DICTIONARY OF THE HISTORY OF IDEAS

Studies of Selected Pivotal Ideas

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VOLUME III

Law, Concept of

TO

Protest Movements

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CONCEPT OF LAW

A LEGAL system is the most explicit, institutionalized, and complex mode of regulating human conduct. At the same time it plays only one part in the congeries of rules which influence behavior, for social and moral rules of a less institutionalized kind are also of great importance. The complexity of the organization and operations of a legal system has led to disagreements about the best terms in which to describe the nature of law, while the coexistence of law with social and moral rules affecting conduct has generated discussion about the exact nature of the relationships between the different sets of rules. A further source of difficulty is caused by the opposition or tension that sometimes exists between legal and moral rules, as when a legal prescription appears to violate the dictates of conscience. This has led to discussion of the relationship between the concept of law and ethical criteria.

I

In primitive societies legal rules are often not sharply distinguished from religious prescriptions and the dictates of social morality or convention. It is only with the emergence of law as a distinct and organized form of social control in a relatively advanced civilization that the problems mentioned above become apparent. The Greek Sophists raised such questions in the fourth and fifth centuries B.C. They distinguished between nature (*physis*) and convention or law (*nomos*) and regarded law as an artificial, man-made scheme of regulation which encroached upon natural freedoms. In their view there could be no explanation of law-making and no reason for obedience to law other than self-interest. This is a position which recurs throughout later thought about law; it is echoed in the writings of Thomas Hobbes. But it should be noticed that while this position seems to deny the possibility of incorporating natural reason in positive law, it does at the same time leave room for an argument that there are good reasons for complying with the law. This argument would be that the security and relative satisfaction of desires guaranteed by a legal system are to be preferred to the constant conflict of an anarchic society, where even the strongest cannot expect peace. This argument from enlightened self-interest, so strongly urged by Hobbes, also characterizes nineteenth-century utilitarianism. Discussion in the 1960's of the obligation to obey the law tended to rely less on utilitarian considerations and more on arguments of fairness derived from notions of reciprocity (Wasserstrom [1963], passim).

The Sophists' view of law as an arbitrary expression of self-interest was opposed, even in the ancient world, by the more hopeful tendencies of Platonic and Aristotelian thought. Plato denied that law could be constituted by the mere application of coercive power; he defined it rather as public regulations which express the results of a process of reasoning (*Laws* 644D). Aristotle, though he was concerned more with an analysis of justice than with the concept of law or a legal system, spoke always of law as "order" or "reason." This opposition in Greek thought, between those who viewed positive law as simply the working out of coercive power and those who saw in law some necessary expression of reason, continues to be a matter of debate in modern legal theory.

II

The pattern of discourse about the concept of law in modern legal philosophy emerges in the nineteenth century with the work of the English jurist, John Austin. Austin described law as a set of general commands issuing from a sovereign. The sovereign he defined as a determinate human superior who receives habitual obedience from the bulk of a given society and is not himself in the habit of obedience to any superior. The command of the sovereign is characterized by the sanction which is held out as a threat in the event of noncompliance and such a command backed by a sanction imposes a duty on the citizen. Command, sanction, and duty are thus key terms in the Austinian scheme.

Austin was bent on freeing the concept of positive law from entanglements and confusion with notions of justice and natural law. Not only did he select hard and concrete key terms for his description of law but he also insisted explicitly on the separation of law and morals. "The existence of law is one thing; its merit or demerit is another. Whether it be or be not is one enquiry; whether it be or be not conformable to an assumed standard, is a different enquiry" (1954, p. 184). This severance of the realms of law and morality has characterized a continuing school of legal philosophy which is sometimes known as analytical positivism, signifying its preoccupation with the analysis of the content and structure of law as found (*positum*) in a given legal system. Austin's position on this issue is reiterated in the work of the most distinguished contemporary analytical positivist, H. L. A. Hart. But while the positivist thesis on the separation of law and morals has held firm, there has been radical revision since Austin's time of the terms used in elucidating the nature of positive law.

Here the foremost architect of the modern positivist position has been the Austrian legal philosopher, Hans Kelsen, who has lived for many years in the United States. Kelsen, in two celebrated works, *Allgemeine*

Staatslehre (*General Theory of Law and State*, 1925) and *Reine Rechtslehre* (*The Pure Theory of Law*, 1934), departed from Austin's attempt to describe law in terms of a human commander laying down rules for subjects and substituted as his key concept the notion of laws as consisting of normative ought-propositions which, in a legal system, are all linked together and acquire unity through their common derivation from a basic ought-proposition or set of propositions which he called the *Grundnorm*. The most concrete and particular propositions of law in a legal system ultimately derive their validity through a process of tracing back to the basic norms of the system. So the proposition that X ought to pay Y $100 may be valid because it is contained in a contract duly made in conformity with general rules of the legal system which prescribe how binding agreements may be made. These general rules in turn are valid because they are contained in a statute or in decisions of the courts. The statute or decisions of the courts are valid because they have been enacted or decided in conformity with constitutional provisions which prescribe the proper procedures for enacting statutes and for appointing judges with definitions of their jurisdiction and powers. If we ask why the provisions of the constitution are valid we must, according to Kelsen, simply accept as necessary for comprehending the existence of a legal system the proposition that the provisions of the constitution ought to be complied with.

It is apparent that when Kelsen uses the term "valid" with reference to a particular rule of the system it has no connotation of approbation or moral approval but signifies only that the rule has been identified as belonging to the system by the criteria of recognition. To speak of the basic norm as "valid," however, introduces an element of confusion, since this cannot be a question of identification by further formal criteria of recognition, but must refer either to an empirical observation about actual acceptance in society or to a moral precept that functioning coercive orders ought to be obeyed. The failure to clarify the precise import of his assertion that the basic norm has validity has been a source of difficulty with Kelsen's theory of the nature of law.

With respect to the relation between law and morals Kelsen is squarely within the positivist tradition. In *What is Justice?* . . . (1956, p. 4) he tells us that questions of justice "cannot be answered by means of rational cognition," and takes up a thoroughly noncognitivist position in ethics, asserting that choices about values and ends ultimately rest on intuitions. His basic concept of the *Grundnorm* can encompass the totalitarian society as easily as the democratic, vicious and depraved laws as well as just and beneficent ones.

Kelsen's system is a powerful demonstration of the unity and scheme of action of a legal system. His pyramidal image of a set of norms linked ascendingly to a basic norm reveals the essentially common features of the legislative and judicial roles, for both judge and legislator are creating new legal norms while at the same time drawing upon and applying superior norms which confer validity upon their actions. Just as Austin insisted on the central place of sanctions in a legal system, so does Kelsen find the distinctive element of law in the element of coercion institutionally applied through the normative structure. For Kelsen all legal norms are directives to officials to apply force in certain prescribed circumstances though this may not be superficially obvious. For example, a rule that directs that a will should have two witnesses appears to say nothing directly about the imposition of coercion. For Kelsen, however, the aspect of the rule which gives it a legal character is to be found in the proposition that coercion will be applied to those who seek to act in defiance of the terms of a valid will. This, in Kelsen's scheme, is the primary rule, and the direction to private citizens about how they should make a will is a secondary or derivative rule. The terms "secondary" or "derivative" here do not imply any sense of precedence or superiority but are only a figurative way of expressing the notion that the distinctive characteristic of a legal rule is in its reference to the prescribed circumstances for the application of institutional force.

The most powerful and subtle contemporary exponent of analytical positivism is the English jurist, H. L. A. Hart. In his book, *The Concept of Law* (1961), Hart offers a devastating critique of Austin's attempt to elucidate the nature of law in terms of a human superior issuing commands, backed up by sanctions which create duties. This elucidation, Hart argues, will not serve to explain the nature of laws which confer powers (such as the power to make a will) and which cannot be seen as imposing duties, while the notion of law being founded in the habit of obedience to a sovereign commander does not explain the continuity of a legal system which, by the operation of basic constitutional procedures of succession, proceeds uninterruptedly after the death of the head of state. Who, after all, are those determinate human beings whose commands the law could be said to be? The members of the legislature know only a little of the law and are themselves bound by the law. (Similar criticisms of the Austinian position have been made by Scandinavian jurists, notably Karl Olivecrona.)

Hart suggests that the key to understanding the nature of a legal system is to distinguish between what he calls primary and secondary rules. Primary rules are those which impose duties and secondary rules are those which confer powers. It is the union of primary and secondary rules which gives a legal system its

dynamic, highly structured, and rapidly creative character as compared with a body of customary rules. Secondary rules are rules about rules. They provide procedures for the creation, modification, and abrogation of primary rules. At the base of a legal system we find secondary rules which are fundamental rules of recognition and which embody the constitutional procedures for valid lawmaking in the system.

It is apparent that Hart's analysis owes a great deal to the earlier work of Kelsen but it differs in some significant aspects. For Hart the basic rules of recognition are not described in terms of validity which Kelsen used in constructing his concept of the *Grundnorm*. The existence of a basic rule of recognition is presented rather as an empirical phenomenon evidenced by the actual acceptance of the rules in a given society. The notions of obligation and duty are also analyzed by Hart in more subtle and complex terms than Kelsen's reduction of all legal rules to a uniform pattern of directives to officials about the application of coercion. Hart elucidates the meaning of statements about duty and obligation in the context of a legal system as involving social practices of reference to certain standards. In the light of these standards we justify criticism and condemnation of the behavior of others and the application of sanctions to them, and we offer reasons to explain and justify our own behavior. The maintenance of a general system of coercion in society no doubt psychologically sustains feelings of obligation, but statements of obligation are not simply statements of the probability that coercion will be applied. Our ordinary speechways evidence this, for we do not cease to speak of a person as being in breach of an obligatory rule simply because he has effectively removed himself from the jurisdiction and so from any threat of sanction. Statements of obligation do entail a general acceptance in society of the basic rule which is taken to validate the primary rules which formulate particular duties, but this is to be distinguished from an individual's acceptance of any particular rule. So if I say that X has broken his legal obligations by smoking opium, this does imply my recognition that the rule against smoking opium (primary rule) is properly derived from the constitutional procedures for lawmaking in the jurisdiction (basic rule). But it does not logically entail the prediction that X will probably be prosecuted and punished, and it says nothing at all about what I or X may feel about the sense and wisdom of the particular law in question.

III

Hart's introduction of the concept of acceptance of a basic rule as the foundation of the legal order immediately raises questions about the connection between analytical and philosophical enquiries into the nature of law and, on the other hand, enquiries which employ the concepts and methodology of the social sciences. Law is, after all, eminently a social phenomenon. A legal system is more than a structure of rules on paper. It is a system of rules in action, for without some minimal effectiveness in the life of a community a set of rules would not be said to constitute a legal system at all. This was recognized by Kelsen in his statement that a *Grundnorm* must be minimally effective, and by Hart in his reference to the acceptance of basic rules of recognition.

Long before the rise of the modern social science disciplines European jurists had concerned themselves with the social aspects of law through the medium of studies in legal history. In the eleventh century the study of Roman law was revived in the universities of Italy and France, and this study deepened as Roman law was received as the foundation of the legal systems of Western European societies. The basis for modern scholarship was laid by social interpretation of law in the work of the French jurist, Jacques Cujas, in the sixteenth century, and there is a continuing link between this early movement and the great German school of historical jurisprudence in the nineteenth century whose finest exponent was F. K. von Savigny. These historical jurists were not very consciously or explicitly sociological in their emphasis, but the necessity for them to elucidate doctrines of Roman law in terms of historical change inevitably led them to advert to the relationship between legal concepts and social phenomena. In this way they lead into the Germanic school of sociological jurisprudence which counts as its leading figure the Austrian jurist, Eugen Ehrlich.

Ehrlich insisted that if our interest and enquiry are into the forms of social control we must acknowledge that formal law plays only a part, and sometimes no part at all, even in areas where it purports to regulate. A full statement of the "living law" which applies in any sector of human conduct could be made only after careful observation of actual behavior in that context. After such observation we would often find that morality, custom, and commercial practice play a large part as sources of the norms to which people actually adhere, and that in some instances the norms of positive law are in practice largely ignored. As an analysis of the reality of social regulation this is patently true, but it is not particularly helpful as an elucidation of the concept of law where the enquiry is rather into what distinguishes the norms of positive law from those of morality, custom, and commercial practice. If a rule of positive law is in practice ignored both by citizens and by law enforcement officials, this may be a good reason for deciding that it is not a part of the "living law" but it is not so clear whether we can for this

reason decide that it has also lost its character as positive law.

Ehrlich's insistence on a constant comparison of the formal content of the norms of positive law with the reality of social practice set a theme for legal philosophy which has continued to be strongly influential in the twentieth century. In Scandinavia a school of jurists has developed who, in a strongly empiricist vein which owes something to the logical positivist movement in philosophy, have analyzed the concept of obligation as it appears in a legal order in psychological terms. The most interesting of these writers is the Danish jurist, Alf Ross, who in his book *On Law and Justice* (1958) invites us to begin an analysis of the nature of a legal system by considering the analogy of the rules of a game. He suggests that if we were watching two people playing a game, say chess, and we wished to know what were the rules of the game, we could not necessarily rely on the statement of the rules as issued by some governing body such as the International Chess Federation, for it may well be that the two players are not following all of these rules but are playing some modified version of the game. But then again we could not deduce the rules of the game simply by watching and observing the moves that the players made, for on that evidence alone we could never distinguish between what was done or not done because of the demands made by the rules and what was done or not done out of tactical considerations. To comprehend the rules of the game, suggests Ross, we have to introduce the notion of an ideology common to the players, so that the rules of the game they are playing can be defined as those directives with which they comply because they respond to them as binding. When we transpose this analysis to the elucidation of a legal system, the transition is not free from difficulty for it is not immediately apparent whom we are to characterize as the players of the law game. It seems that for Ross the players are the officials of the system so that a valid law for Ross would be a directive to which officials adhere because they have a reaction of feelings of obligation. He would thus accept a position much the same as that of Ehrlich, to the effect that a purported statement of law on the statute book which is in fact ignored by officials is not to be regarded as the statement of a valid law.

In the last few years of the nineteenth century a distinctively American voice began to be heard in legal philosophy, that of Justice Oliver Wendell Holmes. Holmes turned the attention of jurists to the role of the judge and the process of decision making as vital elements to be incorporated in any elucidation of the nature of law. Holmes's new emphasis was underscored by the voluminous writings of the Harvard jurist, Roscoe Pound, who also introduced the American legal public to the thinking of European sociological jurists. The seeds planted by Holmes and Pound germinated in the third and fourth decades of this century in a movement which is usually referred to as "legal realism" and which continues to be influential in a modified form.

The Realists reacted sharply against traditional presentations of law as a system of rules which by reasoned application to the facts of a dispute could yield a predictable decision. They stressed the discretionary role of judge and jury in finding the "facts" of a case, and the further creative role in choosing between competing rules and principles for application. They deprecated the emphasis traditionally given in legal education to the study of the decisions of appellate courts, and stressed the importance of close observation of the practice of decision makers at all levels of the legal system. In their more extreme statements they came close to denying that rules had any significant role in a legal system and suggested that they were mere tokens that were manipulated by decision makers to give a facade of certainty and predictability to their decisions. So Jerome Frank stressed the importance of the psychology of the judge in his book, *Law and the Modern Mind* (1930), and Karl Llewellyn in a famous statement defined law as "what officials do about disputes" (*The Bramble Bush* [1930], p. 3).

The Realist movement had a great impact on the nature of legal education in the United States and so indirectly on the whole English-speaking world. But its philosophical position has come under telling attack, particularly in the writings of H. L. A. Hart. He has argued that the authoritative position of decision makers is not a good reason for defining law in terms of what these decision makers do. So the concept of the "score" in a game would not be adequately elucidated in terms only of what the scorer says. It is true that the score is what the scorer says it is but this is only to say something about it and something which, taken alone, is positively misleading. For it suggests that the score might be anything that the scorer at his whim might choose to say and nobody who has played or watched a game would accept that proposition. When we play baseball or football we do not think we are playing a game of "scorer's discretion." We know that the scorer has discretion but one that is limited by rules and exercised within the framework of rules. Rules, Hart argues, have a core of settled meaning and a penumbral area where their application to a set of facts is debatable, and where no judgment in either direction could in any absolute way be demonstrated to be right or wrong. The American Realists, he contends, were preoccupied with the problems of

this penumbra to an extent that led them to distort the importance of rules in legal decision making.

IV

Contemporary discussion of the concept of law reveals several diverse trends in legal philosophy. One of the most influential is the application of the English school of analytical or ordinary language philosophy to the analysis of the concept of law and legal concepts. This is best exemplified in the work of H. L. A. Hart referred to above. This movement is strongest in England but it now has numerous practitioners in the other English-speaking countries. While writers in this vein are for the most part professional philosophers whose work appears in the philosophical journals, this movement in recent years has had some influence in law schools and its impact can be detected in the writings of some law professors and in the pages of the professional legal journals. While acknowledging the importance of properly conducted sociological studies, analytical jurists tend to concern themselves for the most part with such questions as the elucidation of the concept of a legal system; the relationship between legal and moral obligation or between law and coercion; concepts of responsibility; and, finally, analyses of legal concepts such as rights, duties, powers, and privileges.

In the United States the interest in analytical studies has been accompanied by a continuing influence from the Realist movement which in its central thesis and concern was dubious about the utility of the analytical approach. One of the leading exponents of a neo-realist position is Myres McDougal, who insists on the importance of law in a modern community as a creative instrument of social change. He exhorts decision makers in a legal system to make the fullest and most sensitive enquiries into the social implications of their potential decisions, and to manipulate legal rules and principles (which he refers to as *miranda*) in the interests of maximizing values which serve human dignity on the national and international scene.

America, like Western Europe, has also witnessed something of a revival in natural law thinking. The barbarities of European dictatorships in this century, and in particular the hideous brutalities of the Nazi regime in Germany, left many jurists unhappy with the traditional positivist insistence that an elucidation of the concept of law could not properly include a reference to any element of morality. The positivist view that the criteria for identifying valid law were purely formal was thought in some quarters to be one reason why the German judiciary for the most part so meekly accepted the Nazi edicts. One aspect of this antipositivist reaction has been the strengthening of the traditional Catholic school of neo-Thomist jurists who have been very influential in French legal philosophy in the twentieth century (e.g., Jean Dabin), and also occupy a position of importance in the United States.

In the secular world Lon Fuller in the United States has consistently mounted attacks on the positivist position which are expounded in his book *The Morality of Law* (1964). Fuller stresses the purposive element in the institution of law. He argues that often human conduct and institutions can be best understood and can only be adequately described in terms of their purpose. A description of the arrangement of parts in an automobile would give us very little insight into its social significance, if we did not include in our description a reference to its purpose in providing transportation. The very notion of an automobile thus incorporates the idea that it is at least minimally fit to fulfill a certain social function. If we transpose this argument into the discussion of a legal system then we can also argue that not everything which has a certain formal stamp is to be counted as law, but only those collections of rules which at least minimally serve human purposes of mutual regulation in the interests of furthering certain basic values.

The overlap between the concept of law and morality is, in Fuller's view, further demonstrated by a consideration of certain conditions which a legal system must fulfill if it is to be minimally efficient in achieving orderly regulation of social life. So we cannot contemplate an orderly society in which all rules would be retrospective or where all rules were secret or where tribunals in adjudicating disputes never made reference to the rules that they were charged with applying. But these conditions which are necessary for law to exist at all are at the same time attributes of the concept of justice, and in this way what Fuller calls the "internal morality of law" exhibits a necessary connection with minimal notions of justice.

Of late there has been a concentration of interest by legal philosophers on the nature of legal reasoning, and this promises a revision in the analytical approach to the concept of law. It is now acknowledged that legal reasoning cannot be properly described according to a deductive or an inductive model but consists rather of a marshalling of more or less persuasive arguments—which is peculiar only in the way in which a structure of authoritative precedent is intertwined with the kinds of criteria which go into everyday moral and prudential decision making. In this way a study of legal reasoning involves a revival of the classical notions of rhetoric. Important pioneering work in this field has been done by the Belgian legal philosophers, Chaim Perelman and L. Olbrechts-Tyteca in their book *Traité de*

l'argumentation (1958). These studies cast some doubt on the traditional positivist insistence on elucidating the concept of law primarily in terms of a structure of valid rules. If more diffuse principles and maxims play a vital role at all levels of decision making in a legal system, one can perceive how considerations of ethics and policy are built into the fabric of the legal system more easily than under the traditional positivist position. The sharp separation between law and morals which has characterized the positivist position becomes difficult to defend when the close similarities between legal and moral reasoning are pointed out. In this way contemporary studies of legal reasoning hold out some promise of bridging the ancient division between positivist and natural law traditions.

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GRAHAM HUGHES

[See also **Equity; Justice; Law, Common, Natural and Natural Rights; Legal Precedent; Legal Responsibility;** Positivism; Utilitarianism.]

DUE PROCESS IN LAW

A GENERALIZED and regular procedure becomes established in man's historical and cultural life when hunters who cooperate, or the governing institutions, demand minimum standards of such procedural conduct for all. Whenever, at some point in his history, man claimed as his "due" that substance or property to which he was rightly entitled, he resorted to a procedure to obtain it which was customary, or accepted, in whatever activity he engaged. This economic, political, or cultural process, respectively, became due to persons as a right and was not necessarily the same in different nations, or even in regions or localities within a nation; regardless of what the formal or informal standards of procedure were, they were justified in some manner and continued to be claimed and variously applied as different needs arose over the years.

There is a second and more particularized aspect of such process that is one's due, which comes with a broadening of the meaning of "due." The term continues to mean an entitlement or right, but now has added a regularity or institutionalized formality of a legalistic nature. One reason for this addition is that a continuing basis for the civilization which characterizes all developed nations is a need for, and reliance upon, some regular form of procedure to apply the law as a means of social control. In every such country the law is usually divided and applied in both a procedural and substantive manner. The latter ordinarily deals with the content of the rules and principles which apply to those governed, while the former deals with the methods whereby the content of the law is applied in particular cases. For example, the Ten Commandments are concerned almost exclusively with substance and give the moral laws which are to be followed and obeyed, as does the Golden Rule. It appears that where a formalized belief impinges upon and determines the conduct and control of a relatively small group, detailed legalistic procedures are not urgently needed, as such religious forms dominate. But where a nation is large or controls an empire it must codify its laws and evolve uniform procedures to expedite the handling of cases, e.g., the Babylonian Code of King Hammurabi (ca. 2100? B.C.), the Roman Law of the Twelve Tables, and the English common law.

Historically the idea and content of due process of law arose in very ancient times. The earliest records disclose the difficulty of the Egyptian King Harmhab in finding "two judges ... acquainted with [the] procedure of the palace and the laws of the court." And his instructions to the judges included an admonition not to decide a case "without hearing the other" party. The oldest court record (ca. 2500 B.C.) shows that the Egyptian legal procedure included allegations of a claim, denials by the other, and the requirement that the first party produce "credible witnesses who will make oath" supporting him; otherwise the case is to

be decided negatively (Wigmore, I, 15, 33f.). The earliest Mesopotamian legal records (ca. 2000 B.C.) disclose similar procedures, and the Hebraic Ninth Commandment is "Neither shalt thou bear false witness against thy neighbor." Hindu and Chinese records of the same era are hardly available, but China's reliance upon its past enables its earliest known codes to indicate procedures analogous to the preceding, and even the heterogeneous and religion-oriented peoples of India were given a monarchical personal form of justice which included such minimal procedures.

These minimal procedures seem to include some form of what is today called "notice" that charges are being preferred against a person, then a trial or hearing on them before a (disinterested) court which determines the matter; all these and other details are condensed into the phrase "notice and hearing." This phrase seems to entail universal standards of elementary procedural regularity and fairness. There apparently was no requirement of any degree of formality in these details, although eventually they evolved into generally adopted conventional forms. And there does not initially appear to be any general rationale to support the original necessity for these particular requirements, religious, legal, or political.

Homer's description of the shield made by Hephaestus (Vulcan) for Achilles in the Trojan War depicts, in one part, the marketplace where the people "swarm" for a lawsuit; the parties each pleaded, their witnesses appeared, "The rev'rend Elders nodded o'er the Case" before they each proposed judgments, and the jury, i.e., "the partial People," then chose one proposal by acclamation and so decided the case (*The Iliad*, Book XVIII). In addition to this concept of a jury the Athenians added professional advocacy, with skill in argumentation and oratory, such as that of Demosthenes, to sway the crowds. The Roman Twelve Tables also required analogous notice and hearing, although soon a court of justice or Basilica was used for trials; eventually the Roman Emperors substituted praetors, i.e., professional judges, for the lay juries. These judicial methods were generally assimilated by the *jus gentium* which Roman tribunals applied universally, although other nations, e.g., the Celts, Gauls, and Germanic tribes, had long histories of analogous procedures. Even into the eleventh century such procedural requirements may be found, as in the decree of Conrad II in 1037 that "no man shall be deprived of a fief . . . but by the laws of the empire and the judgment of his peers . . ." (Stubbs, p. 147). The most famous trial in history occurred in the Praetorium at Jerusalem with notice via His arrest, the preferment of charges, a tribunal to hear, the giving of evidence, the opportunity to reply, and the judgment and sentencing. This idea of due process of law seems to appear early in history whenever a person was charged or accused in what is today called an "accusatorial" (criminal) or "adversary", (civil) proceeding. By contrast, the inquisitorial proceeding is applied to a person who may never even be accused but is still subjected to an inquiry and determination without knowing the charges, and who may also be compelled to give evidence which convicts him. This inquisitorial proceeding is to be differentiated from the preliminary investigatory one which may precede a criminal accusatory proceeding.

At the beginning of the modern period we find that in France the Declaration of the Rights of Man and of the Citizen (*Droits de l'homme et du citoyen*), promulgated in 1789 and made a part of the Constitution of 1793, required in Article 7 that "No man should be accused, arrested, or held in confinement, except in cases determined by the law, and according to the forms which it has prescribed." In other countries other forms and hybrids developed. The Universal Declaration of Human Rights, approved by the General Assembly of the United Nations in 1948, attempted to formulate such general principles applicable everywhere (Art. 10).

For the English-speaking peoples it may be that Article 39 of Magna Carta (June 15, 1215) and its subsequent interpretation settled any doubts as to preferment of the accusatorial-adversary procedures. Its language eventually safeguarded the "free man" from being "in any way ruined . . . except by the lawful judgement of his peers or by the law of the land." In addition to this general clause the Great Charter contained other specific procedural ones although, as James Madison remarked in 1789 when proposing the future Bill of Rights, "Magna Charta does not contain any one provision for the security of those rights, respecting which the people of America are most alarmed" (1 Annals 453). Magna Carta nevertheless became a sacred text in England and famous as the precursor of the phrase, "due process of law," first used by Edward III in a statute of 1354 (28 Edw. III, c. 3). It was, however, Sir Edward Coke's Second Institute which emphasized the concept and insisted that "law of the land" meant "due process of law"; it thus became a part of the common law and was given a natural-law interpretation and flavor.

The American colonial reception and modification of the idea of due process of law is disclosed in the early charters granted by the Crown, the laws of the colonists, the documents preceding and following the American Revolution, and the various state and federal constitutions. Colonial statutes and documents continued the Crown charters' general references but also

became more specific. For example, acting under the grant by Charles I in 1629, the Massachusetts colonists agreed "to frame a body or grounds of laws in resemblance to a *magna charta*," and their 1641 Body of Liberties provided somewhat detailed procedures (J. Winthrop, *The History of New England from 1630–1649*, Boston [1826], II, 57). The New England Confederation of 1643, the Dutch provisions for New Amsterdam in 1663, and the New York "Charter of Libertyes and Priviledges" of 1683, all provided for a form of due process, and due process was claimed as a right by the Congress of the Colonies held in New York in 1765. Similarly, the First Continental Congress of 1774 resolved that the colonists "are entitled to life, liberty and property . . . [and] to the common law of England," and following its suggestion the colonies promulgated their own Constitutions. The famous Declaration of Rights adopted by Virginia in 1776 included the guarantee "that no man be deprived of his liberty, except by the law of the land, or the judgment of his peers," and with minor changes in language this was the general type of clause used. It was also found in the famous Northwest Ordinance of 1787.

The Constitutional Convention of 1787 discussed briefly and adopted a few procedural rights. In some of the state ratifying conventions bare majorities were obtained only because of promised amendments. Seven ratifying States appended lengthy proposals; New York's included "That no Person ought to be . . . deprived of his Privileges, Franchises, Life, Liberty or Property but by due process of Law" (*Documentary History of the Constitution*, Washington, D.C. [1894] II, 192), and this may be the first use of this clause in the United States. In 1789 James Madison called the attention of the House of Representatives to these obligations and his proposals included the clause which eventually became part of the Fifth Amendment, that "No person shall . . . be deprived of life, liberty, or property, without due process of law" (1 *Annals* 451–52). Curiously, not a single word appears in the *Annals* discussing or concerning the meaning of due process of law, but it undoubtedly was not meant to include the other substantive and procedural specifics which were discussed in some detail. Of the ten amendments to the American Constitution ratified in 1791, the first eight are generally termed the Bill of Rights. The question whether these limited the federal government only, or also the states, arose in 1833. Chief Justice Marshall held in effect that they were a limitation solely on the federal government (*Barron v. City of Baltimore*, 7 Pet. 243).

In the first important case involving the Due Process Clause it was determined that the language was "undoubtedly intended to convey the same meaning as the words 'by the law of the land,' in Magna Charta" (*Murray's Lessees v. The Hoboken Land & Improvement Co.*, 18 How. 272, 276 [1856]). This dictum limited the Clause to procedural notice and hearing, with the notice required to be adequate and the hearing fair, and subsequent opinions also followed this view (of course, "adequate" and "fair" themselves had to be interpreted, defined, and applied). Until 1868 this limitation and interpretation was not disturbed; in that year the Fourteenth Amendment was ratified, and its first section, second sentence, opens with "No State shall . . . deprive any person of," and then repeats verbatim the Fifth Amendment's language quoted above. There are thus two Due Process Clauses, the earlier one limiting the federal and the later one the state governments. Although the language is practically identical in both, their interpretation is not necessarily so (*French v. Barber Asphalt Paving Co.*, 181 U.S. 324, 328 [1901]); for practical purposes, however, they may be and here are treated as somewhat alike.

The colonial and American idea of due process which now emerges, especially in the light of its English background, indicates only a procedural content. This idea is not limited to judicial or quasi-judicial proceedings. As disclosed at the outset, due process is found in many nonlegal areas such as unions, educational institutions, the church, fraternal organizations, political conventions, and various disciplinary or other proceedings (Forkosch, "American Democracy . . . ," p. 173). However, while due process in the nonjudicial fields in the United States has generally been restricted to procedure, in the judicial area it has been interpreted so as to include substantive rights. The basis for this is found in the separation of the Clause's language into first "life, liberty, or property," and then into "due process of law," terming them respectively substantive and procedural due process. The judiciary in effect has said that the substantive portion may stand alone as a limitation upon the governments, preventing them from depriving a person of these rights when it felt this should not occur; when permitting the deprivation, however, the Justices then insist that the procedural requirements be observed, that is, the term "without" is now activated.

The earliest questioning of a solely procedural content in the Clause is found in a little-publicized opinion of 1819 (*The Bank of Columbia v. Okely*, 4 Wheat. 235, 244), and in the same year that Murray (noted above) was decided, New York's highest court rejected that state's exercise of power "even by the forms of due process of law" (*Wynehamer v. People*, 13 N.Y. 378 [1856]). The following year Chief Justice Taney, despite his earlier acquiescence in the Murray opinion, wrote that "it is beyond the powers conferred on the

Federal Government" to deprive a citizen of his property (*Dred Scott v. Sandford*, 19 How. 393, 451 [1857]). After the ratification of the Fourteenth Amendment the first major case to mention the new Clause was the *Slaughter-House Cases* of 1873 (16 Wall. 36). In his dissenting opinion Justice Bradley pointed up its usefulness, and then rejected the "great fears" that this would lead to Congressional interference "with the internal affairs of the states . . . and thus abolishing the state governments in everything but name . . ." (at 122f.).

This judicial self-abnegation, however, did not last long. Aroused by the 1876 *Granger Cases* (94 U.S. 113) which upheld a state's police power to prescribe rates charged by businesses affected with a public interest, the American bar influenced the Supreme Court to strike down "State laws, regulatory of business and industrial conditions, because they [were] unwise, improvident, or out of harmony with a particular school of thought" (Justice Douglas in *Williamson v. Lee Optical Co.*, 348 U.S. 483, 488 [1955]). By 1890, with three dissenters, the Supreme Court took a decisive plunge into the substantive due process waters by requiring judicial review of a railroad commission's rate-making determination, as well as its procedure (*Chicago, Milwaukee, & St. Paul Ry. Co. v. Minnesota*, 134 U.S. 418 [1890]). Thus in 1927 Justice Brandeis could write: "Despite arguments to the contrary which had seemed to me persuasive, it is well settled that the due process clause . . . applies to matters of substantive law as well as to matters of procedure" (dissenting in *Whitney v. California*, 271 U.S. 357, 373). The substantive limitation may therefore be enforced against a government independently of the second requirement, that is, a government may not have any power whatever to act regardless of the excellence of its procedural methods; or, even if it has such a substantive power, it may be acting poorly in its procedural method. The consequences in each situation are different, for if a government cannot exercise a particular substantive power then it cannot act at all under it unless a judicial reversal occurs, a constitutional amendment is ratified, or another and separate power can be exercised; if, however, it is only the procedure which is bad, this may be properly corrected and the otherwise same law now upheld.

The subsequent exercise of this power by the Supreme Court, even though in exceptional cases the federal and state governments were permitted a degree of control, produced outcries of indignation from laymen and jurists. For example, in the debate on the nomination of Chief Justice Hughes in 1930, Senator William E. Borah denounced the Court as "the economic dictator" of the country; Brandeis felt the majority was exercising "the powers of a super-legislature" (dissenting in *Jay Burns Baking Co. v. Bryan*, 264 U.S. 504, 534 [1924]), while Holmes castigated their use of "no guide but" their "own discretion" so that he could "see hardly any limit but the sky to the invalidating of those [constitutional rights of the States] if they happen to strike a majority of this Court as for any reason undesirable" (dissenting in *Baldwin v. Missouri*, 281 U.S. 586, 595 [1930]).

The turn came with the New Deal era of 1932. The judicial retreat began with its upholding of federal and state legislation by reversing many of the earlier cases, expanding the use of the Constitution's Commerce Clause (in Art. I, §8, cl. 3) to support new laws directed against economic and social evils, and withdrawing from its due process supervisory role. However, although in 1965 it reiterated that "We do not sit as a superlegislature to determine the wisdom, need, and propriety of laws that touch economic problems, business affairs, or social conditions" (*Griswold v. Connecticut*, 381 U.S. 479, 482), the Court still retains and exercises such powers albeit their scope and depth have been voluntarily reduced and narrowed (e.g., *Nebbia v. New York*, 291 U.S. 502 [1934], and especially *Ferguson v. Skrupa*, 372 U.S. 726 [1963]). The Justices have now transferred their major directing role from the economic to other areas, in effect becoming modern Platonic philosopher-kings in determining the minimal procedural and substantive due process of law which must be accorded all persons; nowhere else in the free nations is there such a concentration of this definitional power delegated to nine appointed individuals. These conclusions are supported by what follows.

In 1954 the Court's new form of activism began with the *Desegregation Case* (*Brown v. Board of Education*, 347 U.S. 483), which used the Fourteenth Amendment's Equal Protection Clause to strike down a state's educational segregation; simultaneously, however, the Fifth Amendment's Due Process Clause was used to denounce similar federal conduct in the District of Columbia, the Court saying "It would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government" (*Bolling v. Sharpe*, 347 U.S. 497, 500). This new approach presaged an extended further broadening of the content of the Due Process Clause, and in this regard another question arose, namely, did the Barron case, mentioned above, still limit the use of the Bill of Rights only against the federal government or could it now also so limit the states? As part of their rejection of a generalized natural law content in the Due Process Clause, Justices Black and Douglas urged that the specifics of the entire Bill of Rights be embraced in that Clause (*Adamson*

v. California, 322 U.S. 46 [1947], in effect following the like view of the first Justice Harlan in *Hurtado v. California*, 110 U.S. 516, 550 [1884]). The Supreme Court has never accepted this "total incorporation" view but utilizes a selective case-by-case approach, handling each Clause in the first eight Amendments separately. The result has nevertheless been an almost total incorporation, with only a few Amendments and Clauses not so embraced.

The Due Process Clauses thus impose limitations upon both federal and state governments in civil, criminal, and administrative proceedings, as well as upon their acting through legislative, executive, and (state) judicial branches when they "exceed" their substantive or procedural (constitutional) powers. For example, in civil matters notice continues to be vital, even though a sufficiency of (minimum) contacts enables personal jurisdiction to be obtained upon a nonresident person, and a fair hearing remains an important requirement in every type of adversary proceeding. In criminal matters a virtual revolution occurred during the 1960's. The rights of persons include not only such procedural ones but also, e.g., all of the First Amendment's substantive clauses involving free speech, religion, press, and assembly. For example, the rights to associate and also peacefully to picket and handbill within broad limits whether for labor, consumer, political, or other reasons, are protected, as are teachers and public servants protected against loyalty oaths, vague requirements, and "fishing investigations"; and education and religion are generally not intermixed.

Summary. Due process, whether in the general area of human conduct or the particular one of law, thus connotes a procedure or method which includes regularity, fairness, equality, and a degree of justice. The idea is found in the internal disciplinary and other procedures used by labor unions, athletic organizations, social clubs, educational boards, business firms, and even religious groups, to mention but a few. The use of the term by the judiciary in the United States at first tended to follow the early procedural formulation; since the 1890's, however, a substantive content gradually broadened the meaning of due process.

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MORRIS D. FORKOSCH

[See also Civil Disobedience; Constitutionalism; **Equality; Justice;** Law, Ancient Greek, Ancient Roman, Common, **Equal Protection,** Natural; **Legal Responsibility;** Property; Social Contract; State.]

EQUAL PROTECTION IN LAW

Ancient Roots. The idea of equal protection seems originally to be rooted in the individual's relations to nature and to God. In relation to nature, men have always primordially and collectively feared other creatures and the elements, and thereby found a common ground for mutual protection, sharing an empathic sense of a levelling equality. For example, the seasonal overflowing of the Nile made all helpless equally, regardless of station. In his relation to God, man believed that a higher will rewarded all the faithful equally in a later, if not the present, world. In both the natural and supernatural domains, however, differences were undeniably recognized: a stronger physique was better for hunting, whereas an older head might be preferred for advice. These dissimilarities undoubtedly led to a social stratification of chieftains and priests in an hierarchical, if not a caste, system, with varied supporting justifications such as hereditary innate differences or divine dispensation. Economic and social distinctions eventually followed, and wars and conquests also resulted in the capture and enslavement of man by his fellows.

The originally felt need for equality of protection is found even among early civilized peoples, who at

the same time also practiced inequality. However, the idea of justice functioned to compel equal protection in various ways. Thus Egypt's kings were divine, and they sanctioned oppressive regimes, but Thutmose III (ca. 1500 B.C.) nevertheless charged his new chief justice that "thou shalt act alike to all"; in the Coffin Text a god announced he had "made every man like his fellow" and "made the floodwaters of the Nile for the benefit of the poor man and the great man alike, and given all men equal access to the kingdom of the dead" (Muller, p. 58). So the Hebraic theocracy set up the Ten Commandments to be administered evenly among the chosen tribes, while the Mesopotamian King Hammurabi (ca. 2100? B.C.) legalized inequality by adjusting penalties and damages to rank.

The Greeks felt united against all others, whom they called *barbaroi*, and practiced a form of political equality in that a marketplace assemblage of all the citizens (*demokratia*) made the laws and administered justice, as did the Germanic tribes a thousand years later. Greek society was democratic and unequal, and Janus-like, presented two faces, best exemplified in the ideas of Plato and Aristotle. "Equality consists in the same treatment of similar persons," wrote Aristotle; "equality [is] not, however, for all, but only for equals. And inequality is . . . only for unequals" (*Politics* 1280a). What the Greeks so taught and practiced was continued in subsequent years and centuries; for example, Rome applied to all equally the same general principles of the *jus gentium*.

The sense and practice of inequality in society and religion continued into the Middle Ages, with Saint Augustine defending government, private property, and slavery, and Aquinas also expounding different "just" prices for each separate class in society. The Renaissance revolt against authoritarianism in all fields of knowledge and belief, for example, Luther, Rabelais, and Ramus (1515–72), may have inspired subsequent centuries, but without exception every nation then upheld the inequality of classes and the unequal treatment or protection in the distribution of land and wealth. The Reformation was not much better; Luther exalted the God-derived power of the prince and glorified the state and its class system, while Hobbes's sophisticated liberalism gave it support in a rationalist political philosophy.

Nevertheless, the idea of man's supremacy over nature led to a great levelling movement in Western political, religious, and social history, with a consequent desire for equality and like treatment. This was translated in many countries and in various ways, e.g., the English Revolution of 1688, which projected Locke's idea of a social contract among men who were all equal, an idea which the German Enlightenment reciprocated, for example, in Wolff's (1679–1754) view that all men are equal before nature. And this view is, of course, the essence of the American Declaration of Independence of 1776, which exalted the doctrine that "all men are created equal," and of the French Declaration of the Rights of Man and of the Citizen (1789) which stated "Men are born, and always continue, free and equal in respect of their rights." Through both these documents the middle class achieved political power; Adam Smith's (1723–90) idea of free competition put all persons on a plane of original economic equality; in the nineteenth century Darwin gave a scientific *imprimatur* to man's basic equality, at least in forebears; and the nineteenth- and twentieth-century nationalization and internationalization of democratic ideas adopted the Enlightenment's idea of man's political right to equality everywhere.

This levelling movement was, however, not uniform in time or degree; even the Constitution of the United States partly repudiated the Declaration's egalitarian statement by supporting a system which safeguarded property and class distinctions to a degree; and, despite the idea's growth, questions were asked concerning what sort of equality it was which taxed all equally regardless of differences in wealth. As Anatole France formulated it: "The law in its majestic equality, forbids the rich as well as the poor to sleep under the bridges, to beg in the streets, and steal bread." And when the consequences of such individual equality resulted in an economic laissez-faire exploitation with inequality and hardships occurring, many people and nations rejected the practice if not the theory of such a definition and application of the idea.

Legal Aspect. The translation of this historical amalgam of religion, politics, and economics into the current legalistic concept of equal protection followed a similar kind of circularity. First, the law had to recognize the fact that differences existed among men, corporations, and institutions. And even if there were no identifiable differences some would have to be provided, e.g., geographical ones, because millions of persons were involved. Second, on the basis of such natural or man-made differences, whom and how could the governments then affect? It is at this point that equal protection, based on an acceptable or valid group classification, emerges; once properly classified, groups may be treated differently but, within themselves, all persons must be treated equally or alike. In every new or old nation, whether representative or monarchical, socialist or otherwise, such identifiable differences, and others which conform to their own mores and laws, are used, but without universal uniformity being required (although note the efforts of the U.N., below).

This classification and then equal protection or treatment may each or both be required in a country as the result of custom and history, a law, or a constitution; for example, English custom before and after the Norman Conquest of 1066, and the French Declaration of 1789 (par. XIII). There can, of course, be a negation of such classifications, as is found in the Universal Declaration of Human Rights adopted by the General Assembly of the United Nations in 1948, that all human beings are entitled to all their rights and freedoms "without distinction of any kind . . ." (Art. 2, par 1).

In every country, whether by custom, law, or constitution, such classification and equal treatment are initiated and regulated by its parliament, legislature, or congress, with the judiciary entering in a minor and interpretive role, as in England (e.g., the House of Lords), France (*Cour de Cassation*), Germany (Constitutional Court or *Bundesverfassungsgericht*), and India (Supreme Court). In the United States, however, the legislative and executive branches seem to be only the proposers, with the Supreme Court acting as the determiner in each such aspect of classification and treatment. This is brought about by the language and interpretation of a portion of the Fourteenth Amendment to the Constitution which is binding upon the states directly, and to some extent upon the federal government by judicial interpretation: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws" (§1, sentence 2).

While this Equal Protection Clause does not specifically mention classification, the judiciary necessarily permits this; as Justice Frankfurter said in 1943, "The right to legislate implies the right to classify." Classification is the jugular vein of equal protection. For example, if the government desires to separate XY, the line drawn between them, or the classification X/Y, must be a valid one, that is, constitutionally permitted. If this classification is upheld then all in X may ordinarily receive more or less than all in Y, and so long as all X's and all Y's receive more or less equally, i.e., if they are all treated alike within their own classifications, then they have all received equal protection. This permits one to view equal protection as equal discrimination; that is, the class receiving less is discriminated against with respect to the other class, but so long as this discrimination is spread equally among all within the lesser class, there is no violation of the Clause. If, however, X/Y is held to be an invalid classification, then one XY group results; and so all X's and all Y's must now be treated as one XY group, that is, alike and not differently, as when they were classified separately.

The initial question may therefore be whether the government has the power to classify in this manner. In the United States this ordinarily becomes a question of Due Process of Law in its substantive aspects, that is, whether or not the legislature has power to classify in this fashion for this purpose is ordinarily to be determined by this Clause. In 1966, in an exceptional situation, a "requirement of some [degree of] rationality in the nature of the class singled out" seems to have been suggested (*Rinaldi v. Yaeger,* 384 U.S. 305, 308). However, assuming that such a classification—and also any subclassification—is upheld then one may next question whether all in each class are receiving equal or like treatment. In other words, equal protection now enters. (Of course a government may not have any power at all to act for or against the persons regardless of a valid classification, which is a completely separate question brought under any constitutional clause, or there may be a lack of procedural due process, but these are technical legal problems not pertinent here.)

In this analysis the classification question is generally decisive (assuming government power to act as it desires). Whether or not a particular classification is good or bad, i.e., constitutional or not, is, however, not only a reflection of a nation's historic background and culture but of all of its current and changing attitudes, as well as of how all this is interpreted and applied by those having this power. In the United States the judicial view is to uphold legislative or executive classifications when these are not arbitrary or capricious but are rational and reasonable. In 1928 Justice Brandeis wrote that "the classification must rest upon a difference which is real, as distinguished from one which is speculative, remote or negligible."

The American judiciary has upheld classifications involving or based upon sex, age, income, wages, hours, etc., although repudiating illegitimacy as "an invidious discrimination against a particular class" where only legitimates were permitted to sue for the wrongful death of a next of kin. In several instances the High Court has first upheld, and later denounced, classifications. For example, in 1894, in *Plessy v. Ferguson,* a state's classification of persons on the basis of color was upheld for the purpose of requiring all black people to ride in railroad coaches reserved for them, so long as these coaches were physically equal to those reserved for the non-black. In 1954 the *Desegregation Case* reversed this holding because, in the light of new social discoveries and knowledge, such a classification in education on the basis of color was wrong. Subsequent rulings extended this rejection of a color classification. And, in a remarkably viable decision in 1968, the Court upheld §1 of the Civil Rights Act of 1866 as authorized by the Thirteenth Amendment so that federal courts could restrain racial discrimination by

private individuals in the sale of realty (*Jones v. Mayer Co.*, 392 U.S. 409).

This humanistic attitude toward people, as distinguished from associations, corporations, and all impersonal groups subsumed under the constitutional term "persons" in the Equal Protection Clause, makes for a greater equality in protection and in treatment. In this respect the United States has permitted its judges to lead in determining whether or not such Clause is to be extended beyond its former boundaries. But equal protection is not limited to this Clause; it is accorded in many and different ways, in addition to the voluntary methods adopted by religious and other groups, and individuals. For example, there are other Clauses available, as well as various legislatures and chief executives who may also so act, either independently or in conjunction.

There is thus a broadening of equality and equal protection, a greater inclusion of people within its concepts, with more extensive and deeper protection accorded, even while the built-in historical method of classification remains. For example, equal protection in its general and not necessarily legalistic sense, is also found through the negative use of the Due Process Clause, which generally limits governments in the United States when these seek to prevent permanent resident aliens from working, operating businesses, or otherwise earning a living. The Constitution's Commerce Clause (Art. I, §8, cl. 3) is also used to enable the federal government to prevent inequities and provide for a degree of equality, for example, through desegregation of motels and restaurants which may not be otherwise reachable. The Bill of Rights, among other things, enables all persons to demonstrate peacefully and to speak and protest so as to obtain equality in all facets of life, and gives any accused the right to counsel regardless of financial inability to pay. The legislatures, either federal or state, may strike at discrimination and the unequal treatment of black people, aliens, or others in job opportunities. The chief executives, whether federal, state, or local, may exert similar negative and positive powers with respect to their armed and police forces, and otherwise.

Other Countries. What the United States is doing through its various powers and organs, and what its people do voluntarily, meet with varying degrees of opposition; such opposition is also found elsewhere in the world, sometimes in a repressive fashion. Rhodesia is only one example. Nevertheless, the idea of equal protection and treatment has spread during the last two centuries to the point where the United Nations' purposes include the development of "friendly relations among nations based on respect for the principle of equal rights," etc. (Charter, Art. 1, par. 2). So, too, does India's Constitution provide for equality (Arts. 14–18) and other rights, as does that of the Philippines, which contains a Bill of Rights. In 1968 the new Canadian Prime Minister reportedly promised "to strive for a just society with all possible freedom for individuals and equal sharing of the country's wealth."

The desire for equal protection and treatment politically, economically, educationally, and in all other aspects of human behavior and conduct has spread with the "revolt of the masses" envisaged since Christ. This current desire and need for such negative and positive equal protection is aggressive, that is, the people press for it, but is also defensive, that is, persons and nations which can aid do so not only for humanitarian reasons but also for self-interest. Some feel that this glacial movement toward equality will result in a complete levelling of differences and the elimination of all classifications, but this is impossible. What appears more likely to happen is a general raising of the economic standards of living, equal participation in government and culture, and otherwise the enjoying of more of the good life by those once classed as inferiors.

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MORRIS D. FORKOSCH

[See also Class; Democracy; Enlightenment; Equality; Hierarchy; Justice; Law, Due Process, Natural; Property.]

NATURAL LAW AND NATURAL RIGHTS

I. *DEFINITIONS*

THE EXPRESSION "natural law" includes the ideas of *nature* and *law*, two nouns which do not lend themselves to univocal objective definition or even at least to general or commonly accepted usage. One recent

author Erik Wolf (*Das Problem . . .*, Ch. I, Part III) enumerates twelve meanings of "nature" and ten meanings of "law," which yield 120 possible combinations and almost as many definitions of the expression "natural law." We may add that if it is theoretically possible to think of supporting a specific agreement as to the present meaning of "nature"—again in this case not overlooking all the other historically accepted meanings—on the other hand, it is certain that there is no hope of finding a similar agreement about the idea of "law": the definition of law entails reference to philosophical presuppositions and consequently is not susceptible to supporting an indispensable general consensus. The definition of law is indeed the rock of Sisyphus.

To define natural law in an objective manner by disengaging it from its environment, from the schools which employ the expression, or from the political and legal organs which make use of it, is therefore an undertaking doomed to failure from the start. Hence it is necessary, if we wish to avoid confusion, always to qualify the expression: for example, classical natural law (to make the Aristotelian or Thomist conception precise); Stoic natural law; Protestant natural law; positive natural law characteristic of one of the forms of contemporary natural law (the legal sense of natural law); and so forth.

Furthermore, certain essential features of natural law can be formulated by specifying it in contrast with conventional law: nature opposed to convention, justice to legal right, even unwritten law opposed to written law, the permanence of certain human values confronting the transitory character of other values derived especially from the state. Seen in this light natural law appears as a group of principles that transcend the law of different epochs and regrouping a set of norms endowed with a certain continuity by opposition to the law of a given epoch, which is transitory and changing; for the law of any epoch is the interpreter of the preceding one, whereas natural law is the law which outlives the times.

Though the expression "natural law" is equivocal, the idea of "natural rights" presents much less ambiguity. By "natural rights" we understand the subjective rights that man possesses as a human being, which are granted to his person for the protection of certain essential interests. These rights are considered the irreducible legal patrimony of every human being as part of his very nature. They are based on the idea that only a human being is a person, and that every human being is a person. As a consequence, these rights are inalienable and imprescriptible. Inalienable, because if these rights would be given up, man would cease to be a person and become a case of alienation; imprescriptible, because if these rights ceased to exist (extinctive prescription), man would likewise cease to be a person in his prescribed condition.

Natural rights thus appear as a manifestation of individualism, man being considered in his own nature independently of his political allegiance. They consecrate the idea of the dignity of the human person considered as such.

II. HISTORICAL ORIGINS

Greece and Rome. The idea of natural law is tied to the conception of an organized universe; the idea can be disengaged only after a society has become aware of the regularity, the succession, the repetition of natural phenomena, the existence of cycles and the ability to make predictions, predictability based on the existence of interrelations with the physical world. Natural law assumes a spatiotemporal representation of the universe. Hence it is at a loss when confronted with the many discrepancies in the magical condition of societies lacking any ordered structuring. But as soon as the idea becomes clear that there exist laws governing natural phenomena, there develops immediately the conception of a general principle and ubiquitous organizer of the initial chaos.

In Greece the idea came to a head quickly. Incoherence gave way to order. Since certain phenomena in nature answer to laws, it was logical to believe that all phenomena answer to laws and that notably societies, peoples, and relations among individuals would also answer to a preestablished integral order which needed only to be sought and discovered. It was namely the idea of *Kosmos*, the order of things in contrast to disorder, confusion, and chaos. The single directing principle was supposed to govern everything including men placed at the center of the universe and societies having the same characteristics as the other elements in the external world. Whence the idea that there exists a set of general and universal norms inherent in nature itself, especially in human nature, and which would be imposed upon man's will insofar as his will manifests itself in the form of custom or law. Heraclitus, for example, defined wisdom as consisting of "a single thing, to know the thought which governs all things everywhere" (Heraclitus, frag. 41; Jean Voilquin, p. 76). This thought is the "Logos" whose meaning is surely difficult to comprehend exactly, but which—as Voilquin proposes (p. 76, note 48)—appears really to be reason insofar as it is common to all creatures, because reason contains the laws that govern the world: "It would be in some manner the communality of universal thought, the wisdom which is one, excluding the neo-Platonic and Stoic meaning" (ibid.).

In such a conception the world does not develop