THE CONCEPT OF JUSTICE AS SOCIAL REGULATOR IN LAW, POLITICS, ECONOMICS, AND CULTURE

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The concept of justice is often treated as a timeless idea or ideal. Thinkers have presented it, and often still present it, as an immutable standard in the light of which we are to judge individual actions and cases, legal systems, and social arrangements. Yet the concept of justice is itself the subject of competing interpretations and demands. Formal justice is contrastred with concrete or substantive justice, legal justice with ethical, social and economic justice. Individually-oriented commutative and civil justice are contrasted with collectively-oriented distributive and communal justice; personal claims compete with group claims. At different periods of history, in different societies and within the one period or society there are sharply divergent conceptions of what is just, fair, or equitable. The treatment of fairness, justice, or equity as unhistorical, objective, and universal concepts or intuitions is untenable.

Those who make demands, and specially strident and urgent demands, in the name of justice, or of any other moral concept, display a natural advocative tendency to elevate such concepts *above* the empirical world. They strive to present them as *a priori*, self-evident, or at least generally accepted concepts, demanding implementation rather critical examination or discussion. They resists suggestions that men and women of goodwill many conflict about what is just, and they resist even more strongly the notion that not only claims but even values may be irreconcilable, may live at each other's expense. The suggestion that only the system of private property or the class division of society creates conflicts and "contradictions", in life or in morals, is also untenable.

My distinguished predecessor in the Chair of Jurisprudence in the University of Sydney, Professor Julius Stone, has devoted his life to the fields of internationals law and jurisprudence — areas in which the concept of justice stands more clearly in the foreground than in any

other areas of law and legal thinking. He himself has written extensively on that concept. Yet in his approach he is above all, perhaps, a great Common lawyer — a man who sees both law and justice as developing ideals, forged in concrete historical circumstances, admitting of struggle, internal conflict, differing social perceptions, and human interests from one generation to another. He believes that justice presupposes a man's liberty to define his own interests and that this in turn presupposes a respect for the moral status of the individual, for his moral personality. Such respect requires us to take account not only of the claims any individual puts forward but also of the consequence of those claims for himself and his fellows. Justice is no license for unbridled individualism or "self-expression"; neither it is a foundation for a science of legislation which determines what people "ought" to want. Justice is an articulation of interests which can be well done only in an atmosphere where claims are freely voiced and discussed, when people's interests are heard and felt, where political life is genuinely free and democratic. No formal principle of justice, no logical analysis of the concept, can act as a substitute for the serious and responsible grappling, within history, culture and political life and, above all, within a legal system, with the problem of defining and reconciling competing human claims in a world of scarce resources and changing moral expectations. Neither, despite all the sympathy and compassion one may feel for the Third World, does contemporary history offer much ground for thinking that free institutions, tolerance, a democratic political culture, and a responsible tradition of social service and social concern are readily exportable commodities or things that can be created overnight by government campaigns or redressing economic imbalances. Yet they are crucial to justice.

There are, for Professor Stone, "enclaves of justicie" — hard-won areas of social agreement on what is required by justice accompanied by habitual action in conformity with that agreement, even at the cost of sacrifice. Such "enclaves", however, are immune neither form destruction nor from change. The struggle for justice is an unending, historical struggle, and the "absolutes" thrown up in the course of that struggle are, for Stone, ultimately relative and socially conditioned.

Another distinguished jurist, Professor Chaim Perelman, in his earlier work, has stressed both the logical foundation and the practical limitations of the abstract concept of justice. Its formal kernel, or "definition" if you like, is the prescription that the same norm should be applied to all members of what is the one class or category for the purposes of applying that norm. That is what is meant by treating

equals equally. On the definition of the category, so crucial to the actual judgment of justice — deciding who are equals and when — Perelman and I agree in seeing as relative or emotive, depending on shifting and conflicting *Weltranschauungen,* demanding selection of in principle arguable criteria. Substantive, concrete justice, in short, is derived from wider sentiments or opinions, subjectively or sociologically conditioned. Because it involves reference to far wider sentiments and beliefs, the concept of substantive or actual justice constantly threatens to swallow up the whole of morality. In seeking to transcend abstract, formal conceptions of justice, people and social movements and by making justice the most general of ethical concepts, or the organising principle of morality, into which everything is poured. "Formal" justice gives us insufficient guidance; "material" or "substantive" justice requires us to consider everything. Recently, Professor Stone has emphasised his rejection of attempts to use justice as broadly as this. He believes that it is a specific value that may stand in tension with other values, such as equality. Law and justice require discrimination. In his more recent work, on the other hand, Professor Perelman moves much closer to a Commont law style, linked with his elevation of heuristic reasoning addressed to a universal audience, by emphasising that deciding justly is the outcome not of practical reason, but of practical reasoning, i.e., of working persuasively within socially accepted norms. But this is necessary precisely because justice cannot be equated with equality.

There is in the concept of justice, then, a systole and diastole, a tug of war in two directions, which both Stone and Perelman have sought to escape. The attempt to define justice as purely formal leads not only to narrow abstraction but to a purely procedural view of justice: decisions are just if they have been arrived at by the applications of general rules that would be applied to anyone considered to be in the same situation. The rules themselves and the decision apart from the manner of arriving at it cannot be called just or unjust in this sense. Even the criteria for deciding whether X and Y are, for the purposes of the judgment, in the same situation cannot be derived from the formal concept of justice itself. When we do try to make justice a wider concept that will judge rules, decisions, and criteria, and not only methods of argument, we tend to import the whole of morality, to make everything in principle relevant. If we believe that moralities are historically and socially conditioned and compete, the the sociology of the concept of justice in its wider sense becomes of central importance.

There is another reason why the sociological dimension is of such

great importance in considering the concept of justice. The term justice is distinct from but readily merged with such realated concepts as freedom, equality, and well-being. Wider conceptions of justice easily turn law as the social expression and guarantee of justice into morals, politics, or administration – losing thereby the conception of the specifically legal and of justice as a distinctive concept, tradition and way of working. Revolutions normally take place in the name of justice, and they normally drown the concept and tradition of justice in a flood of wider concerns. In the process, as we all know, they become, at least for a period, strikingly unjust. The recovery after a revolution of a tradition of justice, tolerance and fair dealing is no easy matter.

The outstanding achievement of the twentieth century that migth be regarded as moral progress and as the securing of a further "enclave of justice" is the constant extension since the first world war, in principle if not always in practice, of those who count as fully human. What Hume called "sympathy" – the recognition that others are ourselves once more, have demands, feelings, pleasures, and pains just as we do – has been extended in turn to women, to servants, to the "lower classes", to Asians and Africans and so-called primitive peoples. The concept of justice creates a presumption in favour of equality and of the recognition of any person's claims and demands as worthy of consideration. It is in that sense that legal justice, ethical justice, social justice, and economic justice rest on a common foundation; the belief that any human being's claims, interests and welfare are entitled to social expression and serious and impartial consideration. Yet the concept of justice is clearly distinct from that of equality it requires a balancing of interests, an apportionment of weight to competing claims, a *discrimination* between parties and their entitlements in the light of wider principles, consequences, and social arrangements. It is here that the differences between legal justice, ethical justice, social justice, and economic justice become sharply evident. In each case, decisions must be made in a context, in the light of competing principles, values, and claims that cannot all be satisfied. In morality, as in economics, allowing one value or activity to drive out all others can result in the destruction of all values. That is why the Greeks and Chinese put such weight on the concept of balance, of proper limits to the implementation of social ideals, and the elevation of particular pursuits, rights or duties, on *moira* which rules even the gods, and *li* which introduces a fitting reciprocity and sense of ocassion into the affairs of men. The concept of justice historically arises directly out of that tradition, out of the recognition

that particular values cannot be elevated abstractly and with total simple-mindedness, regardless of consequence. Justice presumes equality in principle but requires the recognition of hierarchy in claims and interests, the making of discrimations, in practice. For justice above all is not the universal solvent in which all values are absorbed or the supreme value to which all other values are subordinated. On the contrary, justice requires the recognition of a plurality of values, not reducible to each other. It requires the attempt to discriminate between them between people and between situations and to strike a balance in the light of many individual and social interests, consequences, and requirements – expressed by Aristotle in the conception of merits. What counts as a merit differs in various situations and contexts and even in the one situation or context opinions regarding what is properly counted as a merit and therefore as a basis for preferential treatment may conflict or vary over time. But it is not conceivable, in a world of limited resources and competing claims, to do justice without a conception of merit, without discriminating as well as equalising.[1]

In many areas of the world today, there is a demand that formal, abstract, or legal justice in the traditional liberal democratic form give way to popular or State action on behalf of concrete, substantive, social, and economic justice. It is a demand that often suggests that social and economic rights must now be pursued, not just as a further concretisation of political, religious, and cultural rights but at their expense, in direct confrontation with them. Formal political and legal equality, it is said, produces social and economic inequality. In the short run, this is certainly true. In the long run, I do not believe that any social and economic rights or powers can long exist unless they are solidly grounded in habitually accepted and practically guaranteed civil and political rights and a culture of public debate and free expression backed by a respected and observed rule of law.

At previous Congresses of this Association, Professor Kamenka and I have distinguished three competing conceptions and traditions of law and justice:[2] the *Gemeinschaft* tradition with its elevation of

1 For a detailed and perceptive discussion of this concept of merit and proper and improper uses of it leading to different concepts of justice, see J.A. Passmore, "Civil Justice and its Rivals", in E. Kamenka and A.E. S. Tay (eds.), *Justice,* Edward Arnold, Londo, 1979, pp. 25-49.

2 See especially our "Beyond Bourgeois Individualism – The Contemporary Crisis in Law and and Legal Ideology", in E. Kamenka and R.S. Neale (eds.), *Feudalism, Capitalism and Beyond,* Edward Arnold, London, A.N.U. Press, Canberra, 1975, pp. 84-103 and our contributions to E. Kamenka and A.E. S. Tay (eds). *Law and Social Control,* Edward Arnold, London, 1980, pp. 1-26 and 106-16.

face-to-face relationships, substantive justice based on a fusion of religious (or ideological), political, and administrative principles in a system of fireside equity; the *Gesellschaft* tradition with its developed and formal legal system, determining conflicts between individuals in terms of abstract, impersonal, and universal principle of law, and the bureaucratic-administrative system elevating social planning and bureaucratic rationality over both the traditions of the *Gemeinschaft* and the individualistically-oriented contractualism of the *Gesellschaft*. In socialist and non-socialist societies today, in developed Western democracies and in the Third Wold, these three models of law and justice are competing with each other. Each has its strengths and its weaknesses; any society based on one of these systems alone would be intolerable. The practical question is to determine in the light of specific historical circumstances, in each country, the optimal mix. We ourselves have drawn attention, in the material cited, to the ways in which the *Gesellschaft* cannot cope with many of the problems of a modern society of mass production, mass consumption, and mass allocation, with a society in which the typical *Gesellschaft* distinction between the private and the public once again becomes weaker and weaker. But we have also emphasised that only the *Gesellschaft* has a concrete and developed conception of justice as a specific moral and legal concept and as a distinct social tradition and institution, with its own guardians and carriers. As Marx saw all too clearly, the concepts of social and economic justice, and of social and economic equality, are parasitic upon and arise out of the *Gesellschaft* conceptions of formal, legal, and political justice and equality.

One most important aspect of justice – most fully developed in the legal field, but relevant to considerations of social and economic justice – is its intellectual character, its drawing of a sharp distinction between "rational" – i.e., publicly discussed and argued for and therefore real and reliable – justice and the so-called equity of the heart and deed of revolutionary consciousness, spontaneous action, love, and concern. But the intellectualism of justice, for me, is not the pretended rationality of the cartesian tradition embodied in the Civil law conception of clear, direct, and definitive laws. Justice is not achieved by deduction or by analysis into simple and clear constituents. Justice is not so much an idea or an ideal as an activity and a tradition – a way of doing things, not and end-state. To say this is not to say, narrowly, that justice is simply a set of procedures, a question of form and not of substance. That is neither my point nor my belief. Nor is it enough to say that justice is simply action according to law, the recognition of rules and the framing of rules of recog-

nition, although much of the cutting edge of law and justice is still against arbitrary and hence despotic action – action that is always facilitated by the absence of an independent and self-confident legal tradition and of independent and self-confident legal institutions and lawyers. Justice involves, and must involve, concrete evaluation, consideration of factual situations, belief and disbelief of testimony, selection of principles and descriptions, ordering of preferences and interests. It would be nonsense to call such an activity purely formal, not concerned with substance, or to say that it can be exhaustively covered by pre-existing rules. But justice as an activity, I believe, derives its special nature as a means of evaluating and resolving conflicts form its intellectual character. Justice is the intellectual consideration and resolution of conflict by an impartial and disinterested third party whose judgement the parties or their social *niveau* in principle accept. As an intellectual activity, the activity and judgment of justice carry with the ethic of discourse and enquiry the careful, impartial, disinterested examination of claims and of the nature of the matter, the consideration of consequences, in the situation, for the parties and for the society around them and the rules by which it lives, the assessment of the strength and authenticity of competing interests and demands, of public interest, moral sentiment and customary expectations, and the relation of all this to a systematic, coherent, and comparatively predictable set of social rules capable of accommodating the existing complexity of interests and the likelihood of significant social change. Because in this, as in all serious intellectual enquiry, there are so many issues at stake, so many interests and considerations to be weighed, there is no general set of principles or a handbook for writing a biography or the history of a revolution. There are, of course, canons, stated or implied in considerable complexity in sophisticated legal systems and exemplified in the operation of such systems. But in the end, the doing of Justice, like all intellectual activity, is an art in the sense that it calls for judgment, for creative imagination, for the ability to see of forge unsuspected connections. That is why I like Professor Stone's phrase "the judgment of justice" and why I agree with him that there is, in most judgment, a creative leap. This is not because a judgment can never be deduced from premises. Sound judgements can be so deduced from, or furnished with, suitable premises. It is in the construction of those complex chains of premises, in choosing at a particular point to introduce one premise rather than another, and doing this over and over again by redescribing, redefining, making new connections, that the creativity of the judgment of justice lies. (Heurisitc or persuasive

reasoning, I believe, is simply logical reasoning with some – suspect – premises missing.) Creativity does not need to be exercised all the time: much of justice, after all, is and needs to be routinely predictable. But just as I believe that some countries have greater literatures than others or greater literatures at one time than another, so it seems to me that some countries have better justice and a better tradition of justice than others or at one time than another.

Those who attented the Basel Congress may recall that I was unashamedly frank in my belief that Common lawyers talk less about justice in the abstract and dispense it better than lawyers in any other system – and I have had reasonable experience of a number of very diverse legal systems. The outstanding feature of the Common Law, and a principal distinction between it and so much of the civil law of the continent of Europe, is its flexibility, the deliberate open-endedness of its concepts, the extent to which it cannot be reduced to black-letter (so-called "positive") law or divorced from the moral sentiments of the community in which it operates. Its language, its specific principles, its statutes and its authoritative decisions are infused terms like "fair", "reasonable", "proper", "sound", "commonsensical" and "just"; judges are enjoined by the provisions of their oath and the law to "do right", to "ideal justly". They have agreed with Lord Denning that it is not a tautology to expect them to "do right according to law" and though they no longer appeal to the timeless or God-given principles of natural law, they achieve much the same effect by reference to "convenience", "public policy", and their duty to do right. They have long held themselves to have a general duty and power to act as custodians of morals and guardians against wrong, to the extent, when there is no other way, of filling lacunae in the law or creating new law. It is true that there has been a great, and in my view, sound, suspicion in English law and among English lawyers of presumptuous readiness to innovate and of that vague jurisprudence which is sometimes attractively styled "justice as between man and man", of palm-tree justice unfetterd by rules, precedent or doctrine. The maxim, "hard cases make bad law", expresses this concern with systematic justice and the belief that it is easily disrupted and ultimately made unjust, capricious, aribtrary, by a fireside equity that concentrates only on the single situation or the one urgent or obvious interest.

The term Common Law, which is derived, oddly, form the Canon Law concept *jus commune,* invites stress on the continuity between Common Law and custom, the legal traditions and ways of settling disputes of a community which existed before the Norman Conquest.

William the Conqueror in fact undertook to respect such customs and laws. But the evolution of the Common Law as a system rested centrally on the specific justice that came to be offered by the King in competition with local and seigneurial justice. Unlike the latter, it was offered to all manner and estates of men, equally and impartially. It emphasised rationality and argument against trial by battle and ordeal. It combined the local juror with the external judge and gradually defined the functions of each. This justice for the English lawyer, by the beginning of the thirteenth century in the time of Bracton, came to be and has since been paradigmatically what is done in the royal courts. It is done there, self-conscioulsy, in a certain manner, within a developing tradition and it is done in precisely that way, except by imitation or delegation, in no other courts or assemblies. For Royal justice is done as a public thing, by the Crown through its judicial representatives as standing above and outside the private sectional interest, acting according to law and in a judicial manner. Such justice, as F.E. Dowrick has it in his very interesting study, *Justice According to the English Common Lawyers* (London, 1961), the English lawyer would maintain to be done adequately only "when the trial of disputes or disorders is conducted within certain canons of fairness, and when the judge decides the case according to moral principles or takes into account the human interests at stake, or applies established laws. Dowrick has chosen his words carefully and well and they bring out the exent to which the Common lawyers' conception of justice goes well beyond the application of black-letter law or, as it is sometimes believed, of purely procedural principles.

Behind the beliefs of the Common lawyer there stands a more general set of conceptions, which he has in common with all those who belong to the Western legal tradition. These conceptions, and the tradition itself, are rooted in the remarkable impact on Western civilization generally of the ideas of law and legal technique introduced and developed by the Romans. They amount to the fundamental belief that law *counts*, that it is not only an outstanding feature of social organization, but that its rules, procedures, and techniques are capable or dealing, justly and under the framework of general precepts and conceptions, with all important human activities. The Romans, indeed, whatever their other habits, were a "law-inspired" people; they had created such a system of law, capable of counting in their own time and of again inspiring subsequent civilizations. The three great original characteristics of Roman law as a living system

up to the time of Justinian, as Professor Geoffrey Sawer has put it,[3] were: first, a complexity which enabled it to cover the main social relationship of human life; secondly, a degree of abstraction enabling many of its principles to apply to a wide range of social relationships and over long periods of time without major change; thirdly, an autonomy of structure and development which gave law an independent role in the development of society as a whole. The subsequent history of Roman and Roman-inspired law, from the sixth century AD to the present, and of its relation to and interaction with Christnianity, Canon Law, Germanic and other legal customs and procedures, is a complex story. But the ideal of a society based on law became stronger and stronger within that history, uniting the English Common lawyer and the continental Civil lawyer and reaching its apogee in the great legal debates and reforms of the nineteenth century.

While the Common lawyer has seen the Royal Courts and what they do as standing at the centre of this conception of justice, it is well known that the Common Law developed many of its most important and attractive traditions in the struggle agains royal authority. The King may be the source and fountainhead of all justice, though Blackstone thought that he was rather a reservoir. But since Chief Justice Coke's great confrontation with James I, Common lawyers have held that while the King may be the fountainhead of justice, he is not, as king, the best dispenser of it. The King's personal prerogative is mercy; justice is a matter of being learned in the law, not as an esoteric secret science, but as the record and distillation of experience. Coke, it is true, still put much emphasis on technique, on "artificial" reasoning. In his time, and until the reforms of 1832-75 abolishing the forms of action, reorganising the jurisdiction of the courts, and merging the administration of Common Law and Equity, Common Law, in its search for certainty and predictability, was dominated by comparatively rigid and formal questions of procedure, cause of action and type of remedy. This was so much so that Sir Henry Maine noted: "So great is the ascendancy of the law of actions in the infancy of courts of justice, that substantive law has at first the look of being gradually secreted in the interestices of procedure."[4]

But the tendency to burst out of procedural bounds in the interest

[3] G. Sawer, "The Western Conception of Law", in Konrad Zweigert (ed.), *International Encyclopedia of Comparative Law II* (Tübingen, 1975), pp. 14-48 at p. 18. See also "Editors" Introduction: Law, Lawyers and Law-Making in Australia', in A.E. S. Tay and Eugene Kamenka (eds.), *Law-Making in Australia* (London and Melbourne, 1979), pp. 20-38 at p. 30.

[4] H.S. Maine, *Dissertations on Early Law and Custom* (London, 1883), p. 389.

of doing justice came from withing. Thus, during the period 1485-1832 a whole body of law, the law of Equity, was developed to provide remedies and deal with wrongs the Common Law courts could not consider. The Lord Chancellor, satisfied that there was no adequate remedy at Common Law, decided cases in the name of the King, "to satisfy conscience and has the work of charity", drawing on the principles of natural justice current in the fifteenth and sixteenth centuries through the Canon Law and Roman tradition. Another, more restricted branch or body of law, the law of quasi-contract, was developed by judges quite specifically to deal with unjust enrichment in situations that the law of contract did not cover, but which seemed to them to cry out for justice. If I pay money to someone falsely thinking I owe it to him, there is no contract between us, and I cannot in contract sue for its return. But that, said the judges, is patently unjust; it is unjust enrichment – a basis for recovery not known traditionally to Common Law – and they gave a right to recovery as though there were a contract. In the eighteenth century a great and creative judge, Lord Mansfield, almost single-handed brought into being the formal law merchant based on Common Law principles and the customs, usages, and moral and commercial expectations of merchants in the city. The nineteeth-century reforms merely made it possible to do justice more directly, more economically, without unnecessary constraints of procedure that reflected the reverence for form so often found in earlier law and complications and accretions that an antiquated formalism necessarily produces in its attempt, within the old system, to deal which new problems and demands. By the late nineteenth century, a series of great lawyers and legal thinkers had persuaded themselves and many other that this learning and artifice of reasoning of the Common Law (now including Equity) in the end came down to common sense, but common sense informed and made cautious and complex by a grasp of the subtle and often unobvious ramifications of human action and judicial decision. The Cartesian ideal is not the Common lawyer's: for him, plain speaking and plain dealing, sound judgment, and common sense do not require the belief that everything is or should be clear and distinct, transparent to reason and capable of logical analysis. On the contrary, they require the recognition of flux, complexity, and of a certain intractability of human affairs.[5]

[5] My remarks to the Basel Congress reproduced in A.E. S. Tay, "The Sense of Justice in the Common Law", in E. Kamenka and A.E. S. Tay (eds.), *Justice, supra*, pp. 79-96 at pp. 80-84.

There is widespread recognition in Common law countries today, let alone outside, that social and economic justice, social and economic planning, legal, political, and structural reform may not be best furthered and achieved by the procedures and principles of *Gesellschaft* adjudicative justice, with its emphasis of reducing the interests before it to those of individual parties, its emphasis on past actions rather than future contingencies, and its belief that the case for consideration is always best stated by those directly involved. The proliferation of tribunals, select committees, Royal Commissions, statutory bodies controlling areas of social activities, issuing licenses, and planning instructions etc. is the result. No sensitive or intelligent Common lawyer would doubt for one moment the need for these typically bureaucratic administrative arrangements in many areas vital to the implementation of social and economic justice. Nor are we now insensitive to the human factors involved: to the importance of having people *feel* that their views have been considered, personally and directly, that *they* count, as well as, or even more than, administrative and impersonal, material requirements. Nevertheless, both the *Gemeinschaft* and the bureaucratic administrative promotion of social and economic justice retain a decent respect for the moral worth and integrity of individual people as people only when they are set in the matrix of the *Gesellschaft* conception of law and justice – of concern for actual situations, actual people, and their publicly heard opinions and demands. It is that and not any question of property which prevents a bureaucratic administrative class or an ideological political elite from governing over the people instead of for them. Yet the moral dignity and concrete worth of every human individual is what all justice, legal, social, and economic, is ultimately grounded in. We are often told by those who think otherwise that what people need is not moral dignity but bread. My point is not to substitute moral dignity for bread or formal equality for real equality. My point is that the conception of moral dignity and the bias toward equality implicit and actualised in the Common Law tradition directly requires the provision of bread and the extension of equality, the provision of bread neither requires nor guarantees moral dignity and does not lay the foundation for a continued concern, even with the provision of bread.