatly concerned with this postulate of predetermination of the concrete by the abstract, of the lower order norm by the higher order norm. Indeed, one would be tempted to assert that a command is a command only to the extent that it predetermines the behaviour of those to whom it is directed, and likewise, to the extent that it predetermines the content of the concrete judicial decision which brings the command into concrete existence.

Kelsen,[46] however, stresses the other side of the command concept. For him, law is an act of will, not an act of reason. It follows that logical principles do not apply to law as such and cannot pretend to govern it. Kelsen strictly distinguishes the science of law from the legal rules themselves. The latter are not a matter of logical persuasion, since obedience is accomplished through coercion. The former has the legal order as its subject matter and is free to point out the inconsistencies and contradictions in it, but that has nothing to do with the law *stricto sensu*.

A positive position, however, cannot escape the problems created by its insistence on the separation of law from reason, volition from cognition. The command may indeed be a pure act of will, but even to be obeyed, let alone applied, it has to be understood. Indeed, if command is to be seen as an imposition of will, it can succeed only through being communicated. Communication is of necessity a question of concept, and the discrepancy

[46] See Kelsen, *supra* n. 9.

between the concept and reality, which the positivist theory sought to escape by separating law from legal science, enters through the back door. If a higher order norm is to be a higher order norm, it must predetermine the lower order norms. To the extent that it does not succeed in doing just that, it ceases to be a command.

Kelsen maintains, however, that the concrete norms can never be entirely predetermined by the abstract ones. Interpretation for him is not a formal logical operation – not if law is interpreted for concrete application by the judge. It can be interpreted by the jurist, in which case, however, it ceases to be law and becomes legal science. Such a position would be acceptable if Kelsen were willing to concede that the 'legal order' is not the only source of all commands, that we are talking not so much of the rule of law, but rather of the rule of man, and that consequently the subject matter of legal science is not complete unless psychology and sociology are added to it.

Insofar as the written word does not predetermine the concrete action in law, there is place for the imposition of individual will by judges and others who apply the law – and this, within liberal doctrine, is not acceptable. In this sense, consequently, the idea of the rule of law must of necessity coexist with the implementation of the legality principle. The only other alternative would be to regard law as a system of symbolic communication.

In his *Pure Theory of Law,* Kelsen says: "[T]he law to be applied constitutes only a frame within which several applications are possible."[47] Kelsen sees the role of legal interpretation merely to be "the ascertainment of the frame which the law, that is to be interpreted, represents."[48] In this context he distinguishes between intended and unintended 'indefiniteness.' The intended indefiniteness allows the lower order norms (authorities) to further 'concretise' (in Engisch's language) what cannot be regulated in the abstract.[49] Under the heading of 'unintended indefiniteness' Kelsen enumerates three categories where:

[47] *Id.* at p. 348-56.

[48] *Id.* at p. 351.

[49] In criminal law a typical example of such legislative technique would be the relatively indeterminate sentencing, the reason for that being that criminal law can conceptualise the relevant aspects of human behaviour on the level of the elements of crime, but cannot catch into concepts all the innumerable additional relevant but not constitutive circumstances and the combination thereof, which are consequently relegated to the role of aggravating and mitigating circumstances. Normative definitions of crimes (for example Model Penal Code § 250.10 [Abuse of Corpse] ["a person who treats a corpse in a way that he knows would outrage ordinary family sensibilities"]) deliberately delegate the authority to decide. In most cases this is done for two possible reasons. First, there might be such variations in proper responses regionally, that it becomes impossible to find a legal common denominator; second, instead of this territorial variation there might exist substantive variations in proper responses as, for example, in treatment of epidemic danger, where it is impossible to know in advance

a) a word or a clause has more than one meaning;
b) there is a discrepancy between the wording of the norm and the will of the legislator;
c) there are two norms that are at the same time incompatible and also applicable to a particular fact situation.

Kelsen seems to regard these possibilities as exhaustive of the source of indefiniteness. Nothing is said about the relationship between concept and reality and similar approaches to the problem. This is all the more surprising because he does in fact discuss the epistemological comparison between legal and natural science.[50] There Kelsen draws the analogy between causation as the subject matter of natural sciences and 'imputation' as the corresponding concept in the science of law. The concept of imputation he defines as "the connection between condition and consequence, expressed by the word 'ought' in the rule of law."[51] Since the consequences in natural sciences are predetermined by their causes, and it is these functional connectives that the natural sciences explore, one would expect Kelsen to seek the reasons for the relative indeterminacy of legal norms, their 'indefiniteness,' within the distinction between causation and 'imputation.' Kelsen, however, does not go beyond distinguishing imputation by pointing out that it is characterised by the verb 'ought.' While in science, when A is, B 'is;' in law, when A is, B 'ought' to be. It is not essential here that 'ought' for Kelsen establishes a *des*criptive (rather than *pre*scriptive) connection between 'norm-constituted' relations and the facts determined by the norms.

What seems surprising is the fact that while Kelsen admits that "[l]ogical principles are applicable, indirectly, to legal norms to the extent that they are applicable to the rules of law, which describe the legal norms, and which can be true or false,"[52] he nevertheless leaves unexplained the problem of indeterminacy of interpretation. If logical principles govern the rules of law, why then is legal science so much less capable of "formulating legal norms as unambiguously as possible"[53] than are other sciences? The surprise is reinforced by the fact that Kelsen follows Kant's epistemology in defining the science of law as "a cognition of the law … [which] 'creates' its object insofar as it comprehends the object as a meaningful whole."[54] Presumably this "meaningful whole" is governed by logical principles which create

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how to react, although it is definitely known in advance that a coercive response in case of epidemics will be necessary.

[50] Kelsen, *supra* n. 9, at p. 73-85.
[51] *Id.* at p. 80.
[52] *Id.* at p. 72.
[53] *Id.* at p. 356.
[54] *Id.* at p. 72.

reasoned and logically meaningful connections between different norms. Kelsen does not explain why these logical principles are less binding and determinative in law than, e.g. in formal logic, natural science or mathematical science. To be sure, Kelsen does insist that the indeterminacy so characteristic of the relationship between the higher and lower order norms is a question of degree. He does not, however, go beyond postulating the reduction of this indeterminacy, i.e. he fails to explain why the indeterminacy exists in the first place.

3.3. The Normative-Systematic Position

While the positivist doctrine strictly separates the question of the role of logic and concept in law from the idea of law as an act of will or desire, the doctrine Joseph Horowitz puts forward in his work *Law and Logic* tries to rebuild the bridge between the conceptual and the volitive aspect of the law. It does this, however, by collapsing the law as command into the law as concept. Ultimately such a doctrine is capable of showing that the total conceptualisation of the legal order is in principle possible. What it fails to explain is why the law has to act before such conceptualisation is actually achieved. It fails to take into account what Kelsen does understand, namely that the normative aspect of law is not recalcitrant to conceptualisation, but that its gist lies not in logical consistency and systematic conceptualisation, but rather in response to (individual and class) conflict. Theories, such as the one we shall examine, make sense only insofar as one is willing to accept the idea of legal system *qua* theoretical manual for a good society. But, of course, it has been clear since Hobbes that the role of law is not to conceptualise reality, but to respond to conflict.

> A legal system is constructed in order to allow adjudication by logical means. As long as the system is not sufficiently developed, such possibilities are in themselves limited. Reasoning without a system is obviously impossible: it is not enough to have factual data in order to draw legal conclusions in a formal argument. In law as in science, the construction of a theoretical system precedes the setting out of argument; in law as in science, the operations of the construction of the theory are, in the initial stage, more numerous than the operations of its employment. In the perfect state of law … the judge only puts the system of laws to use; in fact, however, he must also take part in its construction.[55]

Horowitz is quite correct in pointing out that if there is to be any adjudication in the true sense of the word, it must be based on logical principles. Even in the most primitive adjudicative setting the disputants will turn to a third party

[55] Horowitz, *supra* n. 31, at p. 26.

for adjudication of their dispute only if they believe that the person chosen for that purpose is wiser, i.e. more rational, than the disputants themselves. Reasoning rather than fighting – this is the *raison d'être* of adjudication. But while adjudication provides the form within which reasoning replaces power and force, the criteria for this reasoning must be derived from a platform much broader than the individual case.

To regard a legal system as a conceptual system, however open and imperfect is not, in my opinion, incorrect. There are certain forms of disputes that are ages old and have generated established legal solutions; there are also certain forms of behaviour, such as murder, that are proscribed in every society.[56] In this sense, there is definitely an inductive and empirical side to the task of legal conceptualisation.

Still, the issue cannot be simply how to apply reason to conflicts because conflicts are not only problems to be resolved. To the extent that conflicts are also conflicts of values and not just interests, they can be legitimately resolved by resorting to the basic values that are shared by both the parties. If such values cannot be invoked, then reference can be made to some 'absolute' values which the person deciding the case, but not the disputants, is capable of truly knowing. Unless these two possibilities are given, there can be no resolution of conflict. There can only be coercive maintenance of peace in society. Nevertheless, as the intensity of the sharing of values varies from issue to issue in society, so will the possibility of regarding the conflict as a mere logical problem to be resolved by reference to these basic values. To that extent regarding law as a conceptual problem-solving system is, in my opinion, legitimate. Engisch, however, raises problems on this practical level. In his *Sinn und Tragweite juristischer Systematik* (1957) he observes:

> So much empirical content is enmeshed in legal concepts … that they cannot be reduced to a small and closed set of basic concepts, as can mathematical concepts … In mathematics the deduction is almost the matter itself, whereas in law it merely serves as a conceptual scaffolding … In law every deductive step involves so much material that the purely deductive operation seems insignificant as compared to the [width] of the required cognitive operations.[57]

I mentioned Engisch's and André-Vincent's position in this respect earlier. Horowitz's response is that "Engisch fallaciously compares applied law to

[56] Konrad Lorenz has pointed out in *On Agression* that this rule holds true even in the animal species. As a rule, the fierceness of the aggressive equipment there (teeth, claws, etc.) is in reverse relationship with the intra-species aggression inhibitions built into the animal's instinctive behaviour 'programs.' Otherwise, e.g. lions would extinct themselves.

[57] Horowitz, *supra* n. 31, at p. 35.

pure mathematics."[58] But Horowitz himself fails to explain the difference between the pure legal system and the applied one.

What is incorrect in Horowitz's position is not that he maintains that the legal system could vastly improve upon its level of conceptualisation. It is that Horowitz again and again implies in his argument that this badly needed theoretical work is *all* that is needed to make the legal system 'ideal.' Again, were it possible to construct such a system from a gnoseological point of view, were it possible to create a system of law that could cover all the events in life without encountering irrational discrepancies between *ratio verbis* and *ratio legis*, the problem would still not be solved. The reason is simply that the notion of concept, which does a satisfactory job of explaining reality, is inadequate for guaranteeing certain outcomes where there is a conflict that requires the application of the concept in the first place. If the validity of Pythagoras' algorithm depended on human and class struggles, it too would have been 'reversed' innumerable times.

Despite the fact that the amount of detail with which the law has to deal is not a barrier to conceptualisation, one has to agree with Engisch when he points out the relatively minor operative role of pure logic in law. Syllogisms in law are relatively simple, once their premises are properly articulated. The problem, however, is to find the major premises, to be able to do what André-Vincent calls "*la qualification du cas*," viz, to connect the existing fact pattern with the corresponding combination of rules that will properly describe it. This dialectic of perception and apperception constitutes the 'issue spotting' ability of the lawyer.

In spite of Horowitz's undue reliance on law as merely a conceptual system, rather than a coercive system, one must concede to him that if the law is to be predictive, general and uniformly applied, this must be achieved, insofar as it can be done at all, through the rigorous use of logic. The moment allowances are made to the system on account that such a formalist approach is not 'realistic,' the inevitable result is a resort to 'teleological,' purposive legal reasoning. That, in turn, implies not only the loss of autonomy of legal reasoning it makes the discussion of the principle of legality pointless. In criminal law, even analogical reasoning (*analogia juris*) is forbidden, as I shall try to show, and analogical inference is at least a latent purposive interpretation. If recourse to policies is allowed, we cannot even pretend to be following the postulate *nullum crimen, nulla poena sine lege praevia*.

[58] *Id.*

3.4. Hegel and Marx

Now let's explore the Hegelian description of Concept as presented in Alexandre Kojève's *Introduction to the Reading of Hegel*. In interpreting Hegel, Kojève enumerates four possible relationships between Time and Concept:

I) C = E
II) C = E'
III) C = T
IV) [C = T'][59]

Possibilities I and II relate to the pre-Hegelian philosophy that implied the possibility of intelligible essences. The possibility IV is, for Kojève, incompatible with the idea of philosophy: If Concept is temporal, there can be no truth, and it therefore cannot be discovered.[60] Hegel's philosophy asserts that the Concept itself is time:

> Hegel is the first to identify the Concept and Time. And, curiously enough, he himself says it in so many words, whereas one would search in vain in the other philosophers for the explicit formulas …. Hegel said it as early as the Preface to the *Phenomenology*, where the paradoxical sentence … is found: "*Was die Zeit betrifft, … so ist sie der daseiende Begriff selbst*." (As for *Time*, it is the empirically existing Concept itself.)[61]

Hegel identifies Time and Concept because time, for him, is a question of change brought into reality by willed human action: The real presence of Time in the World is called *Man*. Time *is* Man, and Man *is* Time. In the *Phenomenology*, Hegel does not say this in so many words, because he avoids the word 'man.' But in the Lectures delivered at Jena he says: "*Geist ist Zeit*" (*Spirit is Time*). Now, "Spirit" in Hegel (and especially in this context) means "human Spirit" or Man, more particularly, collective Man – that is, the People or State, and, finally, Man as a whole or humanity in the totality of its spatial-temporal existence, that is, the totality of universal History.[62] Willed human action, for Hegel, is a consequence of Desire. Desire, in turn, is the presence of the Future in the Present:

> The movement engendered by the Future is the movement that arises from Desire. … creative Desire – that is, Desire that is directed toward an entity that

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[59] Kojève, *supra* n. 125 at p. 101. C (concept), E' (eternal), E (eternity), T' (temporal), T (time).
[60] Of course, this is precisely the modern approach of empirical science: There is no reality there to be explored – it is all a question of human purpose. Cf. Hegel's "Selbstbewusstsein" – self-consciousness where human spirit realises that the reality it addresses does not exist objectively, but is a form of consciousness only.
[61] Kojève, *supra* n. 6, at p. 131-32.
[62] *Id.* at p. 138.

> does not exist and had not existed in the real natural World. Only then can the movement be said to be engendered by the Future, for the Future is precisely what does not (yet) exist and has not (already) existed … As a matter of fact, Desire is the presence of an *absence*: I am thirsty because there is an *absence* of water in me. It is indeed, then, the presence of a future in the present: of the future act of drinking. To desire to drink is to desire something (water) that *is*: hence, it is to act in terms of the present. But to act in terms of the *desire* for a desire is to act in terms of what does not (yet) exist – that is, in terms of the future. … In order to *realize* itself, Desire must be related to a reality; but it cannot be related to it in a *positive* manner. Hence, it must be related to it *negatively*. Therefore Desire is necessarily the Desire to negate the real or present given. And the *reality* of Desire comes from the *negation* of the given *reality*.[63]

Kojève goes on to explain Hegel's notion of the Concept:

> To be sure, the Real endures in Time as real. But by the fact of enduring in *Time*, it is its own *remembrance*: at each instant it realises its Essence or Meaning, and this is to say that it realises in the Present what is left of it after its annihilation in the Past; and this something that is left and that it re-realises it its *concept*. At the moment when the present Real sinks in to the Past, its Meaning (Essence) *detaches itself* from its reality (Existence); and it is here that appears the possibility of retaining this Meaning outside of the reality by causing its own Past – that is, this same Past that is "eternally" preserved in the Word-Concept. In short, the Concept can have an empirical existence in the Word (this existence being nothing other than human existence) only if the Word is *temporal*, only if *Time* has an empirical existence in the Word. And that is why it can be said that Time *is* the empirically existing Concept.[64]

Hegel's position is usually seen as idealistic. The idea in his philosophy takes primacy over the matter. The latter merely 'carries' the Meaning and affords an opportunity for its manifestation. The Marxist doctrine is the mirror image of the Hegelian philosophy. There the matter evolves through history producing different shapes of the idea: the infrastructure determines the superstructure.

Neither the Hegelian nor the Marxist position, however, affords any direct solution to our concern here. The question of the relationship between concept and reality is addressed in both doctrines in a manner that tries to transcend the separation of the two. The distinction between the Idea and the Word in Hegel and the corresponding distinction (reversed, of course) of infrastructure and superstructure, emphasises the continuum between idea and its material substratum: in both cases one is a manifestation of another.[65]

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[63] *Id.* at p. 135.
[64] *Id.* at p. 143.
[65] This notion, of course, is radically different from the one André-Vincent advances. His

The formalist postulate of the principle of legality, however, is founded precisely on maintaining strict separation of reality and concept. As the two are not only different but also kept apart, it becomes impossible to maintain that one can predetermine another. No matter how inadequate philosophically the distinction between law and reality, the liberal doctrine with its proclaimed belief in the slogan *"non sub hominem sed sub Deo et lege"* must persist in distinguishing between the two.

Thus, as long as it is necessary to maintain the image of liberty based on abstract common denominators, on legal justice rather than on substantive justice, on formal criteria rather than on the sharing of values, it will be necessary to strictly separate concept and reality and thus to maintain the possibility of the former determining the latter. The fact that much of modern legal theory disregards formalist requirements does not mean either that the law itself is not predicated on such illusions or that such illusions can in fact be dispensed with.

3.5. Unger

The simplest and most familiar account of legal justice goes in the literature of jurisprudence under the name of formalism. At different times, it has been embraced by proponents of legislative theories as diverse as the formal and substantive doctrines of freedom by Kantians and by Benthamites. In its strictest version, the formalist theory of adjudication states that the legal system will dictate a single, correct solution in every case. It is as if it were possible to deduce correct judgments from the laws by an automatic process and the regime of legal justice can therefore be established through a technique of adjudication that can disregard the 'policies' or 'purposes' of the law.

On the other hand, according to Unger, those who dismiss formalism as a naïve illusion, mistaken in its claims and pernicious in its effect, do not know what they are in for. Their contempt is shallower than the doctrine they ridicule, for they fail to understand what the classic liberal thinkers saw earlier: the destruction of formalism brings in its wake the ruin of all other liberal doctrines of adjudication.[66] Unger seems to be the only theorist who does not either try to assert that formalism is possible as a coherent and persuasive explanation of what the law does or to brush it aside as if it were an archaic preoccupation.

'substratum' is an amorphous notion of *bonum et aequm* whose autonomy is somehow derived from an agnostic perception of law that escapes logical principles.

[66] Unger, *supra* n. 11, at p. 92.

The antinomy of reason and desire, according to Unger, finds its particular manifestation in law in terms of the antinomy of rules and values. The idea behind the system of 'legal justice' is to hold in check 'subjective' and thus arbitrary values by 'objective' and thus rational rules. This assumption corresponds to the general liberal premise that only reason can hold the arbitrariness of desire in check, that only reason can prevent social chaos where everybody will, without scruples and without regard for the subjective and hence irrelevant values of others, try to realise his own interests. Unger does not attempt to solve the problem of formalism, but rather points out that it is a paradox which manifests the incoherence of liberal assumptions.

If one can show that the notion of law based on formalistic premises is both necessary and incoherent, one has to that extent demonstrated that the law cannot do what it promises to do, and that it is, as Marxist theorists would put it, a mere 'political instrument.' If these formalistic premises are inevitably a basis for law, then this conclusion is also inevitable.

To be sure, that law is ideology has been said many times before; it has not, however, been shown on law's own premises. At least, legal theorists have continued to pretend that their subject matter transcends the logical (André-Vincent),[67] can be separated from the logical (Kelsen),[68] can be collapsed into the logical (Horowitz[69] and Alchourron/Bulyigin)[70] – but is not in itself illogical.

Such a metaphysical attack on law – the attempt to show that the very premises on which the law is built are mutually inconsistent – changes a question such as the one of legality into its own opposite. The concern usually is to maintain the separation of concept and reality, reason and desire, universal and particular, and specifically in criminal law to try to show that the concept can in fact determine the reality, that reason can in fact determine desire, that rules in fact can govern the action. If it is shown that the problem to be attacked is not the relationship between these opposites, but precisely the fact that problems have been framed in these terms, then the issue is no longer to show that in criminal law it is possible to have the rules that guarantee that certain things will or will not happen to people accused of crime. The question becomes rather, whether it is possible to have criminal law without this dilemma.

Unger shows that there are two possible bases for formalism. First is the notion of the intelligible essences – a presupposition that is essentially preliberal. If things have intelligible essences, words would refer to given and

[67] André-Vincent, *supra* n. 21.
[68] Kelsen, *supra* n. 9.
[69] Horowitz, *supra* n. 31.
[70] Alchourron & Bulygin, *supra* n. 30.

constant objects and events in the real world. There would be no problem of interpretation. The second alternative is "the notion that in the great majority of cases common values and common understandings of the world fostered by a shared mode of social life will make perfectly clear to what category something belongs."[71] The paradoxical feature of the formalist doctrine is, however, that the impartiality which it purports to sustain represents an attempted answer to the absence of the "shared mode of social life." To the extent that such life exists, conflicts do not occur and there is consequently no need for norms.[72] But this position is only possible if things do not have intelligible essences, if "there are no natural distinctions among things, nor any hierarchy of essences that might serve as a basis for drawing up general categories of facts and classifying particulars under those categories."[73] The idea of objectivity (impartiality), the idea that man can free himself from the domination of another man through the impartiality of rules and procedures (the principle of legality and disjunction in adversary procedure), is a response to the (perceived) problem that any value held by any man is necessarily subjective, idiosyncratic and thus of no consequence to another. Objective justice, according to the liberal doctrine, can exist despite the fact that people's values have little in common.

A war of everybody against everybody can be seen as a problem to be resolved only if one assumes that the values (ideals, interests) held by the combatants are equally arbitrary (philosophically inconsequential, C = T').[74] The moment one assumes that one of these values has more to it than sheer subjective individuality, one can no longer treat Hobbes' *bellum* as a process that has to be eliminated; one then actually enters the war himself. The concept of 'subjective value' is a *contradiction in adiecto*. If values are subjective or 'temporal' in Hegelian language, then they are presumably something 'internal' and of no consequence to others; but no concept can be internal in this sense. Unless it refers to something that is at least partially shared by many, it has no object to describe. A subjective value is an interest.

Thus to extrapolate from Unger's position would lead us to say about the liberal doctrine that it is entirely anomic because it does not recognise the concept in general and especially not the concept of value. To assert that reality has no inherent meaning, while at the same time to assert that whatever meaning we nevertheless as individuals derive from it is entirely arbitrary because it depends on our interests (which are incompatible with other people's interests), is to say that there is no reality; nor is there any

[71] Unger, *supra* n. 11, at p. 93.
[72] The assumption made here, that norms are only necessary as responses to conflicts, will be discussed later. See also, Zupančič, *Criminal Law and its Influence on Normative Integration*.
[73] Unger, *supra* n. 11, at p. 73.
[74] See text accompanying *supra* n. 59.

conceptual framework, apart from the arbitrary individual and group approach that adequately describes anything apart from the interests of individuals and groups.

We have seen that André-Vincent subscribes to a philosophy that is essentially as follows: there is no reality out there, there is no conceptual framework that exists independently of time, yet there is an agnostic, mysterious *bonoum et aequum* that does exist and can be discovered by judges. Unger's response to this is that if there are indeed only interests or subjective values – no reality and no concepts – then it is impossible to pretend that the concepts govern reality (behaviour, human will and action). If this is impossible, then the pretense is absurd that impartiality as an escape from domination is possible. What was 'truth' becomes an 'ideology;' a lie that is no longer life supporting.

4. The Principle of Legality

4.1. The Dialectic or Antinomy of Legal Formalism

That law should be above every man is taken for granted by most, even though it is not so self-evident that something created by man should and could be above him. Is it not unusual that Man, who strives to be a master in everything and over everything, would in this instance want to submit himself to the rule of law? From a less grandiose and more theoretical point of view, however, the idea that explains this paradox is simple: rather than allow one man to be a master to another, we invent an abstract rule of law that supposedly governs both. In this fashion, the rule of law prevents the rule of man. This is called the principle of legality.

If law is to be seen as existing above any individual, it must not and cannot change every day. Rules express a deonotological tension between what is and what ought to be. In that sense they are a tension between past and the future; between the reality and aspiration. If rules change frequently, the perception of tomorrow becomes erratic, perhaps because its hopes, values, and aspirations are not shared by many. This is then anomie where neither rules nor commonly aspired for future exists.

In that sense, human law is Law only insofar as it describes the shared perception of what ought to be and perhaps will be, but is not. Genuine law is the sharing of aspirations. The moment, however, one requires 'sharing of intent' one also implies an absence of the conflict of interest. If that means that true rules are only possible insofar as interests and values are shared, then most modern legal rules, except for perhaps some moral constants, are legal rules only in the most mechanical and positivist sense of the word. They

are true insofar as they are enforced by the physical power of the state. On the other hand, if the symptoms and the manifestations of the conflict of interests between groups and classes were indicators they would not point to any shared aspirations. Thus, since an aspiration on which all members of society would agree would no longer be an aspiration but rather a reality, law can be said to work toward the intensification of the value sharing (normative integration).

Legal rules, therefore, address the question of unshared values: insofar as some people behave differently from others, the former are made to conform to the latter, minority perhaps to majority, the powerless perhaps to the powerful. An antimony is built into the very essence of the legal rule: the rule could be effective, if the value it expresses were taken for granted by all; but the rule is only needed because the value is *not* taken for granted by all.[75] The paradox of formalism, as Unger pointed out, is that the lesser intensity of the sharing of values itself not only increases the need for reliance (on the impersonal rules), but the improbability, too, that this reliance will be effective.

Unger explains the negative feedback he calls antinomy – built into the concept of formalism – by attributing this to the absence of any intelligible essences in things and events, which therefore leads to an infinite variety of interpretations[76] and to the notion of "common values and common

[75] Unger, *supra* n. 11, at p. 99.

[76] Kennedy, *infra* n. 98, at p. 378: "Formality itself represents a compromise of conflicting claims: the heterogeneity of values and the multiplicity of factual situations, in a world of purposive actors forces the group to admit an element of the arbitrary and irrational into its governance." Here, and especially in footnotes 12 and 13, Kennedy juxtaposes the rational and substantive on one hand and the formal and legalistic on the other. Kennedy follows Unger in maintaining that teleological interpretation *eo ipso* negates adherence to formal rationality: "The minute he begins to look over his shoulder at the consequences of responding to the presence or absence of the per se elements he has moved some distance toward substantively rational decision." Compare this to: "As soon as it is necessary to engage in a discussion of purpose to determine whether the surgeon's emergency assistance falls in the class of acts prohibited by the law, formalism has been abandoned." Unger, *supra* n. 11, at p. 93.

In my opinion Unger's position is a bit extreme. True, the moment reference has to be made – in teleological interpretation – to the purpose of the legislature, the fixed stability of the norm has been abandoned. Yet to juxtapose the ideal of fixed stability to the worst possibility, that of no stability, is a false dilemma. Is it not true that

> All testing, all confirmation and disconfirmation of a hypothesis takes place already within a system, and this system is not more or less arbitrary and doubtful a point of departure for all our arguments: no, it belongs to the essence of what we call an argument. The system is not so much the point of departure, as the element in which arguments have their life. (Wittgenstein, *On Certainty* § 105.)

understandings of the world fostered by a shared mode of social life." That this interpretation will itself be affected by the disparity of values and interests, is obvious. But it is also obvious that *the law, being a response to conflict, has always dealt with this disagreement over the interests by means of the agreement over the concepts*. Insofar as logically compelling arguments can be made at all in law, and insofar as people are logically compelled to accept them even if they are contrary to their interests, this is entirely due to the most basic agreement the people share with regard to words and concepts, and sometimes values. For example, you and I may have interests that collide head on, but we still agree on what the word 'sun' refers to. In this respect, law acts as a cohesive force in dissociative (conflictual) social relationships.

From a broader point of view, it could be said that law in general – when confronted with forces that set one individual apart from and against another – draws upon a more fundamental togetherness imposed by the common fate of the human species. To force two private disputants to recognise that a particular word in the contract has an indispensable meaning; to force the state to recognise that a particular form of conduct is not covered by a particular word in the criminal code and hence is *not* punishable, is to use means of logical compulsion. Juxtaposed in all such confrontations are the centrifugal forces of conflict and the centripetal forces of shared meaning. According to Unger:

> The basic objection to formalism is that the doctrine of intelligible essences whose truth the formalistic confidence in plain meaning assumes, is compatible with the view of social life to whose consequences it responds. … If objective values were available to us, if we knew the true good with certainty, and understood all its implications and requirements perfectly, we would not need a method of impartial adjudication. … the chief vice of

"It is not single axioms that strike me obvious, it is a system in which consequences and premises give one another *mutual* support." *Id.* at § 142. "In order to make a mistake, a man must already judge in conformity with mankind." *Id.* at § 155. In other words, even a strictly clear upper premise of a pure and formal syllogism in law is 'clear' only in the context of "the element in which arguments have their life." In this sense, the purposiveness of interpretation is not a yes-or-no dilemma, it is a question of degree, because all conceptual clarity is such only in reference to our common "facts of natural history." This also answers Kennedy's above-cited juxtaposition of the "heterogeneity of values" with the irrationality of formality. If the latter can be understood as a deeper layer of purpose, an attempt at reference to deeper layers of common human fate, and consequent agreement in the context of a resolution of the conflict, then the choice between rationality and 'formality' will not be seen as a genuine dilemma. All logical compulsion (p. 77) "takes place already within a system." Indeed, it is only because of the basic agreement about this system that logical compulsion is genuinely possible at all. Concerning the sociological dimensions of this question, the origins of, e.g. hegemony of the dominant social consciousness, see Williams, *Base and Superstructure in Marxist Cultural Theory*.

> formalism is its dependence on a view of *language* that cannot be reconciled with the modern ideas of science, nature, and *language* that formalists take for granted. Formalism is a doctrine of adjudication that relies on two sorts of premises, premises about *language* and premises about value, that contradict one another.[77]

Unger polarises the situation to the extent that he eventually distinguishes between totally objective values and entirely inscrutable concepts. It is true that the reference to impersonal rules would not even be necessary if totally objective values as well as the plain meaning of impersonal rules themselves, were available to us. Likewise, if values were totally subjective, no impersonal rules could function because there would be no plain meaning of words, and therefore no communication.

However, here Unger overlooks the fact that even a conflict to which every legal regulation responds is a form of togetherness and is contingent on a more basic togetherness – ultimately on Wittgenstein's "natural history of man."[78] The foundation of law is not an absolutely plain meaning of words concomitant to an absolute sharing of values. Law relies on deeper layers of agreement among people, even when in conflict. It is true that differences in conceptual perception of the world do to some extent depend on interests. When the latter are in conflict, the likelihood is that the former will be too. Yet besides interests and their conflicts, there are deeper, more existential, "facts of our natural history," due to which our conceptual perceptions remain identical.[79]

It may be that what we have in common can be called 'reason,' and what sets us apart can be termed 'desire,' but the basic fact upon which the law relies is that which is shared, can be articulated and preserved in the form of rules, and which the parties, in spite of subsequent controversies can be logically compelled to accept as a 'point of reason' which in turn compels them to forego a countervailing 'point of desire.'

We might add that a controversy can be transcended only by reference to those aspects which the parties share in spite of the controversy. In contracts, this shared element is preserved through the form to which the parties commit themselves *tempore contrahendi*; in criminal law a presumption is maintained prior to the parties' criminal acts – would-be offenders have been acquainted with and have acceded to the plain meaning of the criminal law. The fiction or at least the presumption of their knowledge of the law is

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[77] Unger, *supra* n. 11, at p. 93-94 (emphasis added).

[78] 1 Wittgenstein, *Remarks on the Foundations of Mathematics,* p. 141.

[79] In fact the very existence of a conflict testifies to a common ground on which the conflict can take place: "If you tried to doubt everything, you would not get as far as doubting anything. The game of doubting itself presupposes certain certainty." Wittenstein, *supra* n. 76, at § 115.

a necessary one: the binding effect of a promise is possible to maintain only when there exists at least a theoretical possibility that the promisor knew (and thus tacitly accepted)[80] the rule beforehand.

In criminal law, it can be said that when the offender enters into an official controversy with the state, he can be reminded of his presumed promise not to commit criminal acts; precisely because of the 'plain meanings' of the words, he cannot deny the legitimate logical compulsion of this reminder. He is therefore considered more than merely punishable – he is deemed guilty. To establish this result, it is necessary that the law, whether in fact known or not to the offender, must at least be knowable prior to the incriminating act.

Ultimately, law works towards normative integration. Obviously, then, most rules will necessitate sanction, if only to force the one remaining recalcitrant member into conformance. But it is clear that it is precisely the social practices of punishment which – through the hegemony of the dominant social consciousness[81] – do make values relatively 'objective' and 'shared.' The role of criminal law in society can be seen as a supplement of the social practice of punishment (negative reinforcement) for those individuals who failed to integrate the social practices of monetary and status rewards. The punishment tariffs of criminal activity clearly respond to a lack of what Unger calls "shared mode of social life." The criminal law, however, deals exclusively with that segment of the general public that fails to be sufficiently impressed by such processes.

Therefore, it is clear that insofar as values are shared in spite of the latent conflicts of interests, this is due entirely to social practices. That does not, however, subtract from the correctness of Unger's conclusion, namely that, "sharing of values" and the need for rules and adjudication are in exactly inverse proportion. The myth that nevertheless connects them is called the principle of legality. In other words, the principle of legality is concerned with this definite advance determination of the criterion for punishment. However, I will show that while formalism is indispensible, this notion of predetermination does not actually materialise in criminal law.

I will reveal this inherent paradox in the notion of the principle of legality by firstly delineating the indispensible nature of legal formalism. For this, I will first elaborate the reasons why legal formalism is preferable to purposive legal reasoning, where the concept and the reality collapse into each other and consequently the entire myth of advance notice on which law is based is destroyed. Moreover, I will explore the centrality of conflict and

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[80] "*Qui tacet non utique fatetur: sed tamen verum est eum non negare.*" Paulus, 50, 17, 142. (Whoever does not speak may not thereby admit; however, it is true that he also does not negate.)

[81] "… a complicated Gramsci-style description for a 1984-style indoctrination." See e.g. Williams, *supra* n. 64 to Chapter 9.

form in contracts and the need to honour the guarantees of the defendant in an unequal relationship between the criminal and the state which makes legal formalism inevitable. Next, I will explore the paradoxical side of this indispensible nature of legal formalism by showing that both the major and the minor premises are illusory and their claim of predetermination does not actually materialise.

4.2. Purposive Legal Reasoning

If adjudication is to work as the principle alternative to the use of power and force,[82] it must of necessity be distinct from the rest of the social processes. In almost all manifestations of different conflicts of incompatible interests, such as of power, force, prestige, are prevalent certain social modus operandi. Insofar as adjudication pretends *not* to be part of the prevalent social power game, it aspires to an almost transcendental status of the great corrective and of the great equaliser, i.e. of the lofty exception – usually referred to as 'justice' – among all other social processes.[83] Although adjudication is elevated to a transcendental state, it apparently falls short of this status because substantive law's pretence of advance notice and guarantee do not fully materialise.

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[82] This is essential. The very concept of adjudication of a conflict between two parties makes sense only as an alternative to the use of force, as we have explained above. If this assertion, namely, that adjudication makes sense only as an alternative to the use of force between the parties, which we call the principle of disjunction, is incorrect, then the rest of the conceptual structure elevated above collapses as well.

[83] This idea was perhaps best understood by Nietzsche:

> 'Just' and 'unjust' exist, accordingly, only after the institution of the law (and not as Dühring would have it, after the perpetration of the injury). To speak of just or unjust in itself is quite senseless; in itself, of course, no injury, assault, exploitation, destruction can be 'unjust,' since life operates essentially, that is in its basic functions, through injury, assault, exploitation, destruction and simply cannot be thought of at all without this character. One must indeed grant something even more unpalatable: that, from the highest biological standpoint, legal conditions can never be other than exceptional conditions, since they constitute a partial restriction of the will of life, which is bent upon power, and are subordinate to its total goal as a single means: namely, as a means of creating greater units of power. A legal order thought of as sovereign and universal, not as a means in the struggle between power-complexes but as a means of preventing all struggle in general – perhaps after the communistic cliché of Dühring, that every will must consider every other will its equal – would be a principle hostile to life, an agent of the dissolution.

Nietzsche, *On the Genealogy of Morals*, at p. 76. One, of course, does not need to go into the deep philosophical waters to find out that rules – and consequently adjudication – must necessarily

Moreover, Unger's doctrine that formal justice is an antimony in itself because it mistakenly relies on the existence of intelligible essence of the words which could only exist in such conditions where complete value-sharing were possible – conditions that in themselves deny the need for just adjudication – makes the further belief in the principle of legality somewhat improbable.

If substantive law is not a fixed and almost transcendental series of precepts from which the purportedly impartial adjudicatory processes can derive their legitimacy, what then is the ground on which to build the belief that adjudication and its ritual nature are not mere form? There are two levels of interpretation here. Sociologically, ritualisation is in fact a direct response to anomic tendencies: it is a form that figures as a surrogate of the real belief.[84] Legally and logically, however, the fact that impartial adjudication is a pretence rather than reality matters little because the very fact that it exists and is taken for granted by most and seriously by some is indicative of the need and aspiration for transcendental reference diametrically opposed to the Hobbesian reality of the social processes.[85] Unger has amply demonstrated the objectivity of the rule (which could only be founded in an intelligible essence as a bedrock of distinction between good and evil) to be fraught with antinomies.[86] The myth of impersonal rules, however, is so deeply embedded in the life of the law that it seems impossible to eradicate it without breaking the whole (inherently formalist) context of law. In other words, the fact that something is a myth makes it no less necessary[87] – once the

differ from life and indeed, be in this sense contrary to it, since for what is invariably and naturally done, no rules need exist.

[84] See Merton, *Continuities in the Theory of Social Structure*, at p. 442-473. See n. 8 in Chapter 1 of this book.

[85] From the point of view of social stability, it matters little whether the values underlying adjudication are 'true' values or not. What matters is that those values be first socio-functional and second, appropriately reinforced by the process of adjudication.

[86] A system of laws or rules (legal justice) can neither dispense with a consideration of values in the process of adjudication, nor be made consistent with such a consideration. Moreover, judgments about how to further general values in particular situations (substantive justice) can neither do without rules, nor be made compatible with them. This is the antinomy of rules and values. Unger, *supra* n. 11, at p. 91. "To operate a system of rules we have to appeal to considerations of purpose that end up dissolving what we meant by a system of rules in the first place." *Id.* at p. 98.

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> One can refute a judgment by proving its conditionality; the need to retain it is not thereby removed. False values cannot be eradicated by reasons anymore than astigmatism in the eyes of an invalid. One must grasp the need for their existence; they are a consequence of causes which have nothing to do with reasons.

Nietszche, *The Will to Power*, p. 217-18. For this reason, the Grand Inquisitor in Dostoevsky's

whole suprastructure of legal ideology has been built upon it. Even though its existence is – sociologically speaking – an institutionalised lie because it is far from doing what it pretends to do,[88] that matters little because it gives basis for the deontological tension[89] between what is and what ought to be: a tension that without a false transcendental reference could not exist.

This deontological tension[90] created by the postulated purpose of adjudication being a truly just alternative to the use of force and power is apparent in the very existence and nature of judging. If judging is mere imitation of real life power relationships, why bother having it? If, on the other hand, it is something different ('we are all equal before the Law' – 'equal protection of the Laws') in the sense that before a judge, real life powers do not matter and a poor man is equal to the rich man, then adjudication embodies a promise of the heavenly kingdom on earth. Somehow, it does not matter that these promises never materialise.

This deontological tension, as discussed before, is present in the norm as well. We understood the norm as independent of reality; moreover reality is supposed to live up to the norm. Consequently, legal reasoning was essentially independent from pragmatic policy considerations, although these actually influenced the creation of norms through the underlying morality, which on the other hand, was the result of social needs. Without direct interference of policy considerations, the legal reasoning was seemingly independent from them. Since the legal norms and their interpretations lived in a relatively closed and self-sufficient system, legal reasoning and the whole legal system were autonomous.

However, at a certain stage of development it becomes clear that the law is but *la cristallisation du passé pour étrangler l'avenir*. When it becomes clear that the law is only a means toward a certain end, then it also becomes clear that there is a possibility of a frequent disjunction between means and ends and the notion of law is therefore understood instrumentally. On the other hand, it also becomes clear, that the norm expresses the reality, that it is not only prescriptive, but also descriptive.[91]

The law, because of its occasional inadequacy for attainment of implicit ends, transcends its positivistic definition (of norm-sustenance). The norm ceases to be sacrosanct and is manipulated by the teleological interpretation

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The Brothers Karamazov admonishes Christ on his return: "We have corrected Thy work and have founded it upon *miracle*, *mystery*, and *authority*. And men rejoiced that they were again led like sheep …" at p. 237 (emphasis in original).

[88] i.e. rendering 'true' substantive justice.

[89] *Supra* n. 84.

[90] A good example of this problem is presented in *Brewer v. Williams*, U.S., 97 S.Ct. 1232, 51 L. Ed.2d 424 (1977).

[91] See Wittgenstein, *The Philosophical Investigations*.

to an unprecedented extent. Its inflexibility becomes occasionally a serious obstacle to the attainment of underlying policies. Consequently, the logical analysis has to be extended beyond the norm, i.e. it is applied according to the interest the norm is supposed to sustain. In such a case, the legal reasoning becomes purposive.[92] Here, we will discuss three kinds of purposive legal interpretations: Mistake of law (if it were allowed as a defense), *ex post facto laws* and vague laws, and analogy.

4.2.1. Criminal Responsibility under Mistake of Law

The principle of legality is based on the idea of 'advance notice.' However, mistake of law, if it were allowed as defense would fall into purposive legal reasoning because instead of keeping the 'advance notice' through norms separate, this would collapse norms into subjectivity. Thus, the deontological tension between the concept and reality would be lost should mistake of law be allowed as a defense. The deontological discrepancy (anticipated or actual, abstract or concrete) accentuated by the violation of the norm can be seen as a discrepancy between an objective concept of the rule and its factual subjective violation. Mistake of law, however, presents such a situation where subjectivisation and objectivisation of the rule clash.

To prepare the ground for our discussion of mistake of law, we must establish an important difference between the law of torts and criminal law. In torts law, since damages are objectively ascertainable, liability, too, has largely been objective, i.e. strict. Once the damage is caused, its existence being obvious and measurable, the restitution impresses itself upon the observer as the pecuniary mirror image of the damage (*Restitutio in integrum* in Roman Law). Since the focus is on the (involuntary) material exchange, the exploration of the subjective causation of the damage tends to fade into the background.

Because punishment is not a restitution but a moral rectification of the crime, the central issue and concern in criminal law must be about the subjective. The actor's state of mind *tempere criminis* becomes the key question in all criminal cases because the moral damage caused by a crime is the focus here.[93] It is there that the crime occurs, the material consequences of the

[92] See Dworkin, *The Model of Rules*.

[93] Since criminal law relies upon the subjective responsibility of the actor it follows that the criminal stigmata should not be applied until the actor's underlying 'being' has been thoroughly explored, thus rendering the level of blameworthiness. It is, however, paradoxical that the more one 'understands' the 'whole being' of the actor, the more justified his behaviour appears. The criminal law has traditionally avoided this dilemma by insisting that the moral repugnance attached to the acts, in fact, are reflective of the underlying being of the actor. This not only avoids the seemingly impossible task of defining and quantifying an actor's 'being' but it also

event being the mere objective manifestation of the subjective. If this were not true, a criminal attempt would not be punishable just as an attempt is not punishable in tort law. Since what we punish is the being of the actor, in criminal law we explore his state of being. Cases such as *Robinson v. California*[94] notwithstanding, criminal law's general punishment addresses a state of mind of a certain quality and of a certain quantity (intensity) sufficient to manifest itself in the outside world.

It is no accident, therefore, that the trend in criminal law has been towards greater subjectivisation of the criteria of liability[95] – exactly the opposite, perhaps, of the trend in tort law. In this process of subjectivisation, however, there comes a point at which to understand everything means to forgive everything. But while in torts to understand and to forgive everything nevertheless leaves the objectively ascertainable damages behind calling for restitution, in criminal law the moral damage is too abstract to be ascertained and quantified. There is no self-evident subject to personify the claim and the remedy is, as explained above, far from obvious. The trend toward the subjectivisation of liability criteria, therefore, is unimpeded except for the norm itself.

How can the norm *itself* impede the process of subjectivisation? This question presents itself at the point *where the rising curve of subjectivisation threatens to destroy the very existence of the norm*. The best example of the critical stage arises in a mistake of law situation since it represents a juncture at which the subjective and the objective clash.

It seems patent, even to the uninitiated, that a person who does not know something is forbidden is subjectively just as innocent as a person who, committing a mistake of fact, wrongly assumes that the thing he is taking is abandoned property (*res derelelicta*)[96] and thus available for an original acquisition of the title. Yet in mistake of law cases, the law simply cannot afford to take this subjective innocence into account. It covers up this inconsistency with

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sustains the normative system by utilising something definable and quantifiable, i.e. the act as the objective criterion of criminality.

[94] 370 U.S. 660 (1962).

[95] Fletcher notes that "since the late nineteenth century the principle of subjective criminality has been almost unceasingly ascendant." He uses the law of attempt to illustrate the subjectivist tendency of the Model Penal Code which specifically lists "lying in wait, searching for or following the contemplated victim of the crime" as activity sufficient to warrant conviction for an attempt. Fletcher, *Rethinking Criminal Law,* at p. 167.

[96] See *Morissette v. United States*, 342 U.S. 246 (1952), where the defendant mistakenly believed that the property was abandoned (*res derelicta*). Since abandoned property is, in a sense, a matter of law, it became unclear as to where the line is drawn between mistake of fact and mistake of law. One thing that is clear, however, is that in either case there is subjective innocence.

the apodictic maxim *ignorantia juris nocet*.[97] To make the situation even more paradoxical, even the prior promulgation of the maxim cannot really be a source of its legitimacy[98] since the person mistaken about the maxim simply does not know about it.

In this situation, it becomes important to sustain the myth of impersonal rules or the objectivity of the norm in order to keep the legal reasoning from collapsing its autonomy into purposiveness. Justice Holmes has been perhaps the foremost defender of this myth, while being fully aware of its shortcomings: "A word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in colour and content according to the circumstances and the time in which it is used."[99] Holmes' skepticism as to the semantic accuracy with which words refer to an intelligible essences, however, did not prevent him from defending the existence of this intelligible essence and its true objectivity:

> Ignorance of the law is no excuse for breaking it. This substantive principle is sometimes put in the form of a rule of evidence, that everyone is presumed to know the law. It has accordingly been defended by Austin and others, on the ground of difficulty of proof. If justice requires the fact to be ascertained, the difficulty of doing so is no ground for refusing to try. But everyone must feel that ignorance of the law could never be admitted as an excuse, even if the fact could be proved by sight and hearing in every case. Furthermore, now that parties can testify, it may be doubted whether a man's knowledge of the law is any harder to investigate than many questions which are gone into. The difficulty, such as it is, would be met by throwing the burden of proving ignorance on the lawbreaker.
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> The principle cannot be explained by saying that we are not only commanded to abstain from certain acts, but also to find out that we are commanded. For if there were such a second command, it is very clear that

[97] The maxim, according to Blackstone, is a doctrine of both the Roman and English law. 4 Blackstone, *Commentaries on the Laws of England*. See also Keedy, *Ignorance and Mistake in the Criminal Law*. "That ignorance of the law does not exempt from obligation is a principle which prevails in all legal orders and which must prevail since otherwise, it would be almost impossible to apply the legal order." Kelsen, *General Theory of Law and State*.

[98] Rules, in their pure form, derive their legitimacy, i.e. their power of moral and logical compulsion, from the recorded consent given at a time when the veil on the future prevents the parties from knowing the probability and precise nature of the future conflict between them. Zupančič, *On Legal Formalism: The Principle of Legality in Criminal Law*, *supra* n. 24, at p. 396-97. But moral and logical legitimacy are lost when ignorance of the law reflects the absence of prior consent. In his critique of legal formalism, Duncan Kennedy goes even further and argues that a formal system based on prior consent "is already in decay at the moment the litigant protests against the arbitrary disposition of his case." Formality, according to Kennedy, demands "the same passive response of the litigant no matter how radical the discontinuity of plan and reality." Kennedy, *Legal Formalism*.

[99] *Towne v. Eisner*, 245 U.S. 418, 425 (1918).

> the guilt of failing to obey it would bear no proportion to that of disobeying the principal command if known, yet the failure to know would receive the same punishment as the failure to obey the principal law.
>
> *The true explanation of the rule is the same as that which accounts for the law's indifference to a man's particular temperament, faculties, and so forth. Public policy sacrifices the individual to the general good.* It is desirable that the burden of all should be equal, but it is still more desirable to put an end to robbery and murder. It is no doubt true that there are many cases in which the criminal could not have known that he was breaking the law, but to admit the excuse at all would be to encourage ignorance where the lawmaker has determined to make men know and obey, and justice to the individual is rightly outweighed by the larger interest on the other side of the scales.[100]

In one respect, Holmes offers us the cliché explanation as to how we cannot afford to accept the excuse of mistake of law since everybody would say that he did not know that what he did was forbidden – which presumably would be the end of criminal law. This logic is peculiarly alien to general jurisprudential discourse. The argument is criminological; it represents a departure from autonomous legal reasoning. As a pragmatic mental shortcut it is extrinsic to the normative discourse, because it really says: "We know this is not logical, but life is tough as we cannot afford to be logical here."[101] In making such an argument one moves outside the normative model of thinking. By doing so, one confesses to the secondary ancillariness of normative discourse, thereby abdicating its autonomy.

On the other hand, this is not a simple aesthetic methodological objection. The reference to the normative discourse implies the resort to impersonal rules' logic intended to replace the arbitrary use of power. If the normative discourse is to be reduced to an instrumental role, the question occurs, to what is it instrumental?[102] Since the reference point is extralegal – i.e. one cannot afford to take subjective innocence (of the one unaware of the law)

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[100] Holmes, *The Common Law,* p. 47-48 (emphasis added).

[101] Hall describes the anomaly of *ignorantia juris* as requisite for the existence of a legal order. He finds this to be 'apparent' upon examining "some necessary elements of a legal order, signified by the principle of legality." These elements included the idea that "rules of law express *objective* meanings" and that the interpretation of these "*objective* meanings" by "authorised 'competent' officials" are binding as law. Hall, *supra* n. 29, at p. 383 (emphasis added).

Hall later admits that this position is vulnerable to a challenge of its underlying premise, which is "the desirability of having a legal system. Some may prefer decision by individuals who exercise completely unfettered power." *Id.* at p. 387. Indeed, Hall's dilemma is reflected in Unger's proposition that purposive reasoning is an inadequate replacement for formalism. Yet Unger goes further by suggesting that the 'plain meaning' which Hall seems to use as a rationale for the existence of a formal legal order is ultimately inconsistent with the underlying premises of the liberal doctrine supporting formalism. See Unger, *supra* n. 11.

[102] See generally Poulantzas, *supra* n. 19, at p. 83.

into account – doubts are also raised as to the reliability of the normative framework and the whole ideal of legality. The next step might be for the judge to say: "I know you are not guilty by law, but you shall nevertheless be punished since we cannot afford not to punish you." The Soviet and Nazi introduction of *analogia juris*[103] and the English case of *Shaw v. Director of Public Prosecutions*[104] come to mind as a logical extrapolation from the view that *public policy sacrifices the individual to the general good.* In other words, to sacrifice the autonomy of the normative discourse in criminal law implies an abdication of the principle *nullum crimen, nulla poena sine lege praevia.*[105]

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[103]The Russian Penal Code of 1926 provided:

> [II-6] A crime is any socially dangerous act or omission which threatens the foundations of the Soviet political structure and that system of law which has been established by the Workers' and Peasants' Government for the period of transition to a Communist structure.
>
> [II-10] In cases where the Criminal code makes no direct reference to particular forms of crime, punishment or other measures of social protection are applied in accordance with those Articles of the Criminal Code which deal with crimes most closely approximating, in gravity, and in kind, to the crimes actually committed …

The German Act of June 28, 1935, provided:

> Any person who commits an act which the law declares to be punishable or which is deserving of penalty according to the fundamental conceptions of a penal law and sound popular feeling, shall be punished. If there is no penal law directly covering an act it shall be punished under the law of which the fundamental conception applies most nearly to the said act.

The Penal Code of the R.S.F.S.R. (1934), cited in Hall, *supra* n. 29, at p. 48, n. 60.

The modern Marxist theorists of State take a similar position:

> The State often transgresses law-rules of its own making by acting without reference to the law, but also by acting directly against it … Every judicial system includes illegality in the additional sense that gasps, blanks or 'loopholes' form an integral part of its discourse … Every State is organised as a single functional order of legality and illegality …

Poulantzas, *supra* n. 19, at p. 84-85.

[104][1961] 2 All E.R. 446.

[105]The formulation derives from Anselm Feuerbach's *Lehrbuch des Gemeinen in Deutschland Geltenden Peinlichen Rechts*. See generally, Schottlaender, *Die Geschichtliche Entwicklung Des Satzes Nulla Poena sine Lege*. The principle was not foreign to Roman Law. In *Digestae* 50, 16, 131 we find the following precept: "Poena non irrogatur, nisi quae quaque lege vel quo alio iure specialiter huic delicto imosita est." (The punishment does not accrue, unless it is specifically imposed [foreseen] for that crime.) The French *Declaration of Human Rights* of 26 August 1789 provided: "Null ne peut être puni qu'en vertu d'une loi établie et promulguée antérieurement au délit et légalement appliquée." ("Nobody may be punished except in view of a previously promulgated and established lax, which must be lawfully applied.") Here, of course, the

Let us now delve a little deeper into the mistake of law doctrine. Assume that a sweeping change were to occur in criminal law whereby the mistake of law would become an excuse akin to mistake of fact. Let us, for the moment abstain from considering policy effects on general prevention and concentrate entirely upon the normative effect of such a change. Assume further that a majority of defendants, say in theft cases, could persuasively carry the burden of proof showing that they did not know that stealing was prohibited by criminal law. In instructing the jury the judge would have to say that the actor's subjective interpretation of the norm must prevail over the objective meaning of the norm, just as he would instruct the jury in cases of mistake of the fact that the actor's mistaken subjective interpretation of reality prevails over the objective facts themselves.

In the latter cases (mistake of fact), however, the successful defence of mistake of fact does not annihilate the objective truth of the matter. In *Morissette*,[106] for example, bomb casings remained the property of the Government in spite of the acquittal of the defendant who mistook them for abandoned property (*res derelictae*). The factual reality, in other words, remains unaffected by the subjective interpretation of that reality. But imagine that criminal law has a constitutive effect on property law, thereby, in fact, making Morissette the lawful owner of the taken bomb casings. Surely this would be an unacceptable result. Thus criminal law can afford to accept as an excuse the mistaken subjective interpretation of the property question because the effect is limited to its own sphere of concern, to the question of criminal responsibility.

When it comes to mistake of law, however, the acceptance of the defendant's interpretation of the situation (the norm), changes the very situation (the norm) intended to govern his conduct. If he is permitted to raise a defence of mistake of law, he is enthroned as a legislator in his own case. His interpretation of the law prevails over the one in the books. The judge's job in such a case would be to discover the defendant's true interpretation of the norm and then decide the case by applying this norm.

Not much is left of the existence of the criminal law's rule after such an occurrence. The resort to the subjective interpretation of the norm positively destroys the norm, because it prevents the concretisation of its objective meaning. And since it is this concretisation of the norm – previously a mere abstraction in the books – which brings it to life, the norm simply never begins to exist. We said before that it is the norm's violation (the negation of the norm) which triggers the sanction (the negation of the negation) and thus

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additional emphasis, aside from the one of "impersonal rules," is placed upon impartial adjudication, i.e. legally flawless criminal procedure.

[106] *Morissette*, 342 U.S. at 246; see also *supra* n. 96.

asserts it. The popular misconception to the effect that norms exist because they are promulgated (as mere abstractions) strikes back here. And it strikes at the very heart of the law.

This is why the question is essentially a jurisprudential one. If the norm is seen as 'positively' existent when promulgated in the abstract, no amount of its concrete disregard will be capable of annihilating it. But this is a Cartesian misconception deriving from an assumption that the abstract concept of prohibition has an existence independent of its concrete application and enforcement.[107] Scientific laws, perhaps, may be disregarded, yet they continue to exert their real power. Legal norms, especially the extrinsic ones, can be disregarded only at the cost of disannulling them.

As we pointed out before, the spectrum stretching from extrinsic to intrinsic legal norms will likewise determine the obviousness of the normative lacunae left behind if the objective norm is not applied and enforced. The lack of application of the rule of tort law, we said, leaves something obvious to be desired. *The lack of application of the rule of criminal law in fact changes the underlying reality itself.* Hobbes was right. If the norms of criminal law are not applied, they simply cease to exist. If the norm is continually and consistently applied and enforced, the underlying morality of duty is thereby reinforced; if the norm is not applied, the mores which gave birth to it will themselves vanish. While other branches of law will produce distinct normative lacunae if the rules are not applied, the ethical foundation of criminal law lacks the market exchange criterion to make the need for enforcement not only quantifiable but also obvious. Ethics, more than any other area of human thinking, is a product of its own application.

4.2.1.1. The Limits of Subjectivisation

In cases of diminished responsibility due to provocation by a victim, criminal law refuses to take into account that the actor has a peculiarly uncontrollable temper or that he commits a mistake of fact due to an idiosyncratic lack of faculties.[108] A putative provocation will often not represent a defence in criminal law despite the fact that the actor is subjectively innocent. The principle of

[107] André-Vincent would reject such an independent existence of the norm. Indeed he denies the existence of abstract norms, contending instead that there is only the reality of decided cases. The abstract level of the legal order is, for André-Vincent, a reflection of the concrete level of judicial and other legal decision making. André-Vincent, *supra* n. 21.

[108] That criminal law cannot afford to take into account all the idiosyncrasies of the being of the actor is illustrated by the case of *People v. Caruso*, 246 N.Y. 437, 159 N.E. 309 (1927). There, the defendant, an illiterate labourer, killed a doctor whom he blamed for the death of his child. The idiosyncratic nature of Caruso's inflammatory personality was insufficient to exculpate him.

subjective responsibility is also abandoned in cases of psychopaths, although it is obvious that they lack normal superego inhibitions, and that they are in fact moral imbeciles. In mistake of law situations we are likewise dealing with a defendant who is subjectively innocent since he simply does not understand that he acted contrary to law.

Criminal law, thus, subscribes to the principle of subjective responsibility. This means it excludes responsibility in cases where the subjectivity of the actor does not genuinely manifest itself in his act. In those cases, criminal law presumes that the act was caused by an organic mental illness (insanity), by another person (duress), by a natural event (necessity), by an accidental and misleading constellation of circumstances leading to an unavoidable misapperception (mistake of fact), or by a chemical agent (intoxication). The reason for these presumptions lies in the remedy of punishment which is addressed to the being of the actor and not, as in property law, to his property. If the being of the actor is not genuinely manifested in the act, it cannot be genuinely addressed in the punishment. Blameworthiness does not attach to the actor.

If the process of taking into account all the factors which falsify the being of the actor were to be carried to its (psycho)logical extreme, most actors would be acquitted. It would not be too difficult to show that in most criminal cases the actor's act would not have occurred were it not for some external (societal) alienating factor. It is either to society or genetics, in the last analysis, that we must attribute the evil cause of the criminal act.[109] But to understand everything is to forgive everything.

Except in clear cases of the above enumerated external causations, the act is imputed to the actor, although we know full well this is not just. As in the case of *People v. Caruso*,[110] the borderline between the subjectivisation (of the criteria of criminal responsibility) and the maintenance of objective normative impact can be blurred. The court in *Queen v. Dudley and Stevens*,[111] for example, understood that while the sailor's cannibalism was subjectively innocent, it would nevertheless have to be held criminal in order to discourage future resorts to such an excuse.[112] The irrebuttable presumption is that the actor

[109]In his *Crime and Personality*, Eysenck rejects strict sociological theories which correlate environmental factors directly to criminality. Eysenck notes that the geneticist

> knows only too well that heredity and environment always interact in complex ways to produce the phenotype. He also knows…that there are great difficulties in studying one aspect by itself, hence his formulae accommodate both genetic, environmental and interactional terms. (p. 205.)

[110]246 N.Y. 437; 159 N.E. 390 (1927). See also related case, *People v. Caruso*, 249 N.Y. 302, 164 N.E. 106 (1928).

[111][1884] 14 Q.B.D. 273.

[112]The greatest danger arises in what Meir Dan-Cohen would describe as situations of low

is reasonable unless the causation falls squarely within one of the external exceptions (defences). The social practice of punishment and the objective obstinacy of the normative framework of substantive criminal law can thus be seen as compensating mechanisms counteracting the extensive alienating processes in society.

4.2.1.2. The Norm and the Policy

The issue here is whether it is possible to maintain truly normative discourse if the objectivity of the rules is renounced in a sweeping acceptance of mistake of law as a defence. To enable us to entertain this aspect of the question, we must introduce a distinction between the cognitive and volitive aspect of the objective (the norm) and the subjective (the act[or]). The promulgated norm can be seen as a cognitive message introduced by the legislator. Because this message has an appended cognitive threat of a sanction it will usually also have a volitive impact. Punishment is then *de facto* carried out in those cases where the cognitive aspect of the norm is properly received, but where its volitive impact is aborted. The intent of punishment is not to inform the potential criminal actor, but to influence his will.

It follows from the general doctrine of legality and prior notice of punishability that the actor must have had the chance of knowing the prohibition before the responsibility attaches and the punishment can be carried out. This makes sense since the cognitive aspect of the norm is a conduit for the intended volitive impact. Should this channel of information be cut for one reason or another (mistake of law, insanity, etc), it would not make sense to activate the sanction since the will of the actor may not have been different from that of the legislator in the first place.

Yet, as we saw earlier, this conflicts with the need to maintain the objectivity of the norm in mistake of law cases.[113] While punishment in such cases can be

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'acoustic separation,' i.e. where the governing norms are understood by both those imposing them and those who violate them. Dan-Cohen *supra* n. 19, at p. 641. Dan-Cohen uses the example of prison escapes as an illustration of a situation of low acoustic separation due to the nature of the actors involved. He cites the language of *People v. Lovercamp*, a prison escape case where the defendants contended that escape was 'necessary' to prevent the homosexual attacks of inmates. There the Court emphasised the 'extremely limited' application of the necessity defence, lest "we are exposed to the spectacle of hordes of prisoners leaping over the walls screaming rape." *People v. Lovercamp*, 43 Cal. App. 3d 823, 831, 118 Cal. Rptr. 110, 115 (1974).

[113]This dilemma is reflected in the controversy over the legitimacy of the insanity defence. Sheldon Glueck has noted that the defence has:

> Weakness in it which have become ever more evident as both British and American trial and appellate courts have attempted to apply it. Among these

seen as a cognitive instruction to the actor (who for some reason missed the promulgated normative message), this is not its intended function. Prisons are places in which the will is bent, not places of instruction about criminal law. Oddly enough, then, the norm is applied and the sanction pronounced not for the sake of the policy, but for the sake of the norm itself despite the policy (of general prevention).

Thus, in mistake of law cases, a norm is applied for the sake of its own continued existence. Were it not applied, the subjective interpretation of the mistaken actor would prevail over the objective meaning of the norm, thereby destroying it. This tends to show, at the very least, that the norm, together with the whole normative model of thinking, has a relatively independent life. In other words, it is not a simple tool of the policy: *habent sua fata regulae*. In our case, the policy is violated in order to sustain the norm. In terms of general or special prevention, it surely makes no sense to throw people in jail if they did not know that what they did was wrong. But, the policy here is made positively instrumental to the sustenance of the norm's continued existence.

According to Professor Alf Ross,[114] the law has to impute responsibility for acts which are subjectively innocent since its very purpose is to maintain a certain minimally objective standard. However, he does not explain how we should translate this policy argument – *policy* since it refers to general prevention – into a normative one. Nevertheless, it is clear that the violation of the norm must be punished, otherwise the norm will not have been brought to concrete existence. Within this purview, the enforcement of the norm, once promulgated, is no longer a matter of policy. The norm becomes autonomous and it metamorphoses into a prescriptive rule, relatively independent of its instrumental origins.

In mistake of law cases we see a direct collision between the policy and the norm. This is one of those points in the system where the crack of a built-in antinomy threatens to destroy the legitimacy of the system as a whole and the system itself does not contain the possibility of a logical reconciliation.

> the most devastating is the psychiatric: The various versions of the M'Naghten 'knowledge test' unscientifically abstract out of the total cognitive capacity, which in this age of dynamic psychiatry and recognition of the influence of unconscious motivation has been found to be not the most significant mental influence in conduct and its disorders.

Glueck, *Law and Psychiatry: Cold War or Entente Cordiale?* at p. 47-48.

[114] Ross, *On Guilt, Responsibility and Punishment,* p. 146.

4.2.2. The Negative Aspects: *Ex Post Facto* Laws, Vague Laws and Nonlaws

To the extent that it governs the judicial process, the principle of legality binds by means of formal logic. Its restrictions on interpretation are of a formal logical nature, i.e. presumably less persuasive power is accorded to teleological and other deontic-normative forms of legal interpretation.[115] This statement must be qualified, however, since the principle of legality applies primarily to inclusion within the circle of punishability; it does not restrict exclusion of certain situations from punitive consideration: *in dubio pro reo, in dubio mitius*.[116] The extent to which the principle of legality *de facto* restrains inclusion of behaviour under punitive consideration is modified by clearly illogical processes such as *ex post facto* laws, vague laws and nonlaws discussed below and by apparently logical ones, like analogical inference discussed after this.

The prohibition of *ex post facto* laws has been around since ancient times. *Corpus Juris Civilis* contains a rule which prohibits retroactive legislation in civil cases: "*Leges et consuetutiones futuris certum est dare formam negotiis, non ad facta praeterita revocari.*"[117] Smead[118] traces the principle back through Bracton and Coke to medieval English law, and through Blackstone into early American law. "In the United States the guaranty was regarded as of such importance by the Fathers of the Constitution that it was stipulated in the original draft (U.S. Const., Art. 1, §9 cl.3 and §10 cl. 1), well in advance of the adoption of the Bill of Rights."[119] In 1798, *Calder v. Bull*[120] established the following kinds of laws as violative of the *ex post facto* constitutional proscription:

> 1st. Every law that makes an action done before the passing of the law, and which was *innocent* when done, criminal; and punishes such action. 2d. Every law that aggravates a crime, or makes it greater than it was, when committed. 3d. Every law *that changes the punishment*, and inflicts a *greater punishment*, than the law annexed to the crime, when committed. 4th. Every law that alters the *legal*

[115]One mistake that is often made is the confusion of formal logical method as a *justification* of a position taken, with a *description* of mental processes: "Methodology is not a description of the psychological processes of the scientist but a rational reconstruction of the logical procedure by which he justifies his assertions." Popper, *The Logic of Scientific Discovery,* p. 31-32. A typical example of this criticised position is to be found in Berman, *Legal Reasoning*, which tries to show that legal reasoning is not syllogistic! For a broader discussion of the relationship between logic and thinking, see Heidegger, *An Introduction to Metaphysics.*

[116]Zlatariæ, *Krivicno Pravo,* at p. 87-88.

[117]"There is no doubt that the laws, rather than revoking past facts, refer to future legal acts." (Corpus Juris 1, 4, 7).

[118]Smead*, infra* n. 161, at p. 775.

[119]Hall, *supra* n. 29, at p. 59.

[120]3 U.S. (3 Dall.) 386 (1798).

> rules of *evidence*, and receives less, or different, testimony, than the law required at the time of the commission of the offence, *in order to convict the offender*.[121]

In England there is no explicit prohibition of *ex post facto* legislation, but, as an illustration of the strength of tradition, consider the following passage from Bentham:

> This is one of the noblest characteristics of the English tribunals: they have generally followed the declared will of the legislator with scrupulous fidelity, or have directed themselves as far as possible by previous judgments …. This rigid observance of the laws may have had some inconvenience in an incomplete system, but it is the true spirit of liberty which inspires the English with so much horror for what is called an *ex post facto* law.[122]

On the other hand, as we have mentioned before,[123] all precedents[124] *in statu nascendi* refer to a past event and simultaneously create and apply the new rule retrospectively. Hall admits this clearly to be retroactive legislation, but brushes the reproach aside on the ground that "such retroactivity is an essential aspect of any legal system." He points out that every legal decision reaches back in time and is in this sense retroactive.[125]

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[121] *Id.* at 390 (original emphasis).

[122] Bentham, *Works*, p. 236; See also, Hall, *supra* n. 29, at p. 59 n.87 and Unger, *supra* n. 11, at p. 277: "[A]ll the sins of England will be forgiven because of her services to liberty."

[123] As far as judge-made law and the principle of legality is concerned, see Rantoul, *Fourth of July Oration* delivered at Scituate, at p. 278-82:

> Judge made law is *ex post facto* law, and therefore unjust. An act is not forbidden by the statute law, but it becomes by judicial decision a crime …. No man can tell what the common law is; therefore it is not law: for law is a rule of action; but a rule which is unknown can govern no man's conduct …. The judge makes law by extorting from precedents something which they do not contain.

[124] At that point they are really not *pre*cedents but "*post*cedents."

[125] Hall, *supra* n. 29, at p. 61. The argument is unacceptable, for Hall fails to distinguish between the abstract legal rule and its concretisation (concrétion, Konkretisierung); the latter is always, the former never, retroactive. To the extent that the judge-made law merges rulemaking and rule-application, it presents a problem never encountered by continental legislatures: the application of a norm created on a particular occasion to govern that same occasion.

Unger, *supra* n. 11, at p. 90, believes that as long as the creation of the rule, even though *ex post*, originates in a broader principle entirely separate from the particular fact pattern, the retroactivity itself is not unacceptable. This can be compared to the just naturalist position that the judges merely discover the natural law. Devlin, *The Enforcement of Morals*, at p. 98-107, is a typical example. Unger, however, prudently points out that the separation of the abstract from the concrete is likely to lose credibility:

> What happens to legal justice when the screen [interposed between reasons for having a rule and reasons for applying it to a particular case] becomes transparent? The problem of purposive adjudication is the chief preoccupation

The issue has recently been revived in the celebrated English case of *Shaw v. Director of Public Prosecutions*,[126] in which the previously unknown offence of "conspiracy to corrupt public morals" formed the first count of the indictment. The problem can be seen as one of "normative definition."[127] Notwithstanding the objection of vagueness, the jury is to be empowered to consider as a "question of fact" whether publishing the names of prostitutes in the *Ladies Directory* constitutes a conspiracy to corrupt public morals.[128] *Shaw* is usually considered a case concerning the vagueness problem in criminal law because the charge "corruption of public morals" gives an indefinite indication of what may be considered punishable. But the issue of vagueness really does not differ from the issue of retroactivity: in both cases, the determination of the precise limit between what is punishable and what is not is determined *post factum*. Most authors, Fletcher[129] among them, consider this a mere problem of notice. Devlin, on the other hand, reduces the question of predictability of the law to a question of fact:

> of every system of judge-made law. When the cases that make the law are the same ones that apply it, and the influence of views about what the law should be on views about what it is are constantly before one's eyes, the distinction between legislation and adjudication hangs by a slender thread.

Unger, *Id.* at p. 97.

[126][1962] A.C. 220.

[127]The term 'normative definition' in the above sense is used by Johannes Andenaes in his *Introduction to Norwegian Penal Code*. It refers to definitions in criminal law in which vagueness is intentionally preserved as to certain elements of the *corpus delicti* (e.g. "ordinary 'family sensibilities'"), in order to provide for differences that cannot be reduced to a common denominator. "What causes the problem is that the equitable is not just in the legal sense of 'just' but as a corrective of what is legally just. The reason is that all law is universal, but there are some things about which it is not possible to speak correctly in universal terms." Aristotle, *Nicomachean Ethics,* p. 141.

[128]An example of a similar, but far less broad, normative definition can be found in the Model Penal Code of the American Law Institute: "Sec. 250.10. Abuse of Corpse. Except as authorised by law, a person who treats a corpse in a way that he knows would outrage ordinary family sensibilities commits a misdemeanor." Model Penal Code § 250.10.

Compare State v. Bradbury, 136 Me. 347, 9 A. 2nd 657 (1939), where a brother burned his sister's body in the house furnace; the Court said:

> It is because the common law gives expression to the changing customs and sentiments of the people that there have been brought within its scope such crimes as blasphemy, open obscenity, and kindred offenses against religion and morality, in short those acts which being highly indecent, are contra *bonos mores*.

[129]Fletcher, *supra* n. 95, at p. 574: "The principle of fair warning requires that the legislature define the prohibitory norms of the society." It is for this reason that Fletcher must raise the inapposite question whether "[v]agueness is more readily tolerated in the framework of privilege than at the level of prohibitory norm." *Id.* at p. 571. He correctly implies that a

> Shaw's case settles for the purposes of the law that morality in England means what twelve men and women think it means – in other words, it is not to be ascertained as a question of fact … Not that all men are born with equal brains – we cannot believe that; but that they have at their command – and that in this they are all born in the same degree – the faculty of telling right from wrong.[130]

A vague law can mean one thing prior to the event to which it is to be applied, and another after the event. In this sense a vague law is an *ex post law*. Likewise, as illustrated by *Shaw* and Devlin's treatment, a vague law transfers the decisionmaking power from the legislature, where it is, according to liberal theory, vested with the sovereignty of the nation, to the fact-finder who has no legitimate authority to create rules, but merely to apply them. To say that "corruption of public morals" is a question of fact for the jury to decide is to create a minuscule sovereignty, which is what Devlin recognises, and which therefore, emphasises the requirement of the jury's unanimity and random selection.[131] Devlin, however, does not take into account that the

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privilegium is an alter ego of discrimination. In this respect *Furman v. Georgia*, 408 U.S. (1972), provides one of the best illustrations: As long as juries were exercising 'mercy' in deciding that the convict would not be sentenced to death, this was permissible; when the exercise of this power became so prevalent that the decision of a jury to impose capital punishment became an exception, the 'mercy' of a jury metamorphosed imperceptibly into its own opposite. Likewise, every privilege in criminal law (e.g. self-defense) becomes a disadvantage when its application is withheld: the criteria for a privilege are by the same token the criteria of discrimination. Fletcher, however, believes that he must "develop the difference [sic] between norms and privileges." He relies on Hart's distinction between primary and secondary norms, maintaining that criminal law cannot afford to have norms such as "Thou shalt not kill unless insane, under mistake of fact or under duress!" since this would 'justify' behaviour that ought to be merely 'excused.' In effect, however, the matter is much simpler; Fletcher is merely afraid that such a norm would encourage so-called secondary deviance ("I am insane, therefore I can kill"!) Alf Ross refers to the problem

> by the name [of] 'Oedipus effect,' i.e. a certain aspect of the story of Oedipus whose fate was predicted by the oracle, with the result that the prediction induced Oedipus' father to those very actions which ultimately brought about the predicted events. The effect of a prediction (or a similar piece of information) upon the events or objects to which the prediction refers – for example, by promoting or by preventing the predicted event – I have called the 'Oedipus effect.'

Ross, *On Guilt, Responsibility and Punishment*, (citing Popper, *Indeterminism in Quantum Physics and in Classical Physics*, Brit. J. Philosophy Sci. 1950 at p. 188).

[130]Devlin, *supra* n. 125, at p. 100.

[131]When I talk of the law-maker, I mean a man whose business it is to make the law whether it takes the form of a legislative enactment or of a judicial decision, as contrasted with the lawyer whose business is to interpret and apply the law as it is. Of course the two functions often overlap; judges especially are thought of as performing both.

jury's decision differs in a more significant respect from the legislature's: not only is it no longer anticipatory, but in consequence of that it is no longer abstract and general.

We learn from *Shaw*, first, that the maintenance of the principle of legality prevents the usurpation of power by the tier of fact and, second, that the viability of the principle depends on the separation of fact and law or, more broadly, of reality and concept.[132] The concept is the fixed part, the facts the variable part, of the legal regulation. To regard, as in *Shaw*, "the corruption of public morals" as a *questio facti*, simply means to collapse the concept into reality.

The central dialectic in law is precisely this tension between concept and reality. To make, as Devlin did, the concept nebulous and the reality independent from it, effectively delegalises the field: instead of having the law decide what is criminal and what not, there are now twelve men and women who do it instead. It is not merely that law can be known in advance and people's minds cannot, that law can provide notice, whereas the decisionmaking criteria of a jury as yet unselected cannot. The real function of the law is not to inform, but to provide an escape from the subjectivity of values. This explains Devlin's nostalgia for times when a reference to divine criteria of right and wrong could still be made: the more objective the values, the more intense their sharing, the less the need to fix in legal form what is already fixed in people's minds.

The requirement that laws be promulgated prior to the events to which they are to be applied is consubstantial with the requirement that the laws must not be vague as well as with the requirement that questions of law, as in *Shaw*, should not be collapsed into the questions of fact. In all the cases, the underlying principle is that the concept should be the independent variable, and the facts the dependent one, that the rule should be precisely that – a criterion for judging, not an ad hoc rationalisation of the decision. The rule must be screened-off, separated from the facts, because the rule, if it is to be of legitimate use in adjudicating disagreements, must refer to a more basic level of agreement. Only in this fashion can it hope to be logically compelling even to the parties engaged in controversy.

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[132] Hall, *supra* n. 29, at p. 35-36.

> One's judgment [with regard to the viability of the principle of legality] depends on his opinion concerning the role of the concept in problem-solving. Certainly, the common assumption in the innumerable debates on *nullum crimen*, namely, that it is of paramount importance in the judicial process, is evident. Indeed, if that assumption is rejected, the alternative is the very improbable thesis that the rule of law is a myth and that discussing it is irrational.

If the rule is formed after the fact, if its precise content is, owing to its vagueness, determined after the act, or if all decision-making power is left to the factfinder without firm guidance of a rule at all,[133] then this legitimating reference to the more basic level of agreement can no longer be made, for presumption could not be made that there was agreement at all. *Ex post facto* laws thus lack the essential legal quality of being logically compelling.[134]

4.2.3. The Positive Aspects: Analogy *Lato Sensu* and Analogy *Inter Legem* – Latent Purposive Legal Reasoning

It has been demonstrated that not only is the reliance on prior consent to the meaning of the form and 'symbols' of law inevitable, but that such consent really does not satisfy the demands that it is intended to satisfy (logical compulsion, legitimacy, predictability, syllogistic automatism, logical completeness, etc) and that the final result is "a staccato alternation between rule-making and rule-application."[135] Thus there remains the unanswered question: How is it possible that the postulate of formalism is still taken seriously at all? What, for example, stands behind Poulantzas' intuition that, "[t]hrough its discursiveness and characteristic texture, law obscures politico-

[133]The problems of retroactive legislation, vagueness and the collapse of legal rules into questions of fact can also be seen as obliterating the distinction between *rulemaking* and *rule application*. In retroactive legislation, the latter is collapsed into the former as is true of all *leges in privos datae*. Vague laws do not even draw the necessary boundary for the above division of labour to ever go into effect as is true of the discussed *Shaw* syndrome. But adherence to form and symbols in law is not intended to only prevent usurpation of power by the judges. Kennedy's preoccupation with the above distinction derives from the characteristic Anglo-American emphasis on adjudication; Pashukanis, however, emphasises conflict because it is possible to imagine two parties referring to a past consent or the form of a contract even if no adjudication ever takes place.

Consequently, formalism may well be a liberal preoccupation – a reliance on the sovereign legislature and a fear of judicial arbitrariness; however, von Jhering understood (see *infra* n. 151) that it is a reliance on the stability of fixated words to counteract unstable human interest. This fixation is not limited to private relationships, e.g. the purpose of the law of XII Tables was "*clearly* and *firmly* to set forth the law which actually prevailed – a protection of Plebs against arbitrary treatment." Von Bar, *supra* n. 33 to Chapter 8, at p. 22.

[134]It could be objected that the laws do not in fact compel by logic, but by physical force and, furthermore, that even if logical necessity were always present in controversies, that parties still would not follow its dictates without the sanction of the state. But consider a simple contract. The party tempted not to abide by its terms may not be compelled by the logic of the prior agreement, but he knows that unless he is 'compelled,' the judge will be compelled to follow the logic of the prior contract and will eventually use physical force to impose that logic upon the recalcitrant party.

[135]Kennedy, *infra* n. 98, at p. 398. Also see, *infra* n. 151.

economic realities, tolerating structural lacunae and transposing these realities to the political arena by means of a peculiar mechanism of concealment-inversion?"[136]

In the following paragraphs, I shall try to show how the use of analogy, now repudiated and abhorred, at one time represented such concealment. I do not here abandon either the postulate or the ideal of *form*. My intent is simply to demonstrate that there are superficially logical ways of conforming to the ideal while violating its postulates.

A typical structure of analogical inference is as follows:

All M are P
All S are N
Therefore: All S are P

The statement "All S are P" follows from the two premises about it, only insofar as "M is N."[137] Now, clearly M is not N and if they are called 'similar' that in itself implies dissimilarity in inessential aspects.

Thus: M is A, B, C and R
N is A, B, C and Q

where A, B, C are considered essential characteristics and R, Q inessential characteristics.

The validity of the statement "All S are P" therefore depends on the essentiality of R and Q. The problem turns on the criteria of essentiality. These criteria cannot be derived from the concept as to which the incredibility is to be determined. If this concept were capable of providing the answer, the problem would not exist in the first place. One solution in this search is to resort to other concepts in the conceptual system and use them as criteria of essentiality.[138] Systematic, historical, and other types of interpretation all refer to this problem.

If the similarities (A, B, C) can be demonstrated to be essential and if dissimilarities (R, Q) can be shown to be of no consequence, then M is "essentially" N and "All S are essentially P."

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[136]Poulantzas, *supra* n. 19, at p. 83.

[137]The relationships between M and N in the formula are – in terms of sheer quantitative overlapping – threefold. If all N are M, analogy is not even necessary. In the terminology of criminal law, this would simply mean that all M are the lesser included offenses of P, N of M and S of N. If M is equal to N, then, too, all S are P, i.e. the inference is strictly logical. Only in the case where M is a category broader than N will some or even all cases of S fall outside P.

[138]In the collection of *Dicta Et Regulae Juris* by Stojcevic & Romac, I was able to find 149 rules that refer specifically to interpretation of unclear legal rules. If reference is within law, the analogy is considered *inter legem*. See *infra* n. 144.

For example, because of the Nazi introduction of analogy[139] the following case arose: The Jewish religious practice of circumcision was asserted to be rape, presumably since it involved an involuntary manipulation of the child's genitals. The lack of consent and the genital manipulation were considered to be essential for the inclusion under the concept of rape, whereas the lack of any desired sexual satisfaction in the religious ritual was considered inessential. Thus:

R = desired sexual satisfaction
Q = religiously motivated ritual

By what criteria were R and Q here considered inessential? Why do we ordinarily consider them to be essential in qualifying cases involving R either as rape or child molestation, etc and cases involving Q as non-criminal religious observances? The answer will simply be that in R cases we speak of sexual intercourse or attempted sexual intercourse, whereas in Q cases we simply do not speak of that. The answer to this might be that child molestation is not intercourse and that therefore circumcision could be considered child molestation. In response to this proposition one could say that circumcision is not sexually motivated. Thus R is sexual motivation, Q non-sexual motivation. This criterion clearly distinguishes all cases of crime from what doctors, rabbis and mothers do.

How, therefore, could German criminal law practice consider this distinction inessential? The provision of the German act of 28 June 1935, "[if] there is no penal law directly governing an act it shall be punished under the law of which the fundamental conception applies most nearly to the said act," tells us that the decision whether to punish or not no longer resides with the rules of criminal law, but with the "fundamental conceptions of a penal law and sound popular feeling."[140]

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[139]… into the German criminal law.

[140]"Any person who commits an act … which is deserving of penalty according to the fundamental conceptions of penal law and sound popular feeling, shall be punished." See *supra* n. 103; Neumann, *The Democratic and the Authoritarian State*, p. 29:

> Because in present day society there can be no unanimity on whether a given action, in a concrete case, is immoral or unreasonable, or whether a certain punishment corresponds to or runs counter to 'healthy popular sentiment' they have no specific content. A legal system which derives its legal propositions primarily from these so-called general principles (*Generalklauseln*) or from 'legal standards of conduct' is nothing but a mask under which *individual* measures are hidden.

But see Kennedy, *Form and Substance in Private Law Adjudication*, which comes to exactly the reverse conclusion for private law purposes.

Under such a regime the issue is no longer whether a particular act falls under a particular concept. "Sound popular feeling" becomes the criterion of whether the act should be punished or not, analogy here merely provides the approximate measure of punishment: the proximate crime provides guidance for harshness of the sentence. This is analogy *lato sensu*.

It is still possible to say that the "sound popular feeling" provides criteria of essentiality as to the differences between R and Q as outlined above, but that stretches even the intended impact of the Nazi law itself. The starting premise there is no longer all S and P and therefore whether "M in all essential aspects resembles N," i.e. to establish that the distinction between the desire for sexual satisfaction and religious ritual is inessential, is no longer necessary. The starting premise under such a law is simply whether the *Generalklauseln* and the "sound popular feeling" require punishment, or not.

On close inspection it therefore turns out that the infamous Nazi introduction of analogical inference is not that at all.[141]

In the above cases the analogy is in fact meant to describe the creation of new criminal provisions: it is most explicit rulemaking. Insofar as it refers to similarities at all, it does so only for the purpose of sentencing.

In law the analogical inference is, in fact, a form of extensive interpretation. Consider the following example. Unlawful appropriation of electrical energy may or may not be subsumed under the larceny provision, if that provision refers to a "thing."[142] Since the larceny provision in, e.g. the French Criminal Code was promulgated in 1810, whereas electricity became a household energy supply only a century later, clearly the definition of the crime of larceny did

[141] A similar analysis is possible in the case of the Penal Code of the R.S.F.S.R. of 1934:

> In cases where the Criminal Code makes no direct reference to particular forms of crime, punishment, or other measures of social protection are applied in accordance with those Articles of the Criminal Code which deal with crimes most closely approximating, in gravity, and in kind, the crimes actually committed.

R.S.F.S.R. Penal Code Art. II-10 (1934). Here the general criterion equivalent to German "sound popular feeling" is not even mentioned. The Article does, however, imply that "the crimes can be actually committed" even though they are not directly referred to by the Criminal Code. Nevertheless, it is implied in the formulation of the Article cited above that the Court by general criteria (of 'revolutionary conscience') will be able to determine whether social protections are indicated. The above Article was preceded by Art. 16 of the 1928 Criminal Code of the R.S.F.S.R.: "If this or that socially dangerous act is not specifically anticipated in this code, then the foundations and the limits of responsibility for it are determined according to those provisions of the Code which are describing the criminal acts most similar to it." R.S.R.S.R. Crim. Code Art., 16 (1928). Here it is clear that the real criterion is whether the act is socially dangerous.

[142] C. PEN. Art. 379 (1810): "*Quiconque a soustrait frauduleusement* une chose *qui ne lui appartient pas est coupable de vol* (emphasis added)."

not originally cover electricity until the latter was judicially considered to be a thing.[143] In this case the distinction between R and Q could be considered inessential if reference were made to the intent of the legislator. The word "thing" in the description of larceny, it could be said, stands there not to exclude nonthings, but simply as an object concomitant to the predicate of "taking." Of course, one could also be considered the theft of a thing, again requiring a teleological reference supported perhaps by systematic or historical interpretation.

Analogy in criminal law thus appears in two variations. The usual analogy referred to in theory is in effect not an analogical inference but a creation of new incriminations. Analogy in the strict sense of the word is a form of interpretation; as such its use in criminal law is inevitable. This form of analogy is sometimes called analogy *inter legem*. It is best exemplified (the electricity example is marginal between the two analogies) when a code refers, usually in an illustrative, i.e. nontaxative enumeration, to extrapolation by similarity.[144]

It cannot be denied that *inter legem* analogy, too, involves the making rather than application of rules. Again we are moving on a spectrum between total tyranny and total Rechtsstaat. *Shaw*,[145] where the jury makes the law concerning corruption of public morals, differs little from the 1926, 1928 and 1934 provisions of the Russian and German criminal laws, in which rules are made by nebulous references to "sound popular feeling" and "social protection." In fact, the latter cases are perhaps more determined than the

[143]The French Cour de Cassation did subsume the act of theft of electrical energy under Article 379. A comparable situation in Germany was resolved by acquitting the defendant since subsumption of electricity under the concept of a thing in criminal law would constitute forbidden analogy according to the German Imperial Court. A special act was passed in Germany in order to specifically incriminate theft of electricity. See Zlatariæ, *supra* n. 116, at p. 87.

[144]Model Penal Code § 210.6 (3)(h) – Aggravating circumstances in cases of murder: "[a]fter a specific enumeration of aggravating circumstances the last definition covers all situations where [t]he murder was especially heinous, atrocious or cruel, [and even broader] manifesting exceptional depravity." In other words, murder, to be subject to the legal consequences of being aggravated, does not have to be any of the specific things (a murder of a convict under sentence of imprisonment, a murder by a recidivist, a murder with a great risk to others, a murder for pecuniary gain, etc), as long as it is heinous and manifests exceptional depravity. Whether it is heinous and whether it manifests exceptional depravity will be determined by analogy to the cases described in subsections (a) to (g). In all these cases similarities will be sought and dissimilarities compared within the context of the given article (*inter legem*). The legislator resorts to such devices because he cannot cover all the specifics and he consciously relies on such analogy. This analogy is therefore a form of purposive (teleological) interpretation – except that it is nevertheless more determined than the analogy *lato sensu* we described above.

[145][1962] A.C. 220, discussed in text accompanying *supra* n. 126-132.

Shaw situation, since in *Shaw* the "sound popular feeling" exercised by the jury remains *sub rosa* and cannot even be argued against, whereas one can at least argue whether "sound popular feeling" in Nazi Germany indeed condemns circumcision.

The gradations among total tyranny, analogy *lato sensu*, analogy *inter legem*, cases of vagueness, illustrative enumeration and cases where "the rules are at least sometimes perfectly clearly applicable to particular situations"[146] demonstrate that there can be no clear line between formalism and purposive legal reasoning. This does not mean, however, that a greater degree of formal determinism would not afford a greater degree of security. That the confirmation and disconfirmation of hypotheses takes place within a system, and that the parts of the system derive their meaning from the whole, cannot be a proof that formalism as an ideal is unacceptable. That the ideal is unattainable because the concepts can never have a totally independent existence, does not make the ideal any less an ideal. As Jhering points out, the ideal of formalism has always been part of the legal systems of all nations. The fact that formalism has a built-in contradiction that has excited legal theorists at all times[147] could prove to be the motor of its progress and its own transcendence.

4.3. Conflict and Form in Law

4.3.1. Conflict and Legal Regulation

In criminal law it is often suggested that the rules have to be written in advance and in clear language in order to afford 'fair notice.' How is it then possible that the mistake of law, a fair and honest ignorance, due to the fact that the 'notice' has not reached the ear of the actor, is not an absolute defense? No, the real intent behind the writing of the rule is not so much to make it known in advance – that is what Enlightened writers believed – but rather to *fix it independently of any human memory*. "How can one create a memory for the human animal? How can one impress something upon this partly obtuse, partly flighty mind, attuned only to the passing moment, in such a way that it will stay here."[148] The Law, the written promise – *verba volent scripta manent* – is this creation of memory for the human animal. And it is the principle of

[146]Kennedy, *supra* n. 140, at p. 354.

[147]The typical ambivalence as to Kennedy's staccato alternation goes back at least to Cicero, Top. 9: "*Ius civile est aequitas constituta lis, qui eiusdem civitatis sunt.*" But on the other hand, De off. 1.33: "*Summum ius summa iniuria*," where *summum ius* refers to strict ('mechanical') interpretation of the laws. I am grateful to Professor Janez Kranjc of Ljubljana University, Faculty of Law for having called my attention to this inconsistency.

[148]Nietzsche, *Genealogy of Morals*, Section 3.

legality that mandates the written memory of the Law to be taken seriously.[149] A promise is a bridge over time; it necessarily means that something was stipulated in the past that will be – or so the promise promises – done in the future. That this promise has to be written, i.e. committed to the artificial memory of the ink on the paper, is in itself a declaration of mistrust. It is also good to remember that written law is only second best. It would be far better to have a society that "*sine lege fidem rectumque colebat*."[150]

Legal formalism maintains that the semantic symbols used to record and preserve the binding power of certain human relationships represent the essence of law. The alternation between prior consent and posterior conflict is something so prevalent that the whole institution of law is meant to respond to it. Rules, in their pure form, derive their legitimacy, i.e. their power of moral and logical compulsion from the recorded consent given at a time when the veil on the future prevents the parties from yet knowing the probability and precise nature of the future conflict between them. While individuals alternate between consent and conflict, the stabilising force of law in society responds with constant reference to the form in which the meaning of the past consents was recorded. Law relies on the form because the consent no longer exists. The *substance* of the present conflict is confronted with the *form* of the past consent.[151]

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[149]The remembrance itself, of course, will not do:

> One can well believe that the answers and methods for solving this primeval problem were not precisely gentle; perhaps indeed there was nothing more fearful and uncanny in the whole pre-history of man than his mnemotechnics: If something is to stay in the memory it must be burned in: only that which never ceases to hurt stays in the memory. (*Id.)*

There can be no doubt that Nietzsche in his Second Essay creates the concept, falsely attributed to Freud, of the 'subconscious' and 'repression' ('Positives Hemmungsvermögen'). Nietzsche's thesis is that there is this 'positives Hemmungsvermögen' in Man, an active forgetfulness that represses the unpleasant experiences while it digests them. The duty being essentially a promise that is against one's own best interest, it has to be supported by the rule of law, otherwise it will be suppressed into the subconscious. In that sense law is but an aid to memory, but an aid that has to be felt as pain, because "only that which never ceases to hurt stays in the memory." Compare this to the jurisprudential conventional wisdom that every rule is made of a disposition and a sanction unless it is to be either *lex imperfecta* or *lex minus quam perfecta*.

[150]"… that cultivates good faith and virtue without law," the opening line to Ovidius Naso's *Metamorphoseon Libri.*

[151]The relationships between form and substance, word and deed, concept and reality are thus clearly different from the ones encountered in science and everyday life, where substance is meant to be reflected, together with all its changes, in the form.

> The professional philosopher, who has no understanding of the peculiar technical interests and needs of law, can see nothing in formalism but … a

The described position implies that the conflict is at the core of the phenomenon of law. The law as *ars boni at aequir*[152] is nothing but a counter-measure to life as *malum et inaequum*. According to Pashukanis, this *malum* is the conflict of private interests:

> Human conduct can be regulated by the most complex regulation, but the critical factor in this regulation arises at the point when differentiation and opposition of interests begin. … [C]ontroversy is the fundamental element in everything juridical. In contrast to this, the prerequisite for technical regulation is unity of purpose.[153]

We will here focus on the relationship between conflict and the need for the "pedantic cult of symbols" referred to by the foremost critic of *Begriffsjurisprudenz*.[154] Starting from the premise that "the juridical element in the regulation of human conduct enters where the isolation and opposition of interests begins,"[155] I would like to establish the role of reliance on form in law generally. I shall follow Pashukanis and Jhering[156] in maintaining that, for better or worse, the role of form in law cannot be dispensed with, owing to the element of controversy which Pashukanis believes to be so peculiarly juridical. For purposes of analysis, I shall initially refer to an example from the law of contracts and shall only later extend the conclusion to criminal law.

In contracts, a particular agreement ('unity of purpose') at Time One (T1) is intended to govern the respective relationship between the contractual parties at Time Two (T2). Thus, the conclusion of a contract is not a description of the present complementarity of interests for its own sake. The form of the agreement concluded at T1 (recorded in words, witnesses' memory buttressed by the solemnity of the exchange of promises, exchange of written promises, etc.) indeed expresses and communicates as truly and in as articulate a way as

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> clear derangement of the relationship between form and content. Precisely because his vision is directed to the core of things, … this anguished, pedantic cult of symbols wholly worthless and meaningless in themselves, the poverty and pettiness of the spirit that inspires the whole institution of form and results therefrom – all this, I say, must make a disagreeable and repugnant impression on him. … Yet we are here concerned with a manifestation which, just because it is rooted in the innermost nature of law, repeats itself, and will always repeat itself, in the law of all peoples.

2 von Jhering, *Der Geist Des Romischen Rechts,* p. 478-79, (cited in Kennedy, *Legal Formality*).

[152]Cicero, Top 9: "*Ius civile est aequitas constituta iis, qui eiusdem civitatis sunt*."

[153]Pashukanis, *Law and Marxism*, p. 181-82.

[154]von Jhering, *supra* n. 151.

[155]Pashukanis, *supra* n. 153.

[156]von Jhering, *supra* n. 151.

possible the existence of the "meeting of the wills" of the contractual parties. Care is taken to be as unambiguous and specific as possible.

But how possible is it to be unambiguous and specific regarding the events that have not yet occurred? In ordinary contracts where the unity of purpose is precarious in time, the attempt is made to be specific and unambiguous about the present agreement only in view of the probability of future disagreement. The greater this probability, the greater the stake, the stronger the emphasis on form. On the other hand, in those human relationships where this complementarity is guaranteed by ties stronger than the fleeting coherence of material interests, the articulation of agreements is not necessary at all. The 'unity of purpose' between a father and his son will preclude all need for the formal fixity of agreements between them. The rules here, insofar as agreements between them can be so characterised, are truly instrumental to this fundamental 'unity of purpose.'

In most contracts, though, the recording of present agreements is indeed an attempt to respond to future disagreements. The need for the fixing and articulation of present agreements anticipates, and by means of anticipation (since the outcome is there known in advance) often precludes future disagreements. Nevertheless, future disagreements can only be speculated about *in abstracto tempore contrahendi* to know that at some future time they would quarrel over it.[157]

The difference in time (T2 minus T1) is also essential. Eliminate this difference and you get agreement and disagreement superimposed in the same moment: an impossibility. Thus, all legal regulation must be future-oriented because all legal regulation is an attempt to influence human conduct (of the addressee) *pro futuro*.[158]

Insofar as it decides future disagreements by referring to past agreements, law represents an attempt, through conceptualisation, to create a bridge over time. The past agreement is an event that takes place at a certain point in time, but then irretrievably disappears. When the need for legal interference arises,

[157]This to some extent responds to André-Vincent's assertion that law exists only *in concreto*. It is precisely that alternation between the possible agreement *in abstracto* and the resolution of the subsequent concrete quarrel by reference to past abstract agreements that does, *sit venia verbo*, the trick. In this sense, agreements are often possible because of the ignorance of what the future might bring. Law, one might say, is built on human ability to deceive oneself by believing that only good things are stored in the future. In a society composed of absolute pessimists 'prior consent' on which law is based would not be possible. Contrary to what André-Vincent maintains, this prior consent is as much the essence of law as the posterior application of it and, furthermore, its functionality lies precisely in its being abstract.

[158]1 Seneca, *De Clementiae* 16, (cited in Beccaria, *On Crimes and Punishments*, p. 42 n. 29): "No man punishes because a sin has been committed but that sin may not be committed. For what has passed cannot be recalled, but what is to come may be prevented." A shorter formula is used: "*Punitur ne quia peccatur, sed ne peccetur.*"

it is by definition – controversy being the essence of legal regulation – gone. If agreements themselves could be preserved, there would be no need for law; though agreements themselves may evanesce, their conceptual forms can nevertheless, in a fixed record, be preserved through time. To that extent law *is* formalism.

If it is true that the articulation and recording of present agreements is in law only a means of anticipating future disagreements, then the celebrated 'meeting of the wills' in contracts is merely an alter ego of the conflict of interests to which Pashukanis refers. The relationship between form and substance is perverted here, because the role of the form is no longer to describe the substance of the event, but to describe this event only in order to prescribe future events.[159] Those who fail to distinguish between substance and form will not understand that the substance of law *is* its form.

By the same token all legal regulation must precede the conflict. Agreement on the criteria of conflict resolution – which is what a contract is – is possible only when it is as yet impossible to say what concrete consequences would follow from this or that particular rule. Once the conflict is no longer an abstract probability, it becomes clear what the abstract criteria would mean *in concreto*.

Because people are capable of agreeing *in abstracto* where they will disagree *in concreto*, and because it is possible to separate abstract concords from concrete discords by means of time, it is also possible to legitimise coercive regulation by prior consent. Its *differentia* is inevitably this reliance on semantics, symbols and syntax, in short, form and formal logic – which is intended not to describe or communicate, but to govern.

In ordinary life our decisions about anything are never bound by such formality. Our consciousness may be a product of the past, but as it can still learn in the present it is not wholly subject to the past. The freedom from the past which results from our ability to learn from the present does not exist in law, because 'to learn' from the present means to be able to adjust behaviour to a changing environment. Such adjustment is ordinarily quite rational for an individual or for a group because a change in the environment which appears through time requires modification of instrumental rules if the goal is still to be achieved.[160]

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[159]It is true that all concepts are ultimately purposive in the sense that they are anthropocentric. See text accompanying *supra* n. 76-79 for the discussion of Wittgenstein's reflections on the nature of concepts. Wittgenstein, 1 *Remarks on the Foundations of Mathematics*, at p. 141. To describe in order to prescribe, however, perverts the usual role of the concept exactly in the fashion described by von Jhering, *supra* n. 151.

[160]Instrumental rules serve as the means of achieving a particular goal. In this sense, it is really the goal itself which dictates the means. Should the circumstances change and new avenues

But when two individuals are involved in a relationship in which prior unity of purpose is replaced by conflict, "the ability to learn from the present" must at all costs be prevented. To allow the parties to adjust the rules of the contract as if they were merely instruments to respective goals that now conflict with one another would destroy the possibility of exchanging commodities and services.[161] Reliance on the contract as independent from subsequent changes in the goals of the parties is therefore inevitable.

The sheer symbol of a prior consent that has now been emasculated of its underlying purpose, previously shared by the parties, no longer carries a meaning by reference to which the parties can resolve their dispute: if it did, the conflict would not occur in the first place.[162] It is because the subsequent emasculation of the contract is specifically anticipated by the parties and generally anticipated by legal theory and by the legislature that the emphasis on conciseness of form is so great. But this celebrated legal precision is nothing else than an effort to make the concept independent of the very reality that it formerly expressed. If only the wording of the rules could be so precise as not to require any interpretation.[163]

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of achieving the goal open, the instrumental rules must give way to a more efficient set of rules.

[161] Aemilius Papinianus, the most important classical Roman jurist at the end of the Second and the beginning of the Third Century A.D. wrote: "*Nemo potest mutare consilium suum in alterius iniuriam.*" D. 50, 17, 75. Smead, *The Rule against Retroactive Legislation: A Basic Principle of Jurisprudence*, incorrectly translates the word *nemo* above as referring only to the lawgiver. Cf. Stojcevic & Romac, *Dicta Regulae Juris*.

[162] Since a reference cannot be made to the meaning of the contract as derived from the unity of purpose shared by the parties, only two other surrogate alternatives remain. First, legal theory since Roman law has tried to establish an autonomous meaning of the various forms of contracts. If, second, it were possible to establish the *causa* of the contract *in abstracto*, then the parties could be presumed to have known this established meaning. In this case, if there is a doubt as to the meaning of the rules in the contract, they will be interpreted teleologically – not by reference to the purpose of the parties, but by reference to the purpose of the state as the contract's enforcer. *In* both cases we are talking of the usurpation of power from the parties: the state takes over the relationship that has gone sour and can decide to the detriment of both parties. In both cases, in the first *via* the legal theory, in the second *via* direct and blunt cost-benefit analysis using criteria of the state, the basic relationship has been falsified. It has been falsified in the first case through the use of presumptions and fictions that the parties have intended by the contract what is usually intended by it or what the law maintains is intended by it; in the second case, the state through its monopoly of power, simply assumes governance over those contractual relationships that have been deprived of the unity of purpose. This exploitation of disagreement falsifies what could otherwise be a genuine judgment.

[163] How can a concept stand apart from the underlying purpose which it used to express? Resort can be made to 'intelligible essences,' to 'plain meanings,' to 'common usage' and other such orientation points outside the circle of the particular, now defunct, agreement. What

Clearly, this is the central dialectic of formalism. When, at the time of the controversy, legal decision-making interferes with the previously consensual relationship, the criteria of dispute resolution must find their ground outside the centrifugal center of the controversy. The very substance of the latter is that it has no substance, but is a mere pulling apart. In other words, the criteria cannot be established by reference to the present substance of the relationship. On the contrary, this is the very issue to be somehow resolved.

But 'resolved' by reference to what? All that is left is a verbalisation of the past promise, which must now be divorced from the motives and purposes that it originally manifested. Even the quasi-teleological reference to the past intentions of the parties is somewhat problematic, since the parties would not even have entered the contract had they known that it would end up in the troubles of a dispute. No, the word stands alone, and the extent to which it is an independent variable at all will depend on how firmly it is anchored in semantic and logical grounds that are broader than the dispute itself.[164]

It is my position, therefore, that formalism, because all law exists as a response to conflict, is an inevitable, indeed a constitutive element of law and of juridical thinking. The autonomy of legal reasoning, for example, cannot be seen as predicated on substantive policies and purposes and other metajuridical considerations.[165] Law (and legal reasoning as its practical manifestation) is based on a strange mixture of formal logic, semantics, grammar and perhaps rhetoric. The function of preserving promises in time requires the creation of concepts such as contracts and crimes. Yet conceptualisation in law serves only this narrow need. It remains fully functionalistic and has no deeper meaning.

4.3.2. Conflict and the Principle of Legality in Criminal Law

The rules of criminal law are not agreements between private parties and decisions of criminal courts are not enforcements of inter-party stipulations. The conflict itself (adversariness) cannot in criminal law be interpreted as a private one since a salaried public official (not the victim)[166] has to be appointed

these theories have in common is an attempt to use logical compulsion and similar forms of persuasion to overcome the conflict. In other words, to resolve the narrow and specific disagreement, one refers to a broader almost existential sharing of values as manifested primarily in the use of language and logic.

[164]The question can be seen as one of memory, since preservation of past promises through time seems to be what law does in all its functions: See Nietzsche, *supra* n. 149.

[165]Even in criminal law where policies such as special and general prevention seem to be an integral part of the law itself, they do not describe what criminal law or lawyers do, or what, for that matter, they are qualified to do.

[166]This at least is the case in American criminal procedure. The Continental criminal procedure knows the institution of the 'subsidiary prosecutor' (the injured party) who can step in, in case

to initiate and sustain it. It is not clear, as the inquisitorial system shows, that the context of adversariness is necessary at all[167] for the administration of criminal law. Purposive legal reasoning, more difficult to apply where there is no 'unity of purpose,' seems to be quite appropriate for the largely agreed upon goals of criminal law. Formalism of the kind that we tried to show is inevitable in private disputes, appears to be unnecessary here. However, I shall argue that the principle of legality is not something that can be separated historically or conceptually from criminal law.

As far as formalism is concerned, the same conclusions apply as were formulated above for the purpose of contract law.[168]

> Is it necessary for every potential criminal to be informed in minute detail about the corrective methods which would be used on him? No; it is much simpler and more brutal. He must know what quantity of his freedom he will have to pay as a result of the transaction concluded before the court. He must know in advance the conditions under which payment will be demanded of him. That is the import of criminal codes and criminal procedures.[169]

Pashukanis does not elaborate, however, on the derivation from the law of civil disputes of this "need to know in advance" in criminal law. While it is, for example, clear in contracts that there can actually be no relationship, in the legal sense of the word, unless the complementary rights and duties of the parties are somehow recorded, or "known in advance," nothing in principle precludes criminal law from imposing punishment without a previous fixing in memory of "the quantity of freedom" one has to relinquish in payment for

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the public prosecutor does not initiate the investigation or pursue the case to the trial. In cases where he does, the victim is still entitled to submit his request for damages within the criminal trial. This is called in German *Adhesionsprozess*. Nevertheless the conflict remains a public one even on the Continent, because private claims are handled in civil procedure and according to civil law rules.

[167] Of course, this could never be said for the civil procedure since there the conflict is what the procedure is intended to resolve.

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> [B]ourgeois administration of the law sees to it that the transaction with the offender should be concluded according to all the rules of the game; in other words, anyone can check and satisfy themselves that the payment was equitably determined (public nature of court proceedings), the offender can bargain for his liberty without hindrance (adversary form of the trial) and can avail himself of the services of an experienced court broker to this end (admission of counsel for the defense), and throughout well within the framework of fair trading. In this precisely lie the so-called guarantees of criminal proceedings. The offender must therefore know in advance what he is up for, and what is coming to him: *nullum crimen, nulla poena sine lege*.

Pashukanis, *supra* n. 153, at p. 184.

[169] *Id.*

a particular crime. While one cannot imagine the law of contracts without the particular inter-party agreements or general rules being known in advance, one cannot only imagine, but there have actually existed (in Germany and in the Soviet Union, for example), systems of criminal law which function *ex post facto*; i.e. they relied on analogy.[170] In that sense, it is merely a pretense, an ideological manoeuvre played upon the population through the superficial analogy to private transactions, to believe that the principle of legality would actually guarantee anything.

However, one can say that there is a parallel between the criminal procedure/civil procedure analogy on the one hand and the criminal law/civil law analogy on the other. Criminal procedure is not a genuinely adversarial procedure. Adversariness here is a superficial and artificial imitation of the genuine adversariness in the procedure concerning private disputes. In criminal procedure adversariness is artificially induced to maintain impartiality and, as such, it often conflicts with the truth-findingfunction of criminal procedure.

Criminal law imitates the law of private transactions and also suffers in all those areas in which it differs significantly from its object of imitation. For example, since in criminal law there is no antecedent, explicit and private stipulation about the future conflict, a fiction has to be maintained that the criminal-to-be was informed of and therefore has implicitly agreed to the principle, *ignorantia juris non excusat* (mistake of law is no excuse). The same fiction of criminal law, being a stipulation between the defendant and the state, excludes *ex post facto* laws and mandates the requirements of notice and the prohibition of vagueness, all of which would make no sense if mistake of law were a defense.

Consequently, it comes almost as a surprise that this very formalism, "the strict interpretation of penal statutes," is most pronounced precisely in criminal law. This in spite of the fact that formal inter-party stipulations there, as we pointed out above, are fictitious. But this overemphasis on the principle of legality and the constant concern with the guarantees of criminal procedure, for example, merely testify to the precariousness of all these paraphernalia. It is precisely because it is possible to have a criminal procedure without any adversariness or presumption of innocence or privilege against self-incrimination that these procedures have to be articulated and emphasised; similarly, it is precisely because it is so easy to switch from a formalistic criminal law to one that is run by police without any guarantees, that there needs to be the constant emphasis on the principle of legality, the prohibition of vagueness, analogy, and so on.

If the rules of criminal law are needed as legal rules at all and not merely as technical ones serving the purpose of administrative co-ordination, it

[170]See *supra* n. 103.

is because they address the conflict between the individual and the state. Since the individual is confronted with the organised power of the state, the individual is in a position so helpless that only a strict observance of the written guarantees can offer him any protection whatsoever.[171] Thus, while the function of the rules of criminal law, as is true of all legal rules, is to guarantee, since the state has power on its side anyway, it does not need to rely on any guarantees; it is the defendant who needs guarantees and it is to him that the guarantees are addressed. The principle of legality merely emphasises that these guarantees are to be taken seriously. The formalistic emphasis is merely a compensation for the political precariousness of these guarantees, which are not, as in the case in private law, built into the very function of the law.

However, if the similarity between the private and the criminal law is so elusive, then it surely cannot be seen to be the compelling reason for maintaining the formalism of criminal law. In other words, formalism cannot be explained simply by the notion that at some point in history the structure of criminal law was made in imitation of the private law. The opposite is more likely to be true, that the conflict in criminal law differs from the conflict in private law but is nevertheless the real reason for continuous reliance on impersonal rules. How is this conflict different from the one in private law, and what are the consequences, for our purposes, of this difference?

The conflict in private law is an inextricable part of the law itself: Were it not for conflict between two civil parties, there would be no need whatever for particular legal intervention, and hence no need for legal rules. The moment there is a recognised conflict of interest between the accusing party and the defendant, the reliance on impersonal rules becomes inevitable for all the reasons described above.

Paradoxically, the conflict itself in criminal law originates in the very law to which the strict adherence must be maintained. Were it not for this body of law, behaviour would not be criminal,[172] and there would be no need for conflict in the first place. Is it possible that the law itself creates the conflict and thus the need for strict reference to law? If this is true, the whole structure of criminal law is revealed as much more voluntaristic and arbitrary than it is usually believed to be: the circularity of law-conflict-law, in which there would be no conflict without law (because there would be no crimes), and no

[171] Hall, correctly emphasises that the 'rule of law' includes not merely rules themselves and their strict observance, but: (1) that body governing the legal precepts, (2) those institutions vested with appropriate legal power, and (3) those legal procedures by which those precepts may be applied by those institutions – which together are designed to effect the protection of essential interests of individuals guaranteed by our society through limitations on the authority of the State. Hall, *supra* n. 29, at p. 27. But see Poulantzas, *supra* n. 19.

[172] "[T]he civil law ceasing, crimes cease. …" Hobbes, *supra* n. 11 to Chapter 8.

need for law but for the conflict of interests created by law itself (because the defendant would not resort to legal formalism if his interests were identical with those of the accuser – as is partially the case in *parens patriae* doctrine), reflects the underlying political ambivalence of the modern welfare state. To the extent that it is secure in its monopoly of power, the modern state can afford to limit the exercise of this power by legal rules; to the extent that it is nevertheless endangered by the behaviour it denominates as criminal, it cannot refrain from making such behaviour punishable. It thus exercises power, but within certain limits.

Consequently, if criminal law involved a private conflict resolution (revenge), it would naturally require reliance upon impersonal rules; but when the state usurps the power of revenge, the latter ceases to be either private or a conflict. The formal procedural equality granted to the defendant in American criminal procedure, but never entirely in the Continental one, where the prosecutor is never merely a party to the process (the so-called *ius imperii* theory of the dual role of the prosecutor) is a concession which may or may not be granted to criminal defendants. To grant the defendant the status of an equal party in the criminal process is to pretend that the conflict is between two equal parties. Since in reality, the state is immeasurably more powerful than the individual, the defendant's status as an equal party is inherently precarious. It is a privilege that can at any time be rescinded.

Likewise the admission that the state is also bound by the antecedent promulgation of rules, which are interpreted in *dubio pro reo* at that, is a concession to the defendant. This admission is not inherent in the subject matter in the way that the conflict and approximate equality are inherent in private disputes. The principle of legality, with its prohibition of analogy and of *ex post facto* legislation, must, to the extent that it is not inherent in the subject matter, be an ideological postulate, sometimes a slogan.

It is for this reason that formalism in criminal law cannot be regarded as mere illusion, or as a false reliance upon the elusive guarantees of impersonal rules. Formalism in criminal law is a political concession through which the state relinquishes some of its power by admitting that it is bound by its own law.

The question whether in criminal law, too, it is the conflict which creates the need for 'legal regulation,' i.e. formalism, can thus be answered as follows. It appears that in criminal law the independent political significance of the principle of legality reduces the state to an approximately equal partner, and thus creates the conditions of conflict between two disputants (the defendant and the prosecutor), who are then legally regarded as equal.

It could be said, therefore, that in criminal law Pashukanis' 'legal regulation' in fact creates the 'controversy,' for the conflict could not exist if the state exercised its plenary power unlimited by the principle of legality (i.e. legal regulation).

4.4. The Illusion of the Major Premise

If the idea behind the principle of legality is that rules should be binding on those who apply them, then it is almost necessary to assume that this must be done through the compelling nature of logical reasoning.

The basic instrument of logical compulsion on which the principle of legality ultimately rests is a simple logical syllogism in which the major premise is the legal norm and the minor premise is the fact pattern to be subsumed under the major premise. The conclusion is either guilt or innocence. Again, this brings to mind Beccaria's idea of 'geometric precision.' While this syllogism does not describe the thinking process and particularly fails to explain the origin of the hypothesis of a major premise, it does impose restrictions on the adjudicator. He, after all, must ultimately justify his decision in logical terms.[173]

In the *International Encyclopedia of Social Sciences*,[174] Professor Berman discusses the question of legal reasoning. As usual, in such a discourse, the central distinction is the one between the syllogistic and the 'legal' logic. However, I will try to show that there can be no such distinction, that there is no such thing as 'legal' logic or, in other words that insofar as legal logic is 'legal' it is not logical, insofar as it is logical it is not distinctly 'legal.'

The question has been discussed by many authors and Professor Berman himself cites von Jhering and Oliver Wendell Holmes. In Professor Berman's essay on legal reasoning, the following seems to be the central proposition:

> However useful *syllogistic* logic may be in testing the validity of conclusions drawn from given premises, it is *inadequate* as a method of reasoning in *practical* sciences such as law, where the premises are *not given but must be created*. The legal rules, viewed as major premises, are always *subject to qualification* in the light of particular circumstances; it is a rule of English and American law, for example, that a person who intentionally strikes another is civilly liable for battery, but such a rule is subject, in practice, to *infinite modification* in the light of possible defenses (for example, self-defense, defense of property, parental privilege, immunity from suit, lack of jurisdiction, insufficiency of evidence, etc). In addition, life continually presents *new situations* to which no [single] existing rule is applicable; we simply do not know the legal limits of freedom

[173]This is all the more true of Continental criminal procedure, because the judge there must in most cases reason out the verdict.

[174]Berman, *Socialist Legal Systems: Soviet Law, International Encyclopedia of the Social Sciences*, at p. 204.

> of speech, for example, since the social context in which words are spoken is continually *changing*. Thus, the rules are continually being made and remade.
>
> Also the 'minor premises' – the facts of particular cases or the terms of particular legal problems – are not simply 'there' but must be characterised, and this, too, requires interpretation and evaluation. Indeed, the legal facts of a case are not raw data but rather those facts that have been *selected* and *classified* in terms of legal categories.[175]

A syllogism, legal or not, is a subsumption of a minor premise under the major premise. According to Professor Berman neither the major premise nor the minor premise is ever given in law; rather they are both subject to "infinite modification, interpretation and evaluation."

The answer to the question of major premise is relatively simple. First, in no system of reference, be it mathematics, philosophy, or any natural science, are the major premises 'given.' They must always be 'created.'[176] In mathematics, they are created in terms of axioms; in philosophy they are created less deliberately – by assuming their truth – in terms of 'certainties,'[177] and even our whole relationship to life is one in which certain assumptions are made for us, which we take for granted; they are, therefore, not absolutely given.

Even the most basic major premises about our existence, about space, about time, are not 'given,' they are, at least from the point of view of the species as a whole, 'created.' It is for this reason, that Nietzsche called truth 'a useful lie.' Nothing is absolutely given; in every frame of reference we make certain assumptions which in the last analysis must be built on faith, rather than on subsequent logical proof.

In law, too, the major premises are not 'given,' they are not fixed in advance, but have to be created by a recombination of rules. But, this does *not* mean

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[175]Emphasis mine. *Id.*

[176]It is good to remember that the logic and the syllogisms do not describe the mental process of thinking. No one knows where an idea, a hypothesis about a major premise comes from. The syllogism is merely a method of communication. It communicates in a structured manner what comes like a *deus ex machina* to a living person – namely the idea. A syllogism is a method of persuasion, of logical proof – not a method of thinking at all. Thinking itself will rarely be simply a three-step-procedure.

Yet precisely since the syllogism *is* a method of communication, those who assert that legal reasoning cannot be 'reduced' to logical reasoning are really saying either that judges and lawyers do not know themselves why they are doing what they are doing, or, that they do not know what they are doing in the first place. Only in these two situations is it logical to expect that they will not be able to communicate the dynamics of their decision-makings. There is, of course, another possibility, namely that they do know both what and why they are doing – but that they do not want to disclose the real grounds of their decision. The reasons for this are left to our imagination.

[177]Wittgenstein, *On Certainty*.

that the process is arbitrary, 'creative,' 'legal' – in short *not* logical. It simply means that major premises exist only potentially (as potential combinations) and have to be discovered. It is no different in e.g. physics, or medicine, where raw data are first confronted [hypothesis formation process], only then a hypothetical major premise is chosen, whereafter the adequacy of the hypothesis is tested in an experiment. Only then the question arises whether a particular 'fact pattern' fits such a hypothesis, i.e. whether the minor premise can be subsumed under the major premise. There is nothing praeterlogical in such reasoning. If properly done, if properly understood, it is eminently logical in the strictest sense of the word.[178]

Berman (and generally the Anglo-American jurisprudence) fails to take into account that legal 'major premises' are not directly the legal concepts themselves, but are composed of combinations of those legal concepts. Most criminal theorists either maintain or imply that definitions of particular crimes, such as murder and robbery, represent the automatic major premises from which the prosecutor has only to choose before he presses his accusation. If, on the other hand, it can be shown that the criminal law or code operates not from an absolutely predetermined set of given mechanic hypotheses, but from, at best, an indirectly determined, vast number of combinations of 'elements,' then clearly the protective nature of the principle of legality loses much of its credibility. For the purpose of predictability, there is an enormous difference in choosing between 263 crimes and, what is, as we shall see, in effect, 50 billion.

Consider, for example, a criminal code with 263 articles out of which 99 are found in the general part and the rest in the specific part, there are fifty billion combinations between such articles if one only takes the combinations of two, three, four and five and if one further assumes not only, that every article represents one single concept, but also that every single combination of two, three, four and five articles represents a single variation and therefore a single logical solution. Thus, even under such a simplified model there are innumerable combinations.[179] In other words, 'major premises' in law are not merely the explicitly announced and promulgated legal concepts such as 'battery,' 'self-defense,' 'murder,' etc. Major premises of law are combinations of those concepts. Only through such a permutational trick can a code of law ever aspire to even remotely reflect the rich variety of life.

How else could a criminal code with its limited number of basic concepts ever aspire to 'cover' the innumerable variations of human action. It is impossible to do that by exhaustive and explicit combinations of the elements

[178]See e.g. Popper, *supra* n. 115, especially sec. 30.

[179]Of course, in reality, an article in a criminal code is rarely one concept and even if it were, a combination of two concepts would not necessarily yield one simple correct answer.

into the particular 'major premise.' What the legislator does is that he breaks the life events down into their legally relevant aspects, i.e. elements which can then at will be recombined and which supply a rich source of 'major premises.'

The protections guaranteed by the principle of legality depend on the definiteness of the definitions of crimes (*corpora delictorum*). Ideally, what these definitions exclude is allowed and what they include is punishable. The matter, however, is not so simple.

Offenses themselves are not given in the criminal code, only the elements which the lawyers then recombine into accusations and defenses are given. But that kind of 'recombination' goes on in all empirical and scientific disciplines. That is, in fact, why in science the major premises are called 'hypotheses:'[180] one can never be certain that one has the 'right' major premise. One tests it in an experiment. For a lawyer this experiment is the phase of adjudication in criminal procedure.

Crimes are, therefore, the definitions in the special part *in* potential combination with just about every concept, rule, doctrine, or principle of the 'general part' of the criminal law. There is no such thing as an exhaustive definition of a crime; rather there are [combinations of] rules, doctrines and principles, [combinations] which can very well be treated as hypotheses (potential major premises) under which we subsume particular factual patterns that occur in the case life of criminal law.

According to traditional theory,[181] the definition of a crime is composed of particular elements, e.g. a murder is made of (1) the killing, (2) of another *human* being, (3) with *intent* to do just that, (4) where the act can be shown to have *caused* the death of the victim. All the elements must be present to constitute the crime.

It is, however, wrong to maintain that the only elements of the crime are those recounted in the definition, in the *corpus delicti*. Every codification of criminal law, is composed of a general as well as specific part, and it is clear that certain principles, doctrines and rules[182] will be applicable to all particular crimes even though they are only mentioned in the general part. Questions of intent, negligence, justification, excuse, insanity, etc represent an integral part of the definition of every crime, although they are rarely specifically mentioned there. They are, to use a mathematical simile, exposed before the bracket because they are common to all the factors within the bracket.

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[180]Hypothesis, from Greek *hypo* (under) + *thesis* (placing): a proposition stated merely as a basis for reasoning and argument.

[181]Perkins, *Criminal Law*: "The matter of definition is one of major importance in the whole field of criminal law. The reason is that our criminal philosophy [*sic*] does not permit a conviction for what was not clearly recognised as a crime at the time it was done."

[182]Hall, *supra* n. 29, at p. 17.

This is simply a question of convenience; instead of mentioning the possibility of justification in every single definition of a crime, one treats it comprehensively *in abstracto* in one article in the general part; exceptions may be stated for specific incriminations, but for all other crimes the issue has thus been resolved.

In other words, it could be said that every single incrimination in the specific part contains the potential of billions of combinations from the general part. We can assume, for example, that we are just combining the rule concerning murder with every single rule, doctrine or principle of the general part. That means that we would combine the question of murder with the question of intent, negligence, insanity, mistake of fact, mistake of law, duress, necessity, self defense, etc. A number of combinations including more than two propositions from the general part at one time, is immense. That tells us something about the illusory nature of the principle of legality. Under this rich source of 'major premises' the factual situations are subsumed.

4.5. The Nature of the Minor Premises

This brings us to the second question, to the question of minor premises: "the facts of particular cases or the terms of particular legal problems." Again, Professor Berman is quite right when he says that those legal facts are not "raw data but rather those facts that have been selected and classified in terms of legal categories." But again if the question is, "Are there any objective facts per se?" the answer is, "No, but not only under the heading of 'legal logic.'" Even in modern analytical philosophy, it is generally established that one cannot talk about facts per se. One does not have to go into mathematical and logical constructs such as *Gödel's proof*[183] in order to show that all systems have to be validated from without. Wittgenstein has called this a "mode of life;" Schopenhauer called it "representation" and attributed it to will. The issue, however, is simple. The existence of things can be given only within a certain function, purpose or frame of reference. This can only be a product of someone's need and the resulting purpose. Without this, things will still be there, perhaps, but they will be part of no one's system of reference.

Facts, in other words, change their nature when seen through different major premises, hypotheses, etc. The same basic object-event has innumerable identities anyway. In law a person is insane, in society he is a nuisance, in psychiatry he is psychotic, in religion he is possessed – so what is the 'basic fact' then? Is there objective truth per se? If it does not exist elsewhere, why should law be less logical if it sees the raw data – which, incidentally, are never totally 'raw' anyway, as we demonstrated above – through a variety

[183]See book with the same title by Nagel and Newman.

of different combinations of legal concepts? Wittgenstein has conclusively shown that all systems of reference in the last analysis are nothing but "modes of life," defined by purposes and interests that stand behind them. Every single concept in human logic, language, and existence, is subject to the qualification of, broadly speaking, human purpose.

The assertion, therefore, that legal facts do not exist by themselves, that they are selectively perceived, that they are subject to human perception and apperception, may very well be true – but it doesn't prove anything. It doesn't prove, for that matter, that legal minor premises are any different from any other minor premises.

The same human being is for one purpose a musician, for another a philosopher, for another a psychologist; he is one for his children and another for his wife. To say that that human being 'exists' *in abstracto* would be superficial. Therefore, the fact of existence of that human being is nothing per se, but always something different in relationship to the perceiver. If the perceiver happens to be a judge, who calls this human being a criminal – that does not mean this human being *is* a criminal. He is a criminal only insofar as the legal aspect of his existence is concerned. In all other aspects he remains a body, a mind, a father and a husband, etc. Consequently, if even in everyday life we distinguish between different aspects and identities of the same facts, then this simply means, that per se there are *no* facts.

The combinations between individual concepts, rules, doctrines and principles within the body of criminal law are intended to and, in fact probably do reflect in an almost empirical fashion an aspect of the outside world. If one sees a man with a gun in his hand running away from a body that lies on the street, for example, one initially adopts the hypothesis (major premise) of 'murder.' This hypothesis is arrived at because, first we assume that the gun was the tool of killing and, second, that the killing was by intent of the actor. Should we come closer to the man lying on the street, however, and see that he, too, has a gun in his hand, a new concept (rule) of 'self defense' is added to our hypothesised combination of concepts. Thus, our primary perception of reality differs very much indeed from our secondary apperception of the same reality. It was Paul Valéry, who once said that thinking is the negation of what is immediately before us. To a layman the situation described above would be composed of the raw material of human drama. When I say 'raw,' what I mean is simply that this material, if seen by the layman, is not necessarily interpreted in a legal way.

A lawyer, however, isn't so much concerned with the blood and the guns and the whole drama of the situation, rather he tends to dissect the situation in terms of the concepts, rules, principles and doctrines that he learned in the law school. His freedom to combine and recombine propositions may be limited, but it nevertheless exists. For example, if in this case the person

lying on the street were a wounded policeman, who had tried prior to the shooting to effectuate an arrest without probable cause, that could then be an illegal arrest against which the resistance is sometimes allowed. But the very (il)legality of the arrest represents a whole new world of combinations of procedural and constitutional concepts. I would, therefore, tend to say that freedom *does* exist and that in fact the difference between a good and bad lawyer is the difference between the extent of their respective ability to manipulate a greater or lesser number of concepts, rules, principles and doctrines, in other words, to be more or less free. This in consequence enables him to construct more specific combinations that, as it were, outspecify his opponent's hypothetical major premise.

The primary limitation on this freedom is the 'raw material' of the life situation itself. In the above illustration that 'raw material' would allow for the hypothesis concerning self defense, perhaps even illegal arrest and other similar issues of justification, but is does not seem to allow for, e.g. insanity, intoxication, mistake of law, etc. Thus, even if the 'facts' of the objective reality are not subject to one single interpretation, they do, once we invoke the perspective of criminal law, impose a limit of the number of their interpretations (hypothetical major premises of criminal law). After all, a dead body will probably not lead to the hypothesis of embezzlement.

The question is then quite philosophical, namely, whether there is one single correct interpretation of any factual pattern. Of course, ideally, to every factual pattern that occurs in criminal law, there will be a single correct legal answer. The principle of legality would thus eliminate any freedom and consequently any arbitrary use of power that underlies criminal law. However, given that there are billions and billions of combinations, it is difficult to say that this is true. Every day brings a new case and new combinations of 'facts.' Even if law, criminal law in our case, does reduce life to a handful of legal concepts which make certain aspects of real life ('facts') legally relevant, this is in fact why lawyers' perception of life is, by this criteria of essentiality, drained of all drama, it is nevertheless true that even that handful of legally relevant elements still provides for the immense richness of combinations.

So, although in the final analysis no absolute freedom of conceptualisation exists, the relative freedom does exist because the individual rules do not exhaust the richness of the legal nature of situations.

4.6. The Problem of the Burden of Proof

In an indirect way, the *Winship-Mullaney-Patterson* syndrome exposes the fact that the number of major premises in criminal law, although theoretically finite, is not as small as the number of articles in a criminal code. The issue there is: which are the elements of the offense?

The moment, however, that one begins to discuss the question of the location of the elements of the crime in a procedural context, the following problem emerges. Because of the presumption of innocence, the prosecution is required to prove the existence of all the elements of the crime. Because they potentially apply to every crime, does this refer to those elements, such as justification, which are only mentioned in the general part and not the definition itself?

The reasons for their inclusion in the general part have nothing to do with allocation of the burden of proof. The former are a matter of conceptual convenience, the latter a matter of guaranteeing. That the problem of insanity is potentially a problem in every single criminal case which leads to its treatment in the general rather than in the special part of the criminal code is no reason to shift the burden of proof to the defendant. The principle of legality, with its requirement that punishment be imposed only in cases where all the elements of the crime are proved, loses much of its protective significance, if the defendant is made to carry the risk of non-persuasion.[184]

The procedural issue of the allocation of *onus probandi* goes back to the *Constitutio Criminalis Carolina* (1532). *Carolina* required, for example, that the defendant prove that his act was committed in self-defense.[185] Fletcher cites the Prussian Criminal Ordinance of 1785, § 367: "One having the proof of the act against him is subject to the statutory punishment unless he proves

[184]Hall, *supra* n. 29, at p. 13, n.25:

> Equally serious has been the influence of criminal procedure upon theories of substantive criminal law. Obviously, the prosecution should not, e.g. be required to prove all the material elements that determine penal liability in all cases; it can only be expected in first instance to make out a *prima facie* case that suffices for the particular situation. The respective burdens and the logic of proof, as well as canons of orderly procedure, dominate the judicial inquiry. This also determines the meaning of '*corpus delicti.*' That the origin of this (*Tatbestand*) is procedural, is indicated in Feuerbach's treatment of it in the procedural part of his *Lehrbuch des Gemeinen in Deutschland Geltenden Peinlichen Rechts* (p. 524-25, 6th ed. 1818).

Curiously, Hall, instead of pointing out that the very existence of the guarantee of the principle of legality depends on putting the risk of non-persuasion upon the prosecution (presumption of innocence), rather relegates the whole problem as one of 'adjective law.' What becomes of the principle of legality's protection, for example, if the defendant is required to prove the absence of the elements of *Tatbestand* under presumption of guilt?

[185]Constitutio Criminalis Carolina Art. 141 (1532). In Art. 151 *Carolina* implies that proof will have to be in some cases submitted by the defendant: "When the articles of proof submitted by the defendant are not persuasive ...."Art. 154: "When someone who was [observed] in the act of murder is gaoled and wished to adduce his innocence." *Id.* Arts. 151, 154. See Langbein, *Prosecuting Crime in the Renaissance*, p. 259-308.

that under the circumstances that act was not an offense."[186] Here, however, we address the very possibility of the existence of an act (i.e. presumably, the presence of the required elements of the crime), if the absence of the exculpatory elements has not at the same time been proved.[187] For example, how is it at all possible to speak of murder, if it has not been shown that the act was not a self-defense? Is not the absence of self-defense an element of the crime? What if there were no general part, and every particular definition of murder had to require the absence of self-defense?

It is no argument to say, as Lord Bayley did in *King v. Turner,*[188] that "there is no hardship in casting the burden of the affirmative proof on the defendant, because he must be presumed to know his own qualification, and to be able to prove it," or vice versa*,* "if the onus of proving the negative is to lie on the other party, it will be the cause of many offenders escaping conviction."

In *King v. Turner*, a case "against a carrier for having game in his possession," the question was raised whether it is up to prosecution not only to show that Turner actually possessed pheasants and hares in violation of 5 Anne C. 14; § 2, but also that (1) "the same were not placed in the hands of the said J. Turner, by any person or persons qualified to kill game (2) that the said J. Turner had not then any lands or tenements, or any other estate of inheritance in his own right of the clear yearly value of one hundred pounds per annum," etc. The defense argued that "it does not appear that any evidence was given … negativing the qualifications in the statute, … for if the party can be found qualified in any one respect, the justices have no jurisdiction" i.e. there is no passive legitimation.[189]

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[186] Fletcher, *supra* n. 95, at p. 524.

[187] In other words: the presence of the inculpatory element + the absence of the exculpatory elements = *corpus delicti*. The absence of the exculpatory elements, such as justification and excuse, is the negation of a negation. It is often maintained that the burden should be on the one who asserts, not on the one who denies and, therefore, that the prosecution cannot be expected to show the absence of e.g. justification. "It is often said that the party who must establish the affirmative proposition has the burden of proof on the issue. But language can be manipulated so as to state most propositions either negatively or affirmatively." Fleming, *Burdens of Proof*.

Model Penal Code § 1.13 (1) requires "each element of the offense to be proved beyond a reasonable doubt." But what it gives with its left hand, it takes away with its rights one; (2) Paragraph 1. of this section does not: a) require the disproof of an affirmative defense unless and until there is evidence supporting such defense; b) apply to any defense which the Code or another statute plainly requires the defendant to prove by a preponderance of evidence (3) A ground of defense is affirmative, within the intendment of paragraph 2.(a) of this section, when: a) it arises under a section of the Code which so provides; or b) it involves a matter of excuse or justification peculiarly within the knowledge of the defendant on which he can fairly be required to adduce supporting evidence.

[188] 5 M. & S. at 212.

[189] 5 M. & S. at 208-09.

The issue was whether these negative preconditions ('qualifications'), especially since they were specifically enumerated in the definition of the crime itself, were to be proved by the prosecution: "The question is, upon whom the *onus probandi* lies; whether it lies upon the person who affirms a qualification, to prove the affirmative, or upon the informer (i.e. the accuser), who denies any qualifications to prove the negative.[190]

> There are, I think about ten different heads of qualification enumerated in the statute … to which the proof may be applied; and, according to the argument of today, every person who lays an information of this sort is bound to give satisfactory evidence before the magistrates to negate the defendant's qualification upon each of those several heads. The argument really comes to this, that there would be a moral impossibility [i.e. a logical impossibility] of ever convicting upon such information.
>
> If the informer should establish the negative of any part of these different qualifications, that would be insufficient, because it would be said, *non liquet*, but that the defendant may be qualified under the other. And does not, then, common sense show, that the burden of proof ought to be cast on the person, who, by establishing any one of the qualifications, will be well defended?[191]

Here the question can still be seen as one of the allocation of burden of proof. But this is only because the negative preconditions described above are specifically mentioned in the definition of illegal possession of game according to 5 Anne C. 14, § 2.

Consider the extrapolation of this issue a century and a half later. In *Mullaney v. Wilbur*,[192] and in *Patterson v. New York*,[193] the issue of what are the "elements of the crime" turned on the locus of their mention and thus, indirectly at least, the question of how the major premises, i.e. the criminal law concepts, are arrived at, was dealt with for the first time in a specific case.

In light of *In Re Winship*, 397 U.S. 358 (1970) where the Supreme Court held that the prosecution has to prove every single element of the crime, it becomes very important to know which *are* the elements of the 'definition' of the crime.[194] Traditionally, the elements of a crime were considered to be the same as the elements of the definition of it. The definition of a crime, the so-called *corpus delicti*, is the definition given in the specific part of the criminal law or code, mentioning only those elements which are particular or

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[190] *Id.* at 210.
[191] *Id.*
[192] 421 U.S. 684 (1975).
[193] 432 U.S. 197 (1977).
[194] The assumption here is that there must exist some 'definition' of a crime in order that one particular event can be distinguished from another event, i.e. that when we see a homicide, we can know that it is not check-embezzlement.

idiosyncratic to that specific crime. In other words, it does not mention those elements in the general part: the body of issues applicable to every crime defined in the specific part of criminal code. Logically then one could say that general issues such as the questions of responsibility, insanity, particular modes of guilt, etc are implied whenever an issue from the special part is in question. 'Implied' in this context simply means that they must be 'taken into account,' even though they are not specifically mentioned.

This, of course, raises the question of whether those issues represent a part of the definition of a crime, even though they are not specifically mentioned. If they do, or rather if every single one of them is an element of the crime, then, according to *Winship*, each of these elements must be proved by the prosecution. This hypothesis pushed to the absurd has as its conclusion that, during the trial, the defendant could invoke every possible defense and thereby shift the burden to the prosecution to show the presence or absence, as the case might be, of that particular exculpating circumstance.[195]

In *Mullaney*, the problem was that the state of Maine required that a defendant charged with murder (which carries a mandatory sentence of life imprisonment) himself must prove that he acted in "the heat of passion on sudden provocation" in order to reduce the homicide charge to one of manslaughter. Citing *Winship* the Court held that the Maine rule did not comport with the requirement of the due process clause of the Fourteenth Amendment, and that the prosecution must prove beyond a reasonable doubt "every fact necessary to constitute the crime" charged. In *Mullaney*, therefore, in light of the *Winship* theory, 'the absence of sudden provocation' – the negative precondition to the conviction for murder – was held to be a 'fact necessary to constitute the crime' charged. In a sense, therefore, it is not, or may not be, specifically mentioned in the definition of that crime. The definition of murder does not mention "the fit of passion on sudden provocation;" if it is mentioned at all in the specific part, it is in the definition of involuntary manslaughter.[196] The defendant in *Mullaney* was charged with murder and raised the defense of "sudden provocation."[197]

The *Winship* rule that the prosecution must prove beyond a reasonable doubt every fact necessary to constitute the crime charged is vague, but raises

[195] *King v. Turner*, 105 Eng. Rep. 1026 [K.B. 1816]; see also Perkins, *supra* n. 181 at p. 49.
[196] 424 U.S. 6844 (1975). See the Maine murder statute, which provides: "Whoever unlawfully kills a human being with malice aforethought, either express or implied, is guilty of murder and shall be punished by imprisonment for life." Me. Rev. Stat. Ann. tit. 17, § 2651 (1964). The manslaughter statue in relevant parts provides: "Whoever unlawfully kills a human being in the heat of passion, on sudden provocation, without express or implied malice aforethought, shall be punished by a fine of not more than § 1,000 or by imprisonment for not more than 20 years." *Id.* tit. 17§ 2551 (1964).
[197] 421 U.S. 684 (1975).

an interesting theoretical issue, because in particular situations it is difficult to say which are the "fact[s] necessary to constitute the crime charged."[198] In *Mullaney*, if the defense had not raised the question, it would not have been necessary for the prosecution to bother about sudden provocation at all. However, since the defense *did* raise the issue of sudden provocation, the burden shifted to the prosecution to prove the absence of "sudden provocation," a fact necessary to constitute the crime charged, although not specifically mentioned in the definition of it.

The rule one might logically infer from *Mullaney* is that an absolute or relative defense must be raised by the defense only if the proof of that element is necessary to convict the defendant of the crime charged. The repercussions of such a rule were apparently too destructive of the structure of the criminal process to be fully acceptable to the Burger court.

In *Patterson v. New York*,[199] the defendant was charged with second degree murder. The New York statute specifically mentions two necessary elements of second degree murder: first, the intent to cause the death of another person and, second, the actual causing of the death of that person.[200] To reduce the charge from second degree murder to manslaughter, however, it is necessary to show the element of "extreme emotional disturbance."[201] The question then becomes whether, according to *Winship*, the absence of this "extreme emotional disturbance" is one of the "facts necessary to constitute the crime" of murder. If then we take *Mullaney* into account, the analogy seems to be almost perfect, because in *Mullaney* the problem concerned reduction of a charge of murder to manslaughter on the grounds of "heat of passion on sudden provocation;" in *Patterson* the same reducing of second degree murder to manslaughter was based on the element of "extreme emotional disturbance" – a different term for the same concept.

If that analogy were consistently carried through, *Patterson* would be perfectly identical to *Mullaney*. Not only are the situations analogous because of the similarity between the "heat of passion upon sudden provocation" and "extreme emotional disturbance," but the burden of proof to demonstrate this relevant circumstance ought to be upon the prosecution, since it is not only a "fact necessary to constitute the crime" charged, according to *Winship*, but also a fact the absence of which the prosecution must prove to win its case.

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[198] *Id.*

[199] 432 U.S. 197 (1977).

[200] N.Y. Penal Law § 125.25 (McKinney 1975): "*Murder in the second degree*: A person is guilty of murder in the second degree when: With intent to cause the death of another person, he causes the death of such person or of a third person."

[201] 432 U.S. 197 (1977).

The distinction, therefore, between *Mullaney* and *Patterson* can only be a contrived one, because it seems that the Court could not explicitly overrule itself within two years. At the very least, one can say that the cases are not incompatible on substantive grounds and that they will therefore have to be distinguished on formal grounds.

Upon what formal grounds can we distinguish *Patterson* from *Mullaney*? The Supreme Court distinguishes between necessary facts which are and those which are not expressly or implicitly mentioned in the definition of crime. As for the difference between "premeditation" and the "absence of provocation," premeditation is excluded if provocation is present, and vice versa; thus, according to the logic of *Patterson*, the absence of provocation is mentioned in the definition of murder, i.e. it implies (negatively) in the concept of premeditation. In other words, the Maine statute defining first degree murder mentions an element – premeditation – which the prosecution must prove, even though what is relevant is its absence.

The New York Penal Law, however, in defining second degree murder, measures only the "intent to cause the death of another person" and the actual causation of the death of such a person; it mentions nothing to which the concept of "extreme emotional disturbance" would represent the negative side.[202] Mr Justice Powell, who wrote the majority opinion in *Mullaney*, wrote the dissenting opinion in *Patterson*. His dissent included this critique:

> The test the Court today establishes, allows a legislature to shift, virtually at will, the burden of persuasion with respect to any factor in a criminal case, so long as it is careful not to mention the non-existence of that factor in the statutory language that defined the crime. The sole requirement is that any references to the fact would be confined to those sections that provide for the affirmative defense.[203]

The problem is not with *Patterson*. If anything, it is an attempt to mend the sweeping ruling of *Mullaney*, which extrapolates from *Winship*. The ruling in *Winship* talks about the "facts necessary to constitute a crime" as if these facts were a constant absolutely given by the particular definition of the particular crime.

This whole mess of symbolic logic is created by the old illusion called *corpus delicti*: the facts necessary to constitute the crime. The elements of the crime, however, are never exhausted by the definition of the crime. If such were the case, the task of adjudication could be relegated to a computer. In other words, the criteria of what is essential, or not, are not determined solely by the definition of crime, but are determined also by the behaviour of both parties, the defense and the prosecution, during the trial.

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[202] N.Y. Penal Law § 125.25.

[203] 432 U.S. at 204.

For example, a homicide is murder when premeditation is present, but becomes manslaughter when this premeditation is based upon provocation; adding the new element of 'provocation' changes the nature of the previously required element, 'premeditation.' In addition, the premeditated-provoked homicide could have been perpetrated in putative self-defense, in which case an added element – a mistake of fact – changes the nature of all previously required elements. In most cases certain of these elements will be introduced by the prosecution. In our case these would be (1) premeditation and (2) the proposition that the defense was not an actual self-defense. Mistake of fact, insanity, justification, will, on the other hand, normally be introduced by the defense. All these facts, however, could fall under the category that *Winship* defined as "facts necessary to constitute the crime charged." Yet it does not necessarily follow that the prosecution will either introduce or in fact prove them beyond a reasonable doubt.

One could say, therefore, that the *Winship* requirement is based on the illusion that there is a small number of well-defined sets of facts necessary to constitute the crime charged. This illusion was necessary, however, since it served as the criterion for the distribution of proof.[204]

With respect to this distribution of proof, there are two extreme solutions. If we must talk about "facts necessary to constitute the crime," the first procedural solution is the inclusion of all possible relevant issues that might be raised by the defense during the trial.[205] This was the route taken by the court in *Winship* and *Mullaney*, but we have shown that this is impossible in light of the requirement that controversies be focused.[206]

The other extreme is to limit the relevant facts and issues to those specifically mentioned in the particular definition of the crime. This is the ruling of *Patterson*. The consequence is that the issues not specifically mentioned in the definition of the crime must, for no good logical reason, be proved, at least to a certain standard of persuasion, by the defense. The distribution of the burden of proof should not be allocated simply on the basis that such fortuitous and extrinsic circumstances as the possibility of an 'element' of the crime may be mentioned in the general or specific part of the criminal code. This is so because such issues as insanity, justification, and modes of guilt, are not placed in the general part for the purpose of assigning the burden of proof. They are put there simply to avoid repetition and to reduce the number of possible combinations of discrete provisions.

In his book, *Rethinking Criminal Law*, Professor Fletcher deals extensively with the question of burden of proof. According to his theory, the problem

[204]See *supra* n. 137.
[205]*King v. Turner*, 5 M. & S. 205 (1816).
[206]See *supra* n. 184.

of the burden of proof is that it might be interpreted either as "burden of production" (i.e. "burden to raise a triable issue of fact" alias "the burden of going forward:" the burden of producing some evidence in order to receive instruction on the issue) or the "burden of persuasion." The distinction between the two different burdens is of course one of intensity, the question being whether the defendant has to carry the burden of production or the burden of persuasion in cases where he raises an affirmative defense such as insanity, self-defense, mistake of fact, etc.

Fletcher regards this as a burden of proof question. We, however, now know that the question cannot be resolved on the basis of the distinction between a rule and an exception. In his interesting discussion, Professor Fletcher cites the ancient Latin formula relating to the burden of proving the affirmative assertion. *Ei incumbit probatio qui dicit; non qui negat*.[207] The problem with this formula is not what it says, but what it assumes. The formula assumes that there is a difference between the rule and an exception to the rule. But of course the exceptions to the rules must likewise be based on other rules. In criminal law, if the rule is the definition of murder, the exception to the guilt of murder must likewise be based on a rule concerning insanity, self-defense, mistake of fact, lack of age, etc.

If a rule concerning a particular crime, e.g. murder, is not seen in isolation, but is seen as being potentially connected to every single rule of the general part of the criminal code or law, then of course the distinction between the rule and the exception loses all its meaning. It loses all its meaning because the exception to the rule – the burden of proof to show the facts that support that exception being on the defendant – can be defined as an invocation of a rule more specific than the rule in question, the consequence being that the more general rule does not apply. The general validity of the power of exception to derogate the rule, therefore, derives its power from the principle that a more specific law derogates a more general law.

Consequently, no definition of any particular crime in the substantive criminal law can be seen as a stable rule. It cannot be seen in isolation, because it is potentially connected to all issues and rules defined in the general part of the criminal code or law. Insofar as that conclusion applies, there does not exist what is usually called a definition of a crime. In other words, every definition of a crime is composed of the particular definition in the specific part of the criminal code or law and potentially the whole general part of the criminal law or code. Consequently, to allocate the burden of proof according to whether a particular element is mentioned in the general part of the criminal code or law is bound to be inapposite. When the *Winship* rule

[207] The burden of proving a fact rests on the party who asserts it, not on the party who denies it. Paul, Lib LXIX, Ad Edictum, Justinian, Digest 22.3.2., Fletcher (*supra* n. 95) at p. 520, n. 15.

that the prosecution must prove every element of a crime beyond reasonable doubt is applied, it means inevitable that the prosecution would have to show not only the elements of the *corpus delicti*, but also all other elements that 'might come into consideration.'

The question then arises, how will those potentially relevant elements from the general part of the criminal code or law 'come into consideration?' It is obvious that the court in considering a particular criminal case will not be either able or willing to consider all the potential issues from the general part of the criminal code. It is obvious that the defendant cannot invoke by mere abstract and general claim all of the potentially exculpatory provisions of the general type. The reasons for that are at least twofold. First, the prosecution would be faced with an impossibility of showing the absence of a number of issues which would in such a context be very metaphysical. Take the example of mistake of fact: When we prove the presence of mistake of fact we usually show the circumstances which led to that state of mind. However, were one to show the absence of mistake of fact, one would have to show a purely psychological fact without any objective indicators. Second, the volume of the evidence that would have to be submitted in every particular case would be such that it would tend to make the processing of criminal cases even more impractical than it already is.

It is for that reason, therefore that the defendant has to choose the issues from the general part of the criminal code or law that he deems applicable in his particular case. If he thinks that he was under the mistake of fact then he must at least raise the issue. Enough burden of production must be assigned to him, however, in order to prevent frivolous raising of issues one after another, which would lead to a cascade of consecutive evidentiary attempts and would run against the consideration that we mentioned above. In order to make the issue procedurally relevant, therefore, the defendant must produce enough evidence to raise a reasonable doubt in the minds of the adjudicators. The implication here, of course, is that in any criminal case there exists a series of rebuttable presumptions concerning the defendant's sanity, the absence of mistake of fact, the absence of necessity, the absence of duress, the absence of any other form of justification. These presumptions are easily overcome by the defendant if he satisfies the burden of production. In terms of *Winship* rule, then, one could say that satisfying the burden of production puts the general issue within the specific definition, which means that the prosecution has to prove beyond reasonable doubt that the exculpatory provision will not apply in that particular case.

The problem is not only one of rule and exception, the rule being in the specific and the exception being in the general part of the criminal code. I see the problem as a symptom of a fundamental incompatibility between substantive criminal law and the adversary criminal procedure.

The model of substantive criminal law, especially as for example in the Model Penal Code, is one that invites clear-cut, yes-or-no monocentric conclusions: the defendant is either guilty or innocent. This model thus does not admit of probability and the probabilistic estimates of guilt (insofar as that problem arises it is brushed aside by the presumption of innocence). Consequently, for the substantive model there is no such thing as 'allocation' of the 'burden of proof.' There is no such thing because the actor according to the laws of substantive criminal law is either guilty or innocent, not 'probably' guilty or 'probably' innocent. The concepts of 'burden of proof,' 'burden of persuasion,' and 'burden of production,' are adversarial concepts and as such incompatible with the whole different way of reasoning characteristic of the substantive criminal law.

They are incompatible for the simple reason that they make sense only within an adversary conflict, an adversary alternation of hypotheses of guilt and innocence – a model that is primarily intended to further ambivalent impartiality of the judge. Truthfinding is secondary here.

Thus, while the subject matter of substantive criminal law remains "truth, the whole truth, and nothing but the truth," criminal procedure shrugs its shoulders and says that truth is not really relevant since within an adversary system what matters is the impartial resolution of conflict. Were it not for the adversary criminal procedure the question of allocation of the burden of proof would have never arisen in the first place, as it does not in the Continental criminal procedure (where the judge himself is allowed to find out what happened in the criminal case).

The whole idea of the 'burden of proof' implies that the parties themselves control the influx of information and that, therefore, the truth is going to be discovered only insofar as parties to the conflict want to discover it. It follows that truthfinding is generally secondary in adversary procedures. The whole *Mullaney-Patterson* problem is also one of a cultural conflict: a conflict between two different perceptions of the importance of 'truth.'

On the other hand, the *Winship-Mullaney-Patterson* problem seems to present a typical false dilemma. The *Winship* principle that the prosecution must prove every single element of the crime is founded on a misunderstanding of what is meant by the elements of the crime. The traditional *corpus delicti* teaching indeed maintained that the elements of the crime are those specifically mentioned in the definition of the crime. Berman,[208] too, in his position that the major premises in law are not given (and, consequently, neither are the minor, because the "facts" are perceived through the hypothetical major premise) allowed himself to be seduced by this patently wrong assumption.

[208] Berman, *supra* n. 115.

The fact that some 'elements' of crimes are extracted very much like common denominators and exposed as such in the general part of the criminal code, does not make them any less applicable, any less 'elements,' just because they are mentioned only once for all the crimes catalogued in the specific part of the code. The *Winship* illusion that the number of 'elements' is so limited was maintained for such a long time simply because to hold that there are billions of possible major premises would be in clear contradiction to the simple variant of the formalist illusion of the strict interpretation of penal statutes.

4.7. Judicial Interpretation

Ideally rules would not be abstract, but would be ready-made advance and concrete decisions. Rules are intended as abstract advance decisions of anticipated controversial situations only because it is impossible *in concreto* to predict future conflicts and controversies. But in principle a 'rule' that 'A is to be punished by two months imprisonment when on 27 September 1984 he steals B's bicycle,' would be ideal – there would be no obscurity, no interpretation, no arbitrariness. But absent human omniscience and omnipotence and the *discrepancy between the general legal act (abstract rule) and the specific legal act* (concrete decision subsuming the facts under appropriate abstract rule) is inevitable. The abstract nature of the general legal act is an attempt to transcend time: what cannot be even predicted *in concreto* can be predicted and decided in advance *in abstracto*. Indeed, it is possible to say that through abstract rules the past governs the future.

The creation of the abstract rule presumes that a number of future situations, which the rule is intended to decide in advance, will have certain essential common characteristics.[209] The rule establishes these essential common characteristics as the elements of its definition (disposition) and it thereby makes them legally relevant. The maker of an abstract rule unconsciously assumes that there exists an essential quality of, e.g. larceny

[209] See Aristotle, *supra* n. 127:

> What causes the problem is that the equitable is not just in the legal sense of 'just' but as a corrective of what is legally just. The reason is that all law is universal, but there are some things about it which it is not possible to speak correctly in universal terms. Now, in situations where it is necessary to speak in universal terms but impossible to do so correctly, the law takes the majority of cases, fully realising in what respect it misses the mark. The law itself is none the less correct. For the mistake lies neither in the law nor in the lawgiver, but in the nature of the case.

that is pre-eminent to any particular theft, just as triangles, different as they might be, have in common a certain pre-eminent quality of the triangle.

The choice here is clear: either we have no rules, but have judges who make *ex post facto* decisions, as was, to a large extent, the case with the common law; or, one must have clear advance definitions of what is essential and what is not. Clear definitions, however, are only possible with the above described assumptions concerning the intelligible essences (or whatever one chooses to call the characteristics which exist as common denominators of many particular concrete events). Returning to our example of a theft, once the assumption of larceny is made, the problem is reduced to finding the essence of that quality of larceny. Once properly defined, the concept 'theft' then becomes at the same time abstract and concise. The 'abstraction' is merely from elements inessential to the "quality of larceny."[210]

If legality as a postulate is intended to prevent judicial arbitrariness, that simply means that legality is an attempt to determine in advance the legal consequences of certain events. Thus, ideally, legality would be hypothetical, abstract and anticipatory decision-making, totally determining the legal outcomes of the future situations. These 'future situations' are, of course, anticipated and in criminal law 'incriminated' because the legislature knows on the basis of past experience that they are likely to re-occur. But surely we do not hypothesise here that the legislator is omniscient: how then can he not only predict future events but even determine their legal outcomes?

Two solutions combine to help the legislator out of this predicament. First, as we showed above, there is the possibility to abstract from reality (from Latin *ab trahere*, to draw from) by reducing in the process the actual reality to the legally relevant reality. The latter, of course, is nothing but a

[210]If there be any need to further illustrate that point one must only consider the difference between common law treatment of "larceny, embezzlement, false pretense, extortion, blackmail, fraudulent conversions, receiving stolen property and the like," (Model Penal Code § 223.1) and the lean and terse Continental language that eventually prevailed over the common law casuistic conceptual confusion: "A person is guilty of theft if he takes, or exercises unlawful control over movable property of another with purpose to deprive him thereof." (MPC § 223.2)

This same capitulation of casuistry is obvious all over the Model Penal Code – a veritable reception of the Continental criminal theory. Compare, for example, the present M.P.C. definition of insanity – it certainly is *not* a judicial invention, especially not after escapades *à la Durham* – with the 1937 Swiss definition. Fatherhood is undeniable even to the point where the translation of the French word 'apprécier' is wrongly translated into English 'appreciate' – thereby carrying improper volitive connotation. The proper 'credit' in Anglo-Saxon criminal law was, until recently, (Fletcher, *supra* n. 95) not given to Continental 'extractors' of the 'essences' and is thus amusing to see, e.g. Justice Powell refers to the diction of Model Penal Code as "the leaner language of the 20th century." *Patterson v. New York*, U.S. 97 S. Ct. 2319, L. Ed. 2d (1977) as cited in Vorenberg, *Criminal Law and Procedure*, Supplement 18.

series of denominators common to life events the legislator thinks he wants to influence in advance. We saw how precarious this process of extracting the lowest common denominators is. Second, the legislator breaks the actual reality down into its legally relevant constituent elements. This analytical process, of course, did not occur *in abstracto*. When case after case shows, for example, that people accused of murder defend themselves by saying that they did it in defending themselves against the victim, the concept of self-defence emerges. The concepts of self-defense is then withdrawn (abstracted) from particular *corpora delicti* and placed in the general stack of legally relevant elements available in any single case. What this means is that the real life situations have been broken down analytically so that the concepts may be recombined in solving future legal problems. Not every murder charge will involve the self-defense exception, but some will. When that happens, the law provides the criteria in advance. This in turn means that every intelligible criminal case represents a particular re-combination of legally relevant concepts: death, intent, causal link, self-defense, etc.

This introduces a peculiar aspect of the problem of legality. It is surprising – to put it mildly – that the question has never been put this way: "Is the law really in the rules (concepts)? Or is it in combinations of the rules (concepts)? Assuming that the rules are predetermined, does that mean that the combinations are likewise pre-determined?

This problem has in jurisprudence been called 'interpretation.' The term is misleading because it only addresses the meaning problem of the concept and rule. It, therefore, reduces the problem to philosophy of language. However, aside from this qualitative aspect of the problem of 'interpretation,' there is a distinct quantitative problem. It is interesting, for example, to work out the number of possible combinations in a single criminal code, not, perhaps to prove anything positive, but simply to show how illusionary is the idea of predetermination in law.

This ideal of predetermination, although it exists only latently today, has had an enormous influence in the nature of both Continental and Anglo-Saxon criminal law. Take for example, a criminal code with 362 articles, of which 99 are in the general part and 263 in the special part.[211] Assume that every article represents only one issue, or, in other words, that the concept of murder, theft, check-embezzlement, as well as concepts such as insanity, intent, negligence, are one-dimensional issues, that they do not have multi-faceted natures. Further, assume that a combination of any two, three, four or five issues *eo ipso* yields only one possible and correct solution.[212]

[211]Yugoslav Criminal Code as of 1972.

[212]Thus, we are not talking of murders, but of murders in conjunction with insanity, self-defense, *dolus eventualis*, rape (felony murder rule), etc.

The judge sees a certain combination of facts, and, because he is a lawyer, spots the legally relevant aspects of the fact pattern. He breaks down the event and subsumes its dimensions under the different provisions of the code. Thus, what takes place is a recombination of the basic elements given in the criminal code, a reordering of legal concepts to fit the actual combination of facts in the purported offense on trial.[213] Every such reordering represents something new because as a combination it is not specifically predetermined by the law. Most criminal codes are broken into different articles precisely for the purpose of making possible these recombinations, thereby making it possible to cover many probable and less probable life-situations. This purpose proves that the legislator realises the necessity of allowing judges and lawyers to recombine the elements of the criminal code. The legislator thus implicitly recognises the right of judges to 'make' law insofar as the recombination of the issues in the code is something new and different from the code itself. A code, in other words, is not merely the sum of its parts. It constitutes a dynamic whole in which certain combinations whose existence will not be apparent to the legislator at the time of the promulgation, wait to be discovered.[214]

The question arises as to the extent to which the recombinations of different issues in the criminal code are new and different from the rules themselves. This problem is closely related to the question of how many possible outcomes there are in a particular combination of issues. For example, does the application of the issue of insanity in the case of check embezzlement yield only one correct answer, or two, or three? 'Correct' in this case means 'logically compatible with the code as a whole and with the specific applicable provisions.' If there is more than one possible solution to such a problem, then the choice is left to the judge and that choice is not predetermined. It therefore allows for arbitrariness.

[213]This is assumed upon a presupposition that a combination of two issues, such as, for example, murder and self-defense, in itself represents a problem of legal interpretation, since the concept of self-defense in our example of murder is a different question than in a case where self-defense is combined with a traffic violation or self-defense in a case of rape.

[214]Surprisingly, the issue does not seem to be taken up even by those theorists who approach law as a normative system. See e.g. the otherwise excellent Alchourron & Bulyigin, *supra* n. 30, at p. 29. The authors ascribe the law's ability to decide all individual cases solely to the abstract nature of legal norms because abstract norms can cover an infinite number of generic cases. While this is in fact true, it does not tell the whole story. The combination of abstract norms, as explained above, infinitely enhances the law's ability to respond to reality, for now it not only covers all the specifically anticipated generic cases (e.g. 'straight' murders), but also all the possible recombinations of issues decided separately (insanity, guilt, justifications) without specific reference as to what, e.g. insanity must mean not only in murders but also in rapes, check-embezzlements, etc.

An ideally conceptualised criminal code would always allow for only one logically correct solution, at the same time corresponding to the code's policy intentions. In such a case, if in fact all the major premises were specifically worked out in advance by the legislator, they would be predetermined.

I would like to show what this means in terms of a mathematical analysis.

We are here dealing with 362 issues (articles) which make combinations of two, three, four, five, etc elements at a time. Theoretically it is possible to have combinations from two at a time up to 362 at a time, whereas as a matter of practice we hypothesise that the application of the rules of criminal law rarely involves more than five issues at a time, if for no other reason than because the human mind finds it difficult to combine more than that many issues and still solve the problem. We shall limit ourselves to combinations of up to five at a time, assuming, however, that if a combination of two is comprehended in the combination of three, four, and five at a time, then the problem is not the same and these combinations ought to be counted separately.

The formula for computing the number of combinations (C) or r issues at a time out of a total set of n issues is as follows:

$$C_{r\,n} = \frac{n!}{r!\,(n-4)!}$$

Thus, following the above assumptions, the number of combinations, taken two, three, four and five at a time, is

$$\binom{362}{2} + \binom{362}{3} + \binom{362}{4} + \binom{362}{5} = 5.11 \times 10^{10}$$

Fifty billion combinations is a number that can never be *de facto* worked out by any legislator, yet in a perfect criminal code all these combinations would each yield a single correct answer. Although the legislator has not actually worked out all the possible combinations by thorough logical consistency and the structure of the code, it could be concluded that the legislator has nevertheless prevented the judge from 'interpreting' the rules of the criminal code.

The above computation is slightly misleading because it treats alike combinations of two, three, four, and five issues, whether they are within the general or special part of the code. If we take into account this separation into the general and special part, it becomes clear that out of two issues one has to be from the general part and one from the special part, because there can be no question of guilt, insanity, etc unless there is a special act involved, and this means that at least one issue must derive from the special part. The converse is also true because there can be no offense (special part) which does not involve at least the question of guilt (general part). The same is true of combinations of three issues taken at a time (at least one issue from either the general or special part), four at a time and five at a time.

This requires a modification of the above formula as follows:

$$[(362)\text{x } 99] + [(99) \text{ x } 362] = 4{,}686{,}660$$
$$2 \qquad\qquad 2$$

The above computations hold true where we take three issues at a time. To this we have to add the number of combinations where we take two issues at a time (263 x 99 = 26,037), and the analogous computation of the number of combinations for four and five issues taken at a time, and the total number is 672,257,9882 possible combinations.

This proves the utility of dividing the issues into the general and special part: 5 x 1010 as compared with 5 x 108. Of course, this reduction is not related to the formal separation of the issues into the general and special part of the code, and it holds just as true for the common law as it does for the Continental law: the effect derives from the conceptual rather than the formal separation.

We can now logically assume that there are perhaps 500,000 crimes in the average criminal code. The question arises whether it still makes sense to speak of the principle of legality in such a context. Or shall we again revert to Poulantzas and conclude that the guarantees of anticipatory abstraction have been drowned in legal discursiveness?

Answers to this question will be on the one hand an illusory formalist response to the effect that given sufficiently concise conceptualisation, it is possible to have a code in which the 500,000 possible combinations are nevertheless predetermined. Many of the theorists – Alchourron, Bulyigin, Horowitz and to some extent Fletcher – start from this presupposition. The ideal of a logically consistent and gapless normative system, however, will be rejected by those who start from the trouble of semantic indefiniteness in which legal concepts must of necessity be defined, those who reject the whole idea of the guaranteeing function of the law, and those who believe that formalism is by the very fact of its attempted reliance on semantic symbols a symptom of the disease it tries to cure.

In any event, it is clear that the combinations will have to be worked out in the process of concretisation which has a different meaning for us now. This process may be more or less predetermined, there may be a greater or smaller possibility that a single correct combination to every presented fact pattern may exist. To the extent that there can be no single correct solution, the adjudicator will be given a range of logically consistent choices to choose from by reference to non-logical criteria. It is the validity of these criteria that represents the central problem of legality.

The judicial interpretation will, in terms of our analysis, mean two things. First, it may simply mean the establishment of the single correct answer to the problem presented by any one of the 500,000 combinations. Second, it

may mean the 'creative process' of finding a solution to those cases which cannot be decided on purely formal logical grounds, either because there are two or more logical possibilities or because there are no logical solutions to the question presented.

One can speculate on the percentage of cases that will need to be submitted to this 'creative process,' but no matter whether large or small, this estimate will have to be corrected by the observation that the perception of 'facts' is in many cases affected by the adoption of this or that legal combination. For example, if a prosecutor or investigator decides that the case before him involves a putative self-defense homicide, he will look for facts that tend to demonstrate the reasonableness of the actor's mistake of fact leading to his false belief that he had been attacked. These 'mental' facts often will emerge only if someone starts from the legal hypothesis that there was such a mistake.

This 'creative process,' however, will most often mean a referral to the 'spirit of the law,' so violently criticised by Beccaria, because when the code itself does not yield a logically inevitable answer, what begins to matter is 'the intention of the legislator,' as perceived by the particular judge. In other words, it is impossible to avoid judicial interpretation of the rules of (criminal) law; strict interpretation of the statutes is thus a question of degree or an impossibility in absolute terms. Beccaria's "perfect syllogism" will not be applicable in many cases, because the application of the rule of criminal law is never only a subsumption under one abstract rule of a simple life situation. It always involves at least two rules and most often more than just two.[215]

If we take into account the fact that we neglected the problem of subsumption of the same fact-combination under more than one different abstract rules of the criminal code, because there are rules such as *lex specialis derogat legi generali*, or, *lex posterior derogat legi anteriori*; if we take into account that there are several different incompatible postulates in every modern criminal code, for example, in the case of a murder which will never be repeated, the goals of general and special prevention are incompatible and the punishment imposed clearly a compromise of two postulates which neutralise each other and allow the judge to use his own intuition (arbitrariness); if we take into account that every article comprehends usually more than one or two issues,

[215]In that sense, of course, Professor Berman's position is, in the last analysis and for reasons different from those that he advances, entirely acceptable. Professor Berman attributes vagueness and indeterminacy to the metalogical nature of legal reasoning; we are merely saying that the reasoning itself is, or at least can be perfectly logical, insofar as it is possible to catch the life into well defined legal concepts. Professor Berman explains the indeterminacy of law on the basis of form, we do it on the basis of substance.

we are bound to come to the conclusion that the idea of preventing judicial arbitrariness is an illusion.

The criminal law with its 500,000 unwritten combinations is not an ideal of "geometric precision." The judges who roam through this maze of logical discursiveness can be neither totally restricted nor totally arbitrary. Lastly, there can be no denial of the fact that formalistic guarantees cannot prevent a large measure of purposive legal reasoning.

4.8. Consequences of the Myth of the Principle of Legality

4.8.1. The Continental Criminal System

Because the above illusion of the principle of legality and the idea of a single solution for each issue continues to exist, a series of consequences occurred in Continental criminal legislation and in the procedure – in short within the whole operation of the criminal legal process. The belief that criminal adjudication can be judge-proof led to the following fictions:

1) concise and logically consistent criminal legislation is possible and it ought to be achieved by legislative skill;
2) there exists nothing but the law, the criminal code, and there is no need to make past decisions of judges a part of the law, since it is obvious that the code itself provides all the singularly correct answers to all the possible combinations: in other words, there is no need to make specific rules concerning particular combinations of issues, and if there is such a need, it can be easily resolved by adding qualifications to already existing incriminations;
3) the logical exactitude of the inevitably correct solutions provided by the code makes the judge a kind of computer, a machine, which occasionally may not be correct, yet this can clearly be solved by the procedural means of appeal. Moreover, the possibility of arbitrariness being reduced to zero, not much attention needs to be paid to the recruitment of judges.

The consequence of these fictions has been that the predictability of decisions in a Continental criminal court is much lower than it could otherwise be. Because the judicial solution of a particular combination of issues is, although recorded in the case file, never printed or otherwise made available to the broader professional public for future use, and (with the exception of the minimal publication of the supreme court decisions because of the idea that they ought to help make the practice more consistent and uniform) there is no cumulation of knowledge. Every judge, when he encounters a novel combination of issues will have to solve it by himself and only for himself,

without having any organised access to possible previous solution of the same problem: the cases are not recorded. Since the channels of communication between different judges solving similar combinations of issues through the dimensions of time and place have been cut, (1) the progress in the differentiation of the legal concepts that occur in repeated confrontation with reality, (2) progress in the cumulation of information and ingeniousness in solving particular problems, the progress which makes the solutions of more able judges available to less capable ones and makes possible further progress through innovation – all this is stifled.

There is optic proof of this in the comparison of a European criminal code with the mass of legal information compiled in the Anglo-Saxon legal system: one relatively small book compared with mountains of books. The issue, for example, of behaviour modification as a means of reformation receives no attention in the Continental system, although perhaps there are some cases related to that, whereas in the United States the problem is dealt with in several recorded and retrievable cases. The problem of the use of the polygraph in criminal procedure receives one sentence in the code of criminal procedure, an abrupt and categorical statement by the legislature about its admissibility whereas in the United States there are more than 100 cases in which one gets a considerable amount of factual and legal information; perhaps the solutions are not clear, but at least the problem is articulated. The same problem, however, harkens back to the Continental legislator himself, since he has no available information when he is supposed to make a policy decision on the admissibility of polygraph evidence. What often happens in such cases is that a particular country gets some information from the Anglo-Saxon system, promulgates a procedural rule, which is blindly copied by all who do not have the available information themselves, and is then commented upon by professors who do not have any serious available information. This will not be true in all cases; obviously, but many cases do not arise anyway, because many problems are overlooked in the first place.

Many problems are overlooked for the simple reason that Continental criminal law and theory do not have sufficient contact with reality. The feedback channels are cut because judicial decisions are not recorded and thus not accessible to the professional public. But, why are they not recorded in the first place?

It is our belief that this is due to the fiction that a judge's decision is not law, but only an application of the law; that all the decisions, all the possible combinations are somehow embodied in the structure of the code and that all a judge does is merely make a potential logical outcome concrete, that he, in other words, does not make law, but only produces a solution which was already immanent in the criminal code.

This frustration of the growth of knowledge in law has numerous other consequences. One of them is the fact that the law as a subject represents much less of a challenge on the Continent, requires less intelligence to operate it and less ability to think and work in it. It is simplistic and simple at the same time. This makes the study of law substantially easier, or, in other words, many more people are capable of becoming lawyers. This increases the supply of lawyers in the market, which in turn reduces their price and makes the legal profession a vocation even less attractive to those who think they can do better. This draws into the legal profession the kind of people who think that they could not make it elsewhere, for example, as doctors, engineers, etc. They enter the profession with lower expectations, but also with a lower commitment which in turn, because they soon operate the legal system, makes them satisfied with the system as it is, which, taking into account the element of time and the need for progress, means that the system is further simplified.

On the other hand this has the positive advantage that legal aid is cheaper because legal fees are lower, and since the system is simplistic anyway, the low quality of legal help really is not as pernicious as it would be in the Anglo-Saxon system.

The predictability of decision-making in the Continental system is low because not many of the combinations have been worked out in advance (or rather, have not been made public) and thus the judges tend to rely on the professional advice of their colleagues. This advice however, cannot be known by the defense counsel or by the prosecutor because this is the so-called oral law and its distinguishing characteristic is that it occurs between two or three people privately, whereas the recorded information of the Anglo-Saxon system in effect makes the advice a judge may get from the other judges available to those concerned with the prediction of the outcome of the case. In Continental legal systems this prediction is based on the good or bad intuition of the predictor, his personal knowledge of the judge, etc. On the other hand, these same characteristics will in some cases enhance the predictability because of the above described lack of differentiation reduced to a narrower spectrum, and thus the method of plausible guesses in prediction has a lower probability of mistake even though not much thinking is involved.

Also, because the commentaries of the codes are often taken for granted by the judiciary, this makes prediction in certain cases easier, because one can count on the fact that the judge will follow the commentary written by a well respected university professor. This is all the more true because the judge in the Continental system sees himself not as a law-maker, or a law-interpreter, but rather as an official executor of the law: his perception of his own manoeuvring space is narrow indeed; he thinks that creativity ought not

to play a role in decision-making and this perception becomes his habitual attitude in solving cases and thus, if a solution is offered to him in the commentary, he is more likely to accept it without much further deliberation. In contrast the self-assertive Anglo-Saxon judge is less likely to accept an offered solution un-reflectively, and thus predictability is reduced to some extent.

Another important consequence of the cutting of the channels of information by ignoring the law-making dimension of judicial decision-making is that the creativity of differentiation and adaptation of legal norms is limited to the legislator. 'The legislator,' however, is usually a group of professors, senior judges, and prosecutors, who divide among themselves the labour of the creative adaptation of the rules of criminal law – when the occasion for law reform arises. This group of perhaps at most 20 people is then expected to perform the creative work which in the Anglo-Saxon system is spread over a much greater number of lawyers, judges, *amici curiae*, etc. If we add to this the above mentioned impossibility of retrieval of the relevant conclusions arrived at by individual judges in particular cases, we have the following two comparable situations:

1) In the Continental system we have a group of twenty people who work on the criminal code's adjustment with little available information and no direct contact with reality;
2) In the Anglo-Saxon system we have practically all the lawyers who work within the operation of the criminal justice system participating in the process of solving the combinations of issues, providing new possible answers to old questions, detecting new problems, working out the connections, for example, between Constitutional law and criminal law, etc.

Besides, the above legislative committee is supposed to achieve its goal of reform in a relatively short time span, whereas adaptation in the Anglo-Saxon legal process is built into the system's operation and thus there is continuous creative input.

4.8.2. The Anglo-Saxon Criminal System

The Anglo-Saxon system of criminal law, however, has its own set of problems, which although often the reverse of those in the Continental system, lead to much the same results. Take, for example, the question of predictability discussed above. A very high level of predictability indeed, would be expected if the entire above mentioned 10 per cent of possibly ambiguous outcomes of particular combinations (the number we arrived at was 6 million) were casuistically worked out one after another. Theoretically, if all these solutions

were retrievable, this would mean that the predictability of a solution of a particular case would indeed be perfect. Yet what in fact happens is that, although the facilities of memory and recall are perfected insofar as this is humanly possible, there is an internal communication overload: there is so much information available and relevant that it becomes practically impossible to master it even in the long run, not to mention in the usual situation of the lawyer who, according to Socrates, "is always in a hurry."[216]

> A growing organisation, and hence also a growing state or government, must be able to change its own patterns of communications and organisation, so as to overcome the results of the 'scale effect,' … It must resist the trend toward increasing self-preoccupation and eventual self-immolation from its environment; and it must reorganise or transform often enough to overcome the growing threats of internal communication overload and the jamming-up of message traffic.[217]

This detachment from actuality is in fact achieved through too close a contact with it: because, in a constant feed-back process with individual cases, Anglo-Saxon criminal law tends to become too differentiated, too casuistic, too afraid to violate reality, too eager to shape every legal pigeonhole to fit the factual circumstances of the case. In short, its creativity is also counter-productive in terms of the practical operability of the system. The consequence is a chain reaction of differentiation of legal concepts, a mass of information impossible to master, and in the last analysis the "jamming up of the message traffic."

To this we add that the handling of a particular case becomes a dependent variable (1) of the ability of the lawyer to master more or less information instead of the rules themselves; (2) of the time available to be committed to a particular case, which in fact means the amount of money the client is capable of spending. But since most criminal defendants do not have the means to pay for an extensive research of the legal determinants of their cases, they are likely to remain without efficient legal help – in a precarious position and at the mercy of the judge and the prosecutor.

Continental system is simplistic throughout in a relatively homogeneous manner: judges, prosecutors, and lawyers share the same simplifying attitude toward the law. A criminal defendant there is thus in a position to take advantage of this because at least it enables him to understand what is going on in the case. In the Anglo-Saxon system, there is a trade-off between predetermination and theoretical predictability on the one hand, and the intelligibility (non-obscurity) on the other hand: the more predetermined the outcome of a particular case because of the amount of available information

[216]Plato, *Theaetetus*, 172.
[217]Deutsch, *supra* n. 45.

about solutions to 'similar' cases, the less intelligible and more obscure is legal reasoning to the layman. Besides, a higher level of differentiation involves a higher number of *termina technica* (jargon) and concepts and a geometrically growing complexity in legal reasoning. And, although predictability theoretically rises in direct proportion to the number of issues determined in advance, *de facto* because of the above described "jamming up," the reverse may be true at a certain point of hyper-development. Thus, in a certain sense the Anglo-Saxon system has the worst of both worlds, too: it has invested an enormous amount of energy, time, and money into making its system fit reality better and into dealing with the questions in a more differentiated manner, with more conceptual tools, more factual information, and more sophistication: all this in the erroneous belief that this promotes the goal of criminal law that we call predictability.

Given the complexity of the situation, the impossibility of quantifying most of the factors involved, the difficulty of detecting all the connections between the operation of the criminal justice system and the larger systems of social consciousness, the legal profession and its power, prestige, and income, the dimensions of the political system and the role of the criminal justice therein, it becomes impossible to compare the Anglo-Saxon system of criminal law and the Continental system in terms of precise answers to the question of which system offers more security, more predictability, and is more adequate in its social role.

5. Conclusion

In an attempt to show that legal formalism in criminal law is both inevitable, and insufficient, I have tried to show how the role of the concept in law differs from the role of the concept in general and in science. In law, the concept is intended to withstand, rather than reflect, the changes in reality.

Next, through the analyses of Nietzsche's and Pashukanis' theories, I have tried to demonstrate the connection between conflict and formalism in law. The probability of future conflict forces upon the concept a role of recording and preserving formally what will no longer exist at the time when the law is required to interfere. In applying this to criminal law, I conclude that (a) the conflict here is much more precarious because the parties are, as is generally true in public law, no longer equal; the conflict can therefore be simply disregarded by the state; (b) the fact that it is not disregarded and that, consequently, the criminal law is imbued with the ideal of legal formalism, must at present be seen as a commendable, if precarious, concession allowed by the state; and (c) formalism in criminal law can only be abolished when the interests of those with antisocial behaviour will be truly identical with

the interests of the state. As long as crime itself is a statistically stable social phenomenon, owing to equally stable social causes, the state has no possibility of claiming that in applying sanctions it is doing what is best for the defendant. As pointed out by Pashukanis, only when crime becomes a truly individual occurrence will treatment model replace the punishment model, and the model of the "unity of purpose" replace the conflict model.

Next, I have tried to expose a few misconceptions about the principle of legality as it is presently accepted in criminal legal theory. I have rejected the idea that the principle is something historically new, since this would contradict the previous conclusion that formalism is an integral part of the phenomenon of law. I have briefly described the usual repertoire of particulars of the principle of legality: *ex post facto* law, vague laws and the practice of collapsing legal questions into questions of fact. I have tried to show that analogy *inter legem* differs only in degree from the *analogia juris*, and on a concrete legal example I have tried to demonstrate that the myth of *corpus delicti* really obscures the fact that the number of restrictive definitions in criminal law is enormous – which, of course, substantially subtracts from their restrictiveness.

Consequently, it comes as no surprise to say that in criminal law the ideal of formalistic guarantees is just false and unattainable enough to allow the discursiveness of law to cover up the instances of clearly purposive legal reasoning, yet just true and attainable enough to help prevent the radical switch from the model of conflict to the model of treatment, from the model of formalistic "cult of symbols" to the model of purposive contextual and goal-oriented reasoning wherein rules would be instrumental and determined only by the concordance of the interests of the defendant and the state. As it is, criminal law seems to have the worst of the world of law and the worst of the world of purpose.

Chapter Eleven

Conclusion

If it is true that words themselves, let alone their combinations, cannot make absolute a promise between people and groups, if it is accepted that the idea of legality if isolated from a relatively stable balance of social forces, is an illusion, then, the question is: what role do written rules purporting to be guarantees play? In the end, of course, the role of the principle of legality in substantive criminal law and that of adjudication in constitutional criminal procedure is to provide the defendant with safeguards against violation of human rights perpetuated by the inequality of power between the state and the defendant.

Generally, of course, the degree of guarantee or safeguard needed is in direct proportion to the amount of mistrust in any human or group relationship. Mistrust, on the other hand, is but an awareness of incompatibility of interests between individuals and groups. It follows, that there will be no need for guarantees, safeguards and therefore for rules in the following two hypothetical situations. First, if there is no conflict of interest (family, postulated communistic society) and, second, if the individuals involved are not aware that there are conflicts of interest.

But conflicts of interest have in the class sense, heretofore, always existed in history. If history has not been a total *bellum omnium contra omnes* this must only be attributed to the lack of awareness or vast preponderance of oppressive forces – usually both. In that sense, the society is literally held together by the dominant social consciousness induced by social practices – the enforcement of criminal law being a major one of them.

It, therefore, cannot be stressed too often, that the role of criminal law, even though both its adjudication and its legality are illusory, is to give the appearance of legitimacy and reality to lies such as justice, right and wrong, and a series of other more particular elements of the morality and duty. After all, does a statement that something is wrong, carry any power, unless it is

backed by God or some physical power of the law? Thus, I think it is fair to say, that were it not for Church and Court, future individuals would become unscrupulous psychopaths (except that in such a case the term 'psychopath' would not even carry its present-day negative connotation).

Consequently, even though it is easy to show how little substance there is to adjudication and legality, how untrue they are in their descriptive and in their prescriptive garb, they are nevertheless useful even as lies. Their power lies in the sphere of moral inhibition introjected into the individual psyche, the sphere that once established (as Superego), cannot be undone by mere rational and persuasive argument.

On the other hand, once these moral inhibitions have loosened their grip to the point where it is possible for reason to penetrate the appearances of these socially useful lies (myths) – this could be called the intellectual aspect of anomie – then these false values dissolving into destructive truth can no longer be sustained. After all a lie, useful as it may be, can only masquerade as truth if nobody challenges it: the Emperor can walk naked only if onlookers are willing to believe that their disbeliefs are a proof of their incompetence. In that sense, every Emperor and government can have power only to the extent to which people are afraid to believe their own independent thoughts. The 'objective reality' of the enforcement of criminal law, with its judges, courts, lawyers, policemen, jails, prisons and electric chairs, supports with intellectual legitimacy derived from criminal law's conceptual structure, the reification of a value system which conceals the harsh and unjust reality. The indoctrinative effect is stronger than that of mass media, for it appears to be something more than mere communication.

At the core of this, therefore, lies the problem of power – power of one human being over another. The power to make a man a means to something outside himself. In this sense, history is above and beyond the individual because in the system of exploitation even the exploiters, as Hegel has shown, are exploited. Power of necessity alienates man from man and therefore man from himself and the world.[1] In that very real sense, throughout history, the individual has been continually a sacrifice on the altars of power and 'progress.' Even the historic materialists assume that the cascade of social orders from slave-ownership to capitalism gives 'meaning' to the sacrifice of the individual. This whole theory, therefore, depends on the meaning of 'progress.' In the name of this 'progress,' the individual has arrived at the state where he has never been more alienated from 'his self,' and the human species has arrived at the point where it has never been closer to self-destruction.

Criminal law was and is an accomplice in this process of destruction of the individual, but on the other hand, it also helps to make the 'progress' possible. Criminal law is thereby justified.

[1] Cf. Unger, *supra* n. 11 to Chapter 10 at p. 191-235; Kojève, *supra* n. 6 to Chapter 10.

SECTION III:

Essays on Human Rights in the Context of International and Constitutional Law

CHAPTER TWELVE

On the Interpretation of Legal Precedents and of the Judgments of the European Court of Human Rights

1. The Relationship Between Constitutional Courts and the Jurisprudence of the European Court of Human Rights

The starting premise underlying the discourse on the relationship between constitutional law and European human rights law is what I consider to be an empirical *fact*: the constitutional courts now produce jurisprudence[1] overtly and explicitly transcending the Enlightenment's illusion of complete separation between the competencies of the legislative and judicial branches of power.

In other words, the *in concreto* judicial review by the constitutional courts has become an important source of law. So it is with the *in concreto* judicial review of the international courts, e.g. with the European Court of Human Rights. However, just as this judicial review of the constitutional courts outrightly clashes with the established doctrine of the separation of powers,

[1] The word 'jurisprudence' is somewhat misleading, especially in the context of American legal terminology where it refers to what we in Europe call "legal philosophy." In French, the term refers to the consistent practice of the courts, especially of the higher courts. I chose the term here because etymologically it refers to legal wisdom (*prudentia juris*). As such, the term is somewhat neutral and ambiguous. This suits me well because it averts the question whether the case-law produced by courts is a *sub rosa* legislative activity. Von Savigny, *Vom Beruf unserer Zeit für Gesetzgebung und Rechtswissenschaft*. André-Vincent in France and Rantoul in the United States are some of the foremost authors on this subject.

in terms of international courts, it collides directly with the international law's perception of sovereignty.

For a long time both constitutional and international legal theorists have pretended that this is simply a *de facto* development. For example, some laws dealing with the jurisdiction of constitutional courts often lack but the most basic reference to the binding nature of their judgments.[2] International acts, on the other hand, expressly do proclaim the judgments of the international courts to be only valid *inter partes*.[3] Characteristically, even the European Convention on Human Rights mandates that the decision of the European Court be binding only *inter partes*, between the parties concerned. Thus, we have a relic of this unrealistic and misleading idea in Article 46 (1) of the European Convention on Human Rights which reads as follows:

Article 46 – Binding force and execution of judgments

> (1) The High Contracting Parties undertake to abide by the final judgment of the Court *in any case to which they are parties*.[4]

This means that the *de facto erga omnes* effect of the Court's decisions is contrary to the letter although perhaps not to the ambiguous spirit of the Convention.[5] Strictly speaking, *stare decisis* would be only an internal concern of the Court. Fortunately, the 'law in action' went in the opposite direction. If the ideological intentions of the fathers of the Convention were strictly adhered to the *acquis*, the jurisprudence of the European Court would not even exist. All we would perhaps have would be an atomised series of materially unrelated decisions. Ultimately, if it were true that the judgments of the European Court of Human Rights had the strictly limited *inter partes*

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[2] See, art. 1 (3) of the Slovene Constitutional Court Act: "Decisions of the Constitutional Court are legally binding."

[3] See European Convention on Human Rights, Article 46, cited above.

[4] But see, *Vienna Convention on the Law of Treaties*, 1969, Article 31, *General rule of interpretation*, par. 3(b): There shall be taken into account, together with the context: (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation. See *infra* n. 61.

[5] See Zupančič, *Le Droit Constitutionnel et la Jurisprudence de la Cour Européenne des Droits de L'Homme*. Essentially, I maintain that the European Court of Human Rights is evolving into a European Constitutional Court. Cf. Flauss, *La Cour Européenne des Droits de L'Homme est-elle une Cour Constitutionnelle?*, p. 728:

> Sauf à retenir une conception fortement élastique des définitions préétablis et reconnues, force est de conclure qu'en l'état actuel, la Cour européenne des droits de l'homme n'est pas, d'un point de vue technique, vraiment assimilable à une Cour constitutionnelle. Mais il n'est pas totalement inconcevable qu'à l'avenir, elle puisse encore se rapprocher davantage de cette variété de juridiction constitutionnelle.

effect, there would be no need to interpret their abstract *erga omnes* effect. Only insofar as these judgments *de facto* do have an *erga omnes* binding force the need for an interpretation of their meaning, significance and importance arises in the first place, which is what this chapter explores.

Moreover, the corpus of law of the constitutional courts, derived from continuous judicial review of the activities of all three branches of power, in so far as human rights are concerned, has much in common with the procedures and the substance of the case-law fashioned by the European Court of Human Rights (ECHR).[6] Thus, the big picture is such that a constitutional complaint – such as a Spanish *amparo* or a German *Verfassungsbeschwerde* – entails procedures and legal consequences at national level which are clearly analogous to the procedures and legal consequences by an 'application' or 'requête' at international level, e.g. before the ECHR. However, since the ECHR for the last forty years has also been working as Europe's constitutional court, the external legal features may have been international rather than national – with all the dissimilarities that entail – but the quintessence of the constitutional and human rights in question, is the same.

I take this big picture as a Weberian 'ideal type' and as a starting premise, a *fait accompli*. For what is interesting here are not the technical details and the hesitations one might harbour concerning the across-the-board comparison between national constitutional law and international human rights law in Europe, but the historical evolution – and I do not think that in terms of legal history this is an overstatement – whereby we judges and professors of law all speak a certain Moliéresque 'prose,' without perhaps being fully aware that we are in the process of 'deconstructing' the Enlightenment's idea of law.[7]

As I will show, the Enlightenment's idea of law required strict separation and division of labour between abstract legislative jurisdiction and the mere

[6] Here we do find an important difference between the constitutional courts and the European Court of Human Rights. The ECHR's judicial review applies only to the decisions of the national courts of last instance. This is due to international law's doctrine of subsidiarity. See for example, Cancado Trindade, *The Application of the Rule of Exhaustion of Domestic Remedies in International Law*. This question represents an important aspect of the ECHR's *Cyprus v. Turkey* inter-State judgment (application no. 25781/94, judgment of 10 May 2001) where the Court required domestic remedies before the 'TRNC' courts to be exhausted before it could consider the case. See §§ 82 to 102, citing the International Court of Justice's *Advisory Opinion on Namibia* (1971 ICJ reports, p. 56, § 125). Even so, the ultimate decisions of the national courts time and again entail legal problems deriving from the legislative and executive branches. See, for example, *Chassagnou v. France*, judgment of 24 April 1999, *Nikolova v. Bulgaria*, judgment of 25 March 1999, etc.

[7] The Enlightenment's notion of the rule of law derived, at least partly, from the over-reaction against the arbitrariness of the French aristocratic justice of the *ancien régime*. See, for example, Cappelletti & Cohen, *Comparative Constitutional Law: Cases and Materials*, Chapter 1.

concretisation of abstract legislative acts by the judicial branch.[8] It required a separation between the 'abstract' and the 'concrete,' which is untenable both practically and, in particular, philosophically.[9] Today, the constitutional courts are no longer simply mouthpieces of the law. The same goes for the European Court of Human Rights[10] – a violation of human rights is alleged, and the court produces an *inter partes* decision which, in the end, inevitably has at least a *de facto erga omnes* effect.

[8] See von Savigny, *supra* n. 1. Von Savigny was, for the very same reasons, opposed to the grand designs of Napoleonic codification. He firmly believed (to borrow his metaphor) that the umbilical cord between the life of the nation and its law must not be cut, i.e. that law, as we would say today, is an inductive empirical process of settling any new controversies that arise. Time proved him to be right. The Enlightenment's deductive and reductive rationalistic method tacitly collapsed with, for example, Professor Steinberger's discovery that the decisions of the German Constitutional Court are not only effective *erga omnes* but are an authentic *Rechtsquelle*, *source de droit*, source of law.

[9] From the practical and technical standpoint, I think every judge of every constitutional court can testify to the difficulties arising from this fundamentally artificial distinction. Moreover, in countries in which the rule of law is not established, this 'logic' tends to be perversely abused both in politics and in the 'free' press orchestrated by the new (ex-Communist) *anciens régimes* in order to rein in the nascent independence of the judiciary and especially of the constitutional courts. I should say 'absurdly abused' because – when the constitutional courts are being disparaged on the grounds that they have overstepped the margin of the narrow 'concretising' jurisdiction and that they have transgressed into the 'abstract' territory of legislative jurisdiction – the rule of law is being nipped in the bud in the name of the 'rule of law.' See *Brumărescu v. Romania*, judgment of 28 October 1999; *Streletz, Kessler and Krenz v. Germany*, judgment of 22 March 2001.

[10] Of course, this raises a further elemental issue. Montesquieu's idea of the separation of powers derived from a premise that it was *possible* to construct the division of labour between the legislative and the judicial branch by means of the Cartesian separation of what is abstract and what is concrete. In so far as the separation of abstract and concrete jurisdiction is workable, it has been given ample opportunity to test itself in politics and in the legal tradition. But it has proved to be quite impracticable, to say the least. It required the construction of the falsehood of complete separation of powers, which has become difficult to sustain. Of course, in so far as it is a question of power and prestige, the political protagonists of the executive (the most dangerous) and the legislative (the less dangerous) branch of power do cling to it. They maintain that they have a popular democratic mandate and that the judicial branch (the least dangerous), appointed by them, lacks this electoral accountability. Hence the somewhat disingenuous suggestions concerning 'judicial restraint,' the purely 'negative jurisdiction' of constitutional courts, etc.

A meaningful discussion of the above predicament would require a re-evaluation of some of the basic philosophical premises. Suffice it to say here, that the constitutional doctrine of checks and balances does provide a dynamic (as opposed to static) answer to many of these concerns. In terms of Henri Bergson's philosophy, this reiterates the basic distinction between two divergent modes of thinking: on the one hand, the static (*sub specie aeternitatis*), and on the other hand, the dynamic (*sub specie durationis*). The distinction has been revived by another French philosopher, the late Gilles Deleuze.

This development has been a *de facto* one and if the theory of constitutional law or international law cannot account for it, so much worse for the theory. In the meantime, both constitutional and international courts have been flooded respectively with constitutional complaints and 'applications.' Their presidents complain that they have become victims of their own success.

The riddle thus put forward, at least from the theoretical point of view, is as follows. How can it be that the most abstract legal acts have suddenly given rise to the most concrete litigation? And, "How can it be that the *in concreto* judgments obtained from this litigation have in turn become an important abstract source of litigation?"

Keeping these questions in mind, in this essay, we will explore the evolution of judge-made law in constitutional courts and the ECHR to show how the insulation of the Constitution from reality causes the disconnection of the 'umbilical cord connecting the law and the life of the nation' in Von Savigny's words. For this, I will first discuss the *erga omnes* effect of ECHR's jurisprudence by examining the need for interpretation of its judgments and legal precedents. Next, I will show the importance of granting an individual the equality to take the State to court as this too keeps the Constitution from becoming a dead letter. Ultimately, through these explanations, I will attempt to arrive at the conclusion that with ECHR developing into an international consitutional court, the idea of 'the internationalisation of constitutional law' is growing to be more tenable than that of 'the constitutionalisation of international law.'

2. Checks and Balances Between the Three Branches of Power

While the 19th century Continental codifications undoubtedly infused the legal system with Weberian rationality and predictability they also insulated the legal system from the empirical contact with real-life issues. This means that the legal system does not perform its primary appointed task, i.e. it does not promptly and efficiently resolve controversies which people have the right to have resolved in view of the general prohibition of self-help.

Nonetheless, in the 19th century, the enlightened despots of Continental Europe – from Napoleon in France to Frederic the Great in Germany, Leopold of Tuscany in Italy, Catherine the Great in Russia, Maria Theresa and her son Joseph II in Austria – endeavoured to produce completely self-sufficient and self-referential normative systems that would make the interpretation of the abstract provisions in the code utterly superfluous. Under the penalty of the forfeiture of all property, for example, Frederic II in his Prussian *Landesgericht*

proscribed all interpretation of his Code's provisions. In this, as in other things, the Enlightened Despots followed Napoleon's example.[11]

In today's language we would say that in their codifications they attempted to create a self-referential virtual reality. At the outset, this attempt to completely restate and to codify the hitherto empirically accumulated practical judicial wisdom from Roman law onwards – for Napoleon was deeply influenced by Justinian' *Corpus Juris Civilis* – represented a revolution in legal thinking; but, later it only succeeded in insulating the Constitution from reality.

The assumption in the time of Enlightenment was that there *can* and that therefore there should be a clear division of labour (separation of powers) between the legislative and the judicial branches of power along the seemingly clear line distinguishing between what is abstract and what concrete.[12] This abstract-to-concrete teaching concerning a pyramid of legal acts originated in the wake of the 1789 French Revolution and its overreaction to the arbitrariness of aristocratic justice in the *ancien régime*.[13] Even with Hans Kelsen – the originator of the idea of constitutional courts – the postulate, which Montesquieu, Beccaria and other Enlightenment writers have called for is still very much alive. The strictest possible division of labour between the legislative and the judicial branches, along with the less and less realistic Cartesian distinction between what is abstract (legal norms) and what is concrete (their interpretation and their application), is still distinctly present.

The Kelsenian reading of the Constitution is conceptualistic, i.e. it pretends to infuse order, meaning and connectedness into the imagined 'abstract to concrete' pyramid of legal acts. In Kelsen's traditional pyramid of legal acts, the constitution is the queen bee of the legal system, the cloud-hidden tip of the abstract and deductive logical pyramid with which all subordinate legal acts must be logically concordant. In this tradition, therefore, the specific

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[11] Deuteronomy 4:2. You shall not add to the word that I speak to you, neither shall you take away from it: keep the commandments of the Lord your God which I command you. See, Perelman, *L'Interprétation Juridique*, at p. 33.

[12] Montesquieu, *The Spirit of the Laws*, at p. 185. Engisch and André-Vincent, however, argue that the process of 'Konkretisierung,' in which the abstract command is translated into concrete reality, *is* law, because law lives in its concrete decisions, not in general and abstract norms. See André-Vincent, *L'Abstrait et le Concrète dans L'Interprétation*, at p. 135, and my discussion in Chapter 10 of this book.

Yet this is not simply a philosophical problem. The constitutional provisions, for example, determining jurisdiction of constitutional courts are still based on the untenable distinction between 'abstract' and 'concrete' judicial review along with 'concrete' jurisdiction in cases of constitutional complaints (*amparo*, *Verfassungsbeschwerde*, *certiorari*). In many legal cases, this distinction turns out to be completely *forcé*. Philosophically, the distinction is perhaps Cartesian, but the true reasons for its maintenance are, especially in France, cultural and ideological.

[13] See the introductory Chapter in Cappelletti & Cohen, *supra* n. 7.

sentences of the constitution only rarely formed the major legal premises of judgments delivered by the courts. Thus, according to Kelsen's model of deductive rationality, what mattered was an abstract logical concordance between higher and lower legal acts. This span from the most abstract legal acts (the Constitution) to the most concrete ones (e.g. an administrative or judicial decision), the so-called Kelsenian pyramid, derives from a reflex Cartesian and reductionistic premise.

Thus, the codifications succeeded in sealing the division of powers between the parliament and the courts.[14] According to this way of thinking, only the legislative branch is entitled to produce abstract legal acts, with the concession that they possibly require interpretation by the judges.[15] Thus, the legislative branch of power is entrusted with the exclusive power to create substantive abstract legal criteria for judging (law). Judges, on the other hand, are left with the mere 'concretising' task of applying these abstract criteria in concrete circumstances of specific cases.

Since the specific solutions to specific legal problems introduced by the judges were reduced to the so-called 'judicial practice' according to this ideology, they could not figure as a valid source of law and were *de jure* not even binding on the lower courts. This meant that there was little empirical feedback between the reality of conflicts and deductive law-making. Since the legal solutions no longer organically grew out of specific precedents,

[14] This archaic and dysfunctional distinction between the abstract and the concrete persists in the modern continental constitutions. The jurisdiction of constitutional courts used to be limited to the so called 'abstract review,' whereas 'concrete review,' i.e. what the Americans would call the *certiorari* procedure, deciding the specific cases and controversies (constitutional complaint, *Vervassungsbeschwerde*), has only lately emerged as part of the constitutional courts' jurisdiction. The new issue then arose, namely to what extent should these 'concrete' (*inter partes*) decisions have an 'abstract' (*erga omnes*) effect, i.e. to what extent should the constitutional decisions have the effect of a true legal precedent. The issue has re-emerged, as technically complex, in the characteristic 'rational' Continental way. See Steinberger, *Decisions of the Constitutional Court and their Effects.* (Professor Steinberger was formerly a judge of the German Constitutional Court.)

[15] Consequently, the word 'interpretation' has acquired a meaning so extensive in Continental law that it goes far beyond simple explanation, construction, or elucidation of an abstract legal norm. In German language, the jurists use the more accurate word 'Konkretisierung' in order to denote the mental process, which goes from the abstract to concrete. In French legal philosophy and elsewhere the word 'interpretation' has long been a catchword covering everything creative that judges do to find solutions to real problems that they are faced with. All things considered, the notion of 'interpretation' also represents an attenuation of creative legal process, i.e. an unconscious reduction of it to mere elucidation. This is how the Continental legal professions have internalised Montesquieu's categorical appeal that a judge be a mere "*bouche de la loi.*" (*De l'Esprit des Lois, XI.6*). By contrast, in the judgments of the Anglo-Saxon legal system the occurrence of the words such as 'interpretation' and 'construction' is far less common.

the Continental legal system, although sustained by sometimes brilliant academic theoretical contributions, in a sense lost its ability to learn from its own experience. To the extent the decisions of the courts were nonetheless creative, practical and just solutions of problems raised by particular cases – often despite the rigidity and inadequacy of codified norms – the legal system ignored them and did not store them in its memory.

The consequences of this ideology, for it is in essence an ideologically rigid position to maintain this abstract-concrete distinction, were profound. The process of law-creation was separated from adjudication as its empirical source. It became theoretically deductive instead of being practically inductive. The mania of abstract-deductive codification, so typical of Enlightened despots may have been a restatement in its initial phase.[16] Later it meant that codes were written and rewritten by legal academics while the myth was and still is maintained that the code contains the determinate answers to all questions that might be raised by specific cases.

However, in the process, the constitution, too, was for the same reasons insulated – except in the broadest lines of state regulation – from the social and political reality (not to speak of human rights) it was supposed to govern. At first there was no direct constitutional adjudication at all and then it was limited to abstract review.

As long as the Constitution is a cloud-hidden abstract tip of the Kelsenian legal pyramid, its provisions cannot be directly litigated. The Constitution, albeit the virtual source of all abstract and concrete legal acts, thus remains the remote and unapproachable queen bee of the legal system. As a consequence,

[16] The legislative activity of The Enlightened Despots: Leopold of Tuscany promulgated his rather disorganised Criminal Code in 1786; Austria promulgated its new (eighteen years after *Constitutio Criminalis Theresiana*, 1769) code in 1787. This code, called *Josephine*, an integral part of sweeping reforms of Joseph II, son of Maria Theresa, was already a very well organised code. It was the first to have incorporated the principle of legality and to have completely secularised its incriminations. The only exception there was blasphemy which even an atheist such as Joseph II felt obliged to incriminate. But a way around that was found just as well: there was a presumption of insanity valid for anyone who committed blasphemy: the language of Josephine is already very clear and concise and the reason for that too can be traced back to Beccaria and even Montesquieu who postulated that people have to understand what is prohibited, if they are to be punished after they have committed a wrong. Prussia's Frederick II promulgated the Criminal Code in 1794. This Code is typical of the attitudes of the enlightened despots: it is a catechism of right and wrong and its first article says that every authority – parents, teachers, etc. are obliged to fight against vice and crime. France's Code pénal of 1810 already knew the principle *nullum crimen nulla poena sine lege praevia* from Art. 8 of the 1789 *Declaration of the Rights of Man and Citizen*, yet it still punished the crime of *laesio majestatis* by cutting off a hand. Typically this was the punishment also provided for *parricidium*, i.e. *parricidium* and *laesio majestatis* were regarded as analogous. See generally, Gay, *The Enlightenment: An Interpretation, The Science of Freedom.*

the constitutional provisions cannot be directly invoked and neither the legislative nor the executive branch in their possibly arbitrary exercise of power can be directly challenged in court. Since there was no check on the arbitrariness of the legislative and especially of the executive branch of power, this uncalled for denial of the power of the judicial branch and the concomitant denial of the autonomy of legal decision-making was and still is destructive of the rule of law. Insofar as the rule of law is indispensable for political stability – because it infuses reasoned judgment into politicised divisions and schisms of democratic political life – the function now exercised primarily by the constitutional courts is truly essential.

The absence of constitutional litigation had damaged the whole Continental European history between 1789 and today. In the aftermath of the horrors of World War II, the establishment of the European Court of Human Rights was an act of regret and contrition on the one hand and an act of hope and attempted redemption on the other hand. Perhaps the founding fathers of the European Convention on Human Rights thought that the power of the judicial branch and of the rule of law imposed by it could have stopped Hitler and Mussolini in their tracks?[17] That I do not know, but I do know that Milošević in Yugoslavia could have been stopped, had the Constitutional Court in Belgrade enjoyed the powers and the respect it unfortunately did not.[18]

The issue of constitutional jurisdiction may be better understood if we consider the situation in which there would be no such jurisdiction. In countries in which there is no separate and independent judicial authority to interpret and to apply the constitution, the legislative branch is free to pass any law and the presumption of its 'constitutionality' is irrefutable, i.e. it is *de facto* (politically) presumed that any law whatsoever passed by the political legislature appropriately makes concrete (or at least conforms to) the abstract provisions of the constitution. This, of course, amounts to the unlimited power of the legislative majority and of the particular political faction (party) then in power. Neither the aggrieved individual nor the executive branch or the judicial branch of power can challenge any aspect of legislation, the assumption being that the whole sovereignty of the nation resides in the parliament. Because it is accessible only through its concretised form (the legislation), the constitutional contract cannot be directly cited, cannot be the basis of a legal action and is at least one degree removed from judicial interpretation and social reality. Again, the constitution may effectively be

[17] To the best of my knowledge, this has never been explored in depth. Wherefrom, in 1945, the assumption that the rule of law is the best antidote for the totalitarian rule? On the other hand, this assumption is an integral part of American constitutional law.

[18] In retrospective, this is not an entirely unrealistic supposition. But the judges' traditional self-perception and their lack of courage proved to be determinative.

insulated – by at least one layer of laws with the irrefutable presumption that they conform to the constitution – from the social reality it is supposed to govern.

Such a constitution without a forum in which to invoke it is like a contract one has lost and cannot rely upon.[19] It is a mere recommendation. Consequently, since it is left entirely to the legislative branch to judge the constitutionality of its own laws, the constitution figures merely as a programmatic act, an abstract proclamation: the contract is there, but there is no legal way[20] to see to its implementation, enforcement and the sanctioning of its violations.

Moreover, the assumption behind the idea of the absolute sovereignty of the parliament is that the people are the independent variable and the politicians mere dependent variable in the assumed transformation of the popular will of the people into the specific legislative acts. In reality this has never been simply and entirely true. But even if it were, this would not justify the unlimited dictatorship of the politically established parliamentary majority. The outvoted political and other minorities as well as concrete individuals and everybody else in society – even the animals! – must in any event have their existential interests protected, they must retain their basic constitutional rights. If the political majority, whatever its claim to political legitimacy, were to be granted the unlimited mandate to run the society, then the majoritarian anomalies would stand un-corrected. The value judgment needed to perform these corrections and to maintain justice is built into the constitution. This clearly *requires a forum* in which the objections to the rule of political majority may be raised and the remedy for constitutional injustice requested.[21]

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[19] It is, therefore, a distinct characteristic of the modern dictatorship – claiming international legitimacy – that there be a legally insulated 'constitution' without the possibility to directly invoke it, the issue of constitutionality being left to the abstract logical conformity presumably adhered to by the legislation. The next step in democratisation is to grant the preventative abstract review of constitutionality and in turn the limited *ex post* abstract review. A further step is to grant specific control *(*constitutional complaint, *certiorari*, *Verfassungsbeschwerde*) of constitutionality of concrete decisions (administrative, judicial, etc) to a specialised constitutional court of last appeal. The only logical solution, although it may not be practically feasible in the legal systems unused to the independent exercise of judicial power, however, is to grant the judicial review of constitutionality to all the courts in the judicial system. Only such a solution guarantees the logical omnipresence of the observance of the principles embedded in the constitution. Kelsen, *Pure Theory of Law*.

[20] Of course, if the legal ways are not available there are always factual ways of attempting to enforce the basic human rights and other aspects of the basic social contract: the revolutions and other forms of social upheaval, while leading to instant anarchy, have in the end for their purpose the enforcement of basic social justice, i.e. the ideal of the rule of law.

[21] An extremely important practical aspect of this is the election of the judges performing this constitutional control of democracy. We know, for example, that the alliance between the parliamentary majority and its own government often makes mockery of the checks-and-

Furthermore, the circumscribed scope of the power (jurisdiction) of the judicial branch also limits its powers to check the covetousness of the 'most dangerous' executive branch of power. For the most part, the direct social power and prestige lie in the domain of the executive branch as is, for example, evident when one deals with the power struggle between police and the courts in criminal procedure. Usually, it is the executive not the judicial power, which is prone to all sorts of corruption, arbitrariness and *abus de pouvoir*. It is in the executive, not in the judicial or the legislative department, that we mostly deal with the implications of Abraham Lincoln's aphorism "power corrupts and absolute power corrupts absolutely." The triangle of constitutional checks and balances is plainly not an equidistant and equalised sociogram: the relatively feeble and reasoned out *de jure* attempts of the judicial branch to check the executive are clearly no match to the latter's *de facto* and sweeping supremacy. The 'rule of law' has great difficulties in inhibiting the 'law and order' – with the proviso that the executive is prone to corruption far more than committed to providing genuine law or order. Judge Sirica's role in the 1974 Watergate trial (and tribulation) is a good illustration of that.

Social structures, therefore, which restrict adjudication only to petty personal conflicts or confine the criminal justice system to a repressive role, i.e. to the pretence of adjudication, are both less legitimate and less credible.[22]

balances assumption as existing between the legislative and the executive branch of power. If the judges of the constitutional court were to be elected directly by the people, this would be the simple reiteration of the majoritarian logic they are supposed to control (in reference to the constitution) in the first place. The constitutional review requires a different way of thinking and a different value judgment as far away from the majoritarian day-to-day politics as possible. The problem is, of course, to some extent replicated if they be elected (by a simple or even two-thirds) majority in the parliament. Such courts may, as some claim, represent the values of the 'political rainbow,' but this is precisely what ought not to be represented if they are to represent something which is – as a governing contract – *above* the prevalent political value orientations. The political reproach to the constitutional (and supreme) courts that they are 'politicised' may be entirely to the point, but the issue remains unresolved precisely to the extent the very selection of the judges is 'political.' Much, therefore, depends on the attained political and legal level of culture in a particular state. It would be detrimental, for example, at least in East Europe to surrender this selection (in the name of the independence of the judiciary) to the judicial branch saturated as it is with legal formalism – since the latter represents a large portion of the problem offset by the constitutional courts.

[22] Compare this to what happened in 2001 and 2002 in France, when Judge Halphen tried to make President Chirac testify under the probable cause that he had been involved in corrupt use of the so-called slush funds. In the end, Judge Halphen – having been for years on the receiving end of all kinds of 'blocks and imbalances' from the French executive branch of power – bowed out and stepped down. See Halphen, *Sept Ans de Solitude*. Consider how circumspectly the classical international law advances in the construction of its delicate international jurisdiction.

The establishment of the International Tribunal by the Security Council does

In the big picture, it is plainly obvious that whole political systems, those that grant greater overall power to the judiciary, benefit from greater objective legitimacy as well as from superior subjective credibility. Thus, it is precisely the judicial Siricas, through making use of their inhibitory negative controls, who give veracity to the doctrine of checks and balances and the true separation of powers. The political system, in other words, which permits this kind of judicial feedback, attains an incomparably higher level of social, political and – more genuinely democratic – legitimacy.

Unfortunately, the historically noxious denial of respect for the judicial branch has been an integral part of our Continental political and legal tradition.[23] So was the role of the judiciary in former Communist countries and there is a clear lesson to be drawn from that. Demonstrably, this imbalance is, in terms of re-establishing the checks and balances between the three branches of power, a matter *par excellence* to be corrected by today's Continental constitutional courts.

How to stop this descending positive feedback spiral? Do the legal process in general and especially the process of (constitutional) adjudication have a significant role to play here? Because we now appreciate that law as a science of conflict resolution feeds inductively (empirically) on the specific controversies it is expected to resolve, we also realise that this concordance

> not signify, however, that the Security Council has delegated to it some of its own functions in the exercise of some of its powers. Nor does it mean, in reverse, that the Security Council was usurping for itself part of a judicial function which does not belong to it but to other organs of the United Nations according to the Charter. The Security Council has resorted to the establishment of a judicial organ in the form of an international criminal tribunal as an instrument for the exercise of its own principal function of maintenance of peace and security, i.e. as a measure contributing to the restoration and maintenance of peace in the former Yugoslavia.

Prosecutor v. Dusko Tadic a/k/a 'Dule,' Decision on the defense motion for interlocutory appeal on jurisdiction, 2 October 1995, para. 34-36.

See generally, Ramonet, *Geopolitique du Chaos*. International law – in essence international contract law – derives from reasonable and voluntary co-operation between states. Considerable discrepancies in held values call for supra-national and compelling enforcement irrespective of prior consent. The story of passage from feudal particularism to nation state is being retold on a more universal plane. See, Perry Anderson's brilliant *Passages from Antiquity to Feudalism* and his *Lineages of Absolutist State*.

[23] In reality, of course, most of the judgments at least of the higher courts have always had an *erga omnes* effect. In French, the word "*la jurisprudence*" connotes just that. But the legal systems still pretend that the lower courts are not bound by the decisions of the higher courts. This denial of an obvious reality derives from the somewhat fictitious division of labour between the legislative and judicial branches. In France, for example, this derives from the historically laden fear of the 'government of the judges' ("*le gouvernement des juges*"). See Poralis, *infra* n. 50.

could never have remained purely abstract. Fortunately, the legal systems in Europe have succeeded in developing many return (negative) feedback loops. European legal systems are acquiring the capacity to store and recall their legal encounters with social reality, to learn from them, and to modify their own functioning. In a very definite sense, the legal systems are enhancing their own self-awareness and their ability to assimilate past experiences. These feedback loops reach from the top of the legal pyramid down to each of its lower hierarchical layers and vice versa. Through constitutional (judicial) review, the negative feedback loops (which traditionally existed only in the ordinary system of appeals within the judicial branch itself) have in the meantime penetrated into the legislative and executive (administrative) branches. Previously immune to constitutional rectification ('negative feedback'), these two branches may now be in the initial state of shock. In accordance with the general imperative of the rule of law, however, both the executive and the legislative branches are fast learning that they too are and must be constrained by the constitution, i.e. by the social contract that is binding on all. Quite specifically, for example, it is becoming clear through the judgments of the constitutional courts that the constitution binds even 'the people' themselves. The outcome of this complex and complicated process is the authentic and functional supremacy of the national constitution as a social, political and legal Magna Carta Libertatum.

In a sense, this is what human rights – politically and otherwise – are all about. That is to say, even in substantive terms, constitutional and human rights do largely coincide.

Here, we face another theoretical riddle since the emerging case law was *ex post facto*, i.e. in each particular case the Court had pretended to have merely interpreted the Convention and its spirit. One should note, however, that there has been no fierce dispute in the Court itself, in the European academia or in the national legal spheres concerning the *ex post facto* and quasi-legislative nature of such international judicial law-making. In Anglo-American constitutional law, by contrast, this debate goes back to the 19th century. Its major proponent Robert Rantoul had this to say in a Fourth-of-July address in Scituate, Massachusetts, in 1836:

> Judge-made law is *ex post facto* law, and therefore unjust. An act is not forbidden by the statute law, but it becomes void by judicial construction. The legislature could not effect this, for the Constitution forbids it. The judiciary shall not usurp legislative power, says the Bill of Rights: yet it not only usurps, but runs riot beyond the confines of legislative power. Judge-made law is special legislation. The judge is human, and feels the bias which the colouring of the particular case gives. If he wishes to decide the next case differently, he has only to distinguish, and thereby make a new law. The legislature must act on general views, and prescribe at once for a whole class of cases …

> The Common Law is the perfection of human reason – just as alcohol is the perfection of sugar. The subtle spirit of the Common Law is reason double distilled, till what was wholesome and nutritive becomes rank poison. Reason is sweet and pleasant to the unsophisticated intellect; but this sublimated perversion of reason bewilders, and perplexes, and plunges its victims into mazes of error. The judge makes law, by extorting from precedents something which they do not contain. He extends his precedents, which were themselves the extension of others, till, by this accommodating principle, a whole system of law is built up without the authority or interference of the legislator.[24]

However, according to Von Savigny, a vocal opponent of Napoleon's codification who refused the example of Codex Justinianus,[25] judge-made law would prevent the umbilical cord connecting the 'life of the nation' and the law from being severed.[26] Among other things, this implies that the 'comeback' of judge-made law – through judicial review, through constitutional and through international courts – is something natural, organic and genuine. Quite metaphorically, we might add that Roscoe Pound and other legal realists would be happy to agree with the idea that adjudication represents law's genuine contact with 'the life of the nation,' i.e. with the empirical social reality.

Finally, yet importantly, this 'contact with reality' has proven to be a remarkable contributor to social and political stability everywhere – recently both in Eastern and Western Europe, too – where the judicial review by constitutional (or supreme) courts provides a powerful judicial feedback to legislative fiat and checks the arbitrary abuse of power by the executive.[27] In

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[24] Rantoul, *Oration at Scituate*, at p. 317. See Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*.

[25] Justinian (527–565) proclaimed his *Codex* with constitutio *Summa rei publicae* on 27 April 529. *Vacatio legis* was only eight days, i.e. it went into power on 16 April 528. The Codex itself has not survived but it was followed by the immense work comprising *Digestae*, *Quinquaginta Decisiones*, *Codex repetitiate praelectionis*, *Institutiones* and *Novelae Leges*. The result was an immense *Corpus Juris*, the main antique source of the Western legal tradition.

The anecdotic background of Napoleon's own idea to codify is quite interesting. Apparently, at some point in his youth he had been imprisoned somewhere in Italy and he had the time to read the whole *Corpus Juris*. Later, when he was an Emperor, Talleyrand gave him to read Jeremy Bentham's *Principles of Legislation*. (They had appeared, characteristically, in French translation before they were published in England.) He had read the book in one night and in the morning, he reportedly exclaimed '*Voila, un ouvrage de génie … !*' Thereafter, like Justinian, who had nominated a nine member commission (seven officials, two practising lawyers and a professor Teophilus from Constantinople Law Faculty) to carry out the *Codex* restatement, Napoleon also nominated a commission to write his *Code Civil* (Code Napoléon). From time to time he participated in its work. See Korošec, *Rimsko Pravo,* at p. 32.

[26] Von Savigny, *supra* n. 1, Chapter VII, p. 69-130.

[27] I have had the opportunity to experience the unconstitutional excesses of both the executive as well as the legislative branches first hand as a judge of the Constitutional Court of the

the last decades, the so-called negative judicial review has taken root even in the Continental constitutional practice and has come to be recognised as a functional counterbalance to the political excesses of the democratic process. The 'government of the judges' – we consciously use this pejorative term because it must be incessantly reasoned out according to at least some kind of logic and justified – is to a greater extent consubstantial with the balanced voice of reason. It is this countervailing hope for reason, incidentally, which the European Convention on Human Rights and the European Court of Human Rights originally derive from. The history of the latter proves that this hope – experimental at its inception – was thoroughly, and historically so, justified.[28]

In the end, while the international quasi-constitutional jurisprudence naturally makes specialists of international law speak of 'constitutionalisation of international law,' nevertheless, since ninety percent of the case law of the European Court of Human Rights has nothing to do with international and everything with constitutional law, i.e. insofar as 'human rights' is really just a different (and inappropriate) name for 'constitutional rights,' it would be more fitting to speak of 'internationalisation of constitutional law.'

Republic of Slovenia between 1993 and 1995. It then became pragmatically clear to me that the judicial review – sometimes called 'the negative legislation' – is truly an indispensable 'rule of law' check on what would otherwise be an unchecked abuse of power by all three branches. The chief offender was the executive branch. The politicians in the tripartite structure of power are apparently nevertheless led to believe – the more so the less of traditional separation of power there is – that they are the highest personification of the nation's sovereignty. (This is how power corrupts.) Their immoderation was sometimes surreal. (Moreover, it became clear to me – on the occasion of constitutional examination of unjustifiable referenda – that the constitutive 'social contract' must bind 'the people' too.) There were continuous and unscrupulous attempts by the leading politicians, most often via the slavishly subordinate and orchestrated Slovenian post-Communist media – so much for the freedom of the press in particular social environments! – to discredit the Constitutional Court. Still, the latter enjoyed the highest credibility ratings by far of all the state institutions. The general public understood it better than the politicians that the justice to be found in this court of last resort was essential to political and social stability. In the end however, the 'checks and balances' doctrine enabled the politicians cunningly to defuse, since the mandate of the nine judges was limited to nine years, the autonomous judicial team with the 'politically correct' appointment of much more pliant judges. See Zupančič, *From Combat to Contract: What Does the Constitution Constitute?* p. 59-95, and, more specifically, my *Le Droit Constitutionnel et la Jurisprudence de la Cour Européenne des Droits de L'Homme*, *supra* n. 5. This also explains why legal theorists see the judicial branch of power as the least violent. See, for example, Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics*.

[28] Necessity is the mother of invention i.e. when considering this farsighted political hope for reason, one must keep in mind that these were the war-time politicians emerging from a very different 'democratic process,' i.e. one marked by the 'state of emergency' caused by World War II.

3. Interpretation of Legal Precedents and the Judgments of the European Court of Human Rights

In principle, contrary to the two classical jurisprudential suggestions built into the title above – the concept of 'judgment' and the doctrine of 'legal interpretation' – judgment is not something that would need, or even should need, to be interpreted. Quite the contrary! A concrete *inter partes* judgment itself – and especially so in the European legal tradition – must interpret the abstract legal norm.[29] By definition, therefore, the judgment should be plain and clear and should require no interpretation at all. Moreover, a judgment that lends itself to different interpretations, a judgment that has a range of possible meanings, that is ambiguous, may be difficult or impossible to execute. The purpose of a judgment, because it is meant to put a definite end to a legal controversy, is to be executed, not interpreted. This derives from the need for legal certainty and security.[30] The finality of a judgment, any judgment, is reflected in the Roman Law maxim: *res judicata pro veritate habetur*, i.e. an irrefutable presumption (sometimes as a fiction) is established precisely in order to prevent further interpretation both of the judgment and of the truth concerning the underlying historical event.

However, as explained before, the vitality of the law derives from its direct and empirical contact with the conflicts it is charged with resolving. The European Court of Human Rights and the national constitutional courts translate the empirical reality of these conflicts (in which the State is the defendant) into the legal 'reality' of their own interpretation of the Convention or the Constitution. In doing so, these courts create and recreate their particular legal systems' virtual reality.

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[29] See *Rekvényi v. Hungary*, judgment of 29 May 1999, par. 34:

> [M]any laws are inevitably couched in terms which, to a greater or lesser extent, are vague and whose interpretation and application are questions of practice (see the *Sunday Times v. the United Kingdom* (no. 1) judgment of 26 April 1979, Series A no. 30, p. 31, § 49, and the *Kokkinakis v. Greece* judgment of 25 May 1993, Series A no. 260-A, p. 19, § 40). *The role of adjudication vested in the courts is precisely to dissipate such interpretational doubts as remain* (see, *mutatis mutandis*, the *Cantoni v. France* judgment of 15 November 1996, *Reports of Judgments and Decisions* 1996-V, p. 1628, § 32).

(emphasis added) See, *infra* n. 41.

[30] Here, the need for legal certainty and security is retrospective; it concerns a past historical event (a conflict) that must be irrevocably settled, resolved, determined. As we shall see, the doctrine of precedents deals with the prospective need for legal certainty and security. The need for the interpretation of the judgments of the European Court of Human Rights derives from the need to foresee its decisions.

Furthermore, from the wider perspective, it has now become impossible to maintain the view that the European Court's jurisprudence is simply a separate virtual reality, which happens to be above and beyond the systems being continuously fashioned by the national constitutional courts. In other words, although the technical legal aspects of the (in)compatibilities between the national and the international systems are best dealt with by means of an analytical or case-by-case approach,[31] these (in)compatibilities also have a broader synthetical aspect. Also, referred to as 'harmonisation,' the European Court at Strasbourg has been involved in this process for the last forty-two years.[32]

Of course, the European Court's judgments have never had direct and dramatic consequences of constitutional-review judgments in terms of *erga omnes* effect and unconstitutionality. Consequently, the process of determining the categorical imperatives of human rights in Europe was incremental. The reasons for this become patent if we study the *travaux préparatoires* for the remedies available to the European Court of Human Rights (today's Article 41).[33] There we discern a great concern with the signatory States' sovereignty and the rejection of the idea that the European Court of Human Rights' judgments might have a directly binding and *erga omnes* effect thereof. On a substantive level, the so-called 'margins of appreciation' are the inverse of the constitutional standards of what is 'fundamental.'[34] The European Court of Human Rights perceived itself as an international court and has therefore been much more cautious, perhaps too cautious, in explaining and imposing the European Bill of Human Rights.

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[31] See an excellent essay on this by a former judge of the ECHR, Professor Benedetto Conforti, entitled *Community Law and European Convention on Human Rights: A Quest for Coordination*.

[32] In comparative legal terms, this process is similar to the XIVth Amendment due-process issues. In those cases the US Supreme Court determined which constitutional rights were 'fundamental' to the extent that it was necessary to overrule and reverse states' legal rules and practices accordingly. This covered everything from criminal procedure, which in the US is largely a concern of constitutional law, to substantive and procedural due process, equal protection by the law (prohibition of discrimination), freedoms of thought, speech, the press and assembly, etc. Given the directly binding and *erga omnes* effect of the United States Supreme Court's constitutional-review judgments upon the states, this meant that the latter were required to change their specific legislation in order to conform to the US Supreme Court's interpretation of the Federal Constitution.

[33] See *Luca v. Italy*, judgment of 27 February 2001 and *Scozzari and Giunta v. Italy*, judgment of 13 July 2000. These cases have to do with the binding nature of ECHR judgments.

[34] The term 'fundamental' is used with reference to the XIVth Amendment jurisprudence of the U.S. Supreme Court. But similar criteria are, *mutatis mutandis*, applied by the ECHR. The Convention itself is an establishment of fundamental and minimal human rights standards in Europe.

Nevertheless, there is now a corpus of accumulated ECHR jurisprudence, a veritable legal system unto itself. This system is being continuously transposed into domestic legislation in the member States of the Council of Europe. The signatories of the Convention, of course, have different ways of assimilating these minimum human rights standards into their own legal systems. One of the best ways, in my opinion, is via the State's constitutional court. Constitutional courts continuously scan their legal systems for incompatibilities with the constitution and with superordinate international provisions. Application of the European Court's minimum (quasi-constitutional) standards is therefore part of their skilled *modus operandi*.

Moreover, a State with an independent constitutional court aware of the ECHR's human-rights jurisprudence is much less likely to be condemned for a violation of the Convention, especially if the constitution provides for an individual constitutional complaint – *amparo*, *Verfassungsbeschwerde* or whatever it might be called. Individual constitutional complaints of this kind authorise the constitutional court of the State in question to examine the human rights complaint before it ever reaches Strasbourg. Judicial review of individual constitutional complaints, one after another, continues to lead to the growth and further internal differentiation of the State's own constitutional law. In the meantime, this constitutional development is continuously being harmonised – on an analytical case-by-case basis – with the jurisprudence of the European Court of Human Rights. In other words, the existence of a constitutional complaint in a State's legal system seems to me to provide the happiest medium for interaction between national constitutional law and the law of the European Court of Human Rights. We will examine the process of harmonisation and interpretation of judgments of the ECHR in detail below.

3.1. The Doctrine of Precedents

The interpretation of judgments of the ECHR follows an array of different legal discourses developed between judges coming from different legal traditions. Therefore, the Anglo-Saxon and the Continental legal systems both come into play here. While the Anglo-Saxon dynamic notion of constitutionalism gives us the 'rule of law' approach which is pragmatic, down-to-earth and democratic, the more static Continental system following the Kelsenian pyramid of legal acts, giving us the more pretentious, pseudo-metaphysical[35] and authoritarian approach. This is well-explained in the narrative below:

[35] Reference is to the Kantian origins of Kelsen's 'Grundnorm.'

Imagine an urban landscaping architect in the process of drawing-up the map of a middle-sized park in the center of a town. He sits at his drawing board; he is trying to decide where to place the trees, the bushes, the benches on which people could sit etc. In addition, he must decide where to draw the pathway corridors, which people will use while choosing destinations within the park or while simply trying to get across the park, from one part of the town to another. A typical architect will work out a symmetrical design that looks good from the top-to-bottom bird's perspective, i.e. from the viewpoint of the drawing board. He will then present the plan to the local authorities and since they, too, will only look at the blueprint or a *maquette*, it will probably please them.

There is, however, an alternative empirical way of devising the plan for the park. It is less elegant and neat, but it is effective and functional. A less authoritarian or pretentious and more practical architect, who has the good of the people at heart, will propose to local authorities initially not to foresee any pathways and corridors at all. He will say, "I suggest if you will, that initially we simply plant the grass all over the park and let the people themselves crisscross the park with their own irregular paths, trails, passageways, and shortcuts. Only once, these paths become obvious, we shall reinforce and strengthen them. Thus we shall know for certain that these corridors across the park will truly serve the best interests of the local people."

This wonderful parable comes from Lon Fuller, the famous Harvard legal philosopher. The story is authentic and it concerns the making of Cambridge Common, a park in the middle of Cambridge, Massachusetts. From the frog's perspective it is not at all obvious that the paths of the Common, now of course paved, are irregular.[36]

In terms of comparative law, the parable stands for the comparison between the European synthetic and deductive Cartesian rationality[37] in law on the one hand and the empirical, analytic muddling-through case-by-case approach of the Anglo-Saxon legal tradition. The latter has not developed

[36] The picture is available on the Internet at http://www.ne.jp/asahi/mayumi/watanabe/rtw/18/ccommond/ccommond.htm.

[37] See for example, Kohak:

> Western thought in the twentieth century has worked itself into a dead end by assuming that the only alternatives available to it were those of a technical, solely quantitative rationality which excludes questions of value and meaning from scholarly consideration (so called 'Cartesian rationality,' better represented by writers like Reichenbach in his `Rise of Scientific Philosophy') or, alternately an irrationalism which surrenders all claim to critical reason (as in Heidegger or more recently in various post-modernists).

Erazim Kohak, Kira Conference, 2000.

any sophisticated legal doctrine regarding the interpretation of judicial precedents. Usually they enunciate only two basic rules:

The first rule is that like cases should be decided alike.

The second rule is that the precedent is binding only insofar as the ruling (the holding) and the *ratio decidendi* of a judgment derives from the *underlying facts of the case*. The rest is *obiter dicta.*

However, the misleadingly simple principle according to which "like cases should be decided alike" does represent a radical break with the syllogistic logic, which Continental lawyers are accustomed to. It is based on lateral reasoning by means of finding similarity between cases and applying analogy. The Continental legal reasoning adheres to vertical logical subsumption.[38]

Reasoning by logical subsumption of concrete facts under a major premise is based on an abstract – not concrete! – concordance; it presupposes a strict vertical distinction between the abstract and the concrete. The principles of legality, legal certainty (*lex clara, lex certa*) etc. express the faith placed in predetermined legal outcomes (legal determinism), i.e. the central faith placed in the rule of law rather than in the arbitrariness of man.[39]

Yet this mode of legal reasoning, too, requires different modes of interpretation: the interpretation of words (concepts), grammatical, systemic, historical and above all teleological, i.e. the interpretation of legislator purpose. The need for interpretation, and especially for the teleological interpretation, proves that the vertical syllogistic mode of reasoning based on the concordance between the abstract and the concrete is not as predetermined as most would like to believe.[40] This we inferred in Section II dealing with legal formalism.

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[38] Of course, this is a very schematic and overstated way of presenting the differences. The intention is to present two Weberian 'ideal types' in order to explain the issue of interpretation of judgments. If the differences were as important as presented here, no fruitful dialogue between those who come from two different legal systems would be possible. The fascinating aspect of the European Court of Human Rights in Strasbourg is precisely the facility with which the legal discourse develops between judges coming from different legal traditions.

[39] Ideologically and socio-psychologically, the essence of the rule of law is mistrust, i.e. skepticism concerning the power placed in a fellow man. It is probably fair to say that this distrust, which typically leads to the doctrine of checks and balances, i.e. the mutual blocking of reciprocal power in constitutional law, is now a central feature of Western democratic political and legal ideology.

[40] See, *Refah Partisi and others v. Turkey*, judgment of 13 February 2003, paragraph 57:

> As regards the accessibility of the provisions in issue and the foreseeability of their effects, the Court reiterates that the expression 'prescribed by law' requires firstly that the impugned measure should have a basis in domestic law. It also refers to the quality of the law in question, requiring that it be accessible to the persons concerned and formulated with sufficient precision to enable them – if need be, with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action

Needless to say, for the constitutional courts and other courts of last instance this mode of reasoning turns out to be almost completely useless because in these instances the judges must often deal with the subsumption of concrete facts under the most abstract norm. The case-law of the European Court of Human Rights testifies to this, i.e. to the need to fill in the enormous gap between an abstract meaning of a norm of the Convention and the facts of a concrete case.[41] Half a century ago, of course, the Court was faced with this open space; it filled in the intermediate layers of case-law. The real substance of the Convention now lies in this casuistic jurisprudence. This then generates the need for interpretation of the Court's case-law – rather than the abstract provisions of the Convention itself.

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may entail. *Experience shows, however, that it is impossible to attain absolute precision in the framing of laws, particularly in fields in which the situation changes according to the evolving views of society. A law which confers a discretion is not in itself inconsistent with this requirement, provided that the scope of the discretion and the manner of its exercise are indicated with sufficient clarity, having regard to the legitimate aim in question, to give the individual adequate protection against arbitrary interference.*

(emphasis added).

[41] See for example, *Rekvényi v. Hungary*, judgment of 29 May 1999, paragraph 34:

> According to the Court's well-established case-law, one of the requirements flowing from the expression 'prescribed by law' is foreseeability. Thus, a norm cannot be regarded as a 'law' unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able – if need be with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail. Those consequences need not be foreseeable with absolute certainty: experience shows this to be unattainable. Again, whilst certainty is highly desirable, it may bring in its train excessive rigidity and the law must be able to keep pace with changing circumstances. Accordingly, many laws are inevitably couched in terms which, to a greater or lesser extent, are vague and whose interpretation and application are questions of practice (see the *Sunday Times v. the United Kingdom* (no. 1) judgment of 26 April 1979, Series A no. 30, p. 31, § 49, and the *Kokkinakis v. Greece* judgment of 25 May 1993, Series A no. 260-A, p. 19, § 40). The role of adjudication vested in the courts is precisely to dissipate such interpretational doubts as remain (see, *mutatis mutandis*, the *Cantoni v. France* judgment of 15 November 1996, *Reports of Judgments and Decisions* 1996-V, p. 1628, § 32). The level of precision required of domestic legislation – which cannot in any case provide for every eventuality – depends to a considerable degree on the content of the instrument in question, the field it is designed to cover and the number and status of those to whom it is addressed … Because of the general nature of constitutional provisions, the level of precision required of them may be lower than for other legislation.

Let us now consider the alternative lateral mode of legal reasoning by case analogy formerly characteristic only of the Anglo-Saxon legal system. This mode of reasoning is slowly gaining ground both in internal constitutional law as well as in international law of human rights.

In principle, the choice of the precedent case similar to the case at hand depends on the criteria of similarity. In terms of formal logic, this may mean – if only we choose the right criteria of similarity for the comparison – that any case is similar to any other case and as the French say *la comparaison n'est pas raison*. In formal logical terms, therefore, the level of legal predetermination may seem to be very low indeed.[42]

In turn, this implies the need for a higher level of trust placed in the judiciary, their competence, the judicial self-restraint, their discernment, etc. This indispensable need for the credibility of the judiciary is now coming to the forefront in Continental legal systems that have accorded precedent-creating power to their constitutional courts.[43] Clearly, the balance of power between the three branches has swung in the direction of the judiciary.

In reality, however, the legal reasoning by analogy need not be – and generally is not – any less predetermined than the deductive Continental reasoning by abstract syllogism.

However, in the case-law system of precedents there are several features that make legal reasoning very transparent. The judgments are published and fed into the collective memory.[44] Should the reasoning of the judges be

[42] There is some truth to this, which is why in the 1970s the United States have adopted the now famous Model Penal Code [MPC], probably the most advanced criminal code with an extremely sophisticated system of interlocking rules, doctrines and principles. In criminal law, where the required level of predetermination is the highest in any legal system (principle of legality, art. 7 of the European Convention) the reasoning by analogy is least suitable. Moreover, due to the jury's unexplained verdict the possibility of an appeal based on substantive criminal law's principle of legality is strictly limited, i.e. most appeals proceed narrowly on procedural grounds. This has left the *substantive* – as opposed to *procedural* – criminal law in an underdeveloped state and had made the MPC codification inevitable. The codification itself went far beyond simple restatement and drew heavily on Continental legal theory. The lesson to be learned from this is that the case-law approach has its own serious disadvantages.

[43] For example, this socio-political development is rapidly progressing in some former Communist countries (Slovenia, Check Republic, Slovakia, Hungary, etc.) where there has been, some twelve years ago, a sudden reversal to the rule of law. The unquestionable respect for the decisions of the constitutional courts has become an ideological canon that the politicians do not dare to disobey.

[44] Formerly, the choice of judgments to be published was made by private law reporters (in England and also in the United States). Today, practically all the judgments are fed into Lexis, Westlaw, and the HUDOC of the European Court of Human Rights. Internet has made all this legal material widely available. The legal search machines also make the retrieval of relevant cases far easier, i.e. legal search for the relevant case-law is now completely overhauled.

intellectually dishonest, their judgments are there for the academia and lay public to scrutinise and to criticise them. Of course, this criticism mostly refers to the judgments of constitutional, supreme and international courts whose generally binding pronouncements receive high level of attention. Besides, the publication of separate dissenting (and even concurring) opinions will draw the attention to the weak points in the reasoning of the majority.

More importantly, the lateral comparison and the search for similarity between the case at hand and the appropriate precedent is not abstract and fuzzy. In the European Court of Human Rights, hundreds of the so-called clone cases are dealt with in which the factual pattern is practically identical. Then there are cases which are similar, but not identical and in which the continuation of established jurisprudence does not present a problem. On the other hand, the Court is well aware when faced with a new issue and when the need arises for establishing a new precedent.

For instance, in the jurisprudence concerning Turkey, a good example of this is the following procedural problem. The six-months rule concerning the filing of the application[45] presupposes that the date of the final domestic decision is clear. Usually, the period of six months commences when the last domestic decision is delivered to the applicant. In countries where the decision is not sent by registered mail (Turkey, Italy etc.) but is simply deposited in the registry of the Court of Cassation there may be doubts concerning the exact beginning of the running of the preclusive six months period. In criminal cases the appellant is already in prison, i.e. he may be precluded from both finding out that there has been a decision as well as from getting hold of it. If he has a lawyer, he is at his mercy; if he does not have one he may fail to notice the judgment altogether.

Then there are the leading cases of *Akuş v. Turkey* and *Aka v. Turkey*[46] to which many fully analogous cases followed suit. In all of these cases the basis for calculating the additional loss ought to have been the rate of inflation and not the rate of statutory interest for delay. There is little or no problem of interpretation in such cases because the factual situations are classical and clear-cut and because the ruling in both leading cases is clear.

[45] Article 35 – *Admissibility criteria.* (1) The Court may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognised rules of international law, and *within a period of six months from the date on which the final decision was taken*.

[46] In *Akkus v. Turkey*, judgment of 23 October 1997, Mrs. Akkus sought a ruling that the basis for calculating the additional loss should be the rate of inflation and not the rate of statutory interest for delay. In *Aka v. Turkey*, the judgment of 23 September 1998 concerned the fact that statutory interest for delay had been insufficient to compensate for high monetary depreciation during periods of more than four and five years respectively between dates proceedings for additional compensation had been brought and dates sums awarded were actually paid.

Still, such a clear ruling could not be directly deduced from the abstract norm of Protocol I, art. (1),[47] i.e. the cases themselves represent an interpretation of this provision.

Similarly, there have been a number of identical cases following the judgment in the leading cases of *Kalaç c. Turquie*.[48]

All three above cases represent good illustrations of clear interpretation. In all three cases there is a key paragraph of the leading judgment that is easy to discern. Yet in all three cases further theoretical interpretation may be made. For example, in *Kalaç c. Turquie*, it could be said that the judgment of the European Court of Human Rights relied on prior consent of Mr. Kalaç which made the limitations placed on his freedom of religious expression acceptable. A legal theorist, for example, could question just how far such an implicit consent could go in order to justify the limitations placed on constitutional and human rights.[49] Such further theoretical interpretation, needless to say, is precious because it represents a valuable feedback to the courts (national as well international) and contributes decisively to further development of jurisprudence. However, this kind of creative interpretation should be seen as different from the narrower interpretation concerning the binding nature of a specific precedent.[50]

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[47] Article 1 – *Protection of property*. (1) Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.

[48] Paragraphe 28 du jugement: *En embrassant une carrière militaire, M. Kalaç se pliait, de son plein gré, au système de discipline militaire. Ce système implique, par nature, la possibilité d'apporter à certains droits et libertés des membres des forces armées des limitations ne pouvant être imposées aux civils* (arrêt *Engel et autres c. Pays-Bas* du 8 juin 1976, série A n° 22, p. 24, par. 57). *Les Etats peuvent adopter pour leurs armées des règlements disciplinaires interdisant tel ou tel comportement, notamment une attitude qui va à 'encontre de l'ordre établi répondant aux nécessités du service militaire.*

[49] In terms of comparative constitutional law, see *South Dakota v. Neville*, 459 U.S. 553, 103 S.Ct. 916, 74 L.Ed.2d 748 and *Schmerber v. California*, 384 U.S. 747 (1966).

[50] But compare the following (Jean Poralis, as cited by Jean du Jardin, http://www.cass.be/cass/images/discours2001.pdf):

> Il est deux sortes d'interprétation: l'une par voie de doctrine, et l'autre par voie d'autorité. L'interprétation par voie de doctrine consiste à saisir le vrai sens des lois, à les appliquer avec discernement, et à les suppléer dans les cas qu'elles n'ont pas réglés. Sans cette espèce d'interprétation, pourrait-on concevoir la possibilité de remplir l'office du juge? L'interprétation par voie d'autorité consiste à résoudre les questions et les doutes par voie de règlements ou de dispositions générales. Ce mode d'interprétation est le seul qui soit interdit au juge. Quand la loi est claire, il faut la suivre; quant elle est obscure, il faut en

Of course, there are several issues on the periphery of the established jurisprudence, e.g. concerning euthanasia,[51] the right to know the identity of your parents,[52] environmental issues,[53] the substantive and procedural criteria for torture,[54] positive obligation of the state concerning the protection of life,[55] the nature of parole (conditional release),[56] the obligation of the state to restitute *in integrum* the *status quo ante*,[57] etc.

Here the question of interpretation cannot be generalised. Typically, in *Selmouni v. France* the Court itself undertook to clarify its criteria (for torture), i.e. it undertook its own authoritative interpretation. In *Scozzari and Giunta v. Italy*, on the other hand, the Court's own interpretation of Article 41[58] makes the interpretation of Art. 41 for the Court's addressees more difficult. Only time will show, whether the States will in the future (and in what cases) be required to restitute in integrum the situation that has led to violation of the Convention. However, the effect of *Pretty v. U.K.* is clear, i.e. that the issue of euthanasia is *ratione materiae* not under the Convention. This does not require any further interpretation. For different reasons (the so-called margins of appreciation) the effect is perhaps similar concerning the right of the adopted person to find out the identity of his or her parents.

> approfondir les dispositions. Si l'on manque de loi, il faut consulter l'usage et l'équité. L'équité est le retour à la loi naturelle, dans le silence, l'opposition ou l'obscurité des lois positives.

[51] *Pretty v. United Kingdom*, judgment of 29 April 2002, par. 56:

> The Court therefore concludes that no positive obligation arises under Article 3 of the Convention to require the respondent State either to give an undertaking not to prosecute the applicant's husband if he assisted her to commit suicide or to provide a lawful opportunity for any other form of assisted suicide. There has, accordingly, been no violation of this provision.

[52] *Odièvre c. France*, 13 February 2003.

[53] *Hatton and Others v. United Kingdom*, judgment of 8 July 2003.

[54] *Selmouni v. France*, judgment of 28 July 1999; *Al-Adsani v. United Kingdom*, judgment of 21 November 2001.

[55] *Calvelli and Ciglio v. Italy*, judgment of 17 January 2002.

[56] *Ezeh and Connors v. United Kingdom*, judgment of 9 October 2003.

[57] *Scozzari and Giunta v. Italy*, judgment of 13 July 2000.

[58] Article 41 – *Just satisfaction*. If the Court finds that there has been a violation of the Convention or the protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial separation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.

> [U]nder Article 41 of the Convention the purpose of awarding sums by way of just satisfaction is to provide reparation solely for damage suffered by those concerned to the extent that such events constitute a consequence of the violation *that cannot otherwise be remedied.*

Scozzari and Giunta v. Italy, judgment of 13/07/00, par. 250.

Yet the Court's reasoning (and many dissenting opinions) in *Odievre v. France* leave the possibility open that in the future (and in a different legislative framework) the decision of the Court might be different. That, too, is very difficult to interpret solely on the basis of the judgment in question.[59] Most probably it is impossible to cite or invent a rule of interpretation that would enable someone in Turkey or elsewhere to say with certainty whether the anonymity of delivery would, or would not, be sustained in the European Court of Human Rights in Strasbourg.

3.2. How to Read and Interpret the Judgment

The practical question on the receiving end of this jurisprudence, however, is how to interpret the cases coming from Strasbourg. Here, instead of advising as to any firm rules of interpretation I would first point out simply how to *read* a case.

If we subject any precedent to a legal analysis we should pay attention to three principal legal aspects: *the facts* that affect the specific realistic configuration in which the decision is taken, *the issue*, which transposes these

[59] *Odièvre c. France*, par. 49:

> Par ailleurs, le système mis en place par la France récemment, s'il conserve le principe de l'admission de l'accouchement sous X, renforce la possibilité de lever le secret de l'identité qui existait au demeurant à tout moment avant l'adoption de la loi du 22 janvier 2002. La nouvelle loi facilitera la recherche des origines biologiques grâce à la mise en place d'un conseil national de l'accès aux origines personnelles, organe indépendant, composé de magistrats, de représentants d'associations concernées par l'objet de la loi et de professionnels ayant une bonne connaissance pratique des enjeux de la question. D'application immédiate, elle peut désormais permettre à la requérante de solliciter la réversibilité du secret de l'identité de sa mère sous réserve de l'accord de celle-ci de manière à assurer équitablement la conciliation entre la protection de cette dernière et la demande légitime de la requérante, et il n'est même pas exclu, encore que cela soit peu probable, que, grâce au nouveau conseil institué par le législateur, la requérante puisse obtenir ce qu'elle recherche.
>
> La législation française tente ainsi d'atteindre un équilibre et une proportionnalité suffisante entre les intérêts en cause. La Cour observe à cet égard que les Etats doivent pouvoir choisir les moyens qu'ils estiment les plus adaptés au but de la conciliation ainsi recherchée. Au total, la Cour estime que la France n'a pas excédé la marge d'appréciation qui doit lui être reconnue en raison du caractère complexe et délicat de la question que soulève le secret des origines au regard du droit de chacun à son histoire, du choix des parents biologiques, du lien familial existant et des parents adoptifs.

facts into a legal context and transforms them into a juridical question to be resolved, and *the holding (ruling)* of the court which presumably resolves the question and takes a clear stand on the issue. [60]

Each judgment of the European Court of Human Rights is divided into three principal sections. The first one is entitled *"The Facts,"* the second one *"The Law"* whereas the so-called *Operative Part* at the end represents the implemental ruling of the Court. Compared to Anglo-Saxon tradition in which the judges write the judgments themselves and where there are no prescribed rules as to the structure of the judgments, the decisions of the European Court of Human Rights are highly structured and therefore comparatively transparent and explainable. The renowned quality of these judgments derives both from their characteristic structure and from the constant endeavour of the Court to make them comprehensive and concise. The writing of each major judgment, usually delivered by the Grand Chamber of seventeen judges, is supervised by a *comité de rédaction* composed of several judges.

The Court's deliberations before the vote are in fact mostly dedicated to the final reading and editing of the judgment. The text of the opinion is supposed to reflect the contributions of the judges in the decisive first deliberations, which take place immediately after the public audience (in cases where there is one). The deliberations of the judges of the Court concerning a particular case could be seen as being of three kinds. The procedural considerations concern the admissibility of the case and the discussion of the procedurally relevant occurrences, sometimes the last-minute submissions and events during the public audience.

The substantive discourse itself concerns two major aspects. The first one concerns the extant case-law and the discussion of parallels between the case at hand along with the possibly applicable precedents. The second aspect of the substantive discourse concerns what the French call *la qualification du cas*. Here, the case's legal nature is characterised and typified in the general legal discourse which goes far beyond the discussion of similarities between the precedents and the case at hand. Different legal notions that are part of our shared legal culture are discussed, weighed and reflected upon. I would venture to say that it is this juristic discourse which represents the real substance of the Court's deliberations.

[60] The schematic division into facts, issue and ruling however, may be misleading – and especially so to one who is not used to contextual legal research, case analysis, etc. Especially important is not to take too literally the distinction between the facts and the issue of the case. One must keep in mind that the facts per se do not exist. The facts only become real when seen through a particular legal prism. We cannot go deeper into this here, but we can paraphrase Hobbes in his famous saying: "Civil laws ceasing, facts also cease." Hobbes, *Leviathan*, Chapter XXVIII, paragraph 3.

In the 'Law' part of every judgment case there is usually one key paragraph and in it one or more key sentences. I am not referring to the *inter partes* purpose of the judgment, which is taken care of in the final operative part. Clearly, in order to understand the *erga omnes* effect of the decision, since this will apply to all future similar cases, one must look for the extant grounds of the decision.

On the other hand, the interpretation of precedents is contextual.[61] Because the meaning of the judgment's holding (ruling) – often encapsulated in the key sentence or paragraph of the judgment – depends both on the facts and the implied juridical comprehension of the case, the key sentence can never be separated from the case as a whole (*ratio decidendi*).[62]

The doctrine of precedents tells us that the holding (ruling) of the case carries only insofar as the facts of the case will allow it.[63] When it is said that the like cases must be decided alike, this also means that the holding of a case cannot be elevated to a general principle detached from specific facts. When a new case comes along, in other words, the applicability of a principle, doctrine or rule established in a precedent will in principle apply only if the facts of the case are identical, similar, analogous, etc.

One way of understanding this is to compare the usefulness e.g. of Michele de Salvia's book[64] with a casebook containing the leading cases of the European Court of Human Rights. De Salvia's book is an excellent *aide mémoire* for somebody already acquainted with the hundreds of judgments of the Court, i.e. with their factual and juridical context. For a novice, however, a much better method is to read the select key cases in their complex entirety.

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[61] See, *supra* n. 4. In the *Vienna Convention on the Law of Treaties*, 1969, article 31, paras. 2 and 3, the word 'context' applies to the *normative* surroundings of a particular legal concept (word). In. 3(b), however, there is a reference to "subsequent practice in the application of the treaty." Of course, the *case-law* contextuality is very different from the *normative* contextuality, which the drafters of the Vienna Convention on the Law of Treaties must have intended.

[62] Perelman, *supra* n. 11, at p. 36, citing *Digestae*, L. XVII, 1: *Non ex regula jus sumatur sed ex jure quod est regula fiat*:

> Il ne suffit pas de connaître les règles de droit. Une des principales tâches de l'interprétation juridique est de trouver des solutions aux conflits entre les règles, en hiérarchisant les valeurs que ces règles doivent protéger. C'est comme on le sait, cette fine hiérarchisation des droits constitutionnels qui a été et qui continue à être une des tâches principales de la Cour Suprême des Etats-Unis.

[63] In principle, the ruling (holding) of a case is just that (a ruling, a holding) only insofar as it resolves the specific problem presented by the case's fact pattern. The rest is *obiter dictum* (pl. *obiter dicta*). *Obiter dicta* may have a pedagogical meaning and effect – a message sent to lower courts – but they are neither binding on their own source (the court producing the precedent) nor upon the lower courts.

[64] *Compendium de la CEDH*, Kehl/Strasbourg/Arlington 1998.

Another way to explain the contextuality of the case law is to ask whether the current jurisprudence of the European Court of Human Rights could be restated i.e. codified, in a concise system of rules, doctrines and precedents. This would only be possible to a very limited extent or not at all. Why? The standard answer would be, among other things, as the Court itself has so often emphasised in its decisions, that the Convention is a "living instrument."[65] Very rarely, the Court, and only if there are *compelling reasons* to do so, will change its case law and explicitly reverse itself on a previous standpoint. [66]

More likely, however, is that a new fact pattern in a new case will call for a new or less ambiguous legal approach in resolving the case.[67] What is happening, therefore, is not so much the reversal of preceding case law as its further differentiation. New nuances of decision making are brought into play when new legal issues are singled out and new precedents (principles, doctrines, rules) established concerning the finer distinctions between previously undifferentiated legal issues. A specific new legal issue is sorted out, voted upon and decided. Thereafter, the standpoint thus taken applies to other similar cases, i.e. if and when they do arrive. I would venture to say that this, rather than the self-reversal of previously established rules, is the real meaning of the incantation formula used by the Court, according to which the Convention is not a static but a dynamic, living instrument of the law on human rights. In this fashion the Court – mostly through its Grand Chamber compositions of 17 judges – interprets the Convention and creates new precedents.

A question might be raised about this quasi-legislative creativity of the Court in Strasbourg. Yet today, fortunately, this question originating in the traditional and ideologically overloaded division of labour between the legislative and judicial branches – along with the unrealistic (to put it mildly) and epistemologically untenable 'Cartesian' separation line between the abstract and the concrete – is for the most part technically outdated and ideologically obsolete. Of course, in Continental Europe the transcendence of this dialectic between the abstract and the concrete[68] is mostly transpiring

[65] The phrase appears in thirty judgments (in English language).

[66] In constitutional law (discrimination cases) the notion of 'compelling reasons' evokes the strictest possible criteria of assessment. See for example, *Equality Foundation of Greater Cincinnati, Inc. v. Cincinnati*, 54 F. 3d 261, 267 (CA6 1995): "The law will be upheld only if it is suitably tailored to serve a *compelling* state interest."

[67] Typical examples are *Commingersol v. Portugal*, judgment of 6 April 2000, *Selmouni v. France*, judgment of 28 July 1999.

[68] See more extensively, Unger, *Knowledge and Politics*, p. 88-100. Unger speaks of the "antinomy of rules and values," i.e. of the dialectic in which the clear rules of law are established and fixed in order to take the place of fuzzy values – but are constantly informed by them (via teleological interpretation). In constitutional and in the international law of human rights this

via the empirical case-by-case creative problem-solving by the constitutional and international courts. [69]

3.3. The Erga Omnes Effect of ECHR Law

As Professor Steinberger has brilliantly demonstrated, there are three levels on which judgments can have their effects: (1) as *res judicata*, (2) as *erga omnes* decisions and (3) as the true source of law.[70] The interpretation of a judgment of the European Court of Human Rights is no different from the interpretation of any other precedent judgment delivered by any other court. In the last analysis, the only difference obtains from the perception of the binding nature of the superior court judgments.

Because the judges of the lower courts know that the judgments of the higher courts are at least *de facto* binding on them, these judges – even in countries with the Continental legal tradition – read and interpret judgments delivered by the higher (supreme and constitutional) courts. They know that effectively their independence *vis-à-vis* the higher courts is an ideological fiction. If they did not believe this, they would be reversed over and over again. Thus, for example, the jurisprudence of the *Cour de cassation*, although it is not formally binding on the lower courts, is a *de facto* source of French law.

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antinomy is of special concern. Since values come into play in concrete cases they tend to have an impact on abstract precedents.

[69] From the point of view of systems analysis, the legal system is – just like human consciousness – an arrangement of interconnected feedback channels. These feedback channels feed the experiences deriving from the real cases that the system deals with, back into the legal system's memory. In this way the system further develops its know-how, differentiates its problem-solving approaches and is capable of learning from its own experiences. The legal system is thus a virtual reality (legal culture) with more or less contact with the actual and factual social, political reality of the nation (or of the international community). The significant difference between the traditional Continental legal system and the emerging precedent empirical feedback (traditional in the Anglo-Saxon legal systems) of the constitutional courts lies precisely in the immediacy and the magnitude of the system's self-learning capacity. In other words, the system is better able to maintain its contact with reality, which increases the adequacy and the social relevance of these responses. The main obstacle to the advancement of this beneficial process may be political but in large measure the barriers also derive from the internalised attitude of the jurists, lawyers and judges.

[70] Steinberger, *supra* n. 14 *in fine*. There is not much to add to Professor Steinberger's exhaustive – in the best Continental academic tradition – overview of the problem. My point is simply that it is symptomatic that the issue must be treated in this way in the first place because I consider it natural for the law to evolve out of the concrete cases and controversies. Reversely, however, I consider that great damage has been done to the Continental legal systems because whole areas of law have for more than a century been insulated from this empirical contact due to the unfortunate impact Bentham's *Principes de legislation* have had on Napoleon.

From the point of view of the lower court, the art of reading the judgment as well as of interpreting its relevance as a precedent, and its impact, is admittedly less clear-cut than the art of interpreting an abstract norm issued by the legislature. At worst, it amounts to a speculation about the outcome of the case were the parties to file an appeal and the court of appeal to decide the case anew.[71]

A case, which is filed with the European Court of Human Rights (an application, a *requête*) may be inadmissible for a number of reasons – *ratione materiae*, because the substance of the case does not fall under the Convention, *ratione temporis*, because the event occurred before the coming into force of the Convention, because it was filed more than six months after the last decision of the domestic highest instance, because domestic remedies have not been exhausted – but these are the procedural criteria that do not lend themselves to much interpretation.[72]

From the point of view of the constitutional court, these procedural reasons are not interesting. In the *in camera* deliberations of a national constitutional or supreme court, the real issue is, whether their decision would be reversed in the European Court of Human Rights or not. Here, the practical issue is not so much the in-depth interpretation of the relevant case of the European Court of Human Rights, as is the simple awareness that such a resemblance (analogy) between the case dealt with by the domestic court and a specific precedent of the European Court of Human Rights – exists in the first place. If the domestic court is aware of the similarity between the domestic case to be decided and the specific European precedent, the situation for the domestic court is pretty predictable.[73]

In principle, although the precedents of the European Court of Human Rights are only *de facto* binding on the State signatory of the Convention, the first instance courts and all the courts of appeal ought to apply the Convention (as interpreted by the European Court of Human Rights). Both

[71] Of course, concerning ordinary domestic cases we do keep in mind that the grounds for appeal may be limited, may concern only purely legal issues, the absolutely essential procedural violations, etc. Nevertheless, we are aware that these distinctions are relative and not as clear-cut as imagined.

[72] Still, of the 97.3 per cent of the rejected applications filed with the European Court of Human Rights, except those that are found to be 'manifestly unfounded,' most are declared inadmissible for these procedural reasons.

[73] Again, this predictability – we are referring to *sécurité juridique* – is lateral (based on analogical reasoning), rather than vertical (based on syllogistic reasoning). Yet, lateral reasoning looking for similarities proceeds to finding a common major premise to both cases. Once found, this major premise is likely to be much more specific than the one derived from a remote major premise. In consequence, the predictability and *sécurité juridique* are commensurably increased.

from the point of view of the protection of human rights as well as in terms of procedural economy in the domestic legal system this would be the ideal state of affairs.

One, however, realises that this is necessarily a long term assimilation process – also due to the language and other cultural communication barriers.

Moreover, a stance taken by the ECHR on a particular legal issue is always taken *via* the specific case and *vis-à-vis* a specific domestic legal system: British, French, German, Russian, Swedish, Turkish, etc. Only rarely does the Court pronounce an abstract ruling that may be directly applied in the domestic legal systems of all states signatories of the Convention.[74]

At the current stage of development, therefore, there exist three needs for interpretation. First, the ruling of the ECHR must be abstracted from the differential specifics of the particular case and the specific domestic legal system; second, the meaning of the ruling must be meaningfully transposed into the situation of the domestic legal system; and third, the ruling must be applied to the specific domestic case at hand. Clearly, this is best done by the domestic court of last resort – ideally, by the constitutional court applying the precedent in the *in concreto* judicial review. Here, it would be prudent if each of the national courts of last instance should have at least one senior jurist who is intimately acquainted with the case law of the ECHR.[75]

Once the domestic court of last instance establishes a similarity between the case at hand and the specific precedent of the ECHR, the question arises whether the distinguishing characteristics of the domestic case set it apart from the precedent delivered by the ECHR. From the point of view of the domestic court, this 'differential diagnosis' of the borderline case is perhaps one of the most difficult aspects of interpretation. It presupposes the full cognizance of the case law context in which the specific precedent is being perceived.

Given that the applicability of a precedent is sometimes debatable even in the ECHR, it might be difficult for the domestic court clearly to distinguish the applicability of one precedent as opposed to another – or none at all.[76]

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[74] Such was the case in *Selmouni v. France* (concerning the definition of torture as per Art. 3 of the Convention). Another example may be *Commingersol v. Portugal* (concerning the standing of corporations and perhaps other legal persons to claim non-pecuniary damage).

[75] Of course, the Internet site of the European Court of Human Rights – http://www.echr.coe.int – has the search machine capable of retrieving the judgments dealing with a certain issue. However, in order to be able to use this search machine one must be able to configure the specific idiomatic combination of words (both in English and in French languages) that evoke the relevant series of judgments and admissibility decisions.

[76] See for example, *Hatton v. U.K.* as well as *Ezeh and Connors v. U.K.* and especially the appended dissenting opinions.

At the current stage of national assimilation of the international human rights law it is perhaps not realistic to expect of all the States signatories of the Convention, i.e. of their courts of last resort, to be capable of making this differential diagnosis. However, in countries where the citizens may file individual constitutional complaints (*Verfassungsbeschwerde* in Germany, *amparo* in Spain, *certiorari* in the United States), because the individual constitutional complaint is largely analogous to the application (*requête*) in the ECHR, the *in concreto* judicial review may be the best domestic screening device (from the point of view of the state signatory of the Convention).

Because constitutional rights stand for a far larger circle of rights than human rights – the latter establish only the *minimal* standards for 43 signatories of the Convention and apply to roughly 800 million people from Iceland in the West to Russia in the East, from Norway in the North, to Turkey in the South – *in concreto* judicial scrutiny when fair and independent is a superior domestic remedy. When efficacious, it must be used before the case ever comes to Strasbourg Court, whose jurisdiction is international and thus subsidiary (supplementary, auxiliary, ancillary) to domestic legal remedies to be previously exhausted.

Here, it becomes apparent in what way the ECHR is – despite all the formalistic arguments to the contrary – an international constitutional court with the power of *in concreto* judicial review and with the *de facto erga omnes* effect of its judgments.[77]

4. The Individual in Litigation with the State

We saw that the checks and balances between the three branches of power of the state help in keeping the Constitution in contact with reality through its judicial review. Another benefit that occurs from this is that the constitutional jurisdiction provides an essential framework of equality. Rousseauian fiction concerning the individual's partnership in the social contract becomes a reality precisely to the extent every aggrieved citizen is given standing to challenge everything in the legal system he deems incompatible with the social contract. He can challenge the legislative branch for the perceived unconstitutionality of its laws, the executive branch for the unconstitutionality of its regulations as well as the modes of enforcement of otherwise constitutional laws and he can challenge the judicial branch, if he believes its interpretations of the laws to be incompatible with the clear intent of the letter of the constitution.[78]

[77] More specifically on that question in, Zupančič, *Le Droit*, *supra* n. 5.

[78] Many laws defining the jurisdiction of constitutional courts in different countries give standing *(actio popularis)* to challenge the (abstract) constitutionality of particular legislative acts to every aggrieved citizen. "Everyone can, if he can show the existence of his legal interest,

Only through all this does the constitution become a *living* contract between the people and their government, and the people are then empowered to demand that their government strictly adhere to the contract.

This fortunate development, of course, has everything to do with the previous establishment of the constitutional *fora* in which the individual citizen finally acquired equal[79] standing to sue all three branches of power. It is this procedural equality which first opened the eyes of the law to the whole new world of (constitutional) controversies. These controversies, of course, existed all along yet there was no framework of equality permitting them to legally surface and be recognised as such, which is what I meant above when I said that the constitution used to be 'insulated' from the underlying social and political reality. The law can deal with substantive conflicts and controversies only if the legal framework of equality permits the issues to surface. Since legal equality is an artificially maintained procedural framework, the controversies will not surface unless the institutional and the procedural structure providing this primordial legal equality is first provided. The constitution as a social contract remains a dead letter unless this institutional framework and the consequent standing is also provided. The individual, at least legally, becomes equal to the state.

In any event, the immediate litigation of the Convention's provisions in Strasbourg, where all three branches of state power turn into one defendant, represents a clear break with the tradition in which the ultimate abstract legal act (Convention or the national Constitution) was not available to the individual citizen for direct litigation.[80] As discussed before, in terms of constitutional law, the analogy to the individual application in Strasbourg,

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file a written initiative to begin the procedure [of abstract review of constitutionality]." Art. 24(1) of the Slovene *Constitutional Court Act*, Official Gazette of the Republic of Slovenia, no. 15 (1994) 821 at p. 823.

[79] Every conflict by definition requires two elements, of which only the first (incompatibility of interests) is *prima vista* obvious. The second element of every conflict is the *approximate equality in power*. If the difference in power is too great, we speak of prevalence, not of conflict. The state, therefore, by eliminating physical prevalence as the criterion *eo ipso* creates among its subjects the equality in power(lessness). This equality is then the first factual precondition for legal adjudication as a surrogate of self-help. Yet the legal system, too, must create additional institutional, procedural and substantive conditions permitting all kinds of incompatibilities of interests, which would otherwise not surface at all, to legally manifest themselves. Often, paradoxically enough, the greatest inequities – those now considered violations of constitutional and human rights – never manifested themselves legally, although these rights were *substantively* enumerated in the constitutions because the *procedural* framework of legal *equality* (the constitutional forum, standing to sue, constitutional jurisdiction, etc) for these basic grievances was not provided.

[80] As the *travaux préparatoires* clearly demonstrate, the remedies available to the European Court of Human Rights according to Article 41 of the Convention have been watered down

clearly is the individual constitutional complaint (*Verfassungsbeschwerde* in Germany, *certiorari* in the United States, *amparo* in Spain etc). For this reason, too, the individual domestic constitutional complaint is, from the point of view of domestic constitutional law, the best preventive device. It resolves the problematic cases at home rather than authorising their submission in the ECHR in Strasbourg.

By definition, in Strasbourg, the party being taken to Court is always the State. The alleged violation of human rights is always perpetrated by the State. We do not have the statistical data, but evidently, in a large percentage of cases, the State is not the direct perpetrator of the alleged violation of human rights. International law's principle of subsidiarity, i.e. the Convention's procedural requirement concerning prior exhaustion of domestic remedies, implies that the violation perpetrated by, say, another private person has not been heeded, i.e. has *de facto* if not *de jure* been ratified, by domestic – including, in the last instance, the constitutional – courts.

Of course, in criminal procedure cases – i.e. by some estimates in about 65 per cent of the European Court's cases – the State's executive branch is the direct perpetrator of the violation. This is possibly comparable to the distribution of issues in effective constitutional courts (those, having jurisdiction to consider constitutional complaints), where the exhaustion of lower instance remedies, too, is a requirement. In criminal process, the individual and the State come into direct and Kafkaesque collision. The blame, one way or another, is laid on the State. Yet, while this is natural in cases where the State is the direct perpetrator, it is less obvious in cases where the violation occurs indirectly via 'ratification' of the violation by the State's judiciary.

Even so, the indirect blame is well deserved. The reason for this is so deep-rooted that we often overlook it. From a Hobbesian perspective, the basic requirement of 'law and order' in the State is that the individuals refrain from direct combat in order to resolve their conflicts. Understandably then, the 'rule of law' is an indispensable State-sponsored conflict resolution service replacing as it does the 'logic of power' with the 'power of logic.' If this judicial service fails – say in terms of "justice delayed is justice denied"[81] logic

from the initial (directly binding) nature of the Court's judgments to the pecuniary 'just satisfaction.'

[81] Article 6 – Right to a fair trial:

> (1) In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing *within a reasonable time* by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the

– a specific effect emerges as in the saying "live by the gun or die by the law." Legally, this 'self-help' is a criminal act and an antechamber to anarchy. In very real terms, thus, the non-functioning domestic legal system – 'ineffective domestic remedies' in the Convention's language – amounts to a subversion and betrayal of the most basic promise and guarantee the State at its very inception, while absorbing all violence, makes to its citizens. This perfidy, while less obvious and more insidious, is in fact more subversive[82] than the direct violation of the citizen's rights, say, by the police. In such systemic and endemic circumstances, one should reasonably maintain that the State is to blame more than in direct violations of constitutional and human rights.

The more substandard the operative performance of the domestic legal system, the more valuable and more important turns out to be the resort to international legal remedies. Hence, 40.000 cases annually in the European Court of Human Rights demonstrate that an international legal instance, liberated as it is from national-internal idiosyncrasies and pressures, better performs this immune-system function. This, in turn, is evidence of a need for, in Nietzschean language, a greater agglomeration of power, i.e. jurisdiction going beyond the legal limits of the national state. The development exacts it.

4.1. The Individual in Direct Litigation with the State

Consider the case of *Halford v. United Kingdom*.[83] A policewoman working in a remote police station in England had used a dedicated official phone and had, in addition to her official, made certain private conversations over that official

> protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice. (Emphasis added.)
>
> The problem of 'unreasonable delay' is often called 'systemic.' In Italy it was 'resolved' by interposing another domestic remedy, by the so-called Pinto Law. The systemic nature of the problem of the litigious society, however, is too deep-seated to be easily and truly resolved.

[82] Subversive of what? Of the rule of law and ultimately of the political and social stability.

[83] *Halford v. The United Kingdom*, 25/06/1997, Reports 1997-III: Para: 43.

> The Government submitted that telephone calls made by Ms Halford from her workplace fell outside the protection of Article 8 (art. 8), because she could have had no *reasonable expectation of privacy* in relation to them. At the hearing before the Court, counsel for the Government expressed the view that an employer should in principle, without the prior knowledge of the employee, be able to monitor calls made by the latter on telephones provided by the employer. […]

Para 45.

phone line. It turned out that these conversations were incriminating and that the phone was tapped. The evidence so obtained was used in convicting the policewoman. In Strasbourg, after the exhaustion of all domestic remedies, the issue was raised as to whether she had "a reasonable expectation of privacy" while making various private (and some of them incriminating) conversations over the official phone line.

The formula "after the exhaustion of all domestic remedies" implies that all domestic judicial instances have pronounced themselves concerning the policewoman's right to privacy and the legitimacy of the use of evidence obtained in violation of it. The European Court of Human Rights decided that, indeed, the woman did have an expectation of privacy and that that expectation was reasonable. The point, however is simply that, as in practically every case before the European Court of Human Rights, various entities within the domestic legal order (here the perpetrating police and the arbitrating courts) have failed to take into account her constitutional and human rights. Inside the domestic legal order the case ends before the constitutional court; it is empowered to correct the judicial mistakes under it. In the European Court of Human Rights, however, the State as a whole (including its judicial system) is the party held liable for the supposed violations in any of its branches of power.

In this particular case, it was the executive branch of the state which had committed the policewoman's violation of human rights. Her constitutionally "reasonable expectation of privacy" had not been respected by domestic courts and it was, therefore, the European Court of Human Rights which took a different view of the matter.

The case, however, is interesting for a different reason. The criterion of the "reasonable expectation of privacy" derives from American constitutional law, i.e. from *Katz v. United States*.[84] When the *Halford v. U.K.* case was argued before

> There is no evidence of any warning having been given to Ms Halford, as a user of the internal telecommunications system operated at the Merseyside police headquarters, that calls made on that system would be liable to interception. She would, the Court considers, have had a *reasonable expectation of privacy* for such calls, which expectation was moreover reinforced by a number of factors. As Assistant Chief Constable she had sole use of her office where there were two telephones, one of which was specifically designated for her private use. Furthermore, she had been given the assurance, in response to a memorandum, that she could use her office telephones for the purposes of her sex-discrimination case. […]

[84] 389 U.S. 347 (1967). Mr. Justice Harlan, concurring:

> I join the opinion of the Court, which I read to hold only (a) that an enclosed telephone booth is an area where, like a home, *Weeks v. United States*, 232 U.S. 383, and unlike a field, *Hester v. United States*, 265 U.S. 57, a person has a

the European Court of Human Rights, it was the U.K. government which *sub rosa* (without citing) relied on the constitutional criterion of "reasonable expectation of privacy" derived from a thirty year older *Katz* case. This must have seemed natural, because a policewoman making a phone call from her office really should not reasonably expect privacy on such a dedicated phone line. But in the European Court of Human Rights, they had no access to Lexis or Westlaw and the origin of the pregnant phrase was never explored.

This rather amusing episode could not have happened, if the specialist of international law knew what every second year law student of constitutional criminal procedure knows, i.e. that the criterion of "reasonable expectation of privacy" derives from the constitutional case of *Katz v. United States*. The hilarity of the coincidence, however, subsides when we consider that this elemental constitutional criterion now sits unrecognised in the middle of the case law of the European Court of Human Rights, as Byron would say, 'unknelt, uncoffined and unknown.' While it is clear that the criterion would be applicable in hundreds of cases, neither the applicants' lawyers nor the Court itself even recall it – as if this cyptomnestic episode proved the limits of lateral communication between judicial instances.

One only has to shepardize the *Katz* case in order to establish the difference in gravity between international and constitutional jurisprudence. Sooner or later the incredible lightness of international jurisprudence will become clear.[85] At that point in time one will either appoint constitutional law specialists to international judicial instances, or the latter will become irrelevant. *Mutatis mutandis* (and to a much greater degree of absurdity) this holds true for what is in fact a first instance 'International Criminal Court' – now run without a single criminal law specialist. Similar grave constitutional criminal procedure and substantive blunders constantly crop up in the specialised Tribunal for former Yugoslavia.[86] The difference between 'constitutionalisation of

> *constitutionally protected reasonable expectation of privacy*; (b) that electronic as well as physical intrusion into a place that is in this sense private may constitute a violation of the Fourth Amendment; [389 U.S. 347, 361] and (c) that the invasion of a constitutionally protected area by federal authorities is, as the Court has long held, presumptively unreasonable in the absence of a search warrant. (Emphasis added.)

The word "reasonable" derives from the IV[th] Amendment reference to "unreasonable searches and seizure."

[85] The case-law of the European Court of Human Rights, for example, does in many respects function as a separate virtual reality. If you type 'beyond reasonable doubt' into the Court's Hudoc search machine, you will obtain anything but what one would expect in classical legal terms (the burden of persuasion in criminal law). When I have raised the question, I was curtly told that this is the way this Court uses this language and that was the end of the matter. *Roma locuta, causa finita.*

[86] Personal information from Mr. Slobodan Stojanović, LL.M., a Belgrade lawyer now

international law' on the one hand and 'internationalisation of constitutional law' is then no longer simply semantic. If European Constitution is to be adopted, the Court in Luxembourg, too, will have to learn some authentic constitutional law.[87]

4.2. The Individual in Indirect Litigation with the State

Every case before the European Court of Human Rights does have this indirect aspect, as we have pointed out above, because the Court cannot entertain it if at least the violation had not been overlooked, ratified, or condoned by the domestic legal system.

Most of the so-called positive obligations of the state cases, however, deal with the lack of active state investigation into human rights violations by their own police, and security forces. The perpetrator here is the executive branch and the culprit is the prosecutorial division of the same branch as well as the

defending some of those accused in the Hague Tribunal for Former Yugoslavia.

[87] Kojève, *Esquisse d'une Phénoménologie du Droit*:

> On peut donc dire que si le Droit international public tend à s'actualiser, il ne peut le faire qu'en devenant un Droit fédéral, c'est-à-dire le Droit interne public, c'est-à-dire constitutionnel et administratif d'un État fédéré. En tant que Droit il est imposé par la Fédération à ses membres, tout comme un Droit interne est imposé par les gouvernants aux gouvernés. Et ce Droit n'est fédéral qu'en ce sens que certains justiciables, à savoir les États fédérés, ne se contentent pas de le subir, mais l'appliquent eux-mêmes en qualité de gouvernants à leurs propres gouvernés. Si la Société est un État proprement dit, elle sera un État fédéral, et ses membres seront des États: non souverains certes, mais autonomes si l'on veut (tout en ne l'étant pas par rapport au Droit qu'ils appliquent, car ce Droit leur sera imposé comme à des gouvernés). […] p. 389.
>
> Nous voyons ainsi qu'on aboutit au même résultat soit en partant du Droit international (public), soit en prenant pour point de départ le Droit interne. En s'actualisant pleinement et complètement, les Deux Droits aboutissent au Droit fédéral, c'est-à-dire au Droit interne d'un État fédéral ou d'une Fédération mondiale. Le Droit interne existant en acte implique dans son aspect public un Droit fédéral, qui n'est rien d'autre que le Droit international (public) actualisé. Inversement, le Droit international actualisé est un Droit fédéral, qui fait nécessairement partie d'un système complet de droit interne. Le Droit international public n'est donc pas un Droit sui generis. Il n'y a qu'un seul Droit, qui est le Droit interne (la Société qui le réalise étant à la limite l'Humanité). Mais dans la mesure où le Droit n'existe qu'en puissance et s'applique aux interactions entre États souverains, on peut l'appeler Droit international public. Seulement ce Droit n'existe par définition qu'en puissance et il se transforme en Droit interne (fédéral) en s'actualisant. C'est pourquoi il tend à se supprimer en tant qu'international. p. 392.

courts (the investigating judge, etc). In constitutional law language, the issue is insufficient separation of powers between the two branches.

However, in *Hatton v. United Kingdom*,[88] for example, the issue was more complex. The case concerned the unbearable noise emanating from the Heathrow Airport next to London and its suburbs. The question was raised, whether the authorities were co-responsible for the resulting disturbance of the neighbouring people's private life in terms of Article 8 of the Convention. Does the State, in other words, have the positive obligation to intervene and exercise a modicum of environmental protection? Somewhat analogous was the situation in *Athanasouglu v. Switzerland*[89] where the applicants questioned the security of the neighbouring nuclear power plant. In both cases the Court refrained from getting involved and has, in my opinion demonstrated its hesitancy in matters, precisely, where it, as an international legal instance, ought to assume a more active and interventionist role. The key Court's phrase in this respect is "the margins of appreciation," which in terms of constitutional law reminds one of the inverted fundamentality criterion exercised by the U.S. Supreme Court via the Fourteenth Amendment (applicability of federal standards to the states). Indeed, in both cases the Court refused to get involved because it did not consider the environmental human rights sufficiently central. A similar result derives from the non-interventionist philosophy of *Pellegrin c/ France*,[90] the case in which the Court simply refused to consider the interests of civil servants vis-à-vis their own employer, the State. One can question this approach even in terms of international law, i.e. how far can one go with its "subsidiarity principle."

The reverse of this impression however, obtains in cases of classical violations of human rights. We have already mentioned the Turkish cases where there is no doubt that the State must investigate. An interesting development was partly aborted, however, in *Al Adsani v. United Kingdom*[91] where the applicant, a British citizen, had been tortured in Kuwait and wanted to file a civil action against Kuwait in London. As I have pointed out in my concurring opinion in the case, this ought to have been seen as a private international matter (conflicts of laws), i.e. one really cannot blame United Kingdom for not having allowed a civil action against a foreign sovereign entity if the judgment of its court could not then be executed.

In the area of the protection of family life (Article 8 of the Convention) there are some very painful cases. Judge Garlicki refers to *Ignaccolo-Zenide v.*

[88] *Hatton and others v. the United Kingdom*, 08/07/2003.
[89] *Athanassouglou and others v. Switzerland*, 06/04/2000, Reports of Judgments and Decisions 2000-IV.
[90] *Pellegrin c/ France*, 08/12/1999, Reports of Judgments and Decisions 1999-VIII.
[91] *Al Adsani v. the United Kingdom*, 21/11/2001, Reports of Judgments and Decisions 2001-XI.

Romania[92] where the question was raised as to whether the State is obliged to "snatch" the refusing child from the arms of her father. A similar situation presented itself in *Nuutinen v. Finland*. There the Court demonstrated a rather activist tendency, i.e. a positive obligation now flows from these family law precedents. The reverse, however, happened in *Perle c/ France*, where the Court again resorted to the "margins of appreciation" in refusing to hold that France ought to reveal the identity of a mother who had several decades earlier given an anonymous birth ("*accouchement sous X*").[93] The same happened in the British case concerning euthanasia.[94]

In all of the above cases, one can detect the conservative and inhibiting (the reductive) impact of international law – except in *Al Adsani* where the situation was reversed – on what would otherwise be classical constitutional issues. Insofar as these cases were, at least in my opinion, inadequately decided this has to do with "constitutionalisation of international law" i.e. with insufficient "internationalisation of constitutional law."

5. Conclusion

The diagnosis, I think, is rather clear. The individual's standing (*legitimatio activa ad processum et ad causam*) to litigate directly against the State has set in motion a long term process of what one might call "constitutionalisation of law." In ideological terms, this was a revolutionary, democratic and egalitarian development. Such standing (and the corresponding *legitimatio passiva* on the part of the State) implies equality in power between the state and the individual. Gone is the a priori given *raison d'état*.

On the Continent, constitutional courts are now saturating criminal procedure with their own criteria often in direct conflict with the codified procedures (and the hardened 19th century Kafkaesque traditions). If this continues at this pace and *tant mieux* if it does, in a couple of decades not much will be left of the tidy and well arranged authoritarian post-Enlightenment traditions. Von Savigny will have been proven right, i.e. the Courts will succeed in reattaching his "umbilical cord connecting law and the life of the nation."

Perhaps, the Founding Fathers of the European Convention on Human Rights intuitively have set in motion the international aspect of this identical process. Long before e.g. the German Constitutional Court became really active, they perhaps postulated that direct judicial review with its precedential effects is the best defence against authoritarian attitudes – those that had caused World War II.

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[92] *Ignaccolo-Zenide v. Romania*, 25/01/2000, Reports of Judgments and Decisions 2000-I.
[93] *Odièvre v. France*, 13/02/2003.
[94] *Pretty v. United Kingdom*, 29/04/2002, Reports of Judgments and Decisions 2002-III.

Certainly, this was an international, not a national and constitutional development. Nevertheless, at bottom the universal[95] and large scale international process is, in the mode of its autonomous legal reasoning, indistinguishable from internal, national constitutionalisation of law. The same legal challenges bring into being very similar judicial responses which, in my opinion, does substantiate the authentic autonomy of legal reasoning. It is then this 'autonomous legal reasoning' – transcending the national, cultural, ideological impediments – which is at the core of the favourable and constructive process we are referring to.

[95] See for example, Franck, *Are Human Rights Universal?*, p. 191-203.

CHAPTER THIRTEEN

Access to Court as a Human Right According to the European Convention of Human Rights

1. Introduction

The first command in the Roman *Leges XII Tabularum* – the primordial source of law in Judeo-Christian civilisation – reads as follows: "*Si in ius vocat, ito!*"[1] The meaning of this categorical command was simply that the party against whom legal proceedings had been commenced had to appear.

This in turn meant, first, that no legally articulated infringement of anyone's interests could go unanswered by the person sued or accused. But the most important implication, second of the categorical requirement that anyone sued or accused had to appear before the court – something little understood even by Romanists – was that *no legally articulated dispute could be left unresolved by the legal system.* Of course, the absolute obligation to submit to legal process served on you also means that substantive (material) legal rights are procedurally enforced. This implies that the State's legal conflict resolution service should always be available – and promptly so.

From the broader perspective of maintaining social peace and order, the prompt and consistent availability of the state's conflict resolution service is what law is all about. Peace and the orderly division of labour in society – not to speak of individual dignity (human rights) – are closely connected with the rule of law,[2] or in other words, *the rule of law is practically identical with the rule of the courts.*

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[1] "If you are called before a court of Law, you *must* go!"

[2] 'Rule of law' is the Anglo-Saxon version of the Continental *Rechtstaat* or *l'état de droit*. There is, however, a fundamental difference between the two. The emphasis in rule of law is on

Considering the Hobbesian primordial state of anarchy, i.e. the war of everybody against everybody or *bellum omnium contra omnes*, it is not difficult to imagine the State issuing its very first command, i.e. that this war of everyone against everyone must stop.[3] Before it can issue the prohibition of the war of everyone against everyone, however, the Hobbesian State must first actually establish itself as a supreme physical power. Only once this monopoly over violence is established, i.e. only after all violence is absorbed into the State, does the State have the credibility to forbid its subjects to resort to physical power as a natural, elemental means of resolving their conflicts.[4] Access to legal process, to this surrogate conflict resolution service, is simply one systemic aspect of the prevention of anarchy.

But what chaos and anarchy as an absence of law and order really mean is that the personal power of individuals and groups is unhindered and that all conflicts are resolved by direct resort to physical violence. It is only under the greater threat of greater State violence that people are forced to forgo violence and choose to regulate their conflicts in the courts. The State, however, must maintain the credibility of its constant threat. This threat must be greater than all potential individual or group threats of violence. If the State loses its physical credibility, the regression to chaos and anarchy is imminent.[5] On the negative side, therefore, if a nascent state wishes to establish itself, it must absolutely forbid the resort to physical power as a means of conflict resolution.

On the positive side, therefore, the State must offer an alternative conflict resolution service. The criteria for this (legal) conflict resolution must not be based on arbitrary violence but on logical consistency (justice). This we call the primary legal process. Moreover, this surrogate legal service, replacing the natural resort to violence, must be rendered objectively, fairly and without

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procedural guarantees (due process), whereas the emphasis in *Rechtstaat* or *l'état de droit* is on substantive (material) guarantees. This is due, at least in part, to the powers of the jury in Anglo-Saxon law, i.e. to the fact that the jury's verdict is not reasoned (explained) so that appeal in substantive terms is not even possible.

[3] I have elaborated on this question in Chapter 2 of this book.

[4] The resort to aggression is a natural human response to frustration. See Lorenz, *On Aggression*. Since aggression is a *natural* response, the pressure to regress to the war of everyone against everyone, self-help, is always there. The state of peace in society is therefore *artificially* maintained only by the continuous threat of war, i.e. the credibility of the rule of law depends in the last analysis on the credibility of criminal law and its ultimate sanctions.

[5] Of course, this credibility does not depend on the fact that the power of the State is greater than the sum of all individal powers of its subjects. The credibility of the State's threat is very much a matter of an organised collective power facing many individual powers neglible in comparison. This is why conspiracy, *complot*, organised crime are considered very serious indeed. This, on the other hand, must be balanced against the freedom of association as a human right. See Art. 11 §§ 1 and 2 of the European Convention of Human Rights.

unreasonable delay. This we call the secondary legal process because it is a long-term precipitate of the primary legal process.[6] Our nascent state, in other words, must replace the arbitrary logic of power, as it were, with the consistent power of logic.

We may call such an established conflict resolution service the Law of the Land (Magna Carta, 1215), the Rule of Law, *Rechtstaat*, *l'état de droit* etc., but its essence was caught very practically and very directly in the first phrase of the Laws of the Twelve Tables: *Si in ius vocat, ito!* If you, as a plaintiff, have a claim deriving from your interest[7] you must not seek to prevail over your adversary physically – that is what we usually call self-help[8] – but must go to court and seek the satisfaction of your interest *qua* 'right.' The Roman law command *Si in ius vocat, ito* actually refers to the corresponding duty on the part of the defendant, i.e. to appear in court and answer your charges. But the latter duty, of course, implies the former.

It follows that State-given access to court is a logical precondition for these two duties of the private parties. Because you must not and cannot resort to self-help, denial of this access to court, in other words, amounts to denial of justice.

The defendant, as we have said, is required to appear in court. He cannot say: "I do not care about the plaintiff's claim to a right, since anyway I'm more powerful, influential, etc." If he is called before the court, he *must* go, he must submit to the legal process initiated by the plaintiff, i.e. he must thereby admit that the brutal reality of power – whether physical, economic, political, or whatever – must yield to the virtual reality of the legal context. The real interests of both parties are thereafter translated into legal language.

In modern times, however, we have considerably extended the notion of the rule of law. Previously the duty to appear in court (and by implication the standing to sue/make a claim) applied only to private individuals. This prevented anarchy and private brutality by another subject of the State. But such rule of law did not prevent the State's own brutality, arbitrariness and capricious abuse of power. The State itself was above the law precisely to the extent to which it was impossible to challenge it before the courts. However, the idea of constitutional supremacy, of separation of powers and of checks and balances between the three branches of power was not discussed until five centuries later, with the publication of Montesquieu's *L'Esprit des Lois* (1748). Once the Enlightenment writers introduced these precepts it became

[6] See the classic treatise on this by von Savigny, *Zur Gesetzgebung unserer Zeit*.

[7] Interest, from Latin *inter esse*, is to be in between, i.e. something that is in between two (opposing) parties. In verbal form, in Latin, *interest* means that something is important.

[8] *Self-help* is usually a little-noticed offence in most criminal codes. Even if the actor has a legitimate claim to a right, the criminal law forbids the resort to physical and other non-legal means of enforcing it.

possible to challenge the abuse of power by the executive branch before the judicial branch. Thereafter the State itself had 'to appear in court.' This further supremacy of the rule of law over the executive branch of the State thus represents an extension of the original prevention of anarchy. This extended rule of law prevents dictatorship, totalitarian government and the arbitrary use of power. The famous *Marbury v. Madison* (1803) case in the United States and the introduction of constitutional courts in Europe by Hans Kelsen (1929) firmly established the power of judicial review *vis-à-vis* the executive as well as *vis-à-vis* the legislative branch of power.[9]

The European Convention on Human Rights (1950), on the other hand, further elevated the rule of law above and beyond an internal (national) judicial review, onto the international level. Before the European Court of Human Rights the whole State Party to the Convention (its executive, judicial and legislative branches) is held answerable for breaches of human rights.

From the point of view of access to court doctrine, therefore, access to ordinary, constitutional and international courts is the *active* procedural aspect of the extensive spread of the rule of law. To this active aspect there corresponds a *passive* aspect, i.e. the duty of the individual defendant or the State itself to appear in court and answer the allegations of the plaintiff. Clearly, all of this presupposes the existence and accessibility of the *fora* before which claims to the legal protection of the State may be made.

Having established that the right to access to court is one of the most important services provided by the State in the process of preventing anarchy, we will proceed in the next sections of this essay by demonstrating the access to court doctrine as dealt with in the Convention and referring to various basic cases that establish this doctrine. Next, we will demonstrate through recent cases that access to court often conceals various other issues such as discrimination. Ultimately, we will show the need for this procedural right to be given the status of substantive due process.

[9] See, for example, the excellent presentation of this in Machacek, *Austrian Contribution to the Rule of Law*, especially p. 2-6.

2. 'Access to Court' Doctrine According to the Case Law of the European Court of Human Rights

2.1. Basic Cases Establishing the Doctrine

2.1.1. Access to Court According to the Convention

As the concept of 'access to court' has a very low common denominator of procedural rights deriving from the Convention and is, consequently, something of a misnomer, it is quite difficult to present a short survey of the relevant cases of the European Court of Human Rights. Nevertheless, Article 6(1) of the Convention does require the States Parties to it to offer a prompt conflict resolution service in the areas of both private and public law.[10] However, 'access to court' collects under its roof too many disparate legal issues (from discrimination against civil servants to the right to counsel in civil matters). Sometimes the 'access to court' doctrine tends to obscure other issues such as should be decided on their own merits – typically, as we shall see, questions of equal protection. Despite this misleading effect, however, access to court as the most elemental procedural right has proved to be a powerful inspiration to the Court in protecting a number of fundamental procedural and substantive rights of aggrieved citizens. This is especially interesting as the right of access to court is a constructive right, i.e. one derived from a systemic construction (interpretation) of different clauses of the Convention.

The syntagma 'access to court' does not appear verbatim in the Convention. The first paragraph of Art. 6 – the *sedes materiae* for the access to court doctrine – does not directly refer to anyone's right to lodge an action in defence of his civil rights and obligations: in the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a [1] fair and [2] public hearing [3] within a reasonable time by [4] an independent and [5] impartial tribunal [6] established by law.[11]

In the French text, the right to a hearing is *le droit à ce que sa cause soit entendue*, i.e. the right that one's *cause*[12] (complaint) be heard. *Stricto sensu* this could mean

[10] Article 6 (1): "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing *within a reasonable time* …" (Emphasis added.)

[11] Article 6(1) *ab initio.*

[12] Cause nom féminin (latin causa) I. 1. Ce par quoi une chose existe; ce qui produit qqch; origine, principe. Connaître la cause d'un phénomène. Il n'y a pas d'effet sans cause. – Être cause de, la cause de: être responsable de, être la raison de; causer, occasionner. 2. Ce pourquoi on fait qqch; motif, raison. J'ignore la cause de son départ. *3. [Droit] But en vue duquel une personne s'engage envers une autre. Cause d'une obligation, d'une convention. II. 1. Affaire pour laquelle qqn comparaît*

that the 'civil rights and obligations' should be determined or one's 'cause' heard, only after they have already been established as rights and obligations or a *cause* respectively.[13] Formally (and purely in terms of timing) one could therefore maintain that the procedural rights enumerated in Art. 6 (fair trial, public hearing, reasonable delay, independence and impartiality of a tribunal established by law) do not accrue prior to the actual commencement of proceedings. These procedural guarantees, in other words, would not become applicable unless proceedings had already been commenced. But there would be no right to commence the proceedings in the first place, without the right to access to court.

The leading case transcending this formal obstacle was *Golder v. U.K.* (1974).[14] There the Court maintained that "the principle whereby a civil claim must be capable of being submitted to a judge ranks as one of the universally 'recognised' fundamental principles of law." The Court equated the denial of this principle to the denial of justice (in terms of international law).[15] The ruling was limited to civil cases because Mr Golder wanted to initiate a civil action for libel. Also, the case did *not* concern standing (*legitimatio activa,* legal interest) insofar as standing is concerned with the procedural right (to

en justice. Plaider la cause de qqn. – La cause est entendue: l'affaire est jugée. – Être en cause: faire l'objet d'un débat, être concerné. – Mettre en cause: incriminer. – En connaissance de cause: en connaissant les faits. – En tout état de cause: de toute manière. 2. Ensemble d'intérêts, d'idées que l'on se propose de soutenir. La cause de l'humanité. – La bonne cause, celle qu'on considère comme juste (souvent ironique). – Faire cause commune avec qqn: unir ses intérêts aux siens. – Prendre fait et cause pour qqn: prendre son parti, le soutenir sans réserve. à cause de locution prépositive En raison de; en considération de; par la faute de. pour cause de locution prépositive En raison de. *Le Petit Larousse*, 1998, s.v. cause.

[13] Roman law distinguished between *legitimatio activa ad processum and legitimatio activa ad causam*. The denial of the former (*ad processum*) would amount to the denial of purely procedural standing, e.g. *ratione temporis.* The denial of the later (*ad causam*) goes into the merits of the case, e.g. *ratione materiae*. But since we are speaking only of standing to sue (legal interest) in both cases the denial of standing *ad causam* should not imply that the court has gone into the merits of the case. In such cases, the court nevertheless procedurally rejects the case only in terms of manifest lack of a substantive right giving one's procedural claim a substantive basis. The distinction is, in other words, a little blurred.

[14] *Golder v. the United Kingdom*, judgment of 21 February 1974, Publications ECHR, Series A vol. 18.

> While in prison, Mr. Golder had been accused of participating in a prison riot. To exculpate himself of this charge, he petitioned the Home Secretary for leave to consult a solicitor and start legal proceedings for libel. The Home Secretary refused. This refusal made any correspondence with a solicitor impossible. Mr. Golder claimed a violation of his rights under Article 6 para.1 ('access to court') and Article 8 (respect for correspondence).

Lawson & Schermers, *Leading Cases of the European Court of Human Rights*, p. 18.

[15] *Golder*, *id.*, para. 36.

commence proceedings) as an anticipation of a material right. There was no consideration in *Golder* of any substantive (material) precondition for the procedural commencement of a civil action.

The problem in *Golder* was situated even earlier and had to do with the pre-standing stage of a case. But the Court took great care to establish that a teleological interpretation and the differences between the English and French text did indeed imply that there should be a general right to submit a civil claim to a judge in the first place.

Although it was not specifically so articulated, it could simply be said that the right to have access to a court is a logical precondition, a *sine qua non*, of all other procedural guarantees. In other words – as the Court did say – were this not so, all the courts in a particular State party to the Convention could be abolished once they had dealt with their pending cases.[16] This mode of interpretation is not unusual in constitutional jurisprudence.

2.1.2. The Penumbras and the Umbra of Access to Court

Thus, even though 'access to court' is not directly dealt with in the Convention, the right is implied through its conceptual overlap with other rights. The fact that certain rights may overlap was shown in the leading case concerning privacy, *Griswold v. Connecticut*,[17] where Justice Douglas of the American Supreme Court developed the so-called penumbric theory of privacy. He demonstrated that the *penumbrae* (half-shadows) of various/specific constitutional rights form a full *umbra* (shadow, lowest common denominator) of the right to be left alone by the government (right to privacy). Such an overlap between rights presupposes the existence of one another.

There is thus an overlap between the constructive right of access to court established in *Golder* and Article 13 of the Convention (right to an effective remedy).[18] The impact of the Convention's right of access to court, however, is broader than the right to an effective remedy. The right to an effective remedy applies only to rights and freedoms as set forth in the Convention. The right of access to a court, however, "applies to all determinations of civil rights and obligations, and not only to those which are related to one of the rights laid down in the Convention."[19] However, while access to a

[16] This rather exaggerated *argumentum ad absurdum* appears in § 36.

[17] *Griswold v. Connecticut*, 381 U.S. 479 (1965).

[18] Article 13:

> Right to an effective remedy: Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.

[19] Van Dijk & van Hoof, *Theory and Practice of the European Convention on Human Rights*, p. 419.

court implies that the court in question has full jurisdiction over the subject-matter (both *questiones facti* and *questiones juris*), there are some areas where this requirement can be adhered to only partly, e.g. in the application of zoning laws, urban planning, etc.[20]

Thus, to use the metaphor of the distinction between *umbra* and *penumbra* on the right of access of a court, we find that the full shadow (*umbra*) of this right is the right of access to a court in which the issue may be resolved and to have a hearing in this court. The half-shadows (*penumbrae*) of the right of access, however, cover at least (1) the right to present his or her case *properly and satisfactorily*, (2) the right for the access to be to a court that is *independent and impartial* and (4) has *full jurisdiction* (competence) over the subject-matter, as well as (3) *the right to counsel in non-criminal cases*.[21]

Of course, the right to present one's case fully ('to have one's day in court') does not have to be further derived from the already derivative (penumbric) right of access to a court. The right to present one's case fully is implied in the meaning of 'fair hearing' in the text of Art. 6 (1) of the Convention.[22]

In terms of the criterion of full jurisdiction over the subject-matter, in *Obermeier* (1990),[23] the question arose whether access to a court as a minimum standard was satisfied by the ability to challenge an administrative decision in a court whose jurisdiction (competence), was, however, limited to a formal review of the administrative authorities' exercise of their discretionary power. Since the court in question could not itself enter fully into the merits of the administrative-law issue – the court in question was limited to seeing that the discretionary power had been exercised in compliance with the object and purpose of the applicable administrative law – the Court held that this violated the right of access, too.

With regard to right to counsel, at least in criminal cases, the right for prisoners to have free and unhindered correspondence with their (prospective)

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[20] The *Bryan* case, judgment of 22 November 1995, A.335-A, pp. 17-18. Van Dijk & van Hoof, *supra* n. 19, p. 419-420, n. 705.

[21] The right to counsel in criminal cases, on the other hand, is covered *expressis verbis* in Art. 6(3)(c) of the Convention: "Everyone charged with a criminal offence has [the minimal right] to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require." The latter part of the clause refers to *ex officio* appointment of counsel *in forma pauperis*.

[22] A fair hearing presupposes a balanced presentation of both sides of the controversy. This 'equality of arms' has at least two purposes. First, the finding of truth in the interests of justice requires a full presentation of both sides. In criminal cases, second, the prevention of forced self-incrimination requires the legal protection of the defence's procedural rights. See Saunders, *infra* n. 26.

[23] Judgment of 28 June 1990, A. 179, p. 22-23, *idem*.

counsel[24] as well as the right to oral consultation without the presence of prison officers[25] are rights considered to be an integral part of the right of access to a court.

Moreover, to ensure effective access to court, assistance of counsel should be allowed in the pre-trial stage of criminal prodecure. In light of the issue whether the presence of a lawyer is required, should the suspect so desire, during the custodial interrogation of a suspect at a police station, the famous American Supreme Court *Escobedo* case is noteworthy. Here, the suspect implicated himself by admitting to know of the identity of his co-suspect. He was interrogated *incommunicado*, i.e. by police officers who refused to permit Escobedo's lawyer to be present. Justice Goldberg then maintained that the absence of counsel at the police station was decisive for the further development of the case. If at that critical stage the presence of counsel is not allowed, the rest of the criminal proceedings are often merely an appeal against what happened at the police station. The analogy is powerful and it implies that the effective assistance of counsel early in the pre-trial stages of criminal procedure amounts to later effective access to court.[26]

But the right to counsel may in many non-criminal cases also be a precondition to effective access to court. Since the right to counsel in Art. 6(3)(c) – *the right to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require* – is limited to defendants in criminal prosecutions, the question arose whether in, e.g. divorce proceedings one might also be entitled to counsel paid for by the State.

The case of *Airey v. Ireland* (1979)[27] concerned a wife requesting judicial separation from her violent husband. Mrs Airey did not have the means to hire a lawyer and was, due to the insufficiency of her legal knowledge, unable

[24] Judgment of 21 February 1975, A. 18, p. 12-20; report of 11 October 1980, *Silver*, B.51 (1987), p. 100-101; judgment of 28 June 1984, *Campbell and Fell*, A.80, p. 46-47; Report of 3 December 1985, *Byrne, McFadden, McCluskey and McLarnon*, D&R 51 (1987), p. 5(15). Cited after van Dijk & van Hoof, *supra* n. 19, p. 412, n. 713.

[25] Judgment of 28 June 1984, *Campbell and Fell*, A.80, p. 49, *idem*.

[26] *Escobedo v. Illinois*, 378 U.S. 478 (1964). We may add that this critical-stage-focused investigation doctrine then led to the famous *Miranda* decision. In *Miranda,* 378 U.S. 478 (1964) an irrebuttable presumption was established to the effect that all self-incriminatory evidence obtained in the absence of counsel in the context of custodial interrogation was obtained in violation of the privilege against self-incrimination. Exclusion of such tainted evidence was seen as a constitutional right of the defendant. The ECHR has yet to go thus far. But it would be logical to expect this extension of the right of access/right to counsel combination in the future. *Saunders* is therefore a crucial case to be carefully studied although some of commentators have chosen to ignore it. Judgment of 17 December 1996.

[27] Judgment of 9 October 1979, Publications ECHR, Series A vol. 3. See also Lawson & Schermers, *supra* n. 14, p. 85-94.

to institute the required judicial proceedings herself. Consequently, she was unable *to present her case fully and properly*. She claimed that her access to court had been effectively barred because she had not been able to have a counsel appointed *in forma pauperis*. The Court held by five votes to two that Mrs Airey's right of access to court had been violated but refused to entertain the discrimination issue, i.e. the fact that as a poor person she had not been able to afford legal counsel.

Since the right to counsel *in forma pauperis* paid for by the State is in so many cases a virtual precondition to success in judicial proceedings, the question may be raised as to who ought to have the power to decide whether counsel will, or will not, be paid for by the State.[28] The issue would be problematic even if the appointment of counsel were decided by the national court in question – since the preliminary decision on whether the case merits the additional expense of appointing of counsel implies a certain pre-judgment of those merits themselves. The right of access, i.e. the right to counsel in non-criminal cases, is *a fortiori* endangered in cases where such a decision is made by the administrative authorities themselves.[29]

2.1.3. Difference Between Civil and Criminal Cases with Respect to Access to Court

From the discussion above, it emerges that access to court in criminal cases has entirely different characteristics to those of civil cases. It is typical of criminal cases that the suspect should deny his passive 'standing' (*legitimatio passiva*) throughout the pre-trial and trial procedures. By denying his criminal responsibility, in other words, the defendant in criminal cases is objecting to the prosecution's *legitimatio activa ad causam*, i.e. its (substantive) standing. Access to judicial protection is always in the interest of the plaintiff or the prosecution. It was clearly in Mrs Airey's interest to institute judicial proceedings against her violent husband. But was it in the interest of the husband? Can his interest be expressed in terms of 'access to a court?' *Mutatis mutandis*, can we say that it is in the interest of a criminal defendant to 'have access to court?'

[28] The right to counsel *in forma pauperis* may be interesting in the context of appeal cases and, especially, concerning the constitutional complaint. In some State Parties to the Convention, for example, there is no right for poor people to have counsel appointed to lodge a constitutional complaint. Since *Airey* stands for *effective* access to court it would be only logical for the right to have counsel appointed *in forma pauperis* to apply in such cases, too. Besides, this is good policy since it gives the State Party's constitutional court the chance to deal with the legal problem presented before it reaches Strasbourg.

[29] Cf. European Commission's view in Appl. 9649/82, *X. v. Sweden* (not published). See van Dijk & van Hoof, *supra* n. 19, p. 420-421, n. 711.

The answer to this question, we think, is given in the first rule of the Roman Leges XII Tabularum: *Si in jus vocat, ito!* In other words, to the *right* of access on the part of the plaintiff (prosecution) there corresponds a *duty* on the part of the (civil or criminal) defendant. The duty to appear in court is perhaps the most primordial of all legal-procedural duties of a citizen. This *duty* to appear is a mirror image of the plaintiff's right of access to a court.

In private law cases, the sanction for a defendant's violation of this duty is for him to be declared *contumax* (stubborn) by the court, i.e. to face a judgment reached in his absence. Such a solution to the defendant's *de facto* denial of the plaintiff's right to have the case adjudicated by a judicial authority, however, will simply not do in criminal cases. In criminal cases the defendant's attendance at his trial must be assured by forcible means (arrest, pre-trial detention, etc). For these reasons the right of access to a court in criminal cases makes no literal sense. Instead, the right of access in criminal cases simply means that the court into which the defendant is forced to attend must fulfill the other enumerated requirements of Art. 6 (fair trial, impartial trial, public hearing, etc.).

Nevertheless, there are some unusual legal situations in which access to court per se becomes an issue even for a criminal defendant. In *Deweer*[30] the Court extended the doctrine to criminal cases because the prosecution had been abandoned by the State. This had happened because the would-be defendant had been forced to pay his dues to the State by extra-judicial means, i.e. under the threat that, if he did not, his shop would be closed. Under these circumstances the defendant had an interest in being tried (and presumably acquitted), rather than having non-judicial authority determine his financial liability.

Somewhat similarly, there may be cases in which it is actually in the interest of a criminal defendant to obtain a continuation of the criminal trial and a judgment in his favour, i.e. a judicial confirmation of the presumption of his innocence.[31] In *Minelli*,[32] the Court held that a criminal defendant's right of access to a court in criminal proceedings will be violated if the prosecution is discontinued and the 'odium of guilt' continues to hang over the defendant. Thus, in *Minelli*, access to court was functionally equated with the right

[30] *Deweer* case, Judgment of 27 February 1980, A-35.

[31] It may be interesting to note here that the rebuttable pre-trial presumption of innocence implying that the burden of proof and the task of persuasion are on the prosecution and that all reasonable doubts have to be interpreted in favour of the defence (*in dubio pro reo*) becomes, in case of acquittal, an *irrebuttable* presumption of innocence (*ne bis in idem*, double jeopardy)

[32] *Minelli* case, Judgment of 25 March 1983, A-62.

to have one's innocence judicially ascertained and confirmed. The Court connected this with the presumption of innocence postulated in Art. 6(2) of the Convention.[33]

2.2. Recent Cases

Occasionally, the right of access to court has been denied to applicants due to potential collisions between 'socialist legality' and the Convention. In *Brumarescu v. Romania* (1999), the applicant was the owner of a pre-war private villa in Bucharest, nationalised in the wake of the Communist revolution in the early Fifties. The relevant nationalisation Decree had provided, however, that certain categories of owners were exempted from the nationalisation of their property, among them 'professional intellectuals' such as teachers, professors, etc. Nevertheless, the house was *de facto* nationalised, the owner being reduced to occupying one apartment there as a tenant. After the collapse of the regime in the Nineties, Mr Brumarescu filed a civil complaint in a Romanian civil court challenging the technical legality of the 40-year old nationalisation. The civil court promptly ruled in his favour and the property was restituted *in toto*. Although the Civil Division of the Supreme Court had previously upheld similar rulings by lower courts, the procurator-general applied for judicial review to the full Supreme Court to have the decision annulled in Mr Brumarescu's (and other analogous) case. The Romanian Supreme Court, sitting in general session,[34] overruled its Civil Division by 25 votes to 20, holding that the lower courts had acted *ultra vires* and that it was for the legislature alone to decide whether property in such cases was to be denationalised. The 'final' decision in Mr Brumarescu's case was thus reversed.

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[33] Art. 6(2) of the Convention: "Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law." Since the right to be presumed innocent only accrues once one is charged with a criminal offence, the impact of the presumption of innocence is limited to the context of criminal proceedings: the burden of proof and the risk of non-persuasion are on the prosecution, and in doubt the court must acquit *(in dubio pro reo)*. This means that there is in society no general presumption of innocence such as would, for example, imply that newspaper articles cannot be published about the alleged guilt of a criminal suspect. (But cf. Articles 8 and 10 of the Convention.) On the other hand the words "charged with a criminal offence" do not mean that a formal bill of indictment (accusation, charge) must be filed in order for the presumption of innocence to accrue as a right of a criminal suspect. A 'charge' is implied, typically, by the arrest itself or any other form of *focused* investigation. Compare *Spano v. New York*, 360 U.S. 315 (1959).

[34] The reference is to the *plenary session* of the Supreme Court, which has the power to establish abstract principles to guide lower courts as well as the different Divisions of the Supreme Court.

The case is interesting because it has political overtones typical of the transitional legal systems in Eastern and Central Europe. The position of the Supreme Court was changed after a speech by the President of Romania – by a margin of five votes; the background to the case was that the denationalisation decision of first-instance civil courts were affecting the interests of former *nomenklatura* still residing in many of these nationalised properties.

From the point of view of Art. 6 § 1 access to court doctrine, however, it is interesting to note that there was initially entirely normal access to the Romanian civil courts and that final and executory decisions were rendered by those courts. The procurator-general's *ability to apply for judicial review* in civil cases is a typical *ultimum remedium* in socialist legal systems, function of which is ostensibly to protect 'socialist legality.' The power given to him or her is the 'extraordinary remedy' of intervening in final private law decisions if he/she deems them incompatible with this 'socialist legality.' In other words, the primary access to court in the cases in question was retroactively denied by the secondary reversal of the Supreme Court's position – in blatant violation of the fundamental principles of *res judicata* and legal certainty and possibly of the principle of acquired rights.

In this sense, *Brumarescu* is characteristic of the potential collisions between 'socialist legality' and the Convention. In constitutional-law and political terms, the case concerns the independence of the judiciary. The retroactive denial of access to court in *Brumarescu* was a consequence of the political pressure put on the Supreme Court of Romania to which it succumbed by a margin of five votes.

One lesson here is that there can be no due process in a legal system in which the Courts are not independent. The independence of the courts is an integral part of a particular political attitude. Constitutional doctrines such as the independence of the judiciary, due process (access to court), the separation of powers and the rule of law (*état de droit, Rechtstaat*) describe and prescribe this political attitude.

It follows logically that the European Court of Human Rights will be required to deal with cases in which these constitutional precepts are violated to the precise extent to which the domestic legal system has failed to internalise this political hierarchy of values and the corresponding constitutional doctrines. The best way of achieving this harmonisation in former Communist countries, and, *nota bene,* in many other Contracting States,[35] is to fully empower the respective constitutional courts as the national guardians of these precepts.[36] If this legal filter is in place, in my experience,

[35] See generally my dissenting opinion in *Cable and Hood v. the U.K.*, judgment of 18 February, 1999.

[36] If a legal system is to embody 'the rule of law,' it is absolutely essential for its constitutional

cases such as *Brumarescu* and many others do not reach the Strasbourg level because they are satisfactorily resolved at the domestic constitutional level. In a very real sense, however, this presupposes that domestic legal education and political culture have worked so as to allow to a greater degree of power-sharing with the judicial branch.

Sometimes, however, access to court cases conceal other issues, which need to be brought to light to arrive at a decision. In *Pellegrin v. France*,[37] the Court tackled an old question concerning the access to court of civil servants. Given the wording of Art. 6(1), the old Court had rather inconsistently held that sometimes civil servants do have access to civil judicial proceedings and sometimes not. The case law turned on a distinction between questions concerning civil servants' careers (no access) and questions concerning purely financial interests of their access.

M. Pellegrin was employed under contract by the French Republic and was sent to Equatorial Guinea in order to assist in the financial management of that State. When his contract was not extended (for medical reasons) he claimed compensation. Before the Court, therefore, the issue was whether he was entitled to have access to the French civil courts or whether the protection of the administrative courts sufficed. The Court refused to adopt an extreme solution either requiring access for all (including civil servants) or denying access to civil servants as a matter of principle. It found no violation of Art. 6(1). In reality, however, the issue should have been defined as one of equal protection since it is obvious that civil servants as a class were being discriminated against in terms of their access to ordinary civil courts. The Court, however, does not use equal protection tests in the way they are employed by constitutional courts and thus did not define the issue in terms of Art. 14.[38]

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court to have the following minimum features: its judges should be appointed in a non-political process and should have life tenure; it should have jurisdiction over both theoretical questions and concrete cases (in the form of a constitutional complaint/ *Verfassungsbeschwerde/amparo);* and its judgments should have effect *erga omnes* (as opposed to simply being *res judicata*).

[37] Judgment of 8 December 1999, Application No. 28541/95.

[38] Article 14:

> The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

While it is clear that it is the purpose of all laws to "discriminate" (from Lat. *discriminare*, make differences) *lato sensu* between different classes of legal subjects, for instance between those who have and those who have not committed criminal acts – some of the criteria of discrimination (*stricto sensu*) are impermissible (gender, race, colour, language, religion, etc). These are called 'suspect classifications.' If the state chooses to discriminate and for example,

The crux of the matter, as in other such cases, was the above-mentioned career-pecuniary interest distinction. The real issue was discrimination against civil servants concerning their access to court. Civil servants are a separate class of employee in many member States. This is due to the sensitivity of their functions and the special status they enjoy as trusted agents of the State. Their responsibilities and career interests, in other words, are too closely linked to the interests of the State for them to be treated as ordinary employees. In terms of classic (constitutional) equal protection, the issue was therefore whether denying this class of employee access to court represented unacceptable discrimination or not.[39]

The Court, as we said, rarely deals with discrimination as such. It prefers to address this question only if another of the basic rights has been affected. An alleged violation of equal protection (discrimination) is consequently almost never entertained as such. It is probably safe to say that the Court has so far failed to adopt a consistent equal protection doctrine.[40] Many national constitutional courts, on the other hand, do *have* such doctrines, notably in Germany, whose Constitutional Court has developed a rich jurisprudence in this respect.

The issue is really quite simple, although perhaps – as some constitutional theorists maintain – a little self-referential. Clearly, the purpose of every law is to establish differential treatment for different categories of legal subjects and the legal situations affecting them. In fact, the substance of the normative regulation of social life lies in differential treatment of different categories of legal subjects and legal situations.[41] There is in absolute terms, no such thing

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not accept women into the armed services it must show that (1) a *compelling state interest* exists (e.g. national security) and (2) that the law building upon such discrimination is *suitably tailored* to achieve that compelling state interest. However, if the classification is not so suspect as gender, race, etc, the test of discrimination is much milder. In case of civil servants the classification is not very suspect ('status'), therefore the test ought to have been whether to discriminate against them and not permit them access to regular courts *was rationally related to a legitimate state interest.* In *Pellegrin,* the interests of the French State abroad were at stake. It would consequently be conceivable to maintain that these interests were legitimate and that the question of re-employment of M. Pellegrin was not a simple matter of labour law. Discrimination it was, of course, but a justified one.

[39] Article 14, Prohibition of Discrimination, see *supra* n. 38.

[40] See my dissenting opinion in *Chassagnou v. France*, 1999.

[41] As for the distinction between formal and substantive equality, Marx's *The Critique of the Gotha Programme* is still the classical text used for example at Harvard Law School's jurisprudence courses. Socialism could probably be defined as an unsuccessful attempt to introduce substantive equality. Militant egalitarianism as a mode of violence against those who were more capable and energetic in fact probably contributed to the failure of the socialist experiment. Chomsky, *Secrets, Lies and Democracy*. A far better explanation is rendered

as equal treatment, the purpose of every law on the statute-books being to establish the legal consequences deriving from its normative distinctions and differentiations.

Furthermore, to say that 'equal situations require equal treatment' begs the same question (*petitio principii*), i.e. the question what *is* an 'equal situation.' In ninety per cent of legal situations, the differential treatment of different legal subjects is entirely acceptable – for example, statutory discrimination in the form of imprisonment against those who commit criminal acts. Even a law discriminating against one of the explicitly forbidden/protected/ring-fenced categories (sex, race, colour etc)[42] may be acceptable if there are compelling reasons of State interest. Take the most difficult example of gender (sex) discrimination: what if women complained that they were being discriminated against by not being permitted to participate fully in the combat operations traditionally reserved for men? Such discrimination would most likely be upheld due to compelling reasons related to the national interest in maintaining its combat-readiness.

The relevant tests are, therefore, (1) whether the legislative discrimination at issue is *proportionate* to the importance of the legitimate State interest, and (2) whether the legislative instrument employed for that legitimate purpose is *rationally related*[43] to it.

The equal protection scrutiny may be more or less strict depending whether the discrimination at issue is more (sex, race, national origin) or less (civil servants and other social and economic categories) suspect. When the issue is discrimination against civil servants, as in *Pellegrin*, therefore, the equal protection test to be employed is less strict. In other words, if the French State, as such, had a legitimate interest in defining the dispute over Mr. Pellegrin's foreign service/posting as a matter of the 'public interest' in France's foreign relations (and thus a case for the administrative courts), rather than simply in terms of labour law, then it was acceptable to discriminate against him in denying him access to ordinary labour or civil courts.

Unfortunately, the Court was not ready to apply the pure equal protection doctrine, but it arrived at the same result by further elaborating its over-interpretation of the career-pecuniary interest distinction. Nevertheless, I am convinced that sooner or later many of the access to court cases will be dealt with in terms of the (un)acceptability of specific forms of discrimination. In my opinion, *Pellegrin* also illustrates the fact that access to court questions may

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in Nietzsche, *Genealogy of Morals*. Nietzsche maintained that too much equality "stifles life itself."

[42] In constitutional law doctrines, these are called "suspect classifications."

[43] See my partial dissent in *Chassagnou v. France* (1999) in which the law in question, the French Loi Verdeille, was decidedly clumsy.

often conceal various other issues. Thus it may sometimes be misleading to define the issue only in terms of access to court doctrine.[44]

A somewhat similar question, albeit on the international level, was raised in *Waite and Kennedy v. Germany*[45] except that the issue there concerned not civil servants but employees of an international organisation, the European Space Agency. The Court held as follows: "The Court recalls that the right of access to the courts secured by Article 6 § 1 of the Convention is not absolute, but may be subject to limitations; these are permitted by implication since the right of access by its very nature calls for regulation by the State. In this respect, the Contracting States enjoy a certain margin of appreciation."

The applicants in *Waite and Kennedy* were employees of the European Space Agency. The issue was whether they had the right of access to German labour courts in relation to their employment dispute. The question of discrimination, however, was directly considered due to the overriding (purpose, aim to be achieved, legitimate aim) international organisations. The Court held that"[t]he attribution of privileges and immunities to international organisations is an essential means of ensuring the proper functioning of such organisations free from unilateral interference by individual governments."[46] The implication is clearly that clauses in employment contracts with international organisations limiting the access to court to internal arbitration procedures are acceptable. Again, in terms of (non)discrimination, the question would be whether international employees as a class may or may not be discriminated against in the process due to them, in their access to court. The Court's references to margins of appreciation and proportionality (between the means employed and the aim sought to be achieved) tend to show that here the equal protection doctrine was indeed the decisive factor in its findings against the applicants.[47]

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[44] A similar criticism, however, may be made in respect of the constitutional doctrine of equal protection (discrimination). Useful as it may be in some cases, it may, if overused, reduce constitutional considerations to courts' rather unrestrained assessment/view of what is "legitimate" as a governmental aim on the one hand and what is a "rational legislative approach" for achieving that aim on the other hand. This reductionistic approach would be reproachable to the precise extent to which the constitutional courts would then be empowered to entertain what in essence are legislative (rationality, legitimacy) issues.

[45] Decided in December 1998, application no. 26083/94.

[46] *Waite and Kennedy v. Germany*. See *supra* n. 45.

[47] The Court cited *Osman v. the U.K.* judgment of 28 October 1998, Reports of Judgments and Decisions 1998-VIII ¶ 136 and *Fayed v. the U.K.* judgment of 21 September 1994, Series A no. 294, pp 49-550, ¶ 65, *Waite and Kennedy idem* at ¶ 59.

3. Some Tentative Conclusions

The origin of the problem of access to court seems to lie in the far too rigid distinction between the substantive rights on the one hand and the procedural rights on the other. If the procedural rights are seen as purely ancillary, i.e. merely as an instrument for the implementation of the substantive rights, then the Art. 14's prohibition on discrimination will continue to apply only in combination with another 'substantive right.'

In his excellent analytical essay, *Access to Court*,[48] van Dijk, a former judge of the Court, maintains:

> The present Strasbourg case-law concerning 'civil rights and obligations' is one of lack of clarity. Lack of clarity because still no general definition of 'civil rights and obligations' can be inferred, while the construction of the outcome of the procedure for a right or obligation of civil right or obligation is very complex and rather undefined... Uncertainty because the elements actually developed in the case-law for such a definition appear still to lead within and between the Court and the Commission to different views in concrete cases, while the number of the adherents to the various views are almost equal. In our opinion this lack of clarity and this uncertainty […] can only be eliminated when the Court breaks through its hitherto pursued casuistic approach and develops *a general and readily applicable definition in the exercise of its function to give direction to the interpretation of the Convention.*[49]

This dilemma, as we saw, was tackled in the *Pellegrin* case, but it was not resolved. It is possible that the problem with the present case-law goes even deeper than some have imagined.

In terms of comparative law, the access to court doctrine seems to be similar to the constitutional due process doctrine. In constitutional law, due process is (1) limited to fair decision-making process, whereas the individuals are (2) entitled to a fair procedure (hearing) before being deprived of a life, liberty or property interest. The procedural rights are contingent upon the legitimacy of the claim of entitlement or liberty interest. Only once this has been established, does the question 'What process is due?' arises. In other words, the problem of the definition of the legitimate substantive right is inherent in all access to court/due process legal considerations.

On the other hand, there is something called '*substantive* [as opposed to procedural] *due process*,' i.e. the requirement that the substance of the law, the restrictions it seeks to impose, affecting all people, should be valid under the constitution or, in our case, the Convention. In other words, van Dijk's point concerning the 'definition' of the '[substantive] right' protected by access to

[48] MacDonald et al. (eds.), *The European System for the Protection of Human Rights*, p. 345-379.
[49] *Ibid.* at p. 375-376.

court is really the question whether the law is arbitrary or irrational or whether it infringes fundamental rights.

These questions are questions of equal protection by the law. The denial of equal protection amounts to discrimination as defined in Art. 14 of the Convention. The standard objection here is that the question of discrimination can be raised only with respect to a right 'set forth in this Convention,' i.e. that it does not apply to rights which are not explicitly enumerated in the Convention. Thus, in *Pellegrin* one could not refer to discrimination against the class of civil servants denied access to ordinary courts because their right to be treated equally in terms of access to court is not specifically mentioned in the Convention.

But this kind of reasoning is clearly circuitous. If the Court is to break out of this vicious circle, in my opinion, it must do two things.

First, the Court must recognise that, irrespective of its past practice, the equal protection approach is clearly more functional, adequate and direct way of dealing with the problem in some cases. Second, if the Court decides to adopt that approach in cases such as *Pellegrin,* in terms of discrimination it must not be inhibited by concerns over whether the specific right is expressly set out in the Convention. The right of access to Court, for example is specifically given in Art. 6(1). The fact that this is a procedural, and not a substantive right, does not mean that it is incompatible with another procedural right such as the right not to be discriminated against (in one's access to regular courts). Only the two procedural rights in combination – to have one's claim decided by the normal court – would suffice to implement the alleged substantive right of M. Pellegrin to obtain another contract from France without unreasonable delay.

Third, once this approach has been established, the Court may entertain the discrimination issue applying the appropriate scrutiny. The outcome of the case will ultimately depend on whether the discrimination in question is reasonable, i.e. whether (1) the classification is suspect, (2) if suspect, does it merit (a) strict scrutiny, (b) heightened scrutiny or (c) only the mild rationality test. Depending on the strictness of the discrimination test applied, the 'proportionality' between the legitimate aim sought to be implemented and the legislation in question and the rationality of the legislative instrument, must be weighed.

The logical solution is to break out of this vicious circle and recognise that discrimination is a breach of 'substantive due process,' i.e. that as a right it stands on its own feet and does not have to be complemented by a breach of a 'substantive' right. The fact that Art. 14 refers to 'rights and freedoms enumerated in this Convention' should not mean that synthetic (penumbric) derivative rights and freedoms such as access to court cannot be covered by the anti-discrimination clause.

CHAPTER FOURTEEN

Morality of Virtue vs. Morality of Mere Duty

or

Why Do Penalties Require Legal Process Whereas Rewards Do Not?

> At present […] "equality of right" can too readily be transformed into equality in wrong – I mean to say into general war against everything rare, strange, and privileged […], the higher duty, the higher responsibility, the creative plenipotence […].[1]
>
> – Nietzsche

The distinction between penalties and rewards, as we shall see, is not always easy to establish. Yet, once perceived, this distinction often becomes – or

[1] Nietzsche, *Jenseits von Gut und Böse*, (Beyond Good and Evil) § 212, full quote of the passage:

> Heute umgekehrt, wo in Europa das Heerdenthier allein zu Ehren kommt und Ehren vertheilt, wo die Gleichheit der Rechte allzuleicht sich in die Gleichheit im Unrechte umwandeln könnte: ich will sagen in gemeinsame Bekriegung alles Seltenen, Fremden, Bevorrechtigten, des höheren Menschen, der höheren Seele, der höheren Pflicht, der höheren Verantwortlichkeit, der schöpferischen Machtfülle und Herrschaftlichkeit - heute gehört das Vornehm-sein, das Für-sich-sein-wollen, das Anders-sein-können, das Allein-stehn und auf-eigne-Faust-leben-müssen zum Begriff Grösse; und der Philosoph wird Etwas von seinem eignen Ideal verrathen, wenn er aufstellt: der soll der Grösste sein, der der Einsamste sein kann, der Verborgenste, der Abweichendste, der Mensch jenseits von Gut und Böse, er Herr seiner Tugenden, der überreiche des Willens; dies eben soll Grösse heissen: ebenso vielfach als ganz, ebenso weit als voll sein können. Und nochmals gefragt: ist heute – Grösse möglich?

ought to become – decisive. The state may grant certain privileges (rewards) to a certain class of people. On the international plane, the position of the European Court of Human Rights (ECHR) has been that the granting, *vel non*, of privileges is in itself not litigable. They are not litigable presumably because – although this has never been said but amounts to the same thing – privileges are not rights. Such is, for example, the situation concerning the granting of certain supplementary pension benefits derived from social solidarity, i.e. not from previous payments.[2]

On the national plane, the distinction between rights and privileges is even more critical especially when it comes to deciding that a particular claim does or does not amount to a litigable constitutional right. Imagine that a state opens a concourse to grant the privileges of the office of a notary public whose function is endowed with express public trust.[3] Does one of the persons who complies with the formal pre-conditions for the office but has not been appointed have standing before the constitutional court to claim discrimination, i.e. to maintain that he ought to have been granted the privileges of the office of the notary public? If he does, is the minister of justice in whose discretion it is to grant the privilege, obliged to disclose the reasons for which the privilege had not been granted? Because they cut down legitimate discretion, the consequences of our taking such or other position on the question whether something is a privilege (subject to discretion) or a right (subject to litigation) are momentous.

If the boundary between penalty and reward, between a right and a privilege, is unclear, particular legal processes risk becoming hostage to the exercise of misleading labels.[4] If this happens, legal formalism and its formalistic equalisation may invade areas such as granting of offices endowed and dispensed with public trust (promotion of public servants and other officials, lawyers, notaries, promotion of judges and of military personnel, etc) – the effects of which may be disastrous for the society in question.[5]

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[2] See the latest judgment in this development, for example, *Stec v. U.K.*, applications n[os]. 65731/01 and 65900/01, judgment of 12 April 2006 and previous cases cited therein. The doctrine, however, maintains that once the privilege has been granted by the national legislature, it becomes an entitlement, a right. As the privilege becomes right it must now be dispensed without discrimination. Significantly, such a position has been adopted before the coming into force of Protocol N°. 12, which shall make discrimination per se a violation of human rights. For the relevant passage of Protocol N°. 12, see, *infra* n. 171.

[3] *Majhen v. Minister of Justice*, Judgment of the Slovene Constitutional Court of the Republic of Slovenia, Up-829/03.

[4] See Letsas, *The Truth in Autonomous Concepts: How to Interpret the ECHR*, at p. 288 (discussing *Engel and Others v. The Netherlands* (1976) Series A no. 22.)

[5] Imagine that a student, having received a specific grade with which she is not satisfied, appeals it within university and then in court. Imagine further that the court decides to interfere with the pedagogical diagnosis imparted by the professor. To those who teach it

Law may be the great equaliser, but it is a formalistic and therefore a superficial and often a counterproductive equaliser. In many areas, say in higher education, excellence must be maintained and cultivated.[6] In many areas, legalistic egalitarianism implies aggression of the non-deserving over those who are capable, admirable and praiseworthy. In many areas, positive discrimination (affirmative action) – granting of privileges to those who do not deserve it in order to correct historical injustices – may, legally speaking, represent the cutting either of rights or of privileges of those who deserve it. If these are rights, they too must be litigable; if they are privileges, they should not. And while it is certainly true that not granting an allegedly deserved privilege, say a promotion, is very often unjust, the thick formalistic fingers of the law, which historically evolved in clear-cut monocentric conflict resolution processes, are always too crude to deal with subtle polycentric issues. Suffice it to say here that in law, conceptually, everything often depends on whether we consider something a penalty or a reward.

1. Fuller's Morality of Duty vs. Morality of Aspiration

Why do penalties require legal processes and criteria, whereas rewards can be handed out unceremoniously and without legal confrontation? The question has been posed by Professor Lon Fuller of Harvard in his *Law and Morality*.[7]

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is obvious what kind of colossal (negative) consequences this would have for the striving for excellence, an integral part of the good university. We are dealing here with a head-on collision between two models. The first model is the formalistic aspect of the rule of law, the second model is meritocratic. This translates into the disagreement between formal justice that ensures only the equality of conditions of the competition and the substantive justice, which concerns itself with the equality of the end results. Compare, "From each according to his abilities, to each according to his needs!" Marx, *Critique of the Gotha Program*, and the critique of this in Manuel, *A Requiem for Karl Marx*, p. 163. In other words, the so-called substantive justice – apart from manifest discrimination – is too refined a matter to be taken over by the mechanical fingers of the 'rule of law.'

[6] But see, Nietzsche, *Skirmishes of an Untimely Man*, sec. 29: 'What is the task of all higher education?' To turn men into machines. 'What are the means?' Man must learn to be bored. 'How is that accomplished?' By means of the concept of duty. 'Who serves as the model?' The philologist: he teaches grinding. 'Who is the perfect man?' The civil servant. 'Which philosophy offers the highest formula for the civil servant?' Kant's: the civil servant as a thing-in-itself raised up to be judge over the civil servant as phenomenon.

[7] Fuller, *Law and Morality*. For a completely different understanding of the distinction between legal and ethical impact, see Pashukanis, *The General Theory of Law and Marxism*, at p. 107:

> Moral conduct must be 'free;' justice must be compelled. Compulsory moral conduct tends to deny its own existence; justice is openly 'applied' to man; it allows external realisation and an active egoistic interest in demanding justice.

For him the answer lies in the ordinariness of duty as opposed to the extraordinary nature of aspiration. What is minimally required of everybody can easily be defined. Such behaviour represents the statistical bulk of conduct in any society. The deviations from these minimal standards, therefore, are both easy to define (e.g. crimes) and easy to anticipate. Murder, for example, can be defined *in abstracto* because it recurs as an empirically ascertainable event. At least in the abstract, murder is a fungible event and it lends itself to anticipation in the abstract definition of the criminal code. Only events which recur are capable of being (1) empirically analysed as to their constituent elements and (2) theoretically synthesised into abstract concepts. For example, for someone to define murder as the intentional killing of another human being, he must have had the occasion to observe several actual events of that nature in which certain constitutive elements recur. Through this recurrence the essentials of murder coalesce and the inessentials are discarded as legally irrelevant. In other words, the recurrence of fungible events is a necessary condition to abstract conceptualisation.

When it comes to the morality of aspiration, deviation from normal human conduct also occurs, but it cannot be defined as breaking the minimal standard. An extraordinary achievement of a gifted mathematician such as Gödel, a composer such as Bach, a painter such as Escher, and a writer such as Joyce, is likewise a deviation from the norm – but such extraordinariness cannot be defined, commanded, or even postulated for ordinary people. By virtue of being extraordinary, such events, because they do not repeat themselves and are not fungible, cannot be empirically caught into a conceptual definition.

Besides, virtues cannot be commanded. They can only be recommended. They cannot be commanded for at least two obvious reasons. The first one is comprised in the formula "*nemo ultra posse tenetur*," i.e. what is subjectively or objectively impossible cannot be commanded or prohibited.[8] The second reason has been recently addressed in *Achour v. France*.[9] There, it became clear

Here are found the main points of contiguity and divergence between the ethical and the legal forms.

[8] All commands and all prohibitions are situated on a spectrum between the extreme of the impossible ("Thou shalt not breathe!") and the extreme of the redundant ("Thou shalt breathe!"). There is some truth in the French adage *les règles sont faites pour être violées*; every prohibition has a quotient of violability and every command has a quotient of non-performance (disobedience). Conduct certain to occur needs not to be commanded; conduct that is out of the question needs not to be prohibited. Thus, legal norms address only what is probable. Inversely, rules exist precisely and only in so far as they are likely to be violated.

[9] *Achour v. France*, ECHR, judgment of 29 March 2006. See my concurring opinion where I refer to *Robinson v. California*, 370 U.S. 660 (1962). Both in *Achour* and in *Robinson* the question presented itself as to whether the status of 'being' a recidivist or respectively a drug addict can as such be sanctioned or prohibited. In *Achour,* the answer was positive because the status of

why law can only command, prohibit or authorise acts, or in other words, why it cannot command, prohibit or authorise status. It is conceivable that the law might say: "You must practice violin every day for one hour!" it cannot say "You must become a violinist!" let alone an outstanding violinist.

One could object that deviations from the minimal standards defined in the criminal code, for example, are also relatively rare and thus extraordinary, yet they do lend themselves to definition and conceptualisation. Such evil events, however, are not unique. They are merely rare. They are still sufficiently prevalent to be capable of empirical ascertainment.

The difference, therefore, between the morality of duty and the morality of aspiration is also statistical. Deviations from duty are extraordinary, but recurrent; creative deviations are extraordinary and unique. Only what recurs can be defined.[10]

Moreover, morality of aspiration, concerned with rewarding unique achievements, in fact creates history; morality of duty merely repeats it.

Because they create something new, unique achievements delve into the future; violations of the minimal behavioural standards repeat the past. But again, it is not the positive nature of the achievement and the negative nature of the violation that explains our inability to define morality of aspiration. It is the uniqueness of an event – good or bad – that creates a precedent. Creating precedents creates history and shapes the future; repeating the precedents reiterates the past.[11]

Fuller, therefore, is wrong when he assumes that the distinction between achievements and violations explains why rewards do not need criteria and processes, whereas penalties imposed for violations do. The issue is not whether the event is 'good' or 'bad.' The question is has it occurred before. The Nobel Prize Committee awards prizes for unique events; the Nuremberg Court imposes (*ex post facto*) penalties for similarly unique events.

'being' a recidivist lends itself to clear definition (and consequently to litigation); in *Robinson* the answer was negative because the status of 'being' a drug addict, as opposed to the act of committing a drug abuse, does not lend itself to definition. Status, thus, cannot be properly litigated in an adversarial setting.

[10] A unique violation of the morality of duty would likewise be indefinable. When humanity was for the first time confronted on a uniquely large and abominable scale with the horrors of Nazis, it did not know how to relate to it. Killing of an extraterrestrial being, for example, would also not be a crime. The events of that kind *would* be unique. Punishment, because of the principle of legality, cannot be imposed, since such events would not be defined prior to their occurrence. A contemporary illustration (concerning cannibalism) has been provided by the trial of Armin Meiwes in Germany.

[11] "The connection … is that between punishment and crime, not between punishment and moral and social wrong," Hall, *Principles of Criminal Theory*, at p. 318 [citing Mabbot, *Punishment*, 48 Mind (N.S.) 155 (1939)].

Here, I suggest that rewards do not require substantive criteria and procedural safeguards because they do not create a conflict. Penalties impose suffering and must therefore be imposed against the will of those punished. This presupposes an incompatibility of interests. If the subject[12] being punished is taken seriously, the entity punishing him will exercise power according to pre-existing rules. Such pre-existence requires conceptual definitions of punishable events.[13]

What is it in the nature of penalty and reward, respectively, which does or does not require the formalistic interposition of legal substantive criteria and procedural barriers between the one who is going to be penalised or rewarded? This is what we hope to explore in this essay. Beyond that, the question of what *is* a reward and what *is* a penalty will have to be explored because very often a penalty is nothing but a mirror image of a reward and vice versa. Curiously enough, rewards, along with penalties, occur in the framework of penalties, while some penalties occur in the framework of rewards and are seen as such only in contradistinction to the framework in which they occur. The best example of this relativisation of rewards and penalties is the reward of clemency given to somebody who has been condemned to death. The absence of criteria for such a 'reward' has led – on a curiously statistical level – to the problem tackled by the Supreme Court of the United States in the case of *Furman v. Georgia*.[14]

2. The Function of Legal Formalism and Criteria

There is one general reason why the law must of necessity resort to concise definitions and structured processes for the purpose of applying those definitions. Legal formalism, both substantive and procedural, is a barrier to human frivolity. The real question is, as Nietzsche has indicated, 'how to make the human animal keep its promise.' It is this promise, which is being defined in all law with the purpose of crystallising it for future reference. The human promise frozen in the formalities of semantics and formal logic stands as a monument of the past with the purpose of resisting the changes of the future.

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[12] To speak of a 'subject' in counter-distinction to 'object' implies, among other things, granting the subject a procedural subjectivity. The so-called 'equality of arms' derived by judicial implication from Article 6 of the European Convention on Human Rights [Article 6 – Right to a fair trial] represents the acknowledgment of procedural subjectivity to (criminal) defendants.

[13] "Punishment presupposes rules, their violation, and a more or less formal determination of that expressed in a judgment." Hall, *supra* n. 11 referring to Hobbes' *Leviathan*, Chapter 28.

[14] *Furman v. Georgia*, 408 U.S. 238, 92 S. CT. 2726, 33 L.Ed. 2d 346.

These definitions of legal duties in human relationships are based on a prior consent between individuals concerned. This consent may be more immediate as in the case in contracts, but it may also be remote as it is the case in torts and crimes. In sum, it is from this 'prior consent' that the definition of the duty derives its legitimacy. The legitimising fact of 'prior consent,' however, does not explain the power of the definition of the duty to compel the performance. Without external compulsion (coercion, enforcement, execution, etc) performance would not occur. In the case of non-performance, the power to enforce derives from two distinct sources, of which one is logical and the other real.

Legal definitions aspire to conciseness and clarity and thus to be capable of lending themselves to logical compulsion.[15] The need for logical compulsion derives from the very role of law: to make the human animal keep its promise. By virtue of formal logic and concise definitions which make it applicable, it is possible for the party aggrieved to confront the non-performing party with an argument logically so compelling that it makes the pretext for non-performance sound absurd.

On the other hand, powerful as the logic may be in compelling a particular conclusion, it lacks the palpable power of actual coercion. For this there is a need for a far reaching coercive authority – the state – which, when put in the neutral role of a referee (the judiciary), will decide whether the definition of the duty, indeed, logically requires the performance on the part of the recalcitrant party.[16]

The use of both formal logic and the coercive power of the state are indicated only because one party wants to make another party do something that this latter party does not want to do. In other words, we are speaking of a conflict in which the incompatibility of the interests of the parties requires that the party who is formally-logically in the right be given the coercive support of the state. The state must give this support to the extent where it becomes possible for the logically prevailing to actually prevail over the recalcitrant party.

The existence of the conflict requires not merely that there be, first, an incompatibility of interests between the parties, but also, second, that the parties are approximately equal. There are various forms of inequality – economic, political, and the like – that the law as 'the great equaliser' must make extrinsic. Only then can the intrinsic logical necessity, which is essential

[15] My conception of logical compulsion applied to legal process derives from Stroud's *Wittgenstein and Logical Necessity*. 'Logical compulsion' is simply another term for 'proof.' There are, of course, intermediate terms between disbelieving and being compelled to believe. Persuasiveness is thus central to legal discourse. See Perelman, *L'Empire Rhétorique: Rhétorique et Argumentation*.

[16] See, *supra* n. 13, Hobbes.

to the rule of law, prevail. The constitutional doctrines known under the name of 'equal protection of the laws,' make legally extrinsic all criteria that would derive from discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.[17] We speak of the purity of the purely intrinsic legal assessment.[18]

There is a perverse side effect to this game. Because the conflict is taken out of the context between the two parties, the subject matter of the conflict schizophrenically splits in two otherwise inseparable aspects: separate procedures and substantive formal-logical criteria. In short, in law, the authenticity of the real game is replaced by the simulation of the real game; the purpose is to imitate what *would* in fact happen if the game *were* allowed.[19]

The process of deciding the winner and the loser by reproduction of alternative criteria of conflict resolution is burdened by the procedural problem; the actual game is disallowed and the process develops on a verbal formal-logical plane as a confrontation in a purely hypothetical fashion. Since the actual organic whole of the conflict has been disallowed, the formal-logic surrogate of the real game implies that the procedure of arguing the case before a neutral magistrate is now artificially detached from the conceptualised

[17] As in Article 14 of the European Convention on Human Rights:

> Prohibition of discrimination: The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

[18] This 'purely intrinsic legal assessment,' so characteristic of legal discourse, is universal. The European Court of Human Rights in which forty-six judges come from completely different legal and cultural backgrounds is living proof of the universality of legal discourse. Of course, what is universal here is not 'human rights' but what Wittgenstein would call a language game through which they are considered. Over a period of half a century that formal logical form, governed by the initial norms embodied in the Convention, produced a predeterminative *acquis*, the substance, i.e. the case-law of the European Court of Human Rights.

But compare this with Franck, *Are Human Rights Universal?*. For a good illustration as to why value judgments cannot cross cultural barriers, see *Regina v. Muddarubba*, (SC (NT)-Kriewaldt J) 1956/1. 2 February 1956. This reminds us of Wittgenstein's postulated misunderstanding between a human and a Martian as to what constitutes a cubic metre of wood. Should the latter define it as simply a pile on a square metre of ground, who is to tell him that he is wrong and we are right? Every language game presupposes a common denominator. And while values (what is 'human rights') diverge, the logic converges. See, Wittgenstein, *On Certainty*.

[19] In law, such a situation is rare. It does, however, exist in the plea-bargaining modus of American criminal process.

substantive criteria of winning and losing. This is the true reason for which in law, procedure detaches itself from the substantive law.

Since the formal-logical criteria of the law are a surrogate for the forbidden self-help,[20] the conflicts are alienated from the combatants and are elevated to a semantic level in which the actual use of force between the parties is replaced by the process of logical compulsion on the one and the intervention of the actually powerful state on the other hand.

This gamut of human controversies coincides with Fuller's 'morality of duty.' The 'duty' itself is the mirror image of the rules which define it. The purpose of those rules, as explained above, is to transpose human conflicts from the actual to the semantic plane. Just like in medicine a whole spectrum of empirical impairments of human health is categorised according to the similarities and patterns in which these impairments occur, in law, the whole gamut of probable human controversies is tackled in different branches of law by different conceptual tools describing the syndromes such as contracts, torts, crimes, etc.

The need, however, to define these contracts, torts and crimes, does not derive from the fact that it is empirically possible to describe them; rather it derives from the need to transpose the actual war of everybody against everybody in crude physical terms onto the plane of semantic logical compulsion. The frozen conceptualised promise or any other definition of the duty is argued in a simulated procedure under a third party, which has the power to invoke the power of the state.

3. The Centrality of Conflict

The mechanical notion of a legal duty presupposes that the addressee of that imperative is not willing to perform the duty and live up to the promise. Thus, when one speaks of a duty, the conflict is built into the situation. On the other hand, if one speaks of a reward, there can be no controversy. Rewards are intended to please those rewarded and we do not expect them to resist. If someone is recalcitrant and does not want to accept the reward, as for example, Jean-Paul Sartre who did not wish to accept the Nobel Prize, we will not object to his refusal to 'live up' to the intended praise. This has to do with the fact that when we speak of duties we imply a potential controversy, whereas when we speak of rewards such controversies are non-existent.

Where we speak of rewards and duties we must keep in mind the underlying question of the conflict. If the addressee of a 'reward' refuses to regard it as

[20] *Si in ius vocat, ito. Ni it, antestamino. Igitur em capito.* (If someone is called to go to court, let him go. If he doesn't go, a witness should be called. Only then should he be captured.)

such, we will be speaking of the 'penalty' even though the one who bestows the 'reward' considers it to be a privilege rather than a punishment.[21]

In the law of civil commitment it is well known that the so-called 'treatment' which was supposed to be 'in the best interest of the patient' was rarely regarded as so benevolent by the patient himself. Even though objectively it might in fact be beneficial to the patient, the latter refused to regard it as such and has thus succeeded in raising a controversy over the question whereby a third party, a judge, is now to decide whether such a 'reward' is actually to be given to the patient. A similar situation developed in the area of juvenile delinquency law. There the state used to act as if it were a parent of the child thus furthering his own best interest, whereas in fact neither the objective reality of such action nor the subjective perception of the child himself confirmed such a perception. The net result is, as we are all well aware, that the controversy has crept back into the area of juvenile delinquency law.[22]

In other words, the question really is whose perception of a particular 'reward' or 'punishment' is going to be decisive. If it is going to be left to the one who 'rewards' or 'punishes,' this will probably mean that controversies in the particular areas will simply not be allowed to arise.[23] In both civil commitment and juvenile delinquency law, for example, this was the situation

[21] Compare this idea with Plato's and St. Thomas Aquinas' theory of punishment. In an absolute sense, punishment is good, therefore there is no conflict. This however, is an objective view of conflict and punishment, rather than subjective to the actor.

The issue is not as metaphysical as it may seem. The "*parens patriae*" doctrine has been invoked in situations of civilly committed (and sometimes sterilised) mental patients, juvenile delinquents, etc: "There is evidence in fact, that there may be grounds for concern that the child receives the worst of both worlds: that he gets neither the protections accorded to adults nor the solicitous care and regenerative treatment postulated for children." (Abe Fortas for the majority in *Kent v. US,* 383 US 541, 555–556). "The condition of being a boy does not justify a kangaroo court." *In re Gault*, 387 U.S. 1, 27-28 (1967). Another leading case is *In Re Winship*, 397 US 358 (1970). These cases coincide with the collapse, in Europe, of Mark Ancel's "*Defense sociale nouvelle.*" The ECHR, to the best of my knowledge, has not dealt with the false label of '*parens patriae'* benevolence ('reward').

[22] Addressing the question of whether or not there is in fact conflict in the rehabilitation of juvenile delinquents, see Hall, *supra* n. 11. See cases cited *supra* n. 21.

[23] This is why it was necessary for the ECHR to give to the word 'punishment' an autonomous meaning. *Case of Welch v. U.K.*, judgment of 26 October 1995, paras. 27 and 28:

> 28. The wording of Article 7 para. 1 (art. 7-1), second sentence, indicates that the starting-point in any assessment of the existence of a penalty is whether the measure in question is imposed following conviction for a 'criminal offence.' Other factors that may be taken into account as relevant in this connection are the nature and purpose of the measure in question; its characterisation under national law; the procedures involved in the making and implementation of the measure; and its severity.

before the late 1960s and early 1970s: since the state is obviously so much more powerful than the individual involved, it also has the power to refuse to recognise the controversy, which in fact simply means that the domination cannot metamorphose into a conflict. As we have mentioned above, in every controversy one of the two preconditions is that the partners in conflict be approximately equal, a situation which clearly does not exist in those conflicts where the state is a potential partner.

In public law, the conflict arises particularly between the state and some other entity, perhaps an individual. Here, the executive branch of the government must renounce some of its power in order to reduce itself to an equal partner in the controversy.

If this were not the case, for example, we could imagine an absurd situation in which the state would simply proclaim that all imprisonment is in fact a 'reward' and therefore that those who are thus 'rewarded' have no controversy against it. Similar examples can be, in less absurd terms, cited for the societies in which the universal military service is in effect. In those countries it is often maintained that those called in to serve in the military must regard it an 'an honour,' even though in real terms it is clear to everybody that this is not a 'reward,' but simply a 'punishment.' It is only that the controversy in such situations is out of the question because the interests at stake for the state are too great, and it follows that the state is not willing to regard this as a controversial situation. In other words, the state is not willing to litigate the issue and reduce itself to an approximately equal partner in the conflict with the individual who refuses to accept the reward of 'the honour of serving his country.'

The question thus, whether something is going to be regarded as a reward or a duty-penalty depends, first, on the perception of the individual to be thus rewarded or punished and, second, on the power of the one who bestows the rewards and imposes the punishments in a particular context. Whether there are going to be substantive and concise definitions of duties and whether there are going to be precise rules about the decision-making involving the existence of those duties, clearly depends on these two factors.

An additional problem derives from the fact that an absence of reward may be regarded as a punishment. In the context, for example, in which everyone is routinely awarded a particular reward, those left out might very well regard that omission as a punishment. In such circumstances, they are likely to consider themselves deprived, and therefore see a controversy.

Assume that in a particular jurisdiction they retain the death penalty whereas its conversion into life imprisonment is routinely made by the incumbent

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See also *Gordon C. Van Duzen v. Canada*, Communication No. R.12/50, U.N. Doc. Supp. No. 40 (A/37/40) at 150 (1982), para. 10.2.

president of the republic whenever the particular case arises.[24] Assume that this practice has been going on for a good many years, when suddenly there comes a case where the governor, for a particular reason which need not be disclosed, refuses to convert the death penalty. Surely this person who is now condemned to die will regard such an omission as a punishment. It so happens, however, that he will have neither grounds nor standing to raise any controversy. He will have no grounds to raise the controversy because the criteria for the bestowal of mercy by the governor are not, as it is usually the case, clearly defined. Mercy is regarded as a 'reward' which need not be defined because those not granted such a reward are somehow seen as not really being involved in this context, simply because their 'punishment' was imposed by an omission rather than by a commission. The omission to bestow mercy on a particular defendant is clearly a punishment, yet by a curious statistical 'logic' such a man does not have the possibility to raise a controversy about his punishment, even though his interests, when seen in proper statistical context, have clearly been violated.

The mirror image of this situation occurs when the majority of the members of a particular population *are* being awarded a particular positive reward, whereas one member is omitted. Due to the semantic play of labels this omission to reward is not seen as a punishment, whereas in real terms it obviously is something incompatible with his interest. In other words, just because something is called a 'reward,' even though there is nothing exceptional about it and is granted as a matter of routine to everybody, does not mean that the member of the population thus excepted has not in fact been penalised.

The reason why this issue does not occur to us lies in the fact that the real controversies in such context are often not allowed to be litigated. They are not allowed to be litigated because the one who bestows a reward generally operates in the field of property, which gives him the absolute right to do whatever he wants to do with the 'reward.' If the Nobel Prize Committee were to award a prize to every single scientist in this world except one, that one would not have the right to raise the issue because the law of property allows the committee to discriminate as much as it wants. In other words, the person awarding the reward in such context has an incontrovertible power over those being awarded the prize, i.e. the above described approximate equality is not given and thus the controversy cannot arise.

[24] I only use this example, because such reasoning was the basis of the decision in *Furman v. Georgia*, 408 US 238 (1972), *supra* n. 14, the case in which the application of death penalty was for that reason suspended.

The situation is different in the context of criminal law, where the bestowal of mercy has nothing to do with property and where those bestowing that mercy are not operating from the position of an independent property owner.

In cases where it is not a matter of exercising an absolute right, such as property, the following circular 'logic' will often operate. The individual being omitted from the reward process is simply not seen as having standing to bring an action against the entity which deprived him of the reward. He does not seem to have standing since he somehow is not aggrieved; he is not perceived as aggrieved because none of his rights are violated; none of his rights are violated because the legal system did not choose to grant him the right not to be deprived of the otherwise routine reward. (The latter is often, as in administrative licensing process, seen as a 'privilege' and thus discretionary.)

This logic, of course, presupposes what it attempts to prove, namely that his deprivation of access to controversy is legitimate. To say that the individual does *not* have standing, because he does *not* have the right – and he does not have the right, because he does *not* have the standing – simply means that he was not allowed to penetrate the magic circle of power. If he has the (political) power to make himself felt, then he will no longer beg for mercy or feel deprived of what is otherwise a routine 'privilege.' He will have the right to raise the controversy, i.e. he will make himself be counted by the state and be capable of reducing it to the level of approximate equality in litigation before the judicial branch. This analysis applies to all discrimination cases.

Such was the situation in *Furman v. Georgia*. Historically, the juries in the United States were given the right to recommend life imprisonment instead of the death penalty for a particular defendant because the law did not want the considerations of sentencing to encroach upon the fact-finding process. In England, the jurors would often falsify the verdict, i.e. they would acquit even though they knew the defendant was guilty simply because they were afraid the judge would impose a death penalty should they find the defendant guilty. Attempts to amend the problem in the United States, however, led to the discrimination on the basis of race, i.e. decision-making on the basis of a criterion which had nothing to do with the question of guilt or punishment. Whereas juries would routinely 'bestow' clemency on white defendants, they would refuse to do this for the members of the black minority. The end result of this was that there were many more black defendants condemned to death than would be logical in the context in which only the criteria of criminal law would be relevant.

But it is important to understand that the situation arose in the first place because the juries were seen, in their role of converting the death penalty to life imprisonment, as bestowing a 'reward' rather than imposing

a punishment. Of course, those denied their 'reward' were always punished, but the matter became obvious only when the bestowal of mercy became statistically a rule, whereas recommendation to execute became an exception. When it became clear that the statistical line of these exceptions followed the criteria of race, rather than the criterion of guilt, the issue became ripe for Supreme Court consideration. At this point it suddenly became clear that the refusal to reward, i.e. to bestow mercy, actually is nothing but punishment. It is conceivable, however, that generally such a reward discrimination will continue to be ignored by the law; it certainly was ignored for a long time.

It is misleading to perceive *Furman v. Georgia* simply as a case of discrimination. Discrimination along racial lines only served to bring into focus the misleading semantic perplexity which is probably rampant in all aspects of the law. Clearly, the law must comport with those arbitrary reward-discriminations which derive from bestowal of a gift by the person or the institution which makes them. Not that this would not be discriminatory and arbitrary. As we have mentioned above, this derived from the fact that ownership of private property gives the owner a certain absolute right over the disposal thereof. Neither can we define a reward, as opposed to punishment, in terms of the rule and the exception. Whenever a reward is given on arbitrary grounds, those not given a reward are in fact being punished. The fact that those not rewarded (and thus punished) have no standing to raise a controversy, cannot be seen as logically decisive, because they have no standing precisely since we refuse to perceive them as being punished. If in an identifiable class one person is rewarded and ninety-nine of them are not rewarded, then those ninety-nine have in fact been punished even though by the logic of 'misery needs company' they may not perceive themselves as such.

In this context, however, we may revert to Fuller's distinction between the morality of duty and the morality of aspiration. In areas where super-human achievements are being rewarded, it is indeed often difficult, if not impossible, precisely to define the criteria for the bestowal of an award. It is true that such super-human achievements are statistically an exception as well. There are many areas where arbitrariness and discriminations are rampant because of the semantic trick of seeing something as a reward rather than punishment.[25]

[25] See Letsas, *supra* n. 4; *Engel and Others v. the Netherlands* (1976) Series A, no. 22.

4. Conclusion

But the reverse is also true. There are many areas where interference of legal formalism induces unjust equality and where this legalistic equality of non-deserving is a burning inequality for the deserving.

In the end – and especially in view of the Protocol N°. 12 – something very basic should be reiterated. Equality before the law does not mean that all dissimilar treatment of similar situations is forbidden. This would be absurd. One should keep in mind that 'similar' life situations can only by virtue of artificial and abstract legal criteria be seen as 'identical.' In real life, they are never identical. If different criteria of similitude were to be adopted they would not even be seen as similar let alone identical. The anathema of discrimination as applied by constitutional courts through reasonableness tests is therefore applied sparingly – as a matter of policy. It is thus clear that we speak of – if not of *le gouvernement des juges* – at least of the real power of the courts.[26]

Law grants rights and allocates duties. Rights and duties must be bestowed according to articulable criteria that distinguish (discriminate) between different classes of people and different kinds of factual situations. For this reason, norms – constitutional and international – which prohibit discrimination, only limit this proscription to the taxatively enumerated suspect-classes of sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.[27]

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[26] For a critique of judicialisation, see Shapiro & Sweet, *On Law, Politics & Judicialization*, at p. 3:

> In democratic states most government officials achieve legitimacy by acknowledging their political rule and *claiming* subordination to the people through elections or responsibility to those elected. Judges, however, claim legitimacy by asserting that they are non-political, independent, neutral servants of 'the law.' Alone among democratic organs of government, courts achieve legitimacy by claiming that they are something they are not.

Surely, this is a somewhat superficial view inasmuch as elected political officials may indeed 'claim' legitimacy (whatever 'legitimacy' is) whereas public credibility polls everywhere demonstrate the exact opposite – and whereas the legal process, even in its loosest form, is still transparent and at least minimally bound by logical consistency and by what we might call cognitive consonance. For a deeper discussion on the dialectic between 'the logic of power' and 'the power of logic' see, Chapter 2 of this book.

[27] *Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedom*, E.T.S. 177, (as of 1/4/2005 entered into force for Albania, Andorra, Bosnia and Herzegovina, Bulgaria, Croatia, Cyprus, Finland, Georgia, Luxembourg, Netherlands, San Marino, Serbia and Montenegro and Macedonia):

> Article 1 – General prohibition of discrimination (1) The enjoyment of any right set forth by law shall be secured without discrimination on any ground

In other words, law is free to make distinctions and to enforce dissimilarities based on anything but the above 'suspect class' criteria. If the distinction based on a suspect class is nevertheless made (*in abstracto* by the legislature or *in concreto* by the court, administrative authority, etc), the constitutionality of the legislative act or the *in concreto* decision will be scrutinised by three-level constitutional law tests.[28] In short, this scope of review of inequality before the law is relatively limited.

such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

[28] In constitutional law, three levels of scrutiny are defined as follows:

Strict scrutiny (if the law categorises on the basis of race): the law is unconstitutional unless it is 'narrowly tailored' to serve a 'compelling' government interest.

Intermediate scrutiny (if the law categorises on the basis of sex): the law is unconstitutional unless it is 'substantially related' to an 'important' government interest.

Rational-basis test (if the law categorises on some other basis): the law is constitutional so long as it is 'reasonably related' to a 'legitimate' government interest.

See, *Railway Express v. New York* (1949), *Kotch v. Bd. of River Port Pilot Commissioners* (1947), *Skinner v. Oklahoma* (1942), *Korematsu v. United States* (1944), *Loving v. Virginia* (1967) at http://www.law.umkc.edu/faculty/projects/ftrials/conlaw/epcscrutiny.htm.

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