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LA THÈSE A ÉTÉ
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THE IDEA OF LAW

AN INQUIRY INTO -
THE NATURE OF LEGAL PROPOSITIONS AND
THE BASIS OF LEGAL AUTHORITY

by

Chhatrapati Singh

A thesis submitted to the School of Graduate Studies and Research
of the University of Ottawa
as partial fulfillment of the requirements for the Ph.D. degree in Philosophy

Ottawa, Canada, 1982

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CURRICULUM STUDIORUM

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INTRODUCTION

Aim of the Work. Law gives a form and direction to the social world. The factors determining the continuity of the society, however, are not all legal. Political and economic changes sometimes disturb the legal relationships in fundamental ways. This makes it necessary to reflect on the very meaning of a legal enterprise.

The past century and a half has witnessed various significant political and economic changes and together with them numerous attempts to inquire into the nature of law. Among such attempts the theories of John Austin, Karl Marx, Hans Kelsen, H.L.A. Hart and Lon.L. Fuller are noteworthy. This work also inquires into the nature of law. It once again raises and attempts to answer the basic philosophical question : what is law ?

Various legal systems have many elements in common. All such common elements can be said to belong to the idea of law. Everything that belongs to the idea of law is not to be found in every currently existing social institution that calls itself a legal system. Some have many elements belonging to the idea of law and some have only a few. Since the existing social systems which call themselves legal systems differ in significant ways, it becomes necessary to clearly characterize the idea of law so as to distinguish it from other related notions. This work is an attempt to explicate what belongs to the idea of law.

I am using the term 'idea' in the Kantian sense, not in the Platonic sense. In the Kantian sense the idea of law does not exist in some other realm. It is a notion provided by our reason for directing human actions to a goal in a systematic way. Unless we have a clear conception of what is contained in the idea of law, it will neither be possible to appraise different social systems that claim to be legal systems, nor will it be possible to direct the development of any such social system towards greater perfection. Any attempt to better an existing legal institution presupposes a basic understanding of the idea of law.

Motivation.

The basic motivating factor in undertaking this enterprise is my serious dissatisfaction with not only the traditional natural law theories but also with modern legal positivism, such as that of Hart and Kelsen. Recent works by Joseph Raz¹ or John Finnis², for example, do not seem to me to have deepened our insight into law in any profound way. I find myself more in sympathy with the views of Fuller, but his analysis does not seem to have gone deep enough in characterizing the basic principles of law. In the final analysis, as I shall attempt to show, Fuller's theory is unable to bring out the morality that is involved in law.

There is a second but less urgent factor that motivates this work. It is the desire to systematize the elements and the problems involved in a legal theory. Insofar as law is a system, it should be possible to distinguish

the foundational elements from the derivative ones. Moreover, it should also be possible to describe the relationship that holds between the different parts of law, such as the Criminal law, Constitutional law, Law of Contracts, Law of Persons, etc., in some related and orderly manner. In the prevalent legal theories the relationship between the parts seems to be only intuitively intelligible. The reason behind such conceptual discontinuities seems to be the fact that most legal theorists have tended to follow the traditional and historical compartmentalizations of law, instead of the conceptual and thematic necessities dictated by reason. I shall attempt to describe the nature of law systematically, distinguishing basic elements from secondary ones. Such a method requires that I follow the conceptual order in describing the parts of law rather than the historical ones. I shall explain the manner of such a presentation subsequently while describing the plan of the work.

The above remarks clearly suggest that I take a kind of foundationalism to be true for law.

Background. The philosophical background from which I approach the analysis of the idea of law derives its elements more from the Indian tradition than the Greek tradition of thought. From such a perspective I perceive the issues and the problems in some very different ways. However, as will be evident, the Indian tradition stays as the background in this work. It is only the arguments of some

Western thinkers that are analysed. The critique of each argument, however, has its roots in some Indian outlooks.

Although I find myself in disagreement with Austin's, Hart's and Kelsen's views, it must, nonetheless, be emphasized that in spirit I see my endeavour as continuous with their's, insofar as it concerns an attempt to purify law from extraneous elements. Austin, Kelsen and Hart do not, however, seem to me to have succeeded in their endeavour. The basic reason why they did not succeed in purifying law of extraneous elements is that they seem to have misunderstood the basic moral reason for trying to arrive at a pure theory of law. The task, as will be evident, is not just one of theoretical niceties but of practical consequences.

Following the work of Bentham and Austin, the task of trying to purify law of morality seems to have become a common enterprise. However, considerations of the actual social and political ends that led Bentham and others to distinguish law from morality have been generally neglected. It is known that Bentham, Austin, James Mill, J.S. Mill, James Fitzjames Stephens and others who have theorized in detail about law were actively involved in structuring the societies of the English empire by means of law. Many of their central theories had their roots in some practical problems confronted by them in such activities. As to what actual influences these activities had on their theories is a matter of historical research. But if one turns a blind eye to the fact that all their

theories were designed to meet some practical difficulties, some essential links in understanding the development of their theories would be missed.³

The assumption that one can distinguish law from morality is only plausible in a theory of law like that of Austin's. According to Austin law is what the sovereign commands. But suppose there are limits to what the sovereign can command to be law, such that only that which ought to be law can in fact be law, then Austin's distinction between law as it ought to be and as it is, would not hold.

If the distinction between law and morality is tenable only by arbitrarily equating law with the dictates of someone's will, one must ask what advantage, if any, is gained by defining law in this way. There is one straightforward practical consequence of this definition. By telling the people that law is whatever the legislator commands it to be and that there is an obligation to obey it, the activity of governing becomes much easier. For then, any and every violation of what the legislator commands becomes a case of disobedience against which force may be used and claimed to be legitimate. Moreover, such a definition of law gives a complete freedom to the legislators.

Now this is just the kind of theory that one would need for all colonial and imperial purposes where one wants to give complete freedom to the legislators for legislating rules on other people and justifying the use of force

against every violation.

The point, however, is not about the practical use and misuse that legal positivism has been put to, but about the fact that the various distinctions, such as between law and morality, which legal positivism makes, cannot be fully understood if one ignores the actual social context of such distinctions.

There is no reason to believe that Bentham and Austin were motivated by a desire to enhance the power of the legislators. (Although James Fitzjames Stephens clearly seems to have been so motivated.⁴) There is another and a more significant purpose desired by the legal positivists in distinguishing between law and morality. This purpose, as they have claimed, is to keep open the possibility of moral appraisal of law. The positivists believe that only by maintaining a sharp distinction between law and morality is such an appraisal possible.⁵

Suppose we do grant the positivist thesis that law is to be appraised by morality, the next natural question is: by which morality? Is the English legal system to be appraised by Chinese morality? Or is the American legal system to be appraised by Hindu morality? If supposing all legal systems are to be appraised by the morality that emerges from the Judaic-Christian-Islamic

system of thought, why is the morality that emerges out of the Buddhist and the Vedantic systems incapable of serving the purpose ? As far as I know, no legal positivist has attempted to justify the morality by which law is to be evaluated.

To say that we evaluate law, as the positivists claim, is to assert a complex misleading statement, for what we in fact evaluate is only the statements of the legislators. Only if we characterize as law everything that the legislator legislates, can the statement be made that everytime we evaluate what the legislator ~~proposes~~ we are evaluating law. However, such an assertion already presupposes legal positivism to be true.

We indeed need to evaluate what the legislator legislates. But the possibility of such an evaluation does not by itself require that we separate law from morality, it only requires that we separate what the legislator legislates from morality. We actually need a better understanding of law so that we can differentiate laws from non-laws when the legislator legislates. The positivists' claim that we need to distinguish law from morality so as to evaluate law is based on a confusion which arises because they presuppose their own theory to be true in the first place.

An appropriate legal ~~theory~~ should make possible a moral evaluation of valid legal rules legislated by the authorities and also at the same time be able to show

the moral ends and means of law. The thesis that I present attempts to achieve such a synthesis.

If law is not to be separated from morality in the way that the legal positivists have generally demanded, what is it to be separated from? I shall argue that law needs to be purified firstly of political elements and secondly of religious elements. In other words, the basis and the function of a legal system must be distinguished from those of political and religious systems.

To suggest, as I am doing, that law is related to morality, is to say little so long as morality is left undefined. In this work I seek to define the morality in which law is necessarily grounded. No claim to completeness can, however, be made in such an enterprise. This work represents only a beginning in what seems to me to be the right direction as to the moral foundations of law.

But where must one start the inquiry about the morality that is involved in law? It is my opinion that for deeper considerations about law one must return to the pre-colonial thinkers, mainly to Immanuel Kant and Leibniz.

There are many reasons why the development of legal theory in Europe took a new and, as I shall argue, a mistaken direction after Kant. The chief reason seems to be that the major political preoccupation of Europe in the nineteenth century, after Kant's death, was with imperialism and expansionism. Such activities call for a greater attention to the theory of the state,

since, where new states are being created, there is a practical necessity to conceptualize and justify the activities. On the other hand, such a political atmosphere is hardly conducive to the drawing up of a Kantian scheme for the civil state, in which the Republican civil state, as a legal state, cannot act without the people's consent and knowledge.⁶ We have already noted how the main proponents of legal theory in Europe after Kant were directly involved in building very un-Kantian civil states.

Method.

In terms of contents, there are two aspects to this work. The first aspect is that this work is mainly a criticism of legal positivism. The second consists of a presentation of what seems to me to be the right account of the nature of law. The strategy, hence, is essentially one of presenting my own view by eliminating other important views. In terms of presentation, the work is divided into four parts. The reasons for this will be explained in the plan of the work.

The legal positivism that I criticize in detail is that of Hart and Kelsen. This is so because they seem to me to have presented two most sophisticated versions of this theory. Two less sophisticated versions of legal positivism, one ideologically to the right - that of Ronald Dworkin, and one ideologically to the left - that of Karl Marx, are also discussed.

I shall attempt to show the correctness but, the inadequacy, of Fuller's theory. When Fuller's point about the internal morality of law is pursued it leads towards the Kantian alternative. The theory of law that I present will be based mainly on Kant's and indirectly on Leibniz's moral and legal theories. I will attempt to show that an appropriate legal theory can be developed by revising some of Kant's essential beliefs. Such a revision, however, must necessarily include some important tenets frequently put forward by the Indian thinkers. I have chosen to direct my arguments against Kant and build the appropriate legal theory in contrast to his views mainly because he seems to me to present the most detailed and the most formidable arguments which need to be taken account of.

There have been controversies about the correctness of legal theories since a long time. By what method, or on what grounds is one to distinguish between different legal theories which claim to be true? The answer to this question forms the central methodological feature of this work.

I shall argue that the right way and perhaps the only way to resolve the conflict between different theories about law is to investigate the epistemological status of basic legal propositions. Let us examine the nature and the status of basic legal propositions which we expect would serve the central aims of the legal enterprise, such as bringing about justice and order, and then let us see whether the propositions asserted by different theories to be basic legal

propositions, in fact have the epistemological status and nature of the type of propositions which serve the legal ends.

The basic point of conflict between different legal theories is their view about the basis of legal authority. The inquiry into the epistemological foundations of law helps to resolve this conflict by providing the appropriate grounds for the basis of legal authority. Different types of propositions have different truth and justification conditions. Once we know the status of basic legal propositions, we can know the valid or true conditions under which authority can be assigned to people to legislate legitimate propositions.

The answer to the question about the basis of legal authority, as I shall argue in detail, is not independent of the answer to the question about the nature of basic legal propositions.

It must be emphasized that although there are three related issues to be tackled - the resolution of the conflict between different legal theories, the nature of basic legal propositions and the basis of legal authority, these are not three distinct problems to be solved. They are only three different aspects of one enterprise. Knowledge about the nature of basic legal propositions will tell us the justification conditions for assigning authority to someone to legislate. The decision about the basis of authority will resolve the conflict between different legal theories.

The basis of authority that this work inquires into is de jure authority and not de facto authority. In recent times the different senses of authority have also been expressed in other related terms. Distinction is made between authority in the sense of "epistemic" authority, which pertains to beliefs and knowledge, and "moral" authority, which pertains to decisions and actions. People such as the scientists and mathematicians are supposed to have "epistemic" authority and people such as the priest are said to have "moral" authority. ?

The way the distinction between "epistemic" and "moral" authority is presently made assumes that for "moral" or de jure authority one does not need or have knowledge. But is such an assumption philosophically warranted? On what grounds is one justified in believing that "moral" or de jure authority does not require any sort of knowledge, and that it is not "epistemic" authority in some sense? The very distinction reflects a current dogma of the Western mind. The belief that 'de jure' or moral authority is distinct and not an "epistemic" authority, goes against a fundamental Indian outlook. I accept the common Indian view that the 'de jure' or 'moral' authority is also "epistemic" authority, albeit the knowledge involved in law and morality is of a different sort. Know-

ledge and action are related ,whether it be scientific activity or legal activity.

By working out the epistemological status of basic legal propositions and by showing its relationship to the basis of legal authority, I shall be showing the relationship that obtain between the "epistemic" or de facto authority and "moral" or de jure authority.

The justification of authority is based on a normative theory grounded in the philosophical assumption that ethics involves knowledge of objective values in such a way that ethical differences are, in principle, subject to resolution by rational inquiry and debate. The arbitrary distinction between "epistemic" authority and "moral" authority, that characterizes the present Western mind, has not always existed . Conservative political thought ,characteristic of the traditional Republican in the United States , has , to a considerable extent , remained committed to the rationalistic theory of ethical knowledge assumed by the founding fathers of the American Constitution. However , under the impact of logical positivism and empiricism , which seems to have entertained some basic misunderstandings about the nature and the capacity of natural sciences , the Western mind, by and large, seems to have rejected the epistemological rationalism in favour of utilitarianism and naturalism. Political liberalism has , in general , operated

on the utilitarian conception of ethics, which was for a long time widely accepted as a satisfactory philosophical theory of ethics from within the perspective of empiricism. Utilitarianism denies that there are objective values in any unique sense or that there are distinctive moral reasons that move individuals. Therefore, the utilitarian theory of ethics or law is inconsistent with the philosophical assumption which underlies our normative theory of authority.

The epistemological rationalism, which empiricism has rejected, based the authority on extra-legal persons such as God, as put forward in some natural law theories. But a normative theory of authority need not necessarily base itself in such natural law theories, nor need it appeal to cognition of entities or percepts which are not objectively recognizable and publicly available. Neither does it need to appeal to intuition or any mystical experiences.

In the theory that I present here, I shall attempt to show how a normative theory of authority can be founded on an epistemological rationalism, which does not require an appeal to extra-legal authority.

Plan of Work: The presentation of this work follows the method of exposition and not of discovery. What this means is that I pursue the inquiry about law in terms of the way one systematically unfolds the conceptual

relationships between the ideas, and not the way one empirically discovers the various elements of law.

Law is a normative system created for sustaining just conditions in the society. Such a characterization involves at least three distinct ideas. Firstly, that law is a system, secondly, that it is normative, and thirdly, that it is aimed at creating and sustaining just conditions. Since law is a system it must have features which are common to systems in general. Similarly, insofar as law is normative it must have properties which are essential to being normative; and lastly, insofar as law is aimed at creating and maintaining just conditions, it must have characteristics which are necessary for achieving such ends. I shall discuss the idea of law with reference to each of these aspects, one by one.

The work is divided into four parts. Law is first of all a system. In Part I, I discuss the requirements that make law a system. There are various principles, rules, maxims and propositions in general; when these propositions, etc., are organized in a certain way we get a system. But not every organization of such propositions can be said to form a system for a legal discourse. Hence it becomes necessary to define the necessary systemic requirements of law. Various theories assume that they have described law because they have identified some systemic properties. I shall argue that the systemic requirements of law are specific, hence such theories have not been able to distinguish the systemic properties of law from the.

properties of systems in general.

Secondly, law is a normative system.

Having found out what makes law into a system in Part-I, I proceed to discuss, in Part-II, what makes law into a normative system. Not every system can be a normative system, therefore, it becomes necessary to specify the different normative properties of law. I shall show that there are various theories which have described only the properties of a normative system, however, they have assumed that they have identified the properties of a legal system.

When the notion of a normative system has been distinguished from the notion of systems in general, the next step will require that we further distinguish the legal system from various types of normative systems. To do this, it becomes necessary to provide the criteria on the basis of which the legal system can be identified and recognized to be distinct from other normative systems. On what grounds can we separate the legal system from other normative systems? The answer to this question is the topic for Part-III of this work. It is argued here that to provide the appropriate criteria the epistemology of law must be investigated. The epistemological status of basic legal propositions is examined.

Law is, lastly, a juristic normative system. Once this system has been identified as the consequence of the investigations in Part-III, I proceed, in Part-IV, to the next and most important task of discussing the substantive

properties of a juristic normative system, i.e., the legal system.

In terms of contents, Parts I, II and III, together form the first aspect of the work. Their main task is to eliminate the problematic and inappropriate views about law, so that the appropriate substantive aspects of law can be described in Part-IV. This last Part, thus, forms the second and the positive aspect of the work. It is only here that some central Indian concepts are involved.

At the outset, it is necessary to mention some basic shortcomings that a work of this nature is likely to have. The idea of law finally rests on the notion of the individual, the community and the world. These notions present difficulties which require inquiries into directions which can only be dealt with in rudimentary ways here. The issues concerning possible worlds presents serious limitations to the depth of analysis. Similarly, the status and actions of the community present ontological problems all of which cannot be pursued here. Lastly, issues about the individual's free-will bring up serious questions, but I shall discuss them in only limited ways. In each case the idea of law will be of main concern.

Distinguishing the idea of a legal system from that of a political system, raises various questions about the latter. These can be discussed only to the extent necessary to highlight some aspects of the idea of law. The idea of the political system or of the state requires a separate work.

Pernaps, at the outset it is also necessary to say a few words about the nature of discussions that one must expect in this work.

It is difficult to say what distinctions (if any), Kelsen, Hart, Fuller and other traditional theorists have had in mind while distinguishing between jurisprudence and philosophy of law. Jurisprudence, as I understand it, is an investigation into the prudential application of the juristic principles. That is, it seeks to understand and better the application of legal principles to the legal phenomenon as it is found in different communities and social contexts. In this sense, one requires different jurisprudential investigations for different legal systems. Philosophy of law has completely different tasks. It does not probe into the questions about what would constitute a prudential application of particular juristic principles for a particular legal system, rather, it seeks to, first of all, define the basic legal principles which can be accepted as prudent principles applicable to every legal system. The second and equally important task of legal philosophy is to justify and explain the grounds for the basic juristic principles whose application is said to manifest prudence. Philosophy of law is thus about the basic legal principles which all jurisprudence must necessarily employ.

Since philosophy of law aims at universality and jurisprudence at the particular application of universal juristic principles, every jurisprudence must eventually draw



its life from some philosophy of law. C.K. Allen's Law in the Making, or G.W. Paton's Jurisprudence, for example, are standard works in English jurisprudence which have their sources in Bentham's and Austin's legal philosophies. Jurisprudential works in the Soviet Union and China, on the other hand, draw their lives from the Marxist metaphysics of the community and of the self. One can notice that Kelsen's Pure Theory of Law is quite unlike Allen's or Paton's texts. This is so because the Pure Theory of Law is essentially a work in philosophy of law, although sometimes it touches upon some jurisprudential issues. One may argue either that the depth to which Kelsen pursues the basic questions in the philosophy of law is enlightening, or that it is insufficient. The same may be said about his treatment of the jurisprudential issues. However, what is important to note is the fact that the kind of problems and issues that Kelsen is trying to resolve are very different from those which one finds in a text book of jurisprudence, such as that of Paton's.

In the sense defined, what follows is a work in philosophy of law and not in jurisprudence. I shall attempt to spell out the basic legal principles and justify them. This will necessitate considering explanations about their origins. Each issue shall be pursued to its deepest roots, or at least as deep as necessary for understanding the basic aspects of the idea of law.

The idea of law that this work attempts to define is, thus, not the idea of a particular social phenomenon as it exists in some particular nation. Nor is it the definition of a specific idea as it exists in the jurisprudential literature of a particular legal system. It is the definition of elements which

apply universally to all legal systems, and on which every jurisprudence must eventually be based. Where actuality does not accord with the idea of law the results of this work will appear both as normative and as demanding reforms.

Although legal theorists have not cared to distinguish between jurisprudence and philosophy of law, it is important to observe the distinction, for the two enterprises attempt to solve different types of problems about the same subject matter. However, although distinct, the two endeavours are at the same time also intimately related. Consequently, doing philosophy of law without acquainting oneself with various jurisprudential contexts can only lead to vague abstractions. Conversely, doing jurisprudence without understanding the basic philosophy that motivates the law's existence and working can either be a misguided work or else a blind or mechanical pursuit. One cannot set out to discover the prudential applications of juristic propositions without first understanding what propositions constitute prudence and what are the most fundamental reasons for their existence and efficacy. Therefore, a clear understanding of the philosophy of law is essential for doing jurisprudence as well as for practicing law in a meaningful way. This work is aimed at inviting the attention of all those who wish to examine law in all its depths. Evidently, the more closely one is involved with the practice and the study of law, the more deeply, I would think, one needs to understand its philosophy.

Part - I

THE FORMAL REQUIREMENTS OF LAW AS A SYSTEM

LAW AS A SYSTEM.

Law is a normative system created and sustained to bring about just conditions in the society. Insofar as law is a system, it must have features which are common to systems in general. A consideration of such features raises problems which are different from those which arise when law is considered as being normative or as attempting to attain just conditions in the society. This first part of the work is a discussion of only those features which make law into a system. The systemic properties of law are true of it because it is a system and not because it is law. It is necessary to specify these features at the very outset because they are often confused with the normative or the juristic properties of law.

There seems to be three basic formal characteristics of law which make it into a system. These are :

- i) the propositions of law must be correlated to each other in such a way that the basic ones can be distinguished from the derivative ones, that is, the propositions must be systematizable.
- ii) the network of propositions must , in some sense, be complete;
- iii) the correlated propositions must be consistent.

In what follows, I will discuss each formal requirement in detail.

1. SYSTEMATIZATION

Systems can be formed in different ways. Depending on the way and the purpose for which the system has been formed, the term system can have different meanings. Legal propositions cohere to form a network of units which are internally correlated. Although a few propositions in the system may conflict with each other, the basic units are connected in such a way that there is an overall consistency in application. A unit is basic if it can not be deleted without changing the properties which apply to the system as a whole, or if it uniquely determines at least one aspect of some other unit. Such basic units must be irreducible in the sense that they cannot be replaced by any simpler proposition without a loss of meaning or a change of truth value. It is in this sense of a notion of a system that legal propositions form a system.

The correlation between various basic and non-basic propositions in law is such that the norms that apply to a particular case can be deduced from the general norms of the system. In this sense the general and the particular norms of the system are deductively correlated.

The property of deductive correlation between propositions is sometimes mistaken for a characteristic of formal systems only. Rationalists have thus distinguished themselves from the empiricists on the basis of making a distinction between formal systems and empirical systems in

terms of the criterion of deduction. Deduction is a relationship between propositions, it is not dependent on the real content of the propositions. A brief look at the roots of the confusion which arose due to the notion of deduction will be relevant here.

The notion that deductivity is specific to formal systems seems to have its roots in Aristotle's definition of science. Aristotle took as a general idea of science the kind of deductive or apodeictic science which is exemplified by Euclid's geometry.¹ This view was later reinforced by the Cartesian emphasis on mathematics.² According to the Aristotelian ideal every science must have the following necessary characteristics

- i) a set of self evident principles, the truth of which requires no further proof;
- ii) a deductive structure, that is, if certain propositions belong to the system then any logical consequence of these must belong to it; and
- iii) a real content, that is, the propositions belonging to the system must refer to a specific domain of real entities.

With the discovery of non-Euclidean geometries the first and the third conditions had to be dropped. That is, it was accepted that a deductive system need not have self-evident principles as its base, and the domain to which it refers need not necessarily be specified.³

The second condition, however, has led to some confusion. Since empiricism was equated with the inductive method and rationalism with the deductive method, many non-formalists, who wished to make law 'scientific' and hence into an empirical science, attacked the formalists for making law into a deductive science and hence non-empirical or non-scientific. Such a criticism is indeed misdirected, for the property of being a deductive system does not prevent any science from being an empirical science. Even the view that empirical sciences involve only inductive inferences seems to be a hasty generalization.⁴ The non-formalist's attack, such as that of Stephen E. Toulmin who considers legal inferences to be the archetype of non-deductive inferences, is thus ambiguous and misplaced. Outside mathematics, Toulmin countenances the replacement of the old geometrical model of logical deduction by a "procedural pattern".⁵ Chaim Perelman also seems to believe that legal logic is different from formal logic on similar grounds.⁶ Even if we grant the non-formalist's claim that the formal structure of legal reasoning is different or peculiar, it does not by itself constitute an attack on analytic jurisprudence, for deductive formalism in arguments, by itself, neither makes a science empirical nor non-empirical. The arguments in natural sciences are deductively correlated, while many deductively correlated arbitrary systems fail to constitute a science.

The difference between various

deductive systems, whether they be one of logic, mathematics, economics or law, arises due to the way their basic propositions are selected, and not merely from the formal structures of their arguments. The grounds on which the basic propositions of logic are selected may be arbitrary ones; basic mathematical propositions are selected on the grounds of their explanatory power, which within the system means the possibility of generating all of or the maximum number of theorems of the system. Similarly, the basic propositions of law are selected in a way that is in accordance with the desired ends of the enterprise. In fact, all deductively correlated systems of propositions are distinguished from each other due to the ends for which their basic propositions are selected.

If the formal notion of deduction is not opposed to empiricism, the reason for the formalism that the analytic jurists wish to retain in their science must lie elsewhere.

Analytic jurisprudence too, it must be remembered, wishes to make its enterprise 'scientific'. The preoccupation of analytic jurisprudence does not seem to be with the second Aristotelian requirement concerning science, as the non-formalists seem to assume, but with the first one. The emphasis of Bentham's and Mill's Utilitarianism and Austin's positivism has been on the abandonment of the postulate of self-evidence. The self-evident basic principles which they rejected were some principles of

Natural law. They replaced them with the norm which states that law is what the legislators say it is. This proposition is not self evident. The abandonment of the self evident propositions thus, apparently makes the legal science fit the non-Aristotelian, non-Cartesian model of science. The jurists thereby preoccupy themselves only with deducing the consequences of the basic norms and do not worry whether they are true.

Thus, whereas analytic jurists have attempted to retain the 'scientific' character of legal science by asserting the acceptance of the basic legal propositions, not as self evident truths but merely on the grounds that people (including such jurists themselves) have accepted them, the non-formalists have attacked these jurists in ways which do not even challenge such claims to being a science. They criticize them on grounds of formalism, but formalism, as noted, does not by itself stop a science from being empirical or socially relevant. The central criticism of analytic jurisprudence, if it is to be a substantive criticism, has to be directed against the analytic jurist's interpretation of Aristotle's first requirement for a science.

Legal realism or empiricism thus fails to constitute a reaction against legal positivism. The central thrust of sociological jurisprudence, such as that of L. Duguit or of realism, such as that of O.W. Holmes and Roscoe Pound,

concerns revision in law and its ability to adjust itself to the ever changing social problems. These aims are indeed significant, but they can be argued independently, they do not contradict the Analytic jurist's desire to systematize the legal propositions deductively.

The central intention of this work too, is to systematize legal propositions in such a way that they are deductively correlated, that is, in a way such that the secondary propositions of law can be deduced from the basic propositions. However, as will be evident, its substantive contentions are very different from those of the Analytic jurisprudence.

The basic propositions of law, from which other propositions can be deduced, are those which, for example, tell us what may and what may not be legislated, who may and who may not populate the legal system, what sorts of propositions can belong to the legal system, and also why there is a legal system at all. Such basic propositions express the ontology, the teleology and other fundamental aspects of law. I shall be examining all such basic propositions systematically through the course of this work.

To argue that a systematization of the legal propositions, in the manner suggested above, is possible, is to contend that foundationalism is true for law. However, to abstractly argue for the truth of foundationalism does not seem to me to be a fruitful task, for, if foundationalism is true, the best way to prove it, is to actually show that the

foundations exist. Hence, I will limit myself here to mentioning my basic reason for believing why foundationalism is true for law, and leave the rest to be proved through the course of this work as I attempt to exhibit the foundations.

The possibility of systematizing a deductive system with any arbitrary set of basic propositions obtains only when one is constructing an artificial and uninterpreted system. Such systems are 'artificial' precisely in the sense that they cannot be interpreted to apply to the possible world inhabited by human beings. Any deductive system that can be applied to the actual world is restricted by the characteristics of that world. Thus a number system which is to be really used in an actual world must be axiomatized in ways which allow for such use. Similarly, a physical geometry which applies to the Euclidean and Newtonian ~~space-time~~[?] must be axiomatized in a specific way. Now when it comes to law, which too is an application of a deductively correlated set of propositions to the actual world, to assume that it can be systematized in any arbitrary way, that any type of basic proposition can be its grundnorm or rules of recognition, is not only groundless but also misleading. For it suggests that legal systems are like abstract uninterpreted formal systems which can be axiomatized in arbitrary ways and be artificial systems like the various artificial languages. Law is not an artificial system, hence the basic sub-set of axioms which yields and regulates other legal propositions must be specific and unique.

2. i). COMPLETENESS.

The notion of completeness is often assumed to be a purely formal notion concerning the relationship between propositions, but this is not the case when we come to consider legal propositions. It is desirable that law be complete for the basic reason that it must apply to all cases, but the desire to apply it to all cases is itself grounded in the reason that we want to protect everyone from injustice. Law is thus intended to be complete in the sense that all socially relevant circumstances are correlated to at least some legal norms so that these norms may be applied to the circumstances to protect individuals and groups from being treated unjustly. Such a sense of completeness is, clearly, not merely a formal sense, law is also intended to be morally complete. Various thinkers have, nonetheless, discussed the question of legal completeness in terms of 'closure rules' and 'sealing legal principles', as if such rules and principles were a matter of mere formal consideration.

The desire for formal completeness seems to be grounded in the possibility of obtaining a system which contains all its logical consequences. This rational requirement for ideal completeness applies to all deductively correlated systems of propositions, whether they be physics, biology, or law. The ground for such a requirement is best expressed in the Leibnizian principle of sufficient reason - the notion that

there must be a sufficient reason for all that happens and that it should always be possible to show the actuality of that event as a foreseeable possibility.

The epistemological requirement of our reason is one thing, the ontological structure of the world another. From the legitimacy of the requirement for completeness, one cannot jump to the conclusion that any legal system is complete. Since law applies to deeds and entities, to suppose that there are norms for every deed and entity is to assume that no new or novel types of deeds or entities can come into being. Such a metaphysical assumption about the social reality seems unwarranted. Groups and entities organize themselves in various new ways giving rise to novel entities and deeds. The view that society is open and creative seems to me to assert the truth about the social reality. Since new entities and deeds, which have not been classified in the legal discourse, often come into being and since we are morally required to protect everyone by applying law to all cases, lacunas in the system of norms are inevitable.

Since the epistemological requirement for law to apply to all cases is grounded in the moral requirement to do justice in every case, any formalization of the 'closure rules' or 'sealing legal principles' which does not take the moral requirement into account cannot be said to describe legal completeness. Yet various theoreticians who propose deontic logics and some, such as Ilmar Tammelo,

who specifically propose the logic of law, formalize various propositions as 'closure rules' for law as if the choice between these different propositions was morally neutral. In selecting certain propositions as the 'closure rules' for law, in the final analysis, such deontic logicians are only expressing their moral views, albeit in a formalized language. Such views need to be morally justified. That is, if these formal principles are to be accepted as 'closure rules' for law, it needs to be shown how, on the basis of such principles, one can protect everyone from injustice.

Questions about the formalization of legal discourse raise straightforward issues about completeness. A subtle and more complex way in which the issue of completeness arises in legal theory is through questions concerning the sources of law.

It is generally accepted by legal positivists that all laws have a social source. That is, the content and the existence of law can be determined by reference to social facts without relying on moral considerations. Ronald Dworkin attempts to show that legal positivism is an inconsistent theory because it cannot tell us what is the law on matters not referred to in any source.⁸ For example, if a person has a legal right only if it can be traced back to a social source, is it the law that he does not have the right if no source confers it on him? The essential points of Dworkin's arguments can be presented as follows.

If p is a legal proposition and $S(p)$ the source thesis for p , legal positivism asserts that p has a social source, that is :

$$1. \quad p \leftrightarrow S(p).$$

By counterposition of 1., we get :

$$2. \quad \neg p \leftrightarrow \neg S(p).$$

By substitution in 1., we get :

$$3. \quad \neg p \leftrightarrow S(\neg p).$$

From 2., and 3., we get :

$$4. \quad \neg S(p) \leftrightarrow S(\neg p).$$

That is, if there is no social source for a legal proposition then there is a social source for its negation. Such a conclusion, according to Dworkin, is not empirically true, for in actual practice we do not find that wherever there is no affirmative rule for an action, there is one prohibiting it. Dworkin argues that whether or not there is a social source for a proposition, every hard case must, necessarily, be decided by the judge, hence in every case there has to be a right answer. For our purposes at this stage, it is not necessary to question Dworkin's 'right answer' thesis. Only the point that the right answer completes the system of norms needs to be noted. Insofar as the notion of completeness is concerned, what is entailed by Dworkin's conclusion that legal positivism is false since it does not explain the status of laws for which there is no social source? The negation of a legal proposition

prohibits, or at least, disallows the deeds that the affirmative proposition makes possible. Hence, the above conclusion that legal positivism entails that if there is no social source for a legal proposition then there is source for its negation, is equivalent to saying that legal positivism entails the closure rule : 'whatever is not permitted is prohibited.' What Dworkin's analysis shows (although he does not characterize it in these terms) is that if legal positivism is true it must assume conceptually fallacious closure rules, such as, 'if there is no social source for a legal rule then there is a source for its negation', or its counterpart 'whatever is not permitted is prohibited'.

The proposition 'whatever is not permitted is prohibited' and its opposite 'whatever is not prohibited is permitted', are often put forward as closure rules for law.⁹ Such propositions can claim to be closure rules only if the asserted relationship between the deontic operators actually obtains in law. But, as Dworkin's arguments show, the assumption that such closure rules actually apply to law can only lead to fallacious conclusions. Such closure rules seem to arise from some mistaken assumptions about the conditions for permission and prohibition in law.

In law, the truth conditions for permission are very different from the truth conditions for prohibition. The two cannot be equated. That people are free to act as they wish is something conceptually presupposed by law. The granting

of freedom, that is, permission to do something, can only arise in very special circumstances in law. There seem to be two such special conditions. The first type of condition arises when there has been a verdict to the effect that someone's freedom is to be curbed in some way, such as when a criminal is put in jail. Permission is required in such cases to allow any freedom to the convicted person. The second type of condition arises when special circumstances require acting in contradiction to a generally established law, such as, when one needs to look into someone's personal belongings, the way the police needs a legal permission (warrant) to search someone's house. Similarly, prohibition by law can also occur, but only in very special circumstances. Prohibition is usually required when the public has to be prevented from incurring some personal harm, such as when one needs to prevent people from driving over a weak bridge, or swimming in dangerous waters, etc.

Observations of actual legislations which permit or prohibit can show the totally different conditions under which they have been legislated. To understand why a particular action is permitted or prohibited one must look into the actual context of the law. The frequent arbitrary formal claims in deontic logic that 'whatever is not prohibited is permitted', and vice versa, are, thus, normative claims whose truth seems to depend only on some questionable moral assumptions. The historical roots of such general logico-moral claims seem to lie in the mistaken assumption that the

general freedom to act stands in need of a permission by law, or that one lives and works in the jurisdiction by the grace and kindness of the sovereign. If the people have a fundamental right to freedom, then, whether the sovereignty be vested in the Crown or in the Parliament, the sovereign does not grant freedom; people already have a right to it and the law recognizes this. The belief that 'whatever is not prohibited is permitted' seems to be a residue of the feudal mentality where the monarch owned everything and gave permission to the people to live and work and to be free. Such closure rules in law would perhaps be, what Friedrich Nietzsche called, an expression of 'slave morality'.

The basic principles of deontic logics are, thus, not morally neutral. By expressing them in a formal language, as Tammelo, Von Wright and others do, one does not get away from expressing morally questionable principles. Law is formally incomplete. The reason for its incompleteness lies in the nature of the social reality. Since the social realm is an open system, keeping law open is not only a formal but also a moral necessity.

Although understanding the reasons for the formal completeness of law requires that we also understand the grounds for its moral completeness, the existence of incompleteness in legal discourse can, nonetheless, be discovered, in actual practice, when one finds that justice cannot be done by an application of the existing laws. On the basis

of the foregoing discussion, the conditions for incompleteness in legal discourse can be specified. Such a specification, however, requires a more detailed account of legal discourse than presented so far. Therefore, in what follows, I will briefly discuss the grammar of legal discourse so as to distinguish different types of legal propositions. The conditions for incompleteness will be subsequently specified in terms of the distinctions made in this discussion.

In itself, the specification of the conditions for incompleteness would require only a few grammatical distinctions. However, I intend to make use of this occasion to discuss the grammar of legal discourse in such a way that it serves the purpose of this whole work. This will make the discussion more detailed than required for the specific point here, but it will facilitate all subsequent discussions by providing the necessary meta-language in which one can talk about legal discourse. It must be emphasized, however, that from the point of view of a grammar, the following remarks are rudimentary, they are intended only to serve the purpose of this work.

A discussion of the grammar is also necessary in another way. Since I make a distinction between basic and derivative legal propositions and intend to explicate the basic ones later, a discussion about the types of legal propositions will give this distinction a definite content.

2. ii). THE GRAMMAR OF LEGAL DISCOURSE.

Grammatically the elements of a legal proposition can be distinguished as the legal-subject, the legal-object and the legal-nexus. The legal subject is any entity whose behaviour is guided by the legal proposition, for example, entities such as 'every citizen', 'every partner'. The legal-object is any instance of the action regulated by the legal proposition, for example, 'driving on public roads', 'becoming a partner in business', etc. The legal-nexus links the legal-subject with the legal-object. Legal-nexus are injunctions like 'shall drive on the right', or, 'may carry out the assignment', etc. The part of the proposition concerning the legal subject, object or the nexus is a clause or a phrase within the complex sentence.

Besides the regular logical connectors ('and', 'if', 'or' etc,) and the deontic operators ('may', 'must', 'can', 'shall', etc,) the vocabulary of the legal discourse consists of observational terms and theoretical terms. Theoretical terms are given their meaning by the way they are defined within the system. Observational terms get their meaning from ordinary language. Theoretical terms functioning as legal subjects determine one aspect of legal ontology, the ontology of the entities that populate the legal system. Typical entities in this ontology are citizens, corporations, trusts, etc. Theoretical terms functioning as legal-objects determine the ontology of actions, that is, actions found in the legal realm and actions

not to be found there. Typical actions in this ontology are contracts, marriage, theft, larceny, murder, rape, etc.

Legal propositions are generated by starting with the simplest notion of the legal-subject and the simplest notion of the legal-object. These are united by means of the simplest legal-nexus, in which the deontic operator occurs. It must be emphasized that the simplicity of these notions is only relative to the systems. The notions occurring in primary propositions are simple because they are not operationally defined in the system, that is, they are not theoretical terms; they are observational terms whose meaning is taken to be known in a general way. Starting from such a primary proposition, the legal-subject, the legal-object and the legal-nexus of a primary legal proposition are further elaborated with the help of a set of rules, so that in its complexity, the legal proposition now applies to all known cases, on the one hand, and, as specifically as possible, to each case, on the other. The rules on the basis of which the primary legal propositions are further elaborated, belong to the second order of legal discourse. The complex legal propositions belong to the first order.

The above points are illustrated by the following example. A legal proposition may begin with a primary proposition such as: 'A person commits homicide when he causes the death of a human being'. In this, the legal-

subject 'person' is defined as 'a human being'; the notion of 'a human being' is basic or simple, its meaning is taken to be understood in a general way. The legal object 'homicide' is defined as 'causing death of a human being'. The notion of 'causing death' is a basic or simple notion, it too is taken to be comprehended in a general way. The notion of committing an act forms the simple legal-nexus which relates the subject to the object. This is the first or starting primary proposition, a development of which can result in the complex legal proposition of Criminal law. The development consists of a series of qualifications and definitions of the subject, the object and the nexus, by means of second order rules, namely, the rules of classification, individuation and correlation. The rules of classification classify the legal subjects and objects in ways such that their scope of application is comprehensive and their meaning as specific as required. The rules of individuation individuate the theoretical terms in such a way that the proposition becomes a rule in a particular division of law. The rules of correlation finally correlate the individuated proposition with certain other states of affairs which must obtain when the conditions stated by the individuated proposition obtain.

The grammar of generating legal propositions can be expressed very briefly by symbolizing the

the essential steps.

If $\emptyset$ is the existential quantifier, (LS) the legal-subject, and the legal-object is expressed as (A.C), i.e, the action A done under condition C, then the first order primary legal proposition can be expressed as :

$$1. (\emptyset) (LS) (A.C).$$

((That is, one/some/all legal-subject(s) is/are said to have done A in case C.))

This is followed by the application of the second order rules of classification on (LS) and (A.C) in step 1, which yields:

$$2. (\emptyset) (LS) (A.C) \Rightarrow T.$$

T is any theoretical terms, such as, 'homicide', 'marriage', 'purchase' , etc.

This is followed by the application of the rules of individuation on T in step 2, which yields :

$$3. (\emptyset) (LS) (A.C) \Rightarrow T \Rightarrow X.$$

X is a general class of action which belongs to a certain division of law, such as to Civil law, Criminal law, Constitutional law or to Tort law, and more generally, to the Private or the Public law. X may hence be a 'contract', an 'offence', a 'treason' or a 'damage', amongst other legal-objects respectively, depending on the division of law. The grounds for the rules of individuation, on account of which legal-objects are individuated differently, will be discussed later.

In the final stage the rules of correlation are applied to X in 3., so that X is related to another set of resulting conditionss, let us say R, which is to be brought into existence when X obtains. This completes the legal-nexus and yields:

$$4. \quad (((\emptyset)(LS)(A.C) \Rightarrow T) \Rightarrow X) \Rightarrow R.$$

R could be a set of duties and rights for the legal-subject(s) when X in 3., is a contract. But if X is an offence or a damage then R could constitute a fine or punishment.

In criminal law (A.C) describes an action that is done under certain conditions, but in other branches of law (A.C) may not describe something that is done, but something that needs to be done if T in 2., is to arise. In such cases (A.C) will in fact be performative rules, that is, rules which describe performances on the doing of which the intended condition T can be taken to exist. For example, in Law of Citizenship, (A.C) may describe the performances that need to be executed, such as oaths, if a human being is to become a citizen. In Civil law, similarly, the performative rules may specify the conditions on the performance of which a marriage may be said to have taken place.

The above is a very simple sketch for a grammar that generates first order legal discourse. Its details should, however, suffice for the subsequent related discussions about law. It must be emphasized that the above scheme represents only a conceptual order of the way in which the first order legal discourse is generated. In actual practice all these steps are present but they need not be in the order outlined here. The codification of law does not necessarily follow the conceptual order, it develops historically, involving many pragmatic considerations. The following examples should make the point clear. The first one is from the Canadian Criminal Code¹¹ and the second one from the Model Penal Code of the American Law Institute.¹²

PART VI—SECTION 205

Homicide

HOMICIDE—Kinds of homicide—Non culpable homicide—Culpable homicide—Idem—Exception.

205. (1) A person commits homicide when, directly or indirectly, by any means, he causes the death of a human being.

(2) Homicide is culpable or not culpable.

(3) Homicide that is not culpable is not an offence.

(4) Culpable homicide is murder or manslaughter or infanticide.

(5) A person commits culpable homicide when he causes the death of a human being.

.....

In the code above proposition 205 is the primary proposition. This is step one. In the next step the rules of classification begin to classify homicide and the related conditions, this begins in proposition 205.(2) above and leads to :

Murder, Manslaughter and Infanticide

MURDER.

212. Culpable homicide is murder

(a) where the person who causes the death of a human being

(i) means to cause his death, or

(ii) means to cause him bodily harm that he knows is likely to cause his death, and is reckless whether death ensues or not;

(b) where a person, meaning to cause death to a human being or meaning to cause him bodily harm that he knows is likely to cause his death, and being reckless whether death ensues or not, by accident or mistake causes death to another human

being, notwithstanding that he does not mean to cause death or bodily harm to that human being; or

.....
.....

CLASSIFICATION OF MURDER—Planned and deliberate murder—Contracted murder—Murder of peace officer, etc.—Hijacking, kidnapping or sexual offence—First degree murder—Second degree murder.

214. (1) Murder is first degree murder or second degree murder.

(2) Murder is first degree murder when it is planned and deliberate.

.....
.....

In step three the classified deed is individuated, whereby it becomes a deed concerning a particular branch of law, Criminal law in the above case. The individuation in this case is as follows:

MURDER IN COMMISSION OF OFFENCES.

213. Culpable homicide is murder where a person causes the death of a human being while committing or attempting to commit high treason or treason or an offence mentioned in section 52 (sabotage), 76 (piratical acts), 76.1 (hijacking an aircraft), 132 or subsection 133(1) or sections 134 to 136 (escape or rescue from prison or lawful custody), 143 or 145 (rape or attempt to commit rape), 149 or 156 (indecent assault), subsection 246(2) (resisting lawful arrest), 247 (kidnapping and forcible confinement), 302 (robbery), 306 (breaking and entering) or 389 or 390 (arson), whether or not the person means to cause death to any human being and whether or not he knows that death is likely to be caused to any human being,

.....
.....

In the fourth stage, the classified, individuated proposition is correlated to other states of affairs :

PUNISHMENT FOR MURDER—Minimum punishment.

218. (1) Every one who commits first degree murder or second degree murder is guilty of an indictable offence and shall be sentenced to imprisonment for life.

(2) For the purposes of Part XX, the sentence of imprisonment for life prescribed by this section is a minimum punishment. 1973-74, c. 38, s. 3; 1974-75-76, c. 105, s. 5.

.....

The official draft of the Model Penal Code shows that similar conceptual steps are involved in creating legal propositions even if one approaches the issue from a different empirical perspective and need.

Section 210.1 is the primary first - order proposition of this code, and it is similar to Sec. 205(1) of the Canadian Criminal Code above. In this Model Code the authors have chosen to carry out the classification of theoretical terms first . These definitions are intended to complement the subsequent classification of the observational terms.

Section 210.0. Definitions.

In Articles 210-213, unless a different meaning plainly is required:

(1) "human being" means a person who has been born and is alive;

(2) "bodily injury" means physical pain, illness or any impairment of physical condition;

(3) "serious bodily injury" means bodily injury which creates a substantial risk of death or which causes serious, permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ;

(4) "deadly weapon" means any firearm, or other weapon, device, instrument, material or substance, whether animate or inanimate, which in the manner it is used or is intended to be used is known to be capable of producing death or serious bodily injury.

The primary proposition:

Section 210.1. Criminal Homicide.

(1) A person is guilty of criminal homicide if he purposely, knowingly, recklessly or negligently causes the death of another human being.

Classification:

(2) Criminal homicide is murder, manslaughter or negligent homicide.

Section 210.2. Murder.

(1) Except as provided in Section 210.3(1)(b), criminal homicide constitutes murder when:

(a) it is committed purposely or knowingly; or

(b) it is committed recklessly under circumstances manifesting extreme indifference to the value of human life. Such recklessness and indifference are presumed if the actor is engaged or is an accomplice in the commission of, or an attempt to commit, or flight after committing or attempting to commit robbery, rape or deviate sexual intercourse by force or threat of force, arson, burglary, kidnapping or felonious escape.

.....

Individuation:

(2) Murder is a felony of the first degree [but a person convicted of murder may be sentenced to death, as provided in Section 210.6].

.....

.....

Correlation:

Section 210.6. Sentence of Death for Murder; Further Proceedings to Determine Sentence.

(1) Death Sentence Excluded. When a defendant is found guilty of murder, the Court shall impose sentence for a felony of the first degree if it is satisfied that:

(a) none of the aggravating circumstances enumerated in Subsection (3) of this Section was established by the evidence at the trial or will be established if further proceedings are initiated under Subsection (2) of this Section; or

(b) substantial mitigating circumstances, established by the evidence at the trial, call for leniency; or

(c) the defendant, with the consent of the prosecuting attorney and the approval of the Court, pleaded guilty to murder as a felony of the first degree; or

(d) the defendant was under 18 years of age at the time of the commission of the crime; or

(e) the defendant's physical or mental condition calls for leniency; or

(f) although the evidence suffices to sustain the verdict, it does not foreclose all doubt respecting the defendant's guilt.

.....

.....

The rules of classification ,

individuation and correlation are, of course, not the only second order rules that apply to the first order propositions. There are other second order rules which apply differently to the first order propositions , such as the rules of

interpretation and the rules of amendment . I shall discuss these second order rules in detail, subsequently. The functional difference between the first and higher order rules, it must be recalled, is that whereas the first order legal rules apply to the activities of everyone, the second and higher order rules apply to the activities of those who legislate the first order rules. Various thinkers, such as J.C.Smith, Ilmar Tammelo and others, have discussed the different second order legal rules, such as the rules of classification and correlation. But these discussions do not make clear how these second order legal rules are organized amongst themselves, and moreover, what is the basis for having these particular second order legal rules.¹³

The second order legal propositions or rules , such as the rules of classification, individuation, correlation, interpretation and amendment , are not just arbitrarily there, they are there on very specific grounds. Not just any arbitrary rule can become a rule of classification, interpretation, amendment, etc. Smith, Tammelo and others have merely listed the second order rules, it needs to be shown which particular second order rule can become a rule of classification, correlation, etc. The choice of the second order rules is itself very strictly governed by the third order legal propositions. These third order legal propositions determine what are to be the second order rules of classification, individuation, correlation, amendment, interpretation,

etc. Since the third order legal propositions determine the second order legal propositions, and the second order determine the first order, the third order propositions also determine the first order propositions, albeit indirectly. The third order legal propositions, thus, form the most basic legal propositions. These basic propositions will be presented and discussed in Part-IV of this work. Here, on the basis of the foregoing discussion of the grammar of legal discourse, it is important to draw attention to two significant issues. These will be developed as we go along.

Firstly, since each order of legal propositions determines the propositions of the order below it, and since legal theory characterizes the second and third order legal propositions, the relationship between legal theory and legal practice (i.e., the application of the first order propositions) is internal and necessary.

The second significant point to note is that, in the first order legal propositions of different codes, terms such as 'ought', 'must', 'prohibits', just do not occur. It is partly to make this point evident that I have quoted the actual codes in detail. The fact that these terms do not occur in the Criminal codes is not to be passed over lightly. In fact, as we shall subsequently see, a significant insight into the nature of law can indeed be obtained if one can unravel why terms such as 'ought' and 'must' never

occur in the first order legal propositions. Hans Kelsen , in his Pure Theory of Law, often tells us that a legal norm is an 'ought' statement. Various other theorists have also often said or assumed this. This is certainly odd ,for no first order legal proposition ever says 'you ought to do this', or 'this ought to be done', the term 'ought' just does not occur. Most theorists have also stated or generally assumed that propositions, of Criminal law for example, prohibits some actions. Here again there is a disparity between facts and theories. No Criminal code ever says that 'murder is prohibited', or even 'do not do X, which is an offence or a crime'; the propositions of legal codes just do not have such grammatical structures; they do not prohibit anything. All legislated legal propositions are straightforward descriptive propositions. They describe what is the case in a certain state of affairs and what will be the case as a consequence. A legal theory must analyse and explain the legal propositions as they are actually found, that is ,as descriptive propositions, and not build up artificial descriptions of them as 'ought' norms, and so on. The significance of this point will be systematically explicated as we go along.

Having outlined the essential meta-language in which the legal discourse can be discussed, I shall now proceed to specify the conditions under which a legal system is incomplete.

2. iii). INCOMPLETENESS.

A system of norms is said to have gaps at the points at which it is incomplete. Legal gaps will occur if there is a breakdown in the system at any of the four stages of generating legal propositions mentioned earlier. That is, there will be gaps if :

- a) a subject whose actions are to be brought under the consideration of law, or an action to which the law is to apply does not as yet populate the legal ontology; that is, there is no primary legal proposition relating the legal-subject and the legal-object;
- b) the rules of classification are unable to bring the legal object under a general action-type; that is, classification is unable to yield a theoretical term applicable to the case;
- c) the theoretical terms generated by the application of the rules of classification cannot be individuated; for example, when it is not clear whether the case under consideration is one of criminal offence, tort or political treason; or,
- d) the individuated proposition is not correlated to some resultant states of affairs ; that is, there is no punishment, fine, rights, duties or privileges correlated to it.

3). CONSISTENCY.

In discussing the eight ways one can fail to make law, Fuller mentions non-contradictoriness of norms as an essential requirement of legal systems (his fifth condition).¹⁴ The consistency of a system is a systemic requirement of all deductive systems, it does not apply to law uniquely. This requirement, hence, does not tell us something specific about law. However, since legal discourse is a system of deductively correlated propositions, it becomes important to know the sense in which this system needs to be consistent.

Since legal discourse is a system of deductively correlated propositions, its basic and derivative propositions must be consistent with each other, so that there is an over all consistency in the system. In such a system both p and $\neg p$ would not be true for any q , otherwise one would derive any q from it. Legal propositions are characteristically applied in the settlement of disputes so that every sub-set of the basic propositions must consist only of propositions which can be applied together. Evidently, this requires more than formal consistency. It involves the notion that such an application be possible in a way that the joint use of the members of the sub-set does not frustrate the intentions of any of the component units. If this condition were to be violated for some members, those members can be rejected or replaced under certain conditions. In such a case, such

members were, evidently, wrongly accepted as members. The real members of the system are some related propositions, specified in part by the conditions for rejection of the incompatible members, and partly by the end that is intended to be achieved by the introduction of the new members. The possibility of removing the inconsistencies in this way requires a knowledge of the systematic juristic aims. A mere knowledge about the ways the incompatibilities formally arise is not enough for being able to replace the inconsistent propositions by consistent ones.

Although the possibility of making law into a consistent system requires a knowledge of its systematic ends, certain inconsistencies can be discovered in actual practice when one finds that the application of the existing laws allows for actions which defeat the purpose of law, i.e., the purpose of bringing about justice. The conditions under which particular inconsistencies arise in legal discourse can be specified as follows :

- i) if the first order primary proposition describes a case in two different ways;
- ii) if the second order rules of classification are applied in different ways to yield different theoretical terms for very similar cases;
- iii) if the rules of individuation are applied to yield incompatible individuations of the theoretical terms;
- v) if the rules of correlation correlate the individuated

cases with different consequences;

- v) if there is a difference of opinion about what constitutes the second order legal propositions.

The last condition is evidently the most difficult to resolve. It leads to, what are now rightly called, 'hard cases'. In hard cases the problem may concern the rules of classification, whether, for example, to classify a particular case as one of mercy killing or one of murder. Or, it may concern the rules of individuation, whether, for example, to make a case one of treason or one of civil disobedience. Lastly, the problem may concern the rules of correlation, for example, whether or not one must punish a case of attempted suicide.

It will be noticed that the conditions for inconsistencies in legal discourse are closely related to the conditions for incompleteness. This is natural because inconsistencies lead to incompleteness. Inconsistent propositions have to be deleted, which leaves gaps in the system of norms and creates the conditions for incompleteness. What is important to note, however, is that each type of inconsistency must be dealt with in a different manner. There cannot be one general formula of deontic relations which expresses the conditions for all inconsistencies.

Once we understand that law has to be not only formally consistent but also consistent in application and that the latter requires a knowledge of the basic moral

ends of law, it becomes possible to note the errors of some theories which attempt to characterize legal consistency in purely formal terms.

The consistency of a system which contains first order declarative propositions is decided by assigning truth values to the propositions and then looking for identity in their truth functions. The success of such a method in logic has led some thinkers to believe that any system is formalizable in an ordinary extensional logic of a suitable order. Ulrich Klug, for example, has attempted to apply a first order calculus and theory of classes to legal arguments translated into the formulae of symbolic logic.¹⁵ As we have seen, the grammar of legal propositions make it evident that they are complex normative propositions whose modalities are unlike those of ordinary declarative propositions. Consequently, first order calculi are unable to reflect the complexity of legal discourse. The failure of such first order calculi has recently led many theorists to look in other directions.

J.L. Austin's and Wittgenstein's emphasis on the non-declarative aspects of human language seems to have led various thinkers to study the deontic relations that obtain between the propositions in these aspects. The deontic logics of Von Wright, Alf Ross, Anderson and others,¹⁶ have not only been related to modal logic in general,¹⁷ some thinkers, such as Stig Kanger, even assert that deontic logic can provide a solid foundation for ethics.¹⁸ Tammelo and Ingmar Porn, on the

other hand, have attempted to apply deontic logic to law.¹⁹ If, as I have shown, the basic principles of deontic logics are themselves normative propositions and if the notions of legal completeness and consistency have not only formal but also moral connotations, then all the above types of attempts to capture the notion of legal consistency and completeness in purely formal terms are eventually based on some deep misunderstandings about not only law but also deontic logic.

I am not opposed to deontic logics. However, it is one thing to construct abstract moral systems in logical terms and another to believe that they apply to the legal system. Even a simple basic axiom of modal and deontic logic, such as, 'whatever is necessary is possible', cannot be assumed to be true when applied to law. For it is quite possible that the achievement of many ends which are legally or morally necessary are not possible given a certain social structure or situation. Some may even argue that the achievement of certain legal ends is never possible given the human nature.

Having noted what is true of law as a system and having also noted that these systemic requirements are grounded in the moral purposes of law, I will now proceed to examine what is true of law as a normative system. Not just any normative system can be a juristic system, hence before we can distinguish the juristic aspects of a legal system, it will be necessary to understand the nature of normative systems in general and as it relates to law.

Review and Conclusions - I.THE SYSTEMIC REQUIREMENTS OF LEGAL PROPOSITIONS.

- 1) The foundational axiomatic propositions of law must be of the kind which make the ends of law possible. Not any arbitrary proposition can be asserted to be a basic proposition of law, just as not any arbitrary set of axioms can be asserted to be the basic propositions of arithmetic.
- 2) Law attempts to be complete not only in a formal way but also in a moral way, hence not just any deontic (or other) formal system can be assumed to be formalizing legal propositions. The logics formalize and assert the moral views of the authors.
- 3) Law attempts to be consistent not only formally but also in application. Moral consistency, which is involved in application, requires that the formal consistency of legal propositions must be in accordance with the moral requirements.

PART - II

THE NORMATIVE REQUIREMENTS OF A SYSTEM

I. LAW AS A NORMATIVE SYSTEM.

A legal system is a normative system, but not all normative systems are legal systems. The notion of a normative system is thus a basic and more general notion. Games, sporting events, clubs, universities, trade unions, the police and the army are other different types of normative systems. The idea of a legal system is, thus, not the idea of a normative system; the two need to be distinguished. However, since the legal system is one type of normative system, attributes applicable to normative systems in general will also apply to legal systems. Legal discourse will, therefore, exhibit all necessary aspects of normative systems. Consequently, if one identifies the necessary conditions of normative systems in the legal discourse, it does not follow that one has identified the legal system. Much more needs to be said to separate the notion of a legal system from the notion of normative systems.

Elementary as the above points may seem, many legal theorists, including Hart, Kelsen and Fuller, seem, in some very basic ways, to have made the mistake of assuming that they have said something specific about law, when what they have said is true of normative systems in general. In fact, a central shortcoming of many recent legal theories seems to be their inability to distinguish the properties of legal systems from those of normative systems. Even theorists, such as Alchouron and Bulygin, who have

approached the notion of a legal system specifically through an analysis of the notion of a normative system, seem to make no distinctions between qualitatively different types of normative systems. They too seem to assume that they are speaking specifically about the notion of law, when this hardly seems to be the case.¹

In this second part of the work I intend to discuss the characteristics belonging to law as a normative system, so that one may not confuse these characteristics with the idea of a juristic system. The discussion will also attempt to show how some significant assertions made by Hart, Kelsen and Fuller, which they took to be assertions about law, are, in fact, assertions about normative systems in general.

To discuss the normative requirements of law, it is first of all necessary to distinguish between norms and non-norms. That is, it is necessary to be clear about the notion of a norm. I shall only make the relevant preliminary distinctions here. They will be elaborated upon, in Part-III, while discussing the epistemological status of norms.

II. NORMATIVE DISCOURSE AND FACTUAL DISCOURSE.

What makes a norm different from other types of propositions? Linguists have often made a distinction between normative discourse and descriptive discourse. Such a distinction makes unwarranted philosophical assumptions. The fact that a proposition is normative does not

exclude it from being descriptive. Propositions such as 'a cricket pitch is 22 yards long', or 'in democracy the government is representative', are both descriptive and normative. They describe the game of cricket or the practice of democracy for those who wish to learn about them, but they are normative for those who wish to participate in them. The characterization of a proposition depends upon the perspective from which it is perceived. Its normativity cannot be decided by merely looking at its grammatical form.

Some thinkers seem to believe that if the grammatical form does not reveal the normative character of a proposition, its logical form must; especially if a deontic operator ('ought', 'must', 'may', 'permitted', 'prohibited', etc) is present in the proposition. Such a belief again seems to be held without a justification. Although it is possible that a deontic operator may occur in a norm, it is not necessary. In the examples mentioned earlier the sentences do not have deontic operators. They can, nonetheless, be taken to be normative. Propositions of Criminal law too, as we saw in Part-I, are purely descriptive propositions; still, they can certainly be taken to be normative.

Whether or not a proposition is normative can only be decided by considering the purpose for which it has been proposed and the context in which it functions. Propositions are norms only with regard to a person's actions and in relation to his situation. For a person participating in a

system, a proposition may be normative; the same proposition could be descriptive for another person not belonging to the system. This evidently suggests a referential and contextual theory of norms. As against the Structuralists, I take a functionalist theory of norms to be asserting the truth. A functionalist theory of the type suggested above, which, in Carnap's terms, adopts a material mode of speech instead of a formal one,² is indeed faced with many difficulties. But these difficulties seem to me to be far weaker than what any other theory would face. I shall attempt to justify my contentions and discuss the difficulties in Part-III of this work, where I discuss the nature of legal propositions and the semantics involved in it. Here it will be important to sharpen the distinctions between norms and non-norms.

In accordance with the mentioned characteristics of norms, a norm can be defined as any proposition whose purpose is to guide the actions of conscious beings so as to create the possibility of mutually intelligible behaviour amongst the participants, whether there are two participants or many. When conscious beings do act in accordance with the norms then the possibility is actualized. Such an actualized possibility I wish to call a feat, in the original sense of the word, in which it means any deed, not a special one.³

Feats are to be contrasted with facts. I intend to use the term fact in the ordinary sense that is in current use. In this sense the use of the term is restricted

to refer to cases whose existence is not dependent upon the activities of human beings.⁴ Normative propositions, then, concern feats, and factual propositions concern facts. The contrast is, hence, strictly between normative discourse and factual discourse, and not between normative discourse and descriptive or prescriptive discourse.

A set of deductively correlated propositions can be a normative system only if its purpose is to describe human conduct in such a way that it creates the possibility for various mutually related feats. Feats belong to the social realm, hence normative discourse concerns the social realm.

Since normative discourse is involved in creating and sustaining a normative system, by analogy one may deduce that factual discourse is involved in creating and sustaining a factual system. I will not attempt to explore or justify such a thesis (or its negation) in this work. Whether or not one accepts an agency behind the factual system, for the purposes of this enterprise it is sufficient if the differences between those states of affairs which are brought about by the acts of human beings and those brought about otherwise, are maintained.

Having made the preliminary distinctions between normative discourse and factual discourse and the types of systems to which these discourses actually apply, I will now proceed to specify the basic conditions which

need to be satisfied if a possible normative system is to be actualized. The propositions expressing the requirements belong to the normative discourse.

III. THE REQUIREMENTS OF A NORMATIVE SYSTEM.

There are at least five different but related requirements which need to be satisfied for a system to be a normative system. These are, material requirements, which include both physical and psychological requirements; heuristic requirements, which tell one how the elements of the system are to be organized; hermeneutical requirements; teleological requirements; and finally, epistemological requirements, which include both a theory of propositions and a semantical theory. In what follows, I shall specify and discuss each of these requirements. The last requirement is evidently the most complex one. It is also the most important requirement, for it not only bears upon the explication of the other requirements mentioned above but also on some fundamental aspects of the nature of law. I shall hence devote a complete part to an analysis of the epistemological requirements of law.

1. MATERIAL REQUIREMENTS.

a) Physical Requirements.

i) The norms should take into account the physical capacities of the persons to whom the norms are to apply.

ii) The norms should take into account the relevant aspects of the appropriate factual system.

iii) The norms should take into account the average or the

normal intelligence of the person to whom they are to apply.

Fuller mentions the above material conditions amongst his eight conditions which must be met if one is not to fail in making law (his sixth and seventh conditions).⁵ He seems to assume that something specific about law has been said. These material requirements apply to all normative systems, whether it be a game of chess or the army; they do not characterize the conditions for law-making in particular.

b) Psychological Requirements.

i) The norms should be as clear and distinct as possible so that they are understood by all. Norms can only guide conduct if they are intelligible.

Fuller's fourth condition for law-making comes in here.⁶ The intelligibility of norms is necessary for all normative systems. Although this condition applies to law it does not characterize it specifically.

ii) The norms should be known to the people who are to mould their conduct in accordance with them.

In simple normative systems, such as games, this condition is easier to understand, but in complex normative systems, such as the law, the significance of this requirement is not clearly understood. Fuller rightly insists that a legal system must publicize all its laws (his second condition)⁷. However, the necessity to make the norms public is, once again, true of many normative systems. The grammar of a

natural language, the rules of an educational system, the norms of games, are some examples of normative systems whose norms must be publicized. This requirement too, does not tell us anything specific about law. Fuller's requirements, thus, concern normative systems in general, they do not characterize law.

2. HEURISTIC REQUIREMENTS.

The facts and their inter-relationships have to be discovered. Such discoveries may lead to a knowledge about why the facts are related as they are in a factual system. In contrast to this, in a normative system, the order of the acquisition of knowledge is totally reversed. First of all, one has to have some knowledge of why the system exists, that is, about its intended aims. Following this, one has to know the means by which the aims are to be achieved; and finally, the details about what constitutes achieving the aims. One cannot create a game without first specifying the aims of the game. Similarly, one cannot form an association without first telling the people what the association intends to achieve. The specification of purpose is conceptually prior in any account of a normative system; but as concerns a factual system, the knowledge about its purpose may (or may not) come as a consequence of an inquiry. Thus, in a normative system, the 'why' question takes a conceptual priority over the 'how' question, which in turn precedes the 'what' question. In actual practice, however, the answers to all the three types of questions must proceed simultaneously.

Normative systems are systems of feats created ab initio by human beings. The possibility of creating and sustaining such a normative system seems to certainly require at least nine different types of necessary heuristic principles. Heuristic principles are those principles which organize and order the material content or the body of the system in particular ways, they do not in themselves specify what this content is or must be. The heuristic requirements are specified in the normative discourse ; they must be followed if the possibility that they describe is to be actualized. .

The specification and actualization of all the nine basic types of heuristic principles would be necessary for a complex system such as the legal system. For simpler systems, which involve few human beings for simple purposes, all these nine types of heuristic principles need not be explicitly specified, they can be assumed to be known. The number of heuristic principles which can be assumed to be known and the number of them that need to be made explicit would depend upon the complexity of the system.

The normative discourse must contain the following basic types of heuristic principles concerning the normative system.

- 1) Principles which specify the systematic aims of the system.

- ii) Principles which order the priorities of the aims.
- iii) Principles which delimit the procedures by which the aims are to be achieved.
- iv) Principles specifying the ways in which the system may be changed if the aims are not being achieved.
- v) Principles specifying which persons ,deeds and entities are to become members of the system, and which are to be excluded.
- vi) Principles specifying the propositions which are to count as belonging to the system.
- vii) Principles specifying the conditions under which persons, deeds, entities and propositions may continue to be members of the system.
- viii) Principles specifying the conditions under which persons, deeds, entities and propositions cease to be members of the system.
- ix) Principles specifying what relationship the system has to one who (or which) ceases to be a member of the system; that is, what may be done and what may not be done to one (if anything at all) when he (or it) ceases to be a member of the system.

The above principles are, logically, not all of the same type. They may be distinguished as follows:

i) and ii) concern questions about the teleological ends of the system; iii) and iv) concern, the issue of change and development and the methods that the teleological principles

of the system permit ; v) concerns the question of class membership; vi) concerns the issue of validity and truth of the normative propositions; vii) concerns the question of class identity; viii) and ix) concern the topic of class non-membership and its relation to the basic systematic aims of the system.

I shall discuss the conceptual peculiarity of each type of heuristic principle at the relevant points in the work. Here, only a few remarks about the last heuristic principle need to be made, since this principle is not usually mentioned in legal theories.

The question about the different ways a person ceases to be a member of a legal system and what may be done to such a person, is complex and hence requires a detailed analysis. It will be discussed at length later while examining the issue about amending persons and groups (in Part-IV, Section III). Here it will suffice to convey the point through some simple examples.

When some people cease to be members of the Mafia, the CIA or the KGB, these normative systems have to decide what to do with such former members. Many times the decision may be simply to kill them. This certainly seems to be true for the Mafia. For the former members of the CIA or the KGB it may entail a curtailed and secluded life. What will be done to a former member depends on the nature of the normative

system in question.

The specification of the above nine types of propositions results in the basic propositions of a normative system. It is important to note that to be able to achieve the normative ends, the particular instances of the above principles must not be conflicting. The principle of class membership, for example, cannot say that 'only people of type X can become a member of the legal system', while the teleological principle says that 'all will be treated equally before the law'. Or, to take another example, it cannot be the case that the sixth principle says 'propositions X count as the rules of recognition in accordance with which the norms of the system are selected', when these norms turn out to make the achievement of the aims of the system (specified by the first principle) impossible.

Since normative systems require not only first-order propositions but also higher order propositions as listed above, it follows that all normative systems have a hierarchy of norms. In pointing out that in the legal system there is a hierarchy of norms, one has not as yet said anything unique about law which will distinguish it from other normative systems. More needs to be said about the hierarchy to specify the distinctness of law as a normative system. A central theme in Kelsen's legal theory is that law is a hierarchy of norms. His arguments seem to clearly imply that in pointing this out, he has said something special about law.⁸

Pashukanis, I think, has rightly suggested that, if a hierarchy of norms was a central feature of law, then the military may as well be described as a legal system, for in no other system is the hierarchy of norms more clearly defined.⁹ In Hart's legal theory too, the notion that law is a union of primary and secondary rules plays a central role. Although Hart argues that, in characterizing law, one must also take into account the minimum content of Natural law claims, he nonetheless often seems to suggest that something unique is being said about law in describing it as a union of primary and secondary rules.¹⁰ There are arguments which seem to assert that, in characterizing law as a union of primary and secondary rules, both the necessary and the sufficient conditions have been provided.¹¹ Even if one were to accept that such an assertion is not intended, it is not made evident at any point in Hart's work that, in talking about primary and secondary rules, normativity is being discussed and not law. Being a union of primary and secondary rules, or any hierarchy of rules for that matter, is a property of many normative systems.

Rolf Sartorius, amongst others, has noted that there are many systems besides law which are a union of primary and secondary rules. He mentions games.¹² Fuller too has remarked that universities, trade unions, etc. are also unions of such rules.¹³ Sartorius' and Fuller's observations seem to me to be fundamentally correct, but still

very narrow. They need to be generalized for all normative systems. The point about the development of primary and secondary rules in other systems besides law can become more explicit by considering different types of systems. Games and various athletic events have been evolving primary rules about how they are to be actually performed, and secondary rules about who is to validate or make the primary rules. The International Hockey Federation and the Olympics Committee, for example, are bodies which are formed on the basis of the secondary rules of recognition and which provide and validate the primary rules. However, to illustrate this point one does not have to think only about those normative systems which involve playing games. Educational systems, such as universities and schools set primary rules which are then validated and regulated by the secondary rules set by the educational boards. Even in cases where the matter is one of mere convenience, there has been a necessity to develop good secondary rules which give precise power to a group of people to validate and change primary rules in the field. For example, for the language of chemistry the International Union for Pure and Applied Chemistry is recognized by the secondary norms to be validating the primary norms of the language of chemistry. The primary rules in various other fields such as, aviation, computer languages, navigation, radio communication, weights and measures, to mention only a few, have been provided by

changes and developments in the secondary rules which are accepted by all those involved in the relevant fields of expertise. These changes have been brought about so as to facilitate activities and make things more easily accessible and comprehensible.

It may seem that Fuller presents an alternative to Hart's view when he contends "trade unions and universities to be imperfectly achieved systems of law", which may "often cut more deeply into the life of a man than any court judgement ever likely to be rendered against him". "But such infirmities", according to Fuller, "are to be expected from all systems of law, big and small".¹⁴ This contention does not really provide an alternative to Hart's view. In fact, on a closer examination, it is not even as different from Hart's view as it is assumed to be. In deciding to characterize social organizations which are constituted by a hierarchy of norms as 'legal', Fuller, like Hart, equates the formal property of normative systems with that of legal systems. The difference lies only in the fact that, whereas Hart wants to call only one specific social organization a legal system on the basis of a normative property alone, Fuller finds many organizations to be 'legal', albeit to different degrees. Hart and Fuller are thus in agreement about a part of the connotation of the concept of 'law' - namely that it connotes organizations having primary and secondary rules. What they differ about is the denotation

of the concept. From what I have argued before, it follows that both of these contentions are erroneous. Fuller's mistake perhaps arises due to his examples. They consist of only one kind of human actions, the kind which involve some transaction and bargaining and, hence, in which some adjudication is possible. What he overlooks is that adjudication is only accidental in such normative systems. The essential normative end of a university is to educate not adjudicate. Similarly, the main function of a trade union is to protect the interest of its members, not to punish people. In legal systems adjudication and punishment are essential ends, not accidental ones. Adjudication may even occur within a family, where the father acts as a judge, or negotiates between two children like a lawyer. A family does not thereby become a legal system, although the acts done by the father in that particular instance are legal. For a system to be a legal system, the performance of such acts must be essential to its nature. Law negotiates and adjudicates all the time. Other institutions, such as the family, the university and the church, have different essential functions. We adjudicate, negotiate and evaluate in various situations. Although all such acts are legal acts, by themselves they do not as yet form a legal system. The notion of a system, as we have seen, requires many more conditions to be fulfilled. Families, universities and trade unions, hence, are not "legal systems small and big". They do not become legal systems because

legal acts such as adjudication and negotiation sometimes occur in them. They are different systems based on different requirements of society. To assume that the family or the university is a small legal system because there are some legal aspects to it, is like assuming that a legal system is a recreational or an educational system since there are dramatic and educational aspects to it. Milner S. Ball, for example, has emphasized the theatrical aspects of the court room proceedings.¹⁵ The theatrical elements that Ball ascribes to law cannot be denied. However, whether one can understand any essential aspect of law on the basis of these elements seems dubious. For, firstly, the theatrical elements are present in many ceremonial activities, including most communal religious activities. Secondly, this analogy misses the main difference between a real theatre and the theatrical aspect of the court room proceedings. The decisions made in a drama function very differently in the actual world than those made in a court room.

Legal codes and proceedings also have an educational effect on those involved with them in any way. One learns about justice, morality and the social problems. But, from this it would not be right to conclude that the court rooms are universities.

If institutions are to be distinguished from each other, one must characterize them in terms of their essential functions and elements.

We find, thus, that in different ways Hart, Kelsen and Fuller have made some similar errors in ascribing to law properties which actually belong to the notion of a normative system. Summer criticizes Fuller's account on the grounds that a proliferation of legal systems fails to distinguish other organizations from what the jurists call law.¹⁶ As I have shown, he is right in this criticism, but then the question still remains : what is it that is different from other organizations and which the jurists call law ? Since the property of having a hierarchy of norms is common to many normative systems, only a unique hierarchy can characterize law. This hierarchy must be specified. Similarly, only a particular union of primary and secondary rules can belong to law. This union must be justified. We shall subsequently see what such a unique hierarchy and union of norms can be. At this stage it is important to discuss another requirement which applies to law because it is a normative system.

3. HERMENEUTICAL REQUIREMENTS.

The hermeneutical requirements of a normative system distinguish a closed system from an open one. A closed system can be interpreted only in a finite number of ways, whereas an open system allows any number of interpretations. Such possible interpretations, whether finite or infinite are not arbitrary or mutually inconsistent. They are related in ways that allow the achievement of the systematic

ends of the system as defined by the heuristic principles. The 'openness' of an open system hence, is in a fixed direction. Any number of propositions can be generated in that direction. The limits and the boundaries of the direction in which the propositions can be generated are defined by the heuristic propositions taken together. A good way to make the idea of an open normative system comprehensible is to consider the working of modal music, especially the notion of rāga in Indian scholastic music. Each rāga is a particular, open normative system in music, whose norms of internal structure and norms of rendering or development are decided beforehand. ~~A rāga can be rendered~~ in any number of ways by different human beings, but it always yields the same type of melody.¹⁷ Legal and other open normative systems are open in exactly the same sense in which a rāga is open.

Analysing the notion of openness in terms of the rules of interpretation which base themselves on the basic principles that generate first order propositions seems to me to be more promising than attempting to formulate it in terms of some arbitrary deontic formulae.¹⁸ However, any such Chomskyian attempt is faced with one serious problem, the problem of explaining counter-examples, i.e., any proposition which apparently seems to belong to the system but which has not been generated by the basic principles of the system.¹⁹ In such cases, the basic generative principles

seem to yield both p and $\text{not-}p$. The consideration of modal music makes it explicit that given the internal constraints of the system, the system cannot yield any arbitrary or contradictory propositions; in this case, it cannot yield any melodic phrase or a combination of notes that does not belong to the rāga. Every inconsistent proposition is introduced only as an error and will not be compatible with the rest of the system. Similarly, all those propositions which are only apparent members of the legal discourse could not have been generated by the basic principles of the system; all such propositions will be inconsistent with the basic heuristic principles of law.

When can a normative system be closed and when must it remain open? Is there a criterion that can guide us in this matter when normative systems are being created? There indeed is one and it does not seem difficult to discover. This criterion follows from the very idea of a norm. A norm describes the possibility of a feat and in normative systems such possibilities are actualized. This provides two possible conditions under which one can create a closed normative system:

- (a) if the norms can describe the feats exactly; and
- (b) if the possibilities can be actualized in only a finite number of given ways.

If these conditions are not met then one must create and sustain an open normative system. The actualized possibilities

proposed by the norms populate the normative systems and determine its ontology. The above requirement amounts to the condition that if the exact ontology of the normative system cannot be predetermined one must create and sustain an open normative system. For law, as we have seen while discussing the issue of incompleteness, a predetermination of the ontology is not possible.

We create various games in which the norms describe the feats exactly and thus predetermine the ontology of the system. For example, in the game of cricket, we predetermine who is supposed to do what and what actions are possible. The theoretical terms in the norms, such as 'out' and 'catch', can be given a specific interpretation in every match of cricket. As against such a closed system, the norms of an open system can at best describe only possible classes of feats, such as 'murder', 'theft', and not particular ones. The theoretical terms in such norms have the property of what Friedrich Waismann calls 'prosität' (openness),²⁰ that is, their meanings are open to change, but on this account they are not vague. Due to such theoretical terms each legal norm is a general norm which has to be interpreted for application in each case. For the possibility of such interpretations the normative system must include its hermeneutical principles in the normative discourse. These principles must explicitly mention the normative ends in accordance with which the interpretations are to be done. The following principle from the

International Convention on Civil and Political Rights
illustrates the point : ²¹

Article 5.

Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at destruction of any of the rights and freedoms recognized herein or at their limitation to a greater extent than is provided for in the present Covenant.

As the above norm shows, the hermeneutical principle is required to operate in conjunction with other principles of the system. However, before I discuss the relationship that obtains between the hermeneutical principles and other principles of the system, it will be important to examine some related views about interpretation. A discussion of these related views will show why it is necessary to emphasize the issues about interpretation mentioned above.

Kelsen's view is perhaps characteristic of all legal positivism. He argues : "from the point of view directed at positive law there is no criterion by which one possibility within the frame is preferable to another. There is simply no method by which only one of the several meanings of a norm may gain distinction of being the only 'correct' one. ...all methods of interpretation developed so far lead only to a possible, not a necessary result..." ²² Kelsen calls the hermeneutical principles of law a matter of legal politics ²³, and he also asserts that

all legal norms are general norms which need to be interpreted for application in every case.²⁴ Now if all these arguments are taken together, it follows that every case of adjudication or application of law is a case of legal politics. Kelsen does not, however, explain what he means by 'legal politics' and how this is to be distinguished from law.

If every interpretation of norms is a matter of legal politics (in whatever sense Kelsen meant it), it is difficult to see how his theory is a 'pure' theory of 'law', it would be better called a 'pure theory of legal politics'.

Kelsen is not only mistaken in asserting that there is no criterion according to which one possibility within the frame is preferable to another, but also in saying that all interpretations are only possible ones and not necessary ones. As I shall show, there are specific criteria for interpretation and certain interpretations are not only possible but also necessary. Kelsen's error here, as will be evident subsequently, lies in his failure to distinguish law from politics.

C.K. Allen discusses Montesquieu's principles of statutory interpretations. He points out that they deal only with the style of drafting statutes.²⁵ For an appropriate interpretation, Allen tells us, the 'golden rule' must be kept in mind, the rule that the general purport or the ratio legis governs the interpretation of norms.²⁶

This remark seems to me to be pertinent . But the basic question is : what is the ratio legis on the basis of which the norms are to be interpreted ? Allen concludes that the principles of statutory interpretations form one of the less stable, less consistent and logically less satisfying branches of jurisprudence.²⁷ What he did not seem to notice is that, if interpretations have to be based on the ratio legis, then evidently, until the latter is well understood the principles of statutory interpretations can never be clear.

Two relevant discussions which make the import of legislation the central factor in interpreting norms are those of C.P.Curtis and Gidon Gottlieb.²⁸ Although their analysis does not go beyond the usual emphasis on the notion of the purpose of law, it will be relevant to consider their views because their analysis raises some important issues from another perspective.

Gottlieb is no doubt right in pointing out that Hart's and Kelsen's theories are an improvement upon the so called 'one word, one meaning school' of semantic theory, for their theories allow for more than one interpretation, which is essential for applying the norms to different cases.²⁹ However, if, as Kelsen argues, there is no necessary way in which norms must be interpreted, or, if there is no restriction on the number of possible interpretation, then

such an 'improvement' in the semantical theory only proliferates possible interpretations without giving them any directions or limitations..

Curtis confines the meaning of legal documents to applications to the particular. According to him, "words are but delegations of the right to interpret them, in the first instance by the persons addressed, in the second and the ultimate instance by the courts who determine whether the person addressed has interpreted them within their authority".³⁰ Although such a view rightly brings the person, to whom the proposition must mean something, back into the context, it leaves the basic question unanswered. For one may proceed to ask: on what basis does the court determine whether the persons involved have interpreted the norms within their authority? To assume that the courts interpret the norms according to their whims and fancy is certainly to misunderstand the proceedings. Since there is an overall consistency and similarity in the way the various courts interpret the norms, the rule of interpretation must be objective and not a personal decision of some judge or judges.

Hart's notion of the context for a legal norm or term is wider than that of Curtis. His context is not confined to some persons or courts, it covers the whole of the legal system.³¹ However, Hart does not seem

to have appreciated what conceptual relationships obtain if one considers the whole of the legal system to be the context for a legal norm or term.

A normative system is structured in accordance with the heuristic principles. One cannot claim to have considered the normative system as the context if one takes into account only some of the heuristic principles. All of them, together with their consequences, must be taken into account to determine the actual context. Moreover, since the normative system is created and sustained on the basis of the heuristic principles, one cannot claim to have understood what the normative system is while failing to understand its basic heuristic principles. Since the context of a norm is the context of all the heuristic principles and since a normative system is comprehended only in terms of all its heuristic principles, it follows that no norm can be interpreted independently or in isolation. The hermeneutical rules must be constructed in such a way that they take into account all the basic heuristic principles. Minimally, the hermeneutical principles must be such that they yield only those interpretations which are consistent with the requirements of all other heuristic principles. Only a necessary set of possible interpretations can be consistent with all the heuristic principles taken together at any time. For example, only a necessary set of possible interpretations can be consistent with the heuristic principles which define the systematic aims of the system,

or those which define and delimit possible ways of achieving those aims. Not just any or every interpretation of a norm can become a further member of the system. Interpretations of a norm in a particular context will, thus, result in a correct interpretation or a set of possible correct interpretations. These will depend upon the system in question. Closed systems will yield definite interpretations and open systems will yield some roughly equivalent interpretations.

The necessity of interpreting the norm in a particular way does not lie within the norm, it arises from the nature of the whole normative system. It is required on account of the systematic aims and other heuristic principles of the system. Kelsen and others have not found any necessity to interpret the norms in specific ways because they have not considered the holistic framework within which the hermeneutical principles function. We shall, subsequently, see the various necessary propositions of law which regulate the hermeneutical principles.

4. TELEOLOGICAL REQUIREMENTS.

Law is a dynamic system . Minor changes in the law occur regularly in every case of adjudication or legislation . However , it is only in the major changes , such as in constitutional amendments , that we become more aware of the dynamic aspects of law. The notion of teleological development involves two ideas : the idea that

there are some ends towards which all dynamic normative systems are propelled, and the equally important notion of dynamicity itself. What is involved in recognizing law as a dynamic normative system?

Some thinkers, such as Kelsen, seem to have believed that by characterizing law as a dynamic system something specific was being said about law. This again is a fundamental error of taking a particular attribute to belong specifically to the idea of law when in fact it belongs to many normative systems. By merely pointing out that law is regulated in its dynamicity by some norms, one has not as yet distinguished law from other similar normative systems. To be able to do so, it would be necessary to make at least three further distinctions: a) what is unique about the norms which regulate the dynamicity of law; b) what is the peculiarity of the direction in which law changes; and c) what are the particular ends towards which law moves which are not the concern of any other dynamic normative system.

At the outset one would have to begin by distinguishing between different sorts of normative systems which are dynamic.

a) THE DYNAMICS OF AN OPEN NORMATIVE SYSTEM:

Kelsen distinguishes between a static and a dynamic normative system in the following way: "A

system of norms whose reason for validity and content is deduced from a norm presupposed as a basic norm, is a static norm system."³² He does not, however, give examples of any static normative systems. Perhaps he has logic in mind, a system in which the propositions are deductively correlated. But then he does not explicate how logic is a normative system. As against this static system, he tells us that: "the dynamic type is characterized by this: the presupposed basic norm contains nothing but the determination of a norm creating fact, the authorization of a norm creating authority, or (which amounts to the same) a rule that stipulates how the general and the individual norms of the order based on the basic norm ought to be created."³³

The above characterization does not distinguish the dynamicity of law from the dynamicity of open normative systems. Language, for example, as all Chomskyians can now tell us, has basic norms which stipulate how the general and the individual norms of the language ought to be created. In fact, Pāṇini, who wrote his Astādhyāyī about two thousand years ago, provided a very precise grammar for the Sanskrit language which later became a grammar of 'presupposed basic norms containing nothing but the determination of a norm creating fact'.³⁴ In modern English we turn to the Oxford dictionaries for the most authoritative norms concerning words, etc. All

modal music also works in a similar way. Perhaps with sufficient insight and ingenuity one may be able to spell out the basic transformational and generative principles of any open normative system.

Kelsen's account of legal dynamicity is thus, superficial. It fails to distinguish the grounds and the nature of the dynamics of law from those of open normative systems in general.

b) THE DYNAMICS OF A CYBERNETICAL NORMATIVE SYSTEM.

Law is distinguished from some open normative systems, such as that of modal music, by the fact that a legal system has basic self-amending norms on account of which it can maintain the direction of its growth. Basic principles of amendment provide the measures by means of which the system can adapt its actions and structure its features to meet the social needs.

One may think that the truth that law has basic generative norms as well as the amending principles which allow for adaptation, provides the necessary and the sufficient conditions for characterizing it. This, however, is not the case. The possession of generative and amending principles characterize a cybernetical normative system, and not a legal system. These aspects only tell us that a

particular open normative system is a cybernetical system. They do not as yet tell us why a particular cybernetical system is a legal system.

All cybernetical systems have the property of changing and developing through self-regulation and adaptation, in accordance with the feed-back of information from the environment and in accordance with the specific needs of the habitat. In a strict sense, language, like law, is a cybernetical system.³⁵

The dynamics of a juristic cybernetical system, i.e., the legal system, have to be distinguished from the dynamics of open normative systems in general and cybernetical systems in particular. Carrying out such a task would involve explicating the three conditions mentioned earlier, conditions which specify the uniqueness of legal dynamics. Kelsen's, Hart's and Fuller's theories seem to be grossly inadequate when it comes to understanding the dynamics of law. Spelling out the teleology of law evidently involves showing how the principles of dynamics of law are substantively different from those of other open or cybernetical normative systems. This issue will be dealt with in its appropriate place later where I discuss the substantive aspects of the nature of law.

Review and Conclusions - II

THE REQUIREMENTS OF A LEGAL THEORY

The basic requirements for a legal theory can now be precisely specified.¹

- 1) The theory should specify the sense in which law is a system. In doing this it will distinguish the different orders of propositions which form the system.
- 2) The theory must specify what makes a system normative. In so doing it will show how derivative normative propositions can be generated from the basic normative principles.
- 3) For each of the nine heuristic principles the legal theory should specify a unique content.

The rest of the requirements follow from the specification of the basic heuristic principles. In specifying a unique content for each heuristic principle a hierarchy of norms will be presented. The legal theory is then required to:

- 4) justify why only a particular hierarchy of norms belongs to the system;
- 5) account for the different methods by which the systematic aims of the legal system are achieved;
- 6) specify the unique dynamics of law.

So far in this work only requirements 1 and 2 have been examined. A major part of the second requirement concerning the epistemological requirements of a normative system, remains to be discussed. On completion of this task, the remaining four requirements for a legal theory will be examined.

In requirement 3 above there are nine different principles which need to be given unique content, hence some further explicatory remarks will be important here. The specification of the heuristic principle concerning membership of propositions in a normative system will limit the types of rules that can be accepted as grundnorm or as a rules of recognition. Not just any arbitrary rule of recognition can be accepted as being a rule in law. Requirement 4 will justify the choice of the rule of recognition or the grundnorm. The heuristic principle specifying the systematic aims will delimit the legal aims. The heuristic principles concerning the membership of entities, persons and actions specify the ontology of law. The legal theory will, therefore, specify and justify the possible legal ontology when it provides unique contents to these heuristic principles. Consequently, the theory will also justify what is done to entities which cease, either in part or totally, to be members of the legal system.

Requirement 5 above allows for a number of ways to achieve the ends specified by the heuristic principle. It would be arbitrary to assume that such ends can be achieved in only one way. As argued before, it is not unreasonable to believe that men are creative agents. It is always possible, therefore, that novel methods will be found to achieve the desired legal ends. The legal theory must account for such a plurality of possible methods.

Amongst possible legal methods, Fuller mentions adjudication, legislation, mediation, managerial direction, elections and contracts.² Since there is a plurality of legal methods, he is undoubtedly right in insisting that to describe a society as 'pre-legal' merely because it practices mediation and not adjudication, is to misunderstand the idea of law in a serious way.³ However, the fact that different procedures are employed to achieve the systematic ends of law, should not be confused with the notion that different social institutions are attempting to achieve the same ends. The plurality of legal methods does not mean a plurality of legal institutions. There seems to be a serious confusion in Fuller's theory when he claims to be a legal pluralist. He not only mentions different legal methods but also calls universities, trade unions, etc, to be imperfect legal institutions. Such a confusion, as noted before, arises in his theory due to the fact that he overlooks the substantive differences which distinguish the function of a legal system from that of other social institutions.

According to Kenneth I. Winston, Fuller's legal theory can be understood as attempting to meet the requirements as set down by the fictional Justice Foster.⁴ These are, 'generosity', i.e, the theory must allow for legal pluralism; 'purposiveness', i.e, the theory must show law to promote some definite ends; and 'normativity', i.e, the theory must make explicit the morality that law promotes among men.⁵

These requirements are too general. However, Winston's claim that Fuller's theory satisfies the fictional Justice Foster's requirements, seems to be unsubstantiated.⁶ As we have seen, although Fuller talks about the morality internal to law, he does not succeed in specifying this morality. The aspects that he mentions apply to many normative systems. The morality internal to law still remains to be shown and Justice Foster's general, but correct, requirements still need to be satisfied. As mentioned, it is the aim of this work to attempt both these tasks.

The criticisms of Hart's, Kelsen's and Fuller's theories, presented so far, do not imply that there are no substantial points in their theories. The discussion of the substantial points, however, cannot be undertaken until we have found a way to clearly distinguish between normative systems in general and the legal system in particular. The most basic criterion for distinguishing between different normative systems, as I have suggested, is to be found by investigating their epistemological foundations. Once the legal system has been distinguished and identified on the basis of its epistemological foundations, its substantive aspects can be clearly described. Hence, I shall proceed now to examine the epistemological foundations of law.

PART - III

THE EPISTEMOLOGICAL REQUIREMENTS OF NORMATIVE SYSTEMS

I.

THE NEED TO INVESTIGATE

THE EPISTEMOLOGICAL FOUNDATIONS OF LAW

Basic principles of law are amongst its most important elements. Unless the nature of such propositions is clearly understood, one cannot tell whether one is dealing with religious, political, legal or some other types of propositions.

An analysis of the nature of basic legal propositions will reveal their truth conditions. To know the truth condition of a proposition is to know the conditions under which they can really apply to and be used in a possible world. The truth conditions for analytic propositions, for example, are different from those for synthetic propositions. Our assumptions about the nature of propositions determine the type of activities that we carry on apropos those propositions. For example, if basic legal propositions are descriptions of facts, like the law of gravity, then they must be discovered the way the propositions of natural sciences are. But if they are like mathematical propositions then the type of activity required to come to know them would be totally different. Or, if such basic propositions are still different, say like the propositions involved in games, then we must come to know them in yet another manner. Different types of propositions do not only require different methods for acquiring a knowledge about them but also totally different types of justifications when we want to hold them as true or valid

propositions. Thus, factual propositions have to be justified through experiments, observations, etc, whereas mathematical propositions are justified by deducing them from more basic propositions. Propositions of games, on the other hand, are justified in still another way.

Some natural law theorists have argued that basic legal propositions are about a certain aspect of the world such as the human nature or the nature of reality. The Stoics and some thinkers in the Brahmanic tradition (who make Rita a feature of the Prākṛiti) would fall into this group. Are basic legal propositions factual propositions according to these thinkers ?

Hart, too, argues that basic legal propositions, such as the rules of recognition, are matters of fact. The sense of 'fact' here seems to be different from the usual sense. Perhaps Hart means they are facts about human society and not about human nature. But in either interpretation the basic legal propositions seem to become factual propositions.

Some natural law thinkers have argued that basic legal propositions are derived purely from reason. Does such rationalism imply that basic legal propositions are analytic propositions ?

Legal positivism demands that we justify the basic legal proposition in one way, natural law demands that we justify them in another way. How we come to know and justify a proposition, as noted, depends upon the nature of the

proposition. A fundamental issue in legal theory thus, is : what is the epistemological status of basic legal propositions ? The epistemological inquiry into the nature of basic legal propositions opens up an alternative approach to settle the dispute between various legal theories and consequently to understand the nature of law.

It is necessary to ask what is behind the different types of justifications that the natural law theory and positivism demand. What difference does it make how we justify a proposition ? The basis on which we assume a proposition to be valid or legitimate is directly related to the way we think that the proposition needs to be justified. For, example, we accept a mathematical proposition to be valid or legitimate on the grounds that it has been justified in a mathematical way by the mathematicians. Similarly, we assume that a scientific proposition is legitimate on the grounds that it has been justified to be so by the scientists. Thus, it makes a crucial difference how we expect a proposition to be justified. The types of people and the types of conditions which provide legitimate propositions are different in each case. The people who satisfy the conditions are taken to be the genuine authors of the particular types of propositions that they assert. Thus, the mathematicians are genuine authors of the mathematical propositions and scientists of scientific propositions. Doctors are authors of legitimate propositions about people's health. Who are the genuine authors of legiti-

mate and valid legal propositions ? The answer to this question, as would be evident from the foregoing discussions, clearly depends upon the type of propositions that we take legal propositions to be. If, together with Hart, we take legal propositions to be matters of fact, then the legal 'scientists' who have 'discovered' them in a 'scientific' way must, evidently, be the genuine authors of the factual propositions. Only those who have a good knowledge about facts and their inter-relations should be telling us what legal propositions must be. Lawyers and jurists do not qualify to tell us about facts, scientists do. The psychologists, for example, know a great deal about human nature. If basic legal propositions are facts about human nature then the psychologists must be accepted as the authors of legitimate legal propositions. If, on the other hand, basic legal propositions are social facts, in Hart's sense, then the sociologists and historians who know much about such facts must be the authors of legitimate and valid legal propositions !

If basic legal propositions turn out to be like mathematical propositions, then people who know the most about the definitional structures and relations of laws (as the mathematicians know about mathematical propositions), must be taken to be the genuine authors of legitimate and valid legal propositions.

Or supposing, on examination, it turns out that legal propositions are not even descriptive, that they

have the form 'You must do X', i.e., a sentence that commands, then the conditions under which such propositions can be genuine commands is that someone should will it to be so. The real authors of legitimate and valid legal propositions, in such a case, would be those who can command. All that we would need to do, therefore, is to recruit good commanders who could bring all the laws into existence. However, as we have seen in the previous section, legal propositions never have the form 'You must do X', hence any commanding ability cannot be relevant to the status of being authors of legitimate and valid legal propositions.

Those who are taken to be the genuine authors of legitimate and valid legal propositions are said to have the authority to assert such propositions. The central aim in labouring the question in the manner done here is to show that the question : what is the basis of legal authority ? cannot be answered independently of the question : what is the nature of legal propositions ? The two answers are conceptually related. The basis of legal authority depends upon the nature of basic legal propositions. This is so because the truth conditions for what is to constitute authority to assert certain propositions depend upon the justification conditions for those propositions. The justification conditions, in turn, depend upon the nature of the propositions under consideration. This makes it extremely important to decide the nature of basic legal propositions.

The procedure of the investigations shall be as follows. The ensuing discussion in this part of the work is divided into four sections. I shall first discuss the theory about types of propositions, clearly specifying the type that basic legal propositions can be and the types that they cannot be. The results of this discussion will be applied to some actual legal propositions in the second section, so as to substantiate and explicate the conclusions reached. In the third section I shall examine the type of entity that a legal entity is. Such an analysis is required because, to specify the nature of legal propositions, it is necessary to know the relationship that obtains between the legal-subject and the legal-object in a legal proposition. The fourth section will be devoted to the final conclusions about the nature of basic legal propositions and its relationship to the basis of legal authority.

A few words about the expected shortcomings will not be out of place here. Questions about propositional theory and theory of types raise enormous issues. Complex as these issues are, if any light is to be thrown on the nature of basic legal propositions, indulging and taking sides in these complex issues cannot be avoided. The best that can be done here is to show the kind of propositional theory and the theory of types that is appropriate for legal discourse. In other words, the work here is limited to explicating the relationships that hold between the idea of law and the

foundational issues concerning the nature of propositions and entities . However , a discussion of epistemology in the concrete context of law raises many important questions for epistemology in general , questions whose significance become explicit only when thrown into relief by a discussion of legal discourse. These important issues in epistemology, since they are not directly relevant for the purport of this work, are only outlined in this enterprise, they are not discussed in any detail.

II. PROPOSITIONAL FORM AND PROPOSITIONAL JUSTIFICATION.

Social organizations assume or stipulate some propositions as their basic working principles. These foundational propositions are defined in specific ways by the people involved. Such definitional propositions are, in an important sense, analytic. By defining a particular way of doing things one may create and sustain a convention. Are the rules of recognition and other basic legal propositions definitional in this sense? I shall argue that they are not. Basic legal propositions cannot be defined in an arbitrary manner. Propositions which are not mere definitions can, in a significant sense, be synthetic.

There are four basic questions that one must ask about basic legal propositions. Are such propositions analytic or synthetic? Are they a priori or a posteriori? Are they necessary or contingent? Lastly, the most significant question: are the categories mentioned here sufficient and appropriate for characterizing basic legal propositions?

Insofar as legal propositions are propositions, I shall argue that the above categories are indeed appropriate for characterizing them. But insofar as such propositions are legal propositions, these categories are not sufficient to make some crucial points about them. Further distinctions are required to single out the peculiarity of the

basic legal propositions in particular and normative propositions in general.

I shall argue that a certain type of analytic propositions are at the base of conventions. These are distinct from the type of synthetic propositions which are at the base of legal systems. These different types of propositions are justified in totally different ways. Both types of propositions, however, are necessary; but the sense in which they are necessary differs in a radical way.

This requires that we, firstly, distinguish the different types of analytic and synthetic propositions, secondly, the manner in which they are justified, and thirdly, the different senses in which propositions are necessary.

In what follows I shall, first, briefly discuss the basic differences between analytic and synthetic propositions and their modes of justification, showing the basic grounds for the distinctions. At the second stage, I shall discuss the analytic propositions so as to clearly specify the type which is at the base of conventions and which, thus, needs to be distinguished from basic legal propositions. I shall also attempt to show the sense in which such basic propositions of conventions are informative. At the third stage, I shall discuss synthetic propositions so as to specify the type which forms the foundations of law. This stage will also require explicating the sense in

which such basic propositions are necessary.

1.a).

The Analytic-Synthetic Distinction.

The traditional characterization of propositions as analytic or synthetic has come under criticism following Quine's and White's attack on the distinction.¹ The issues involved in these criticisms are indeed complex, but despite Quine's and White's objections, I think the distinction still remains useful and legitimate if one specifies the sense and the purpose for which the distinction is being made. I will not attempt any detailed justification for this distinction. Nonetheless, at the outset, it will be important to state the most fundamental reason on account of which I give myself the liberty to employ such distinctions despite recent criticisms.

The manner in which the distinction between analytic and synthetic, a priori and a posteriori and necessary and contingent propositions is being presently made, can be traced back to Leibniz's and Kant's works. It is important to note, however, that in both Leibniz's and Kant's works the epistemological distinctions are not made for their own sake, they are made in order to solve some basic problems in metaphysics, moral philosophy and philosophy of religion. Their epistemological distinctions, thus, are related to and grounded in their other branches of enquiry. It is questionable whether one can borrow Leibniz's epistemological distinc-

tions while totally neglecting or rejecting his metaphysical, moral and religious beliefs. In Leibniz's scheme, the epistemological distinctions function in a possible world in which each monad has a specific place within not only the logically possible conceptual order, but also the morally possible conceptual order. God, too, belongs to the same scheme, he being the most senior monad. Similarly, it is doubtful whether Kant's interpretation of the epistemological distinctions can be maintained without the related metaphysics about the noumenal reality being distinct from the phenomenal reality and the related role of the self and God in each of them. Analytic philosophers have indulged in the Leibnizian and Kantian distinctions while not only neglecting metaphysics but also, at the same time, calling it nonsense, thus depriving the distinctions of their basic roots. Quine seems to have successfully shown that the analytic synthetic distinction cannot be maintained on a semantic basis. But then, neither Kant nor Leibniz seem to have held that epistemological distinctions are linguistic distinctions, or that they can be sustained on the basis of distinctions in language alone. In the subsequent discussions I shall briefly sketch the metaphysical roots of the epistemological distinctions. These discussions are not in any way intended to be a complete reply to Quine's and other's attacks on the distinctions. They only intend to show why it is reasonable to use these distinctions despite the criticisms. To start with, it would be important to define the distinctions.

Like Leibniz and Kant, I take analytic propositions to be distinct from synthetic propositions on two basic grounds². Firstly, the negation of an analytic proposition is self-contradictory. A proposition p is thus analytic if, and only if, its negation is of the form (or leads to the form) q and not- q . A synthetic proposition, on the other hand, is such that its negation, not- p , is not of the form (nor does it lead to the form) q and not- q . This division is exclusive and exhaustive. That is, the negation of all propositions is such that it is either of the form q and not- q , or its negation is not of this form. Such a characterization of course only concerns propositions. It does not imply that all human discourse consists of propositions. Discourse which is not propositional would be classified in other ways.

Secondly, analytic propositions are distinguished from synthetic propositions by the fact that in the former the predicate concept is contained in the subject concept, in the sense that the predicate concept is a constituent of the subject concept and can be shown to be so by analysis. In synthetic propositions, the predicate concept is not a part of the subject concept. Such a criterion can evidently only apply to propositions which are of the subject-predicate form. Legal propositions, as we have seen, are indeed descriptive propositions of the subject-predicate form, in which the subject and the predicate are

joined together by the nexus. The basic legal propositions too, as we shall see, are grammatically of the same form. The criteria provided above state only the necessary conditions for distinguishing analytic propositions from synthetic ones. They cannot be taken to be both necessary and sufficient. However, what we require first of all are the necessary conditions on the basis of which one can recognize the differences between the different types of propositions.

1. b) The A Priori - A Posteriori Distinction.

Kripke has emphasized that a proposition being analytic does not entail it being a priori or necessary; that whereas analyticity is a linguistic notion, apriority is an epistemological one and necessity a metaphysical one. None of these notions can be tied together without producing additional arguments to show how the relationships hold.³ Hanson had earlier, equally emphatically, made the point that the notion of analyticity should not be tied up with that of apriority⁴ without sufficient justification. Both Kripke's and Hanson's points seem to me to be correct. Their criticism however, applies more appropriately to the Logical Positivists and some Analytical philosophers who had equated analyticity with apriority, than to Kant.

Following Kant, I take the distinction between a priori and a posteriori to be depending upon a qualitatively different point. To characterize a proposition as 'a priori' is to say nothing about its grammatical structure, or the

structure of its negation, or the consequences deriveable from them. It is to remark about the mode whereby the truth of the proposition is discovered. A proposition is a priori if its truth can be justified through reasoning alone; that is, if to prove the truth of the proposition one does not have to appeal to a criterion of knowledge which requires observation, testimony, appealing to authority, revelations, etc. On the other hand, a proposition is a posteriori if in order to justify it as a true proposition, reasoning alone is not sufficient and some appeal to facts or experience gathered through perception, testimony, intuition, etc, is required.

Analytic-synthetic distinction thus distinguishes between propositional forms, whereas a priori - a posteriori distinction distinguishes between different types of propositional justifications. Once this distinction is perceived it becomes evident that there can be four types of propositions. All the four different types are logically possible, none of them involves inconsistent ideas. The four types of propositions are : i) analytic a priori ; ii) analytic a posteriori ; iii) synthetic a priori ; and iv) synthetic a posteriori.

Despite the fact that each of the above notions about propositions is logically consistent and independent, philosophers have often not only related these notions, but even equated them. For the purposes of this work, however, it is not necessary to discuss the various ways analyticity

and apriority have been defined and related. The following chart summarizes the different views put forward. The views which seem to me to be right and useful for the purposes here, are singled out.

In this table the description of the proposition, i.e., the criterion is put in the middle. If the proposition fits the description, its characteristic is named by the term on the left, if it does not then by the term on the right. The fact that the same criteria occur both in the table of analytic-synthetic distinction and a priori - a posteriori distinction, shows that some thinkers have mistakenly assumed the distinctions to be making the same points.

1.	Analytic.	Predicate contained in the subject.	Synthetic.
2.	Analytic.	Cannot be denied without contradiction.	Synthetic.
3.	Analytic.	Logical truths or reducible to such.	Synthetic.
4.	Analytic.	Reducible to statements of identity by putting synonyms for synonyms.	Synthetic.
5.	Analytic.	True in all possible worlds.	Synthetic.
6.	Analytic.	True by virtue of meaning alone.	Synthetic.
7.	Analytic.	Does not require empirical test.	Synthetic.
8.	Analytic.	Does not admit empirical test.	Synthetic.

1.	A. Priori.	True by virtue of meaning alone.	A Posteriori.
2.	A Priori.	Does not admit empirical test.	A Posteriori.
3.	A Priori.	Does not require empirical test.	A Posteriori.
4.	A Priori.	Its truth cannot be justified by appealing to experience.	A Posteriori.
5.	A Priori.	Requires a transcendental argument for justification.	A Posteriori.
6.	A Priori.	Requires a deductive proof.	A Posteriori.

From the first table only senses 1 and 2 seem to me to be right and useful for the purposes here. Sense 5 is partly right; however, it raises complex issues which need to be distinguished. I shall discuss the application of the analytic propositions to the world very briefly here, but the theme will be developed as we go along, specifically in Part-IV where I discuss the idea of possible worlds. In the second table only senses 4 and 5 seem to me to be right and useful for the purposes here. The notion of transcendental justification will be presently discussed in the context of synthetic propositions.

2. a) Analytic A Posteriori Propositions.

To create and sustain any convention, whether it be one of games, rituals or political activities, the basic concepts involved in the convention have to be

defined. These definitions take into account the empirical factors involved in the activities. In the course of time the convention may become a custom or a tradition. For example, to create the convention of playing polyphony in a particular way one has to define the chromatic scale as the tempered scale. Such a definition makes harmonizing various instruments possible. The utility of the scheme is tested out in practice. Similarly, the proposition 'the meter rod in Paris is one meter long' provides the basic criterion on the basis of which the convention of measuring things becomes possible. It must be emphasized that when I say that the basic definitional propositions come first in these conventions I only mean conceptually first. In actual practice the definitions are evolved in accordance with the development of the conventions. Our interest in these definitions, however, is not with when they are developed, but with their epistemological status, in whatever order they come into being.

Since all conventions are based on some basic definitions of concepts and activities involved in them they all have analytic propositions at their foundations. But what type of analytic propositions are these? To answer this question we have to see in what way the truth of these propositions is to be justified.

Analytic propositions, which are true in all states of affairs, can be shown to be so by the standard truth table method. The demonstration consists of negating the

proposition p and then finding out whether the conjunction of p and not- p is true or false. If this conjunction turns out to be a tautology, that is, true in all cases of possible combinations of p and not- p , then the analyticity of the proposition in virtue of its logical form alone is proved. How would we justify a proposition such as 'nothing can be blue and red all over at the same time'? One would perhaps approach the issue from the perspective of our conception of surfaces, or perhaps from the perspective of how we attribute properties to surfaces.⁵ In either case, propositions which can be shown to be true by the truth table method or through analysing our ways of conceiving things, as in the case above, are justified on the basis of reason alone. These types of propositions would thus be analytic a priori. They are also of the type which are true in all states of affairs.

But consider the totally different type of justification that is involved when we are asked to justify the basic propositions involved in conventional activities, propositions such as 'the chromatic scale is the tempered scale' or 'the meter rod in Paris is one meter long', and other basic definitional propositions of games, rituals or political proceedings. In such cases we do not say that this is the only way human reason can conceive of the state of affairs, as we do in the case of coloured surfaces, nor do we say that the conventions are so because the physical facts require them to be so. That is, we neither say that reason ordains it to be thus,

nor do we say that the facts make it impossible to be otherwise. We give an altogether different type of justification. We either say that there is no particular preference between arbitrary choices, that the convention was started for fun, or to make life more colourful; or else, we give it an utilitarian justification, we attempt to show that such a convention is very (or most) useful. In all such cases the important point is that the justification does not rest on reason alone, appeals to facts or experiences are necessary. Such justifications are a posteriori. Basic propositions of conventions, thus, are analytic a posteriori.

Kant rejected the possibility of analytic a posteriori propositions. He did this because he thought that all analytic propositions are of the same type, they must be justified on the basis of reason alone. He seems to have been led to this belief through the acceptance of the Leibnizian contention that all analytic propositions are truths of reason and are thus reducible to propositions of identity by suitable substitutions. Truths of reason are supposed to be true in all states of affairs; such propositions cannot be justified by an appeal to some particular experiences limited to only some states of affairs. Kant, therefore, assumed that they must be justified on the basis of reason alone, i.e., in an a priori manner. He thus equated analyticity with apriority.

Now there is nothing in the two

criteria of analyticity provided by Kant (and mentioned here earlier) which entails either, that all analytic propositions are true in all states of affairs, or that all of them must be justified in an a priori manner. Since Kant rejected the possibility of analytic a posteriori propositions, the belief seems to have been ubiquitously accepted, and it seems to remain so, even in contemporary thought. If we do not accept Kant's unwarranted Leibnizian belief that all analytic propositions are truths of reason and are reducible to propositions of identity, then the possibility is left open for analytic propositions which are true in only some states of affairs and whose truth needs to be justified by an appeal to criterion other than reason. For example, propositions such as 'the meter rod in Paris is one meter long' and 'the chromatic scale is a tempered scale' are quite unlike propositions such as 'all bodies are extended' and 'nothing can be blue and green all over at the same time'. While the latter pair can be said to be true in all states of affairs and to be truths of reason in some sense, the former pair of propositions are applicable only within a given context of conventions. The differences, as noted, becomes evident from the way we justify these propositions.

Writers on Kant's analytic-synthetic distinction seem to infer his views on the topic solely on the basis of the Critique of Pure Reason. But while writing this

Critique Kant had concentrated his attention mainly on the phenomenal realm. Morality, law and all that concerns the noumenal realm, had still to be analysed in detail. In the first Critique the noumenal realm remains a vague unintelligible thing-in-itself. By the time of the second Critique, the Critique of Practical Reason, the noumenal realm becomes the realm of freedom, a moral realm in which noumenal entities, such as human being act. Towards the end, that is in Metaphysik der Sitten, the noumenal realm takes a concrete and very intelligible form as the legal realm.⁶ Now it is very natural that as Kant's view about the practical realm (i.e., the moral, legal realm) develops, his ideas about the propositions which apply to the noumenal realm will correspondingly develop. A close study of the second Critique and the Metaphysik der Sitten indeed shows this to be so. I do not intend to say that his development concerning the propositional theory is always consistent or regular as he continues to theorize about the practical realm, but only that when what he says in these other works is taken into consideration, his views on the propositional theory turn out to be far more complex and confusing than would appear to be the case on a consideration of the first Critique alone. For example, in the Metaphysik der Sitten Kant tells us :

All propositions about rights are a priori, for they are laws of reason (*dictamina rationis*). A proposition about rights [or justice] with respect to empirical possession is analytic, for it

says no more than follows from the concept of empirical possession by the law of contradiction, namely, that, if I am the holder of a thing (that is, physically connected to it), then anyone who touches it without my consent (for example, wrests an apple from my hand) affects and diminishes that which is internally mine (my freedom). Consequently, the maxim of his action stands in direct contradiction to the axiom of justice [rights]. Thus, the proposition concerning empirical possession does not extend beyond the right of a person with respect to himself. 7

Granted that a proposition that defines the notion of empirical possession is analytic, it is not at all obvious how it can be justified on the basis of reason alone. The very notion of 'empirical possession', that is, holding on to something by force, requires a knowledge gained through the performance of some actions. Experience is necessary to understand what is 'beyond' myself or others, that is, what the limits of my body are, beyond which empirical possession does not extend. Propositions defining empirical possession are thus analytic a posteriori. In fact, Kant's example above, in which one wrests the apple from someone's hand to verify the truth of the proposition that the apple was in 'empirical possession', makes it very evident that an a posteriori justification is required.

Analytic a posteriori propositions are extremely important when we come to consider activities in the social order where we often have to define new activities and concepts. With regard to the phenomenal realm, i.e., the physical world, the situation is different. We do not define activities for this realm, we discover them. Perhaps Kant's

underestimation of the significance of analytic a posteriori proposition has its roots in the fact that he decided his propositional theory in the first Critique, prior to an inquiry about the moral and the political realm.

2.b). Information Content of Propositions.

Since Kant believed that all analytic propositions are of the type: 'all bodies are extended', he was led to the additional belief that all of them must be uninformative. If there are different types of analytic propositions then such a belief is evidently unwarranted. Foundational analytic propositions of conventions are very informative for those wanting to join and participate in the convention. All propositions which inform must, after all, inform someone, since informing is an activity between agents. Hence any talk about the information content of a proposition which does not take the agent's situation into account, is meaningless. The degree to which an agent becomes informed by a proposition depends upon how much he knows about the subject or about the convention to which the proposition belongs. For example, the now well known proposition in the number theory : 'every even number can be expressed as the sum of two prime numbers'⁸, may carry little information for those not knowing other propositions about prime numbers, but others, who have studied the number theory, will recognize that something different is being said here. Perhaps, this conjecture may turn out to be false, but if true, it can inform one in quite a different way.

Similarly, the analytic a posteriori proposition 'the Greenwich time is the mean time', is certainly very informative for a person who is learning about the convention of time measurement. The information content of a proposition, thus, cannot be decided by merely looking at its syntactical or semantical structure.

Once we understand the importance of analytic a posteriori propositions, certain basic problems in legal theory can be stated in a simple way.

The central claim of legal positivism, although the positivists have not put it in this way, amounts to the following contention. In claiming that basic legal propositions are not a priori propositions of reason, they have rejected the view that such propositions are analytic a priori, a thesis that they assumed some natural law theories to be asserting. What other options are open then? Legal positivism has evidently not claimed that basic legal propositions are propositions about the physical world, i.e., synthetic a posteriori propositions. Their claim amounts to asserting the third alternative, namely that basic legal propositions are analytic a posteriori. This claim asserts that basic rules of recognition, etc., are like the proposition 'Greenwich time is the mean time', and these rules have been defined to be the way they are by a group of men. Such definitions make certain social activities possible, but there is no necessity for them to be

the way they are. We shall see the details about the particular claims subsequently.

The belief that the basic legal propositions can be defined in any arbitrary way seems to me to be totally false. Legal positivists are no doubt right in pointing out that the basic legal propositions are not definitional propositions given a priori by reason, but from this it does not follow that they are given arbitrarily by the will of some people. What follows, I shall attempt to show, is the fourth alternative, namely that the basic legal propositions are synthetic propositions given by human reason, that is, they are synthetic a priori propositions.

To establish such a claim it is necessary to first briefly consider the notion of syntheticity and then the notion of necessity.

3. a). Synthetic a priori propositions.

Just as there is nothing in the criteria of analyticity to show that all of them must apply to all states of affairs, there is nothing in the criteria of syntheticity to suggest that all of them must be such that they apply to only some states of affairs. Synthetic propositions which apply to all states of affairs, evidently cannot be justified by an appeal to experience, for all our experiences are limited to only some cases, they cannot guarantee that the proposition will be true for all future cases. Propositions

such as 'every event has a cause', 'every deed has a doer' and 'every person is a moral agent' are synthetic propositions which go beyond particular experiences. Such propositions stand in need of a priori justification if they are to be held as true propositions applicable to all relevant cases.

What is actually involved in an a priori justification? There are at least two methods which have been traditionally adopted to assert the truth of the propositions of the type mentioned above. The first is to claim that such propositions are self-evident, or that they are intuitively known. Such a method evidently does not amount to a justification, it remains a mere dogmatic assertion. The second and the appropriate method to justify synthetic a priori propositions is to give an acceptable transcendental argument, in the Kantian sense.⁹ A transcendental argument, in this sense, attempts to show that the truth of a synthetic a priori proposition must necessarily be assumed if the experience relevant to that proposition is to be made at all intelligible or possible. It thus establishes a necessary relationship between the presuppositions of the experience and the experience itself. The arguments show that a connection between the subject concept and the predicate concept must be taken as a necessary condition of their application to any instance of a certain kind of thing or a state of affair. The necessity in question here is not necessity simpliciter, nor is it a logical necessity. It is a necessity that is involved in the application

of the concepts.

The notion of synthetic a priori has come under serious criticism following Quine's attack on it in his "Two Dogmas of Empiricism". Since I wish to argue that the basic legal propositions are synthetic a priori, it becomes important to take note of Quine's criticisms. In what follows I shall not attempt to refute Quine's basic assumptions, but only attempt to show why his arguments are inconclusive. If his arguments are inconclusive and the notion of a synthetic a priori is a logically consistent notion then, for the purposes of this work, we can continue to employ it fruitfully.

The essence of Quine's criticism can be stated in the following way. Those who have believed in the existence of synthetic a priori propositions have taken them to be unrevisable presuppositions of a system of thoughts or actions, in the sense that the truth of such propositions cannot be given up without jeopardizing the whole scheme. On the basis of his empiricism, Quine is led to the view that all propositions are corrigible, and since this is the case, there cannot be any synthetic a priori proposition since they are asserted to be unrevisable. It will be important to note how Quine is led to such a view.

Quine elaborates Piere Duhem's claim that sentences cannot be tested in isolation but only as a part of a system of sentences. Sentences are related to each other.
10
In principle there are no sentences immune to experimental

refutation. The principle of empiricism, that all knowledge is justified in terms of experience, is now interpreted by Quine as saying that it is the whole system of our beliefs which has empirical significance and that every sentence within it shares this empirical significance. He tells us :

The totality of our so-called knowledge or beliefs, from the most casual matters of geography and history to the profoundest laws of atomic physics or even of pure mathematics and logic, is a man-made fabric which impinges on experience only along the edges. Or, to change the figure, total science is like a field of force whose boundary conditions are experience. A conflict with experience at the periphery occasions readjustments in the interior of the field. Truth values have to be redistributed over some of our statements. Re-evaluation of some statements entails re-evaluation of others, because of their logical interconnections—the logical laws being in turn simply certain further statements of the system, certain further elements of the field. Having re-evaluated one statement we must re-evaluate some others, whether they be statements logically connected with the first or whether they be the statements of logical connections themselves. But the total field is so undetermined by its boundary conditions, experience, that there is much latitude of choice as to what statements to re-evaluate in the light of any single contrary experience. No particular experiences are linked with any particular statements in the interior of the field, except indirectly through considerations of equilibrium affecting the field as a whole. 11

Thus, according to Quine, no sentence can be singled out as being unrevisable, since in the attempt to fit theory to observation any sentence may become a candidate for revision. Logic, mathematics and all other purported a priori knowledge, are parts of our systems of beliefs and hence, in principle, totally open to revision.

There are at least three basic problems which make it difficult to accept Quine's thesis that in principle all propositions are open to revision.

The first problem is that Quine's statement is self-stultifying. In asserting that

in principle no proposition is unrevisable, one has asserted at least one proposition that is unrevisable, namely the proposition in question, that no proposition is unrevisable. Such an assertion raises the traditional problem about propositions which are self-referentially false, such as the well known problems about the 'liar's paradox' and the 'barber's paradox'.¹² Many have argued that there are genuine solutions to the above and other similar paradoxes, but the issues can hardly be considered settled.

The second basic problem with Quine's argument is that he does not make it clear in what sense our system of beliefs is being 'transformed' when particular beliefs are changed. It seems arbitrary to assert that there can be a system or a field under transformation which has no invariant elements or groups. Such an assertion goes at least against the 'fixed point theorem' of mathematics which applies to all systems under continuous transformation, and which asserts that in all such systems there must be at least one invariant point with reference to which the transformation can take place.¹³ For our system of thoughts one could, at least, point to the principle of contradiction which will certainly remain invariant under all transformations. It is difficult to see how the principle of contradiction could ever be revised.

However, the most fundamental shortcoming of the Quinean thesis seems to be a third issue. Quine's assumption that all sentences are corrigible rests,

in the final analysis, on a theory of types and a certain notion about what constitutes testing a proposition. He assumes that all sentences within a system can be tested in the same way. But what warrants the thesis that all sentences are tested in the same way? Such a hypothesis could only be accepted if all sentences within the system were of the same type. The belief that a system of propositions such as physics or law is constituted of different types of propositions is not unreasonable. In fact it seems more plausible to believe that the discourse of physics or law is constituted of different types of sentences, some of which express observational data and need to be tested, some of which concern the method to be adopted in testing and accepting or refuting a proposition and some of which are about the method of organizing the tested sentences in correlated ways so as to form a coherent system of beliefs. To assume that all such propositions are corrigible because they all can be tested in experience and accepted or refuted on the basis of empirical observations, is simply to assert without justification that all the three types of propositions mentioned above are of the same type, namely of the first type. If it be granted that the above three types of propositions have different functions and status in the system, then by simply asserting the empiricist dogma that all knowledge is based on sense perception, one has not as yet shown that all propositions are corrigible. All that one has shown is that those propositions whose truth is based

on experience, are corrigible. This can easily be granted to Quine, but it still remains to be shown that the truth of every proposition is based on observation or sense experience. There are, as Kant and others have argued, propositions whose truth is not based on sense perception, but they are of the type which, when followed, make true experiences possible, as, for example, the proposition 'every event has a cause'. Thus, Quine's thesis is true if empiricism is true for all types of propositions, but if there are other types of propositions whose truth must be justified in ways other than by grounding them in sense experience, then his thesis is evidently very limited in scope.

One type of propositions, concerning which we can be certain that they are unrevisable are those propositions which make possible or provide the social conditions for the testing of the truth or falsity or the reasonableness of all propositions. These are the basic legal propositions which assert that all scientists, mathematicians, philosophers and everyone for that matter, must always be given the freedom to find out whether a proposition is corrigible or unrevisable and whether it constitutes knowledge. The basic legal propositions which provide for such freedom are evidently of a different type than those whose truth or falsity or reasonableness is to be tested. Of course, the basic legal propositions which provide the freedom of testing can themselves also be tested, but they will be of the type which will come out to be unrevisable

under all conditions of testing. The propositions that we have freedom to express ourselves is unrevisable because, to test its corrigibility, we would always need the freedom to express ourselves. As we shall see, there are many other such unrevisable legal propositions.

We see thus that Quine's arguments do not show that there are no synthetic a priori propositions, they only show that propositions whose truth is based on experience are corrigible. The truth of synthetic a priori proposition, as argued, is not based on experience, it is based on the application of reason to possible states of affairs and hence it requires a transcendental justification.

The notion of a transcendental argument will be explicated further in the next section, where it is applied to some actual legal propositions. Here, we are now confronted with the third category of epistemological distinctions, namely the necessary-contingent distinction, hence it becomes important to discuss this third category briefly if any light is to be thrown on the sense in which the basic legal propositions assert a necessity in the application of concepts.

3.b). The Necessary-Contingent Distinction.

To start with it is important to distinguish the notion of necessity from that of analyticity and apriority. Necessity is often contrasted with contingency and equated with analyticity or apriority. Tying up these notions in any way requires additional metaphysical assumptions.

In his De Interpretatione, Aristotle distinguishes between necessity and possibility and between absolute and relative necessity (necessity on assuming a hypothesis). For example, the conclusion of an argument may be necessary in relation to the premise or it may merely be possible in relation to it. But in a deductive argument, according to Aristotle, not only is the argument valid, it also proceeds from the premises which are true in themselves. For Aristotle, such absolute propositions which are true in themselves, are 'essentially true'. This notion is contrasted with what is possible, but not necessary in an absolute sense. Those which are possible but not necessary, are accidental or contingent. In Aristotle's view, absolutely necessary truths express insights into the essence of a thing or into the nature of its being. There are analogous senses of 'possible'. Insofar as one is concerned with a world in which things are more than their essences, one may say that some feature of the things are merely possible (contingent) since those particular features are not entailed by the essences of the things in question. A contingent proposition, for Aristotle, would hence be one whose truth is not determined simply by the essences of the things about which it is asserted.

The Aristotelian conception of the difference between necessity and contingency, thus, clearly presupposes a particular metaphysics, namely that the real nature of a thing is its essence. When in the seventeenth

and the eighteenth century, philosophers, such as Leibniz and David Hume moved the realm of necessary truths to the relation between ideas or concepts, the propositions opposed to the necessary truths became not those which are merely possible, but contingent truths, i.e., propositions which are not true in themselves. The rejection of the Aristotelian scheme, of essences eliminated absolutely necessary truths about the world. Only the contingent truths remained. Such truths could then be identified with propositions which describe facts. Similarly, since the theory about essences was replaced by a theory about concepts, the necessary relationship between concepts came to be identified with impossibility or absolute possibility. It must be remembered, however, that the essential-contingent distinction is equivalent to the necessary-possible distinction only if the latter terms are taken in their absolute sense. The rejection of essences allowed the opposition of necessary to the contingent simpliciter. The next step in characterizing the necessary relationship between concepts as analyticity and subsequently apriority, occurs in the works of Leibniz and Kant and becomes explicit in the works of the logical positivists. Such identifications assume that things do not have essences, or at least that we cannot know them. The logical consequence of eliminating essences is to reduce all our knowledge of the world to a knowledge of accidental properties. For the purposes here we need not examine in detail how necessity has been related to other notions and what

meanings these relationships have been given. The following table summarizes the main views. In this table the criterion is spelt out in the middle. If a proposition is in accordance with the criterion then it is characterized by the term on the left, if it is not then by the one on the right.

1.	Necessary.	Contradictory is impossible.	Contingent.
2.	Necessary.	Immune from overthrow.	Contingent.
3.	Necessary.	True in all possible worlds.	Contingent.
4.	Necessary.	Is self-evident.	Contingent.
5.	Necessary.	Always true of some objects. (<u>de re</u> necessity).	Contingent.
6.	Necessary.	Cannot be rationally rejected.	Contingent.
7.	Necessary.	Its truth must be assumed to make some experience actual.	Contingent.
8.	Necessary.	Its truth must be assumed to make other propositions true. (<u>de dicto</u> necessity).	Contingent.
9.	Necessary.	Is known with certainty.	Contingent.

The relevant senses of the notion of necessity with which we shall be concerned in this work are senses 5, 6, 7 and 8 only.

The necessity of propositions being true (logical necessity) and the necessity of things having essential properties (metaphysical necessity) are also expressed as de dicto and de re necessities respectively.¹⁴

Depending upon one's metaphysical assumptions, one may hold with Aristotle or Kripke and Putnam, that the synthetic a posteriori propositions, such as 'water is a complex arrangement of H_2O molecules' is de re, i.e., an essentially necessary proposition.¹⁵ Or one may hold with Kant that there are necessary synthetic a priori propositions. I shall argue that the basic legal propositions are essentially, i.e., de re, necessary propositions. The analytic a posteriori propositions of conventions could have been other than they are. We know this because, in the final analysis, the nature of such propositions depends upon how some people have defined them. Since they, or some other people, could have defined them differently, such analytic propositions are contingent. The basic legal propositions, however, as I shall attempt to show, are not contingent because they cannot be defined arbitrarily.

Those who have rejected the knowledge of essences have argued that a description of the actual world consists of contingent propositions. If, for the moment, we even grant that factual discourse is about accidental or contingent properties, it still does not affect the issues concerning legal discourse. All descriptive discourse is not factual discourse. As we have seen, normative discourse concerns the social realm and it too is descriptive. If the facts or the entities in the phenomenal realm do not have essences does it follow that the 'facts' and the entities of the social realm also do not have essences? To answer this in the affirmative

one would have to show that the social 'facts' and entities are of the same kind as the physical facts and entities. In the absence of any conclusive arguments, eliminating essences from the physical realm does not suffice to eliminate them from the social realm. If normative discourse is different from factual discourse then we may still know the essences of the entities referred to in the normative discourse. At least, the mentioned deviation from Aristotle, which makes all discourse about the factual realm contingent, does not by itself make the normative discourse contingent. I shall argue that the entities referred to in the normative discourse are very different from those of the factual discourse.

Before I proceed to provide arguments to show why basic legal propositions are necessary, it will be important and relevant at this point to make a minor deviation in the epistemological inquiry so as to check the veracity and the applicability of the conclusions reached so far. I intend to do this by applying the conclusions to some actual basic legal propositions as found in the legal codes. This concrete application will attempt to show how certain basic legal propositions are really synthetic a priori. It will also provide actual transcendental arguments, the nature of which has only been discussed in a theoretical manner so far. The following discussions are also intended to throw more light on the conclusions of this section.

III. ILLUSTRATION: THE PROPOSITIONAL FORM AND
JUSTIFICATION OF SOME BASIC LEGAL PROPOSITIONS.

The heuristic principles of legal discourse consist of basic and consequently derivative legal propositions. The surface grammar and organization of existing legal documents do not at once reveal their deep structure. However, all the necessary heuristic principles must be present in different ways in the legal discourse of every legal system. The clarity in the specification of the heuristic principles depends upon the development and sophistication of the legal system as a whole. As a prelude to a more detailed discussion in the next two sections and as a postscript to illustrate some points in the previous section, I shall presently examine three basic types of legal propositions which are in fact specifications of some of the heuristic principles. The first one concerns the law of citizenship, which is a specification of the heuristic principle concerning class membership in the legal system. The second discussion is about the freedom of expression; the laws with regard to this freedom are particular specifications of the heuristic principles concerning the systematic aims of the system. The third illustration is a discussion of the laws concerning amendments, these are specific instances of the heuristic principle concerning legitimate changes in the system.

a) Law of Citizenship:

The heuristic principle which defines class membership in a legal system usually distinguishes between citizens, immigrants and visitors. All such persons are members of the legal system in different ways and to different degrees. Membership is automatically granted to those born within the legal jurisdiction, or to those born to the citizens of the legal system. A series of further distinctions then qualifies the law so that it applies to special cases, such as political refugees, visitors, etc. For example, Part-II. Art. 5, of the Indian Constitution states: "At the commencement of the Constitution all who had domicile in India and : (a) who were born in India; or (b) either of whose parents were born in India; or (c) who had been resident of India for not less than 5 years — are to be considered as citizens of India. ..." The laws concerning citizenship in other nations are similar. This proposition from the Indian Constitution may be conceived as a particular instance of the more general form of the law of citizenship to which all other particular instances correspond. This may be formulated as:

All persons born in legal jurisdiction X shall be a member (citizen) of X. Some persons not born in X but domiciled in X shall be members of X under conditions a, b, c...; some persons not born in X and not domiciled

in X but born to member(s) of X shall be members of X under conditions a,b,c,...; some persons not born in X, not domiciled in X and not born to members of X, under conditions a,b,c,... .

Normally, the number of people who fall under "some" in the above proposition becomes progressively less as one goes down the list. On an average, the majority of people fall under the very first part of the proposition; and they also happen to be born to parents who are already members of X or are domiciled in X. The legal rule is framed keeping this fact in mind. Let us take the basic part of the proposition of class membership - all persons born in legal jurisdiction X shall be members of X - for consideration here. What is said about this proposition will apply to its other qualifying propositions too. What is the basic epistemological status of this proposition concerning class membership?

The notion of being born in a particular place or being born to a particular set of parents is evidently not contained in the concept of being a citizen. For, from the mere statement that 'P is a citizen of nation N', one cannot deduce about P that he was certainly born in N, or is of parents of N, or that he is domiciled in N. Additional information is required to derive any of these conclusions.

Also, the proposition 'P is born in N but is not a legal member of N', is not a self contradictory proposition. The basic proposition of class membership within a legal system is therefore synthetic. Is it a priori or a posteriori ? To answer this, one must ask on what basis is the proposition 'all persons born in legal jurisdiction X are members of X' justified ? Is there any fact which one can point to that will be a compelling reason to believe in the truth of the above proposition ? In other words, on the basis of experience, what empirical grounds can one offer for taking all those born within the legal jurisdiction to be citizens ? It seems to me that no factual grounds can be offered for justifying such a proposition. There is nothing special about the process of being born or the physiology of the person or the geography of the place that can be presented as grounds for accepting a necessary relationship between being born and being a citizen. The law of citizenship cannot be founded on any factual basis for the simple reason that the concept of citizenship is not a factual notion, it is a normative notion, that is, it belongs to the normative discourse. What the law of citizenship establishes is a necessary relationship between the normative notion of citizenship (i.e., of legal membership) and the factual notion of being born in the jurisdiction, or of being domiciled in it, etc. A relationship is established between a normative premise and a factual premise. Since this proposition

is necessary and since factual grounds cannot establish its necessity, it must be established a priori. That is, the basic proposition of the law of citizenship is synthetic a priori. A priori propositions are justified by transcendental arguments. The transcendental argument in this case may take the following form :-

For whatever purpose human beings form a legal community, its formation and continuation can only be actual if it is made possible. The law of citizenship makes possible a legal community which can uphold and continue the application of the laws. Since only a community of persons can form a legal system and since a legal system cannot exist without a community of persons, all persons born within the legal jurisdiction must unconditionally become members of the community. The law of citizenship is thus a necessary presupposition of the legal system, the one that makes it possible and actual. It creates the possibility for the existence of a legal system in terms of the members who will be governed by the law and who will formulate the law within the jurisdiction, thus defining and continuing the existence of the legal jurisdiction.

Justifying the basis on which a group of persons should form a community is indeed problematic. But, I think, it can be said with some certainty that any community that regulates its membership by principles which make it impossible for others to become a member of that community supports an eclecticism which may eventually even amount to racism. The Law of Citizenship can, thus, never be grounded in a method which makes the selection of new members to the community depend upon the mere opinion of some people in the community. A sure way to overcome the elements of arbitrariness and racism in the selection of new members to the community is to grant citizenship to every person born within the legal jurisdiction. A person who has been granted citizenship in this way has the option to either remain with the community or join some other at a latter stage. The choice must finally be of the person involved. To make this option available to the person it is necessary that, in the first place, citizenship be granted to him by the community in which he was born. To deny citizenship to a person who is born within a particular legal jurisdiction amounts to denying him the possibility of self-determination and consequently of freedom. The assertion of the Universal Declaration of Human Rights that every person has a right to belong to a legal jurisdiction, would, I think, be vacuous if the determination of citizenship is left to depend totally upon the views and the desires of certain people in the community. If the aim law is to maximize the possibility for human freedom and well-being, then jus sanguinis and jus soli cannot work in

ways which contradicts this possibility. The Japanese Law of Citizenship which does not automatically grant citizenship to all those born within its legal jurisdiction, is a case in point.

In defence of the Japanese Law of Citizenship one may argue that every culture has a right to maintain itself, hence it has a right to select which persons born within its jurisdiction will be its members. This argument is based on a false assumption. It is indeed true that every community has not only a right but also a certain duty to maintain its culture. But from this it does not follow that the culture in that community will be maintained only by those people who are born to parents belonging to that community. The maintenance of culture by a community occurs in complex ways which are not dependent upon which persons were allowed to become legal members of that community. Significant aspects of the American culture, for example, have been generated by people of African origin. Numerous Europeans, on the other hand, have not only adapted to the North American culture they have also been instrumental in its continuity and development. Similarly, one can also observe that many people of Asian origins are at the apex of North American and European cultures. It is also important to note in this context that native people within a community have often been instrumental in breaking down the indigenous culture rather than in promoting it. The maintenance and development of culture, therefore, cannot be done by legally delimiting the membership to the community. Since it is not necessary that a particular culture can be sustained only by

the native population of a community, from the fact that a community has a right to maintain its culture, it clearly does not follow that it has any right to select which persons born within the jurisdiction will be its members.

The Law of Citizenship has a universal aspect to it such that it must operate in the same way in all communities. Only then can it guaranty the possibility of a world community.

The jurisprudential question about how the Law of Citizenship actually operates in various legal systems and how they need to be developed requires a detailed empirical and conceptual investigation for each legal system. My aim here has only been to show what type of justification this law requires, in whatever legal system one may consider it.

Let us now turn to examine the basis of a different type of basic legal proposition.

b) Freedom of expression:

The basic heuristic principles which specify the systematic aims of the system are usually mentioned in the Preamble, they might, however, also come under the headings of Fundamental Rights, Basic law, Constitutional rights, etc. These specify the systematic aims or ideals that have to be actualized by the legal system. One such specification concerns the freedom that people have to express themselves. What is the propositional status of the proposition that asserts - 'everyone has a fundamental right to freedom of expression'?

Firstly, the notion of speaking is not a part of the notion of freedom and secondly, the negation of this proposition does not result in a self contradiction. This proposition is therefore not a definitional proposition about freedom or about speech, it is a synthetic proposition. What is asserted in the above proposition is some sort of necessary connection between freedom and being able to express oneself. This may be interpreted as either that one needs to be free to express oneself or that one becomes free in expressing oneself. In either case, the relationship between freedom and expression is in some way necessary. How is the necessary relationship between these two notions to be justified? It can not first of all be justified by any appeal to physical facts, for the physical facts reveal only causal relationships. The relationship between freedom

and expression that is being asserted here is not causal.

It is not being said that freedom is the necessary cause of expression, there are many people who are very free but who hardly express themselves. Neither is it being said that expression is the cause of freedom, there are many people who express themselves in such abusive ways that they lose their freedom rather than gain or sustain it. Biologically or physiologically there is nothing that shows that there is any sort of necessary relationship between freedom and expression.

The freedom of expression cannot be grounded in any sociological fact such as a convention of speaking freely or having a freedom to so speak. For, firstly, there have often been conventions to the contrary. This makes it necessary to justify the choice of any particular convention. Secondly, an appeal to a convention only draws our attention to the fact that some people accept a certain way of behaving. It does not by itself provide any grounds or reasons why the people accept that way of behaving, or why their way should be emulated by others. To justify that everyone has a right to freedom because there is some sort of necessary relationship between being free and expressing oneself, one would have to provide reasons that will show why this necessary relationship holds under all conditions and not just in some particular conventions. One would also have to show why these two notions

are related in a necessary way. Since the justification can not be based on facts or social facts, it must be sought elsewhere. Mere observation of facts and facts cannot provide the required justification, although such observations can certainly be helpful in understanding the actual application of the principles. A transcendental argument which human reason can provide for the synthetic a priori proposition concerning freedom of speech, may take the following form:

Law provides the conditions under which free communication between human beings can continue to exist. Law can continue to exist (be possible) only when free communication between human beings can take place. This is so because adjudication, mediation, arbitration and other legal processes require reasoning to take place between different human beings. Reasoning requires the freedom to consider all possibilities and actualities. Consideration of all possibilities and actualities requires communication, that is, speech and other modes of expression. Reasoning therefore requires freedom to communicate. Since legal process involves reasoning it necessarily requires freedom to communicate, that is, freedom of speech and expression in general. We see therefore that law is possible only when there is a freedom of expression, and freedom for expression can only continue to exist when people

live by law. The relationship between freedom and expression is thus conceptual, it is not dependent on any factual or social consideration. The relationship is necessary for the very possibility of a legal system.

The basic legal proposition in the above paragraph is the one asserting the freedom of expression. Once this has been established the derivative propositions follow. The derivative propositions are those which are either particular instances of the general term 'to express' or those which are instrumental in achieving this freedom. Thus, speaking is one way of expressing. Publishing, writing letters, using the media such as the radio or the television etc, are other ways of expressing oneself. Hence, the particular derivations, such as freedom of speech, freedom of the press, freedom of the medias, etc, follow from the general necessity of freedom to express. This basic legal proposition is synthetic a priori.

In fact, all basic heuristic legal propositions are synthetic a priori propositions. Being necessary for law, they make law possible. They are justified not by an appeal to any physical or social events but transcendently, that is, by showing that they are internally necessary conditions on the basis of which a community can create and sustain a legal system. Such synthetic a priori

propositions are not of the kind which are open to Quine's analysis of analytic-synthetic distinction, such that they may arbitrarily be analytic at one time and synthetic at another. If they were such propositions they would totally fail in their heuristic function.

I turn now to a discussion of one more type of proposition. These propositions are taken ad hoc and at random only so as to illustrate some of the basic points made in the last section. A systematic analysis of the heuristic principles of law will be carried out in Part- IV .

c) Laws of Amendment:

Heuristic principles which specify the way in which the system may be changed, if the systematic aims of law are not being achieved, appear in legal discourse most significantly as laws of amendment . Such laws mostly require a majority of the legal subjects to consent to the change before the laws can be amended. This consent is sometimes taken to be given if the majority of the representatives of the legal subjects, instead of the subjects themselves , consent to the change. In this interpretation often two thirds of the members of the parliament have to give their consent. For example, Article 146 of the Constitution of the Soviet Union states : "Amendments to the

Constitution of USSR shall be adopted by a majority of not less than two thirds of the votes in each of the Chambers of the Supreme Soviet of USSR." Other constitutions have similar laws requiring a majority vote. Under another interpretation and under different conditions the consent of the majority of the legal subjects is sought directly. In such cases a referendum is held. Fundamental amendments may also be possible by allowing the Supreme Court to bring about the changes. Simpler changes in the law, it must be remembered, are often brought about by the lower courts and individual judges in interpreting or extending the law to cover new cases. What is common to all of the above types of changes, whether secondary or fundamental, is that they are all brought about in a legal way, that is, with the use of reason and free consent. Force, fiat or decree are not involved. The distinguishing characteristic of the legal way is that it is always justiciable. It is grounded in the principles of procedural justice. The basic legal proposition which concerns changes in the law can thus be formulated as : Changes in the law must always be brought about in a legal way, that is, in a way which does not contradict the principles of procedural justice. Or conversely, only changes brought about in a legal way qualify to be law. In a subsequent chapter, where I discuss the issue of legal teleology, I shall discuss in detail the problems concerning legal amendment and the basic principles of procedural justice in which the notion of a legal way is grounded. Here it is necessary to ask : what

is the propositional status of the above proposition concerning legal amendment ?

The notion of amendment is a general notion. Many things and processes are amended. Hence the notion of amendment does not by itself contain the notion of a legal way of changing things. They can be changed in many other ways, such as by force. Moreover, the negation of the proposition does not produce a contradiction. Hence, the proposition is synthetic.

In what manner is the proposition to be justified ? Certainly, bringing changes in the law in a particular manner is not a matter of arbitrary choice as is the case in games. On the other hand, there are no factual constraints which make it necessary to follow only a particular method. Nor is it the mere desire to maintain a decorum or convention that justifies the legal way of amendment, for decorum and conventions can be radically different from each other. Ultimately, one has to justify the legal way of amending things as being reasonable. That is, one has to show that human reason wants this particular method of amendment even if there are no factual or conventional constraints. A transcendental argument to justify the legal way of bringing about amendments may take the following form :-

It is the business of law to create and maintain a legal community in which individuals can continue to act morally and achieve their moral ends. The procedures

which will allow the continuation of moral activities by the individuals are, firstly, those which will not put an individual out of existence; secondly, those which will not physically restrict his activities; and thirdly those which will not make it impossible for him to exercise his free will. Positively, what they will allow is reasoning, the freedom to obtain the knowledge of all possibilities and actualities, cooperation, and help from others. That is, they will allow only a legal way of acting, a way that does not involve force, violence or arbitrary decree. Changes brought about in a legal way are thus necessary for the very existence and continuation of a legal order. They make a legal system possible.

Basically, the above argument asserts a necessary relationship between means and ends, that is, between procedural justice and substantive justice. I shall discuss this relationship while examining the teleology of law. Here it suffices to note the propositional status of the basic proposition concerning amendments.

Having noted the status of at least three basic types of legal propositions, it will be important now to continue the further inquiry about the nature of basic legal propositions, especially the nature of the necessity asserted by the synthetic a priori legal propositions.

IV. THE STATUS OF LEGAL ENTITES.

Basic synthetic a priori propositions of law assert a necessary relationship between the legal-subject and the legal object. For example, as we saw in the last section, a proposition may assert a necessary relation between being born in a particular place and being a citizen, another may assert a necessary relation between freedom and expression, and still another between change and amendment. To explicate the nature of the necessity that is expressed in such propositions we have to know the type of entites that are referred to in these propositions. Different types of entities are related differently. For example, the necessary relation that obtains between thunder and lightning is causal, whereas that obtaining between a triangle and a three-sided figure is logical. Propositions asserting relationships between different types of entities express different necessities.

Traditionally, since John Locke, entities have been classified into two types, the natural kinds and the nominal kinds. According to Locke, with each meaningful term there is associated some abstract idea that determines what things have a right to be designated by that term. He called this abstract idea the 'nominal' essence of the thing for which the term stands. These nominal essences are of our own making whereas real essences exist in things themselves. The things having real essences are natural kind objects.

According to Locke, it is by the nominal essences that we distinguish things into sorts, since we can never come to know the real essence of natural things.¹⁶ A recent version of the traditional theory is that of C.I. Lewis.¹⁷ He argues that the description given in connection with natural kinds defines the term, in the sense that anything satisfying the description falls in the extension of the term. Those terms which do not satisfy this condition are about nominal kinds.

Is the natural kind - nominal kind distinction adequate to encompass the characteristics of legal entities? It does not seem to be so. The inadequacy of this distinction becomes obvious if we turn our attention to the normative discourse. The natural kind-nominal kind distinction, it must be noted, arose mainly in the context of an analysis concerning discourse about facts. Recent realists, such as Kripke, Hilary Putnam and others, who too make use of this distinction, are also mainly involved with analysing propositions about facts and not about feats.

Entities, such as courts, parliaments, citizens, policemen, corporations, criminals, etc., are neither 'natural' like the natural kind objects, such as trees and stones, nor are they like the nominal kind entities, such as the four dimensional cubes. Parliaments, courts, etc., exist objectively, however, they are not tangible like the natural kind entities. What sort of entities are they then?

All these separate kinds of entities, it

will have been noticed , belong to normative discourse. They are not corporeal objects, but nonetheless, they are intelligible as entities. They are intelligible to us as entities in terms of the norms that describe what it means to be one of these entities and what they are supposed to do. However , the main factor that distinguishes entities belonging to normative discourse is that such entities are not created by individual human beings (in their heads), as imaginary or abstract entities are . They are created socially, that is , by the cooperation of a number of people willing to abide by certain norms. We have, thus , at least three distinctions which distinguish the above mentioned types of entities from natural kind and nominal kind entities :

- a) they are not tangible or corporeal objects but they are intelligible as entities;
- b) such entities do not appear by themselves nor are they created by individual human beings, they are created by prolonged cooperative social actions;
- c) they are created on the basis of norms.

Since the entities defined by the above criteria neither describe the natural kinds nor the nominal kinds, it would be best to give them a distinct name. The term normative kinds would , I think, describe them best. Legal entities, then, belong to a separate and unique class of entities. One must neither try to reduce them to physical entities nor to abstract nominal entities. Legal entities are normative

kinds.

Since normative kinds are created by us, we are in a totally different situation in relation to them than we are in relation to entities not created by us. The basic difference is this : since normative kinds are created by us, we do not only know them by description, but also what it means to be such entities, that is we know them both descriptively and essentially. For example, we not only know what 'lawyer' or 'judge' means through description, we also know what it means to be a lawyer or a judge. Similarly, we do not only know what a 'faculty' means by description, we also know what it means to be or to constitute a faculty. The same cannot be said of entities that we do not create, such as stones or trees. Although we know what 'stone' or 'tree' means through description or through sense perception, we do not know what it means to be a stone or a tree.

If the essence of the entity described by a norm is known to us, then, clearly, within the normative discourse the intension determines the extension. That is, the intension is necessarily related to the extension in the normative discourse, in the sense that if we know what is in the intension we also know what falls in the extension.

Since the intension necessarily determines the extension and since we know the extension essentially, it follows that in normative discourse, from the epistemic (i.e., de dicto) necessity between concepts, one can

also legitimately infer the essential (i.e., metaphysical or de re) necessity between the entities in the extension.

For example, if there is a necessary epistemological relationship between being free to express oneself and being able to achieve the legal ends, then the necessary metaphysical relationship follows, it implies that only in a society in which the agents are able to express themselves freely will the legal ends be achieved, also, only an individual who is free to express himself will be able to achieve the legal ends.

Thus, as it turns out, although the necessary relationship in a basic legal proposition is between the concepts, this conceptual necessity does not remain de dicto (as may be the case in factual discourse). The conceptual necessity becomes metaphysical since the essences of the normative kinds are known to us.

Basic legal propositions, then, are synthetic a priori, essentially or metaphysically, necessary propositions. Since some synthetic a priori propositions also concern factual discourse, it becomes important to clearly distinguish those applying to normative discourse, and consequently to law, from the former type.

V. THE NATURE OF BASIC LEGAL PROPOSITIONS.

If our relation to normative kinds is fundamentally different from that to natural and nominal kinds, then the propositions which assert necessary relationships between normative kinds must also be radically different from those asserting necessary relationships between natural or nominal kinds. This difference becomes most significant when we consider synthetic a priori propositions. Synthetic a priori propositions which bind normative kinds into necessary relationships must be distinguished from those which bind natural or nominal kinds into such relationships.

Acting in accordance with norms creates normatively possible states of affairs. Entities of normative kinds belong to such possible states of affairs. Normatively possible states of affairs (such as political, legal, linguistic, commercial, etc.) must be distinguished from the factually possible states of affairs (such as ecological, biological, physical and other similar states of affairs).

Synthetic a priori propositions, such as 'every event has a cause', provide heuristic principles to organize the facts of the factually possible states of affairs. Or, as Kant argued, such propositions inform our understanding and make the world intelligible. The synthetic a priori propositions applying to the normatively possible states of affairs, however, function in a very different way.

Such propositions not only inform and organize our knowledge about the world, they actually organize and give a structure to the normatively possible states of affairs. That is, they literally 'in-form', i.e., give a form, to some states of affairs. The fact that they function in this unique way follows directly from the nature of the necessity involved in such propositions. It was noted earlier that synthetic a priori propositions which apply to the normative kinds assert not only an epistemological necessity but also a metaphysical necessity. Since such propositions express a metaphysical necessity, when it comes to informing or organizing the normatively possible states of affairs, they not only inform and organize our knowledge about them but also inform and organize the world essentially, that is, actually.

Since synthetic a priori propositions, which apply to the normatively possible states of affairs, function in a different way than propositions such as 'every event has a cause', it would be best to distinguish between these two types of propositions by defining the former type as normatively synthetic a priori propositions, and the latter type as factually synthetic a priori propositions.

The view presented here differs from that of Kant insofar as it makes a distinction between different types of synthetic a priori propositions, but it is similar to his view in that Kant too, believed that the basic propositions of law and morality are synthetic a priori. The

difference, however, lies in the fact that since, according to the arguments here, the synthetic a priori propositions of reason give metaphysical form to the social order, they not only become regulative rules of reason but also constitutive principles of the social realm. Kant believed that synthetic a priori propositions belonging to the moral and legal discourse only regulate our knowledge of the moral realm.

The substantive issues about how synthetic a priori propositions function differently in the social realm, can only be considered in detail after the notion of a 'realm' has been clarified to some extent. In the first section of the next Part, I intend to explore, in some detail, the notion of the realm in which law exists. Here it is important to draw the relevant conclusions that emerge from the final decision about the nature of the basic legal propositions, namely, the point that basic legal propositions are normatively synthetic a priori de re necessary propositions.

Three very significant consequences follow from such a characterization of the nature of basic legal propositions.

The first important consequence is that such propositions cannot be justified to be true propositions of law by any appeal to experience. That is, their truth conditions cannot be dependent on the human will alone. Such propositions are not true because they are commands of any person



or persons. Neither are they true because many or all persons have given their consent to make them true. The human will is involved only instrumentally with the basic legal propositions. We will and consent that they be applied because they are true propositions of law. The truth of the propositions does not follow from our activities. We are motivated to carry out the activities proposed by the basic legal propositions, because of their a priori truths.

The second important conclusion is that basic legal propositions are not propositions of natural law, in the sense that they are not propositions about nature; nor do they derive their justification from states of affairs in nature. Discussions about nature seem to be discussions about the factually possible states of affairs, but normatively possible states of affairs, as we have seen, do not involve a discourse of this type. Propositions about nature, in the strictest sense, would be synthetic a posteriori propositions; and propositions which organize our knowledge about nature would be synthetic a priori propositions; but basic legal propositions are like neither of these. This brings me to the third important conclusion.

If the truth of basic legal propositions is not dependent upon the human will, could one say, as it has been said sometimes, that it is dependent upon human reason? There are some very important qualifications which need to be kept in mind if one wishes to characterize them in this

way. Firstly, they are not just truths of reason but truths of reason in application to the normatively possible states of affairs. This makes them very different from the propositions of logic or mathematics which, too, are claimed to be truths of reason. Basic logical or mathematical propositions, which are sometimes rightly called the laws of thought, are often claimed to be eternally true, whether the human mind discovers them or not. Basic legal propositions, however, are not eternally true in this sense. Since they have to be used to create and sustain normatively possible states of affairs, they only become true (that is, come to exist) when there actually exists a social realm created and sustained on the basis of such propositions. In contrast to the laws of thought the basic legal propositions are the laws of practice, that is, laws by which the human will or inclination is determined through reason in practice. Laws of thought, insofar as thought applies to all states of affairs, naturally concern both the factually and the normatively possible states of affairs. But laws of practice concern only the normatively possible states of affairs.

The view that basic legal propositions are propositions of natural law, in the sense that they are about factually possible states of affairs, can have immoral implications. When it comes to natural laws such as the law of gravity, we do not have the choice of following or disobeying them, but we always have the choice of either following

or not following the laws of the normatively possible states of affairs. By not following them we will, of course, not be participating in or creating that normatively possible state of affairs, but then the ultimate choice is ours. The traditional natural law propositions, I think, intend to say: 'this is how things are'. If basic legal propositions were of this sort then, firstly, there would be no moral necessity to follow them, we would be doing it without choice. However, the second danger is more significant, such a belief could lead to use of force by some people, against others, to make them behave as they 'naturally' should. That is, instead of leading to freedom, such a belief could lead to compulsion on the grounds that human nature or the world naturally ordains people to behave in a particular way. Basic legal propositions, as we shall see, are not the type of propositions which allow the use of such compulsion or force.

Since basic legal propositions are not about nature, it is not appropriate to call them propositions of natural law. One may, if one wishes, use the term 'natural' in a metaphorical sense, in the sense of 'internal'. In such a sense basic legal propositions are natural to law, they are internally true to it.

On the basis of the conclusions about the nature of basic legal propositions, I shall now proceed to analyse the substantive claims of some important legal theories. This discussion will show why Part-IV of this work is necessary.

Review and Conclusions - III.

THE BASIC SHORTCOMINGS OF THE TRADITIONAL LEGAL THEORIES.

The different conditions that a legal theory is required to satisfy were noted at the end of Part II. In Part III the status and the functions of different types of propositions were discussed. Let us now proceed to see how different legal theories have attempted to satisfy these requirements and what sorts of propositions they have appealed to to fulfil their task.

Typically, philosophers have responded in three different ways. In the first response they have supposed that the requirements which make a normative system into a legal system could be met by the commands of some authority. In their legal theories they have accordingly attempted to spell out the conditions in which the commands of the authority could determine the validity and the existence of law. In the second response theorists have asserted that the specific conditions are met by a rule or some rules of recognition which simply give the desired limits for the validity and the existence of law. While, in the third response they have argued that the requirements are met by a basic norm which constrains the system but is not, itself, deriveable from a more basic rule. Let us examine each of these types of responses in detail.

The first type of response is to be found in the legal theory of John Austin. In it, legal systems are characterized in terms of second order rules such as the rules of individuation, classification and correlation, which derive their ultimate legitimacy from a higher order basic legal proposition which asserts that the lower order legal propositions are nothing but the decree of the sovereign authority. Such an authority expresses its will, signifies its desire and backs up both¹ by a threat sufficiently effective to compel obedience.

Austin's notion of the way the people are obliged to obey the law has been analysed by Hart in terms of the way people are compelled to do different actions. A man with a gun, for example, can compel people to do something. Law too obliges people to perform some actions. But, as Hart has pointed out, there is an important difference in the way the people are obliged. In the case of the gunman situation, the people are commanded to do something by use of force, but in the latter case, it is their general obligation to obey the law that compels them to perform some actions. Thus Austin, according to Hart, confuses having a duty to obey the law with being obliged to obey it in the sense of being forced to obey it.² But, is Hart's analysis itself successful in showing what sort of obligation people have to obey the law if it is not a fear of threat or force that will be used

against them ? To answer this question we must first take a closer look at Austin's error.

At the deeper level, Austin's analysis confuses the obligation to obey the law with the obligation to accept the rules which legitimize the law making agency. Austin, of course, realizes that there must be rules which determine who is and who is not a member of the sovereign (the law making body), but he does not give any account of why we should accept the rules which say that the law making agency is to be accepted or obeyed. He tells us that such a question is simply beyond the province of law. If, for the moment, we even grant that the answer to such a question is beyond the province of law, it certainly does not follow that it is beyond the province of legal theory. In his The Province of Jurisprudence Determined Austin was not presenting primary legal propositions but a legal theory. If a legal theory can not tell us why we must accept the rules which assert that a particular agency is to be accepted as a law making agency, then what theory can ?

Rules which tell us why the law making agency must be accepted must evidently be conceptually prior to the law making agency itself. They can not, therefore, themselves be commands of the sovereign. The proposition that 'law is the command of the sovereign' is an analytic proposition, or at least intended to be so. For law, in this case, is defined to be the command of the sovereign ; they are

one and the same thing; that is, law is the command of the sovereign and the command of the sovereign is law. However, although this proposition is analytic, Austin did not evidently intend it to be a priori. He did not, for example, hold that this proposition would seem to be a self-evident proposition or that it would be justified by the way we use language. He would, I think, assert that this is how in fact law works, that one has to actually observe how the decree of the sovereign becomes law to verify the truth of the proposition. In short, the acceptance of this proposition to be a true proposition about law would require some sort of a posteriori justification.

In the absence of a justification which tells us why the law making agency must be accepted, Austin's insistence simply that the sovereign's commands comprise the only law and that these laws must be obeyed,³ eventually amounts to propounding a dogmatic theory, which, in its most essential aspects, is indistinguishable from a justification of the use of force by some people on others. Basic analytic a posteriori propositions, as we have seen, are not the basic propositions of law. They are propositions on the basis of which conventions, fashions, styles, games, etc., are created and sustained. An argument which allows for the use of force in a system founded on an analytic a posteriori proposition, is then nothing but a justification of a

convention in which some people can arbitrarily use force on others, that is, it is a justification for 'martial law', dictatorship and other similar coercive systems.

The best exponent of the second type of response to the requirements of a legal theory has been H.L.A.Hart. Hart presents a theory in terms of primary rules which oblige people to obey and secondary rules which confer power and legitimize the law making agency. The secondary rules, which are rules of recognition, change and adjudication are, according to Hart, "matters of fact".⁴

We have already seen that in so far as the property of having primary and secondary rules is concerned, it does not characterize legal systems, but normative systems in general. Such characterizations therefore, do not distinguish law from other normative systems. It is their property of being a 'matter of fact' that needs to be examined here.

By making the basic rules of recognition simply 'matters of fact', Hart does not permit us to distinguish between the reasons why people should obey the law and the reasons why they actually obey it. In the strict sense, as we have seen, matters of fact are expressed as synthetic a posteriori propositions. The question of obeying or not obeying the dictates expressed in such propositions just does not arise, we have no choice in the matter. The proposition that 'a man's heart beats about 72 times a minute

on the average, under non-active conditions, is a synthetic a posteriori matter of fact proposition. This proposition is a general rule which a doctor uses to check the health of a person. Can it be said that when my heart beats 72 times I am obeying this rule? In checking my pulse is the doctor checking whether or not I am being obedient in following a rule? Evidently not, the question of obeying or following a rule which is a matter of fact does not arise, activities just happen in accordance with such rules. Thus, when Hart says that the basic rules of recognition are matters of fact, he obviously can not mean that they are synthetic a posteriori propositions. In England, Hart tells us, the basic rule of recognition is "What the Queen in Parliament enacts is law."⁵ What sort of "matter of fact" does this proposition describe? Clearly, it does not describe a fact of nature or of the physical world. As suggested before, perhaps Hart means it describes something true in a society, and is hence, in some derivative sense, a social 'fact'; but even in this sense it is hard to see how it can be a matter of 'fact', for there is no fact which actually corresponds to this proposition. The proposition, thus, does not describe any 'matter of fact' in either a literal or derivative sense. It is a proposition asserting a norm, that is, it is a norm applying to the normatively possible state of affairs. One must ask then, why does Hart insist on calling it a 'matter of fact'? The obvious result

of making the basic rule of recognition a matter of fact is to suggest that it is a synthetic a posteriori proposition, and like synthetic a posteriori factual propositions (such as the law of gravity) it must be accepted that this is how the world is, there is nothing we can do to change it. It is also to imply that the question of moral appraisal does not apply to the basic legal supposition, since, matters of facts, as we know, are not open to such criticisms.

However, Hart does not believe that law is not open to moral appraisal, although his characterization of the basic rule of recognition implies this. Since he allows them to be morally appraised we must take the basic rules of recognition that he mentions to be analytic a posteriori, and not a synthetic a posteriori matter of fact. Analytic a posteriori propositions, as noted, are propositions defined by human beings to be so, for particular practical purposes. They are not like the factual propositions that we discover. If Hart accepts the analytic a posteriori proposition, 'What the Queen in Parliament enacts is law' to be the basic rule of recognition, how is it any different from Austin's claim that the basic rule of recognition is 'What the sovereign commands is law'? The Queen in Parliament is after all supposed to be the sovereign. The central difference, as it seems to emerge from his analysis, is this: unlike Austin, Hart does not believe that everyone in England has to believe in the truth of the proposition

that the law in England is what the Queen in Parliament enacts. Only some of them have to believe in the truth of this proposition, namely, the officials involved in applying the law. The rule on the basis of which the validity of law is recognized, Hart tells us, concerns only the officials, only they have to take an 'internal' point of view with regard to such rules. To take an 'internal' point of view is to accept the proposition to be binding on one's behaviour. It is not to take an 'external', i.e., an outsider's, point of view from which one only describes what the rules are but is not oneself bound by them. According to Hart, one who takes an internal point of view with regard to the proposition 'what the Queen in Parliament enacts is law' would have to take this proposition to be a true proposition for English law.⁶

If only the officials have a criterion for recognizing what rules are to count as laws, then what about the general public? How do they recognize what the valid laws of the land are? If the question 'what are to count as first order legal propositions?' is answered by 'whatever the officials recognize them to be on the basis of some rule of recognition which they themselves have made up or accepted', then this amounts to firstly asserting that law is whatever the officials declare it to be, and secondly that the general public has no way of

independently recognizing what is to count as the law of the land. If the general public has no independent way of recognizing what is to count as the valid laws in the jurisdiction, does it follow that the officials can declare any proposition to be a law ?

Hart is not unaware of this difficulty and he does suggest that the officials who are authorized to make such rules must give them a content which does not stray too far from the "core sense" of the natural law thesis. He thinks that there is a "necessary-contingent" relationship between the "core sense" of natural law propositions and the validity of the positively declared laws.⁷ But if, in fact, the ultimate rule of recognition is simply a 'matter of fact' (whether we interpret it as a synthetic aposteriori proposition or an analytic aposteriori proposition), how can we explain this "contingent-necessary" relationship in a way which obliges the officials concerned to accept any restriction on the content of their rules ? If there is no restriction on what can become or be accepted as a rule of recognition then, at the ultimate level, there is no restriction on what can be declared to be law. The difference between a legal system and a system by fiat, thus, eventually, becomes impossible to sustain within such a conceptual scheme, although legal practice at levels other than the basic one could be shown to be different from despotic practice. In a despotic or a dictatorial political

system, the dictator dictates what is to be the rule of recognition and he enforces it on the people. If there is no way of distinguishing between the rule of recognition that the dictator enforces and the rule of recognition on the basis of which a proposition is recognized as legitimate law, then there can be no way of distinguishing between an arbitrary political system and a social system in which the people live by the rules of law. Hart's analysis of the system of rules, thus, eventually amounts to the assertion that we can not distinguish between arbitrary rules of recognition set by dictators and the rules of recognition involved in legal systems. Such a thesis, as I shall argue in the next Part of this work, is fundamentally mistaken. We can not only distinguish between arbitrary political systems and legal systems, but also between different types of rules of recognition, even at the ultimate level. Not every arbitrary rule can be classified as a rule of recognition of law.

We see, thus, that both Austin and Hart finally fail to distinguish the concept of law, firstly from the concept of normative systems in general and secondly from the concept of those normative systems which sanction the use of force and compulsion. That is, amongst the normative systems there are many systems which use force to compel people to behave in a particular way; Hart's analysis fails

to show how one can distinguish between these different normative systems.

Since Hart's analysis is unable to distinguish between different types of normative systems which employ force, it is finally unable to tell us in what sense of 'obliged' are we obliged to follow the law. Eventually, the reason why we have to do our legal 'duty' turns out to be : to avoid being forced by someone to do so. But such a compulsion to do one's 'duty' is also the one that obtains in a dictatorial system, or under martial law. Hart's analysis, therefore, is unable to bring out how the compulsion involved in a legal system is any different from the compulsion in a gunman situation. If both are finally based on a threat of punishment and physical and mental pain, then they both finally compel us in the same way. Moreover, since Hart allows the totalitarian system set up by a dictator to be just as 'legal' as any other legal system, he even legitimizes the gunman's method, for a dictator is nothing but a gunman at large. He operates on the same principles and in the same way as a gunman does, the only difference is that while a gunman may compel an individual, the dictator uses a group of people to compel many.

In all its essential aspects then, Hart's theory is not very different from that of Austin's. The aspects that he presents as different are in fact those aspects which belong to the concept of an open normative system, not

to the idea of law. Hart, in fact, presents a variation on the Austinian theme, in which not all citizens but only the employees of the legal system have a duty to take the dictates of the sovereign as binding. But why must the employees take such an internal attitude towards the dictates of the sovereign? Hart does not explain this. Perhaps, as Golding has pointed out, the officials have a mechanical habit of obedience.⁸

The fact that Hart has not moved away from the basic Austinian assumptions becomes evident if one considers even the notions in terms of which he poses the basic questions of legal theory. The question about whether or not there is any necessity to follow the rules set up by the legal authorities, is misleadingly asked as - is there an obligation to obey the law? If law is not a command where does the question of obeying it or not obeying it arise? The requirement of obedience is necessary only for commands and orders. The language game of 'obedience', as the Wittgensteinians would explain it, is intelligible only in a form of life in which orders and commands are issued. In following a legal rule one is only acting in accordance with the principles proposed by a legitimate group of people. To assert that in doing so one is obeying these people an additional theory is being tacitly asserted.

In conclusion then, the central source of confusion in Austin's legal theory and in Hart's version

of his theory, lies in the fact that they base their systems on analytical a posteriori propositions which can be defined in any way depending on the will of different persons. Basic legal propositions, it has been argued, are necessary propositions, they can not be defined in any arbitrary way. The necessity is not grounded in the fact that some one wants them to be so, but in the very possibility of an application of certain necessary propositions to society. A discussion of their substantive nature must, however, wait until we have examined the following alternative responses to the requirements of a legal theory.

The third type of response — a system of rules based on rules — is found in Hans Kelsen's work. According to Kelsen, a legal system is comprised of a hierarchy of norms. The validity of one norm is determined by reference to another norm, one higher in the system. At the base of the system is the "grundnorm", the basic norm which validates and legitimizes all other norms and law-making agencies.

Now we have already seen that the property of having a hierarchy of norms is not unique to law, many social organizations function in the same way. The validation of the basic first order rules in every normatively possible state of affairs is done on the basis of more basic rules of recognition, adjudication, and other

power conferring rules. The characterization that in a normative system the lower rules are validated by the higher or more basic rule is not enough to distinguish law; more needs to be said to specify that hierarchy of norms which can be called uniquely legal. Has Kelsen been able to distinguish law from other such structurally similar normative systems ?

Kelsen declares that "all law is positive law" by which he means that all laws are created and annulled by the act of will, but he recognizes that the basic or the "grundnorm" can scarcely be a positive law in the same sense; it is unique ⁹. What sort of uniqueness is this ?

It has often been claimed that in characterizing the uniqueness of the basic proposition of law Kelsen is presenting a Kantian view, Kelsen himself ¹⁰ claims this. Whether or not this is really the case requires a closer look at his arguments. Kelsen tells us:

Insofar as only the presupposition of the basic norm makes it possible to interpret the subjective meaning of the constitution-creating act (and of the acts established according to the constitution) as their objective meaning, that is, as objectively valid legal norms, the basic norm as represented by the science of law may be characterized as the transcendental-logical condition of this interpretation, if it is permissible to use by analogy a concept of Kant's epistemology. Kant asks: "How is it possible to interpret without a metaphysical hypothesis, the facts perceived by our senses, in the laws of nature formulated by natural science?" In the same way, the Pure Theory of Law asks: "How is it possible to interpret without recourse to meta-legal authorities, like God or nature, the subjective meaning of certain facts as a system of objectively valid legal norms describable in rules of law?" The epistemological answer of the Pure Theory of Law is: "By presupposing the basic norm that one ought to behave as the constitution prescribes, that

is, one ought to behave in accordance with the subjective meaning of the constitution-creating act of will—according to the prescriptions of the authority creating the constitution.” 11

The question posed is indeed Kantian and I think Kelsen is certainly right in seeking to establish the possibility of a legal science without recourse to meta-legal authorities, but is the answer provided Kantian ? Is this what Kant meant by a 'transcendental presupposition' ? Kelsen tells us that the basic Grundnorm of law is a 'transcendental-logical presupposition' , but in what sense of 'transcendental' is the proposition " one ought to behave as the constitution prescribes " , or, as Kelsen reformulates it, " one ought to behave according to the prescriptions of the authority creating the constitution " , a transcendental proposition ? Clearly if the basic norm is a 'constitution-creating act of will' then it can not be a transcendental presupposition, at least not in the Kantian sense, for propositions whose truth or existence depends upon acts of will are not transcendental propositions for Kant. Only propositions given a priori by reason , whose truth requires a transcendental justification, qualify to be transcendental presuppositions. 12 Hence, either Kelsen's argument represents a misunderstanding of the Kantian philosophy, or else he is using the terms

'transcendental' and 'presuppositions' in a sense not explained in the context. Perhaps Kelsen is led to characterize the basic proposition that he presents, as 'transcendental' by the mere fact that it makes something possible. If so, the sense in which different propositions make different things possible must be clearly distinguished. Many propositions make an event or a possible state of affairs physically, i.e., materially possible, but this property alone does not make the proposition a transcendental presupposition; the proposition could be a definitional proposition which defines the convention to be followed, or it could be a permission or a decree which makes possible some acts or events. The proposition presented by Kelsen above is a proposition which allows for the material possibility of a normative system. To illustrate this point it will be helpful to consider other similar propositions. The proposition that 'one ought to behave according to the prescriptions of the authority creating the constitution of Canadian Philosophical Association', makes this Association possible; similarly, 'one ought to behave according to the constitution of the Rotary Club', makes the Club possible; or, 'one ought to behave according to the prescriptions of the authority creating the rules (constitution) of hockey', makes the game of hockey possible. If the proposition presented by Kelsen is a 'transcendental'

presupposition of law, then so is the last one a 'transcendental' presupposition of hockey! It is evidently not such a presupposition for the basic reason that we do not derive the truths of the proposition which creates hockey or the Rotary Club from reason, but from empirical evidence.

It must be noted that I am not asserting that the transcendental presuppositions of legal science do not exist or must not be sought. In fact a significant portion of the inquiry in this enterprise is going to be devoted to precisely that task. What I am attempting to show is that the proposition asserted by Kelsen to be the basic proposition of law, neither belongs to law alone nor is it transcendental. We shall see in the next part what transcendental presuppositions are and which qualify to be the ones belonging to law.

These illustrations bring out two points, firstly that Kelsen is only talking about material possibility of state of affairs and secondly the grundnorm he presents is not a basic norm of law but a basic norm which must be presupposed for the material possibility of any normatively possible state of affairs which is constituted by norms. Moreover, he is not presenting a view based on Kantian epistemology, as is often alleged.

Kelsen thus fails to show us what is unique about his basic norm. If it is an act of will, as he

suggests, then it is not clear how it is any different from other positive laws. If it is not an act of will, it is equally unclear in what sense it is transcendental and in what way it applies to law alone.

As we have seen, propositions of law neither have the form 'X ought to be done', nor do they prescribe anything, they only describe possible states of affairs. Hence, even on grammatical grounds Kelsen's grundnorm cannot be a proposition of law. One may perhaps give it a descriptive form, such as 'behaviour in accordance with the prescriptions of the authority creating the constitution is necessary', but this does not solve the problem, for it is true for all normatively constituted systems, whether they be clubs, games, associations or unions.

Kelsen's account of the grundnorm seems to be too sketchy for being able to decide what epistemological status it should be accorded. Besides the misleading assertion that it is a transcendental presupposition, Kelsen does not elaborate on the nature of the proposition or the nature of the relationship between the concepts obtaining in it. However, for our purposes, it is enough to clearly see what the proposition is not, although it is not clear what it is. The grundnorm is not a synthetic a priori proposition, for its justification is neither based on reason nor is it transcendental.

Moreover, it applies to many normative systems and hence it is not a basic legal proposition.

Since Kelsen's grundnorm applies to many normative systems and since some of these normative systems permit the use of force, we are once again confronted with the problem faced earlier with Hart's account of the basic propositions. How do we distinguish between those grundnorms which are at the base of normative systems which employ force arbitrarily and those which use it in a legitimate way? The distinction between arbitrary normative systems in which force is employed by the mere will of a few people and those normative systems in which force or compulsion is used justly, cannot be made in terms of the criteria that Kelsen provides. His analysis, like that of Hart's, is finally unable to distinguish between a system by law and a system by fiat, force or decree. The criteria and definitions that they provide apply to many systems, including the one set up by a despotic, dictatorial or a totalitarian government. The central shortcoming in both their analyses is that having identified some necessary conditions for a normative system they arbitrarily terminate their inquiry, having assumed that the legal system has been distinguished from amongst various normative systems. Just, as in Hart's case, one has to ask what distinguishes a rule of recognition for law from other sorts of rule of recognition, in Kelsen's case, when he says the grundnorm is 'one ought to

behave according to the prescription of the authority creating the constitution', one must ask, when or under what conditions do the prescriptions of the authority creating a constitution provide a system of rules for a legal way of ordering and running the society ? Or more simply, under what conditions does the authority create a constitution for law ? What this question demands, on the one hand, is a criterion for distinguishing between a constitution set up by a dictator and a constitution acceptable as a legal code set up according to the rules of law. On the other hand, the question demands a criterion or criteria for distinguishing between a legal constitution and a non-legal constitution (such as those of clubs). In short the question demands one to specify the unique legal grundnorm and the hierarchy of norms belonging to law. Although Kelsen talks in Kantian terms, the fact that he is eventually giving us another variation of the Austinian command theory, becomes very evident in crucial passages as this one :

The function of this basic norm is to found the objective validity of a positive legal order, that is, to interpret the *subjective* meaning of the acts of human beings by which the norms of an effective coercive order are created, as their *objective* meaning. The foundation of the validity of a positive norm, that is, one established by an act of will and prescribing a certain behavior, is the result of a syllogistic procedure. In this syllogism, the major premise is the assertion about a norm regarded as objectively valid, according to which one ought to obey the commands of a certain person, that is, one

ought to behave according to the subjective meaning of these com-
mands; the minor premise is the assertion of the fact that this per-
son has commanded to behave in a certain way; and the conclusion
 is the assertion of the validity of the norm: that one ought to be-
 have in this particular way. Thus the norm whose validity is stated
 in the major premise legitimizes the subjective meaning of the
command, whose existence is asserted in the minor premise, as the
command's objective meaning.

13

The above remarks make it clear that Kelsen believes that the 'transcendental presupposi-
 tion' is after all nothing but a command that one person
 or one group issues to others. But this is exactly
 what happens in a dictatorial system.

The fact that Kelsen is actually presenting a type of command theory of law becomes most
 evident from his treatment of the notion of delict. This
 notion has a central place in Kelsen's legal theory. Delict
 according to Kelsen, is not the negation but the condition
 of the law. What this implies is that law does not come into
 existence until someone first commits a delict.

Any theory about delict must pay attention to two closely related questions about this notion.
 The question about the conditions under which a delict can
exist and the question about the conditions under which we
 can recognize that a delict has occurred. The two conditions
 are not necessarily the same. Slavery, as a delict, existed
 long before it was recognized to be so. Similarly, the wrongs
 done by assuming an inferior status for women have existed for a

long time, but only now they are coming to be publicly recognized. If the conditions under which a delict exists are different from the conditions under which we recognize them, then Kelsen's statement that delict is the condition for law is grossly misleading. The confusion between these two conditions can be said to permeate legal positivism in general. Kelsen's assertion is misleading because it confuses the conditions for the existence of law with the conditions under which we recognize that a law has been broken. It is true that we recognize that a law has been broken when a delict is committed, but this presupposes that the law existed prior to the delict, only then can it be recognized to have been broken. Delict can, thus, never be the condition for the existence of the law, it can only be the condition for our recognition of the fact that someone has broken the existing law. What is the existing law on a particular matter is mostly known, but sometimes the judges and the lawyers have to investigate and find out what the law is.

The fact that delict is not the condition for the existence of law becomes easier to grasp if we turn our attention to the sphere of the Private and the Civil laws. These areas of law, of course, have their own counter-parts to the notion of the delict, such as the notion of a breach of contract, etc. However, what distinguishes them is the fact that as an institution they have developed in a different manner than Public laws. The laws concerning marriage, for

example, have existed because people have wanted to get their marriage socially recognized, and not because someone has committed a delict. Similarly, the laws concerning contracts have come into existence because people have been wanting to exchange goods and labour in a orderly and predictable manner. The breach of contract comes to be recognized as a wrong only since the laws of contract are already in operation. Even in the area of Public Laws one may think of Administrative Laws or the laws concerning elections. These laws, evidently do not exist because someone has done some wrong, but on the contrary because someone or many people want to act rightly. The laws facilitate an order and ease.

The practical consequence of Kelsen's notion that the delict is the condition for the existence of law is that whatever the police punishes must be taken as legally wrong. Coercion through police power is supposed to be used only when a delict has occurred, if one makes delict to be condition for law then one makes the use of police power to be the condition for the existence of law. On such a view illegal actions or even general misbehaviour of the police can never be questioned nor can they be punished. To hold such a view is to turn a blind eye to the atrocities perpetuated by the police in many societies. The history of the misuse of the police power in the countries subjugated to foreign powers as well as in independent nations should be enough to deter anybody from agreeing with Kelsen that law exists only because coercion can be used against delict.

It is natural to ask at this stage that if delict is not accepted as the condition due to which law comes into existence, in what factors must one seek the grounds for its existence? At the outset, it can be simply said that the general willingness of human beings to act rationally and purposively is the basic condition for the existence of law. This general remark, of course, needs to be greatly exemplified and justified. A discussion of this issue will be the main aim of this work in Part-IV. The existence of law is a complex state of affairs, many conditions need to be fulfilled.

Although Kelsen does not seem to have succeeded in characterizing a legal system in any of its essential aspects, his insistence that natural law theories can be misleading and confusing since they interpret 'nature' in so many different ways is not out of place.¹⁴ They seem to me to be essentially correct.

In its approach a natural law theory is similar to Kelsen's response; it too attempts to establish the validity of the first order legislated norms in some basic rules about rules. Such legislated norms are supposed to be derivable from the basic legal rules and they also have to be in conformity to these basic rules. However, as Kelsen has noted, the basic rules of such natural law theories are very different from those of his theory because

these natural law theories seek to establish the validity of law by an appeal to an extra-legal authority, such as God. The problem with such theories, however, is not only the one that Kelsen has noted, namely that the existence of God is debateable. There is a deeper problem which becomes explicit when one considers the issue from a secular perspective. Even if one grants that law is based on the authority of God and that God does exist, the question arises - what sort of God? People in different religions have understood the concept of God in very different ways and they still live their lives in accordance with these percepts in significantly different ways. Hence, any legal theory which bases itself on a particular notion of God and which does not allow or tolerate different interpretations of the notion of God as found in different religions, from the very beginning faces the possibility of being inapplicable to a society in which differences in the religious views are accepted. Since law is universal in application, it cannot be based on concepts or practices which are intelligible or available to only one particular religious community. A basic legal proposition asserts that there must be freedom of worship and religious beliefs, or at least, that there must be freedom to discover the nature of God. If this legal claim is to be sustained one cannot start by first making it necessary that a certain idea of God be accepted. Law must provide the conditions under which each person is free to discover the meaning of the concept of God.

It cannot itself make these ultimate decisions in advance for all men . A normative system which does make these ultimate decisions for an individual would be a religious system of norms and not a legal system.

Consequently, the basic problem with theistic natural law theories is the description that they give of the ultimate being and of man's relation to that being. A legal system must allow everyone the ultimate freedom to seek out the relationship that may obtain between man and the ultimate being, whatever that may turn out to be. Law cannot be founded on a set of beliefs which dictates only one particular description of God or his relationship to man, whether that set of beliefs is provided by a philosopher or a prophet.

By insisting that a legal system cannot be based on a set of beliefs which, directly or by implication, limits inquiries into the ultimate nature and purpose of man and the world , I do not intend to imply that a legal theory is not finally grounded in some such beliefs. My insistence is only that such basic and ultimate beliefs cannot be the limiting kind. That is, they cannot be the kind of beliefs that tell one that all inquiries into the ultimate nature and purposes of man, except the one dictated by the system, are wrong or false or undesirable.

We see, thus, that whereas legal positivism fails to provide us with criteria in terms of which a

legal system can be distinguished from an arbitrary political system, natural law theories fail to provide us with criteria in terms of which a legal system can be distinguished from exclusive religious systems. What we need is a legal theory which can distinguish a legal system from both these types of normative systems. The distinctions between the various systems that I have outlined here are, of course, only preliminary ones. The task of distinguishing the legal system from political, religious and all other related systems, forms the major theme of the enterprise to follow in the next Part.

However, before I proceed to this task, a close scrutiny of the essential aspects of another theory will be relevant here, especially because it is sometimes assumed that this theory provides a middle ground between legal positivism and natural law theories. Such a middle position is sometimes taken to be presented by Ronald Dworkin's arguments.

Dworkin has not provided us with a systematic or detailed theory of law, but from his criticisms of the legal theories of Hart and others and from his discussions about the notion of rights, one may, I think, legitimately make the following conclusions.

The essence of Dworkin's theory is that, in its most general features, law is ultimately controlled by a set of principles which one may find

entrenched in the jurisdictional community. Such principles are not arbitrary in the way that the positivists think that law is, but; according to Dworkin, neither are they principles of nature of the type suggested by the natural law theories.

If it be granted that Dworkin is essentially right in claiming that law is eventually controlled by some basic principles entrenched in the community and that such principles need not necessarily be the ones legislated by the authorities, the next question that naturally arises is - what is the status of such principles ? Dworkin, evidently, does not suggest that these principles are a priori propositions. He seems to tell us that it is simply a matter of fact that these principles are entrenched in the community, the community just holds them to be true and applicable to the relevant states of affairs. ¹⁵

In presenting such a view about some basic legal principles, does Dworkin's position amount to a critique of legal positivism ? If positivism claimed that law consisted of only legislated rules, Dworkin would no doubt be right in pointing out that the elements of law are far more complex than positivism seems to assume, but, as John Finch has rightly pointed out,

it is doubtful if any positivist, and especially Hart ,
ever held such a thesis.¹⁶

The central distinguishing feature of a positivist thesis is not its theory about the elements of law. Positivists would, perhaps, gladly grant Dworkin that law consists of more than rules. Its distinguishing feature is its assumption that the basic legal propositions are of a kind whose validity depends merely upon the will of the people who define them, that is, they are analytic a posteriori propositions. The question of validity arises, whatever the components of law are taken to be. On what grounds can legal principles, policies and rules — the elements which Dworkin entertains — be justified? —

In the final analysis the answer given by Dworkin is not very different from the one given by the positivists. Hart makes the rules of recognition a matter of fact entrenched in the practices of the community, Dworkin makes the principles and policies matters of fact entrenched in the practices of the community. We have already seen what serious problems, ~~the~~ theories which assert basic legal propositions to be 'matters of fact', are faced with. Such theories firstly confuse norms with facts, secondly they confuse basic legal propositions with propositions of other sorts of normative systems and thirdly, by asserting that any arbitrary normative system which uses force can be a 'legal'

system, they legitimize violence. On the basis of the criteria that Dworkin provides for a 'legal' system, one cannot distinguish a system by fiat, force or decree from a legal system; nor can one distinguish a religious system from a legal system, for all such systems are based on principles entrenched in a community.

The basic inquiry concerning the grounds on which these entrenched principles and policies can be justified is, as in Hart's theory about the rules of recognition, prematurely and arbitrarily terminated by Dworkin. His theory only makes a statement about the fact that the people of the community will certain states of affairs and behaviour in to existence; it does not tell us anything about why the community wills the way it does. In the absence of this fundamental explanation, Dworkin's theory, like Hart's, fails to enlighten us about the behaviour of the community and hence about law.

The most natural analogue to Dworkin's claim that law consists of principles used by the people of the community, seems to be claims about ordinary language as asserted by the followers of Wittgenstein.¹⁷ If the legal principles are just a set of rules practiced by the community does it follow that legal discourse is a "language game", as some Wittgensteinians have thought religious discourse is? In so far as the "game" of language

is a normative system, this analogy is worth pursuing. But, as we have seen, the common grounds between law and language obtains only insofar as both are open cybernetical normative systems. What distinguishes such systems are their basic principles and the fundamental teleology involved in the dynamics of each system. To carry the analogy any further, it would have to be shown that the basic principles of language, such as the rules of recognition, change, etc., are the same as that of law, or that the purpose in maintaining a linguistic system is the same as that in law. The ordinary language theorists, who believe that the basic principles of language are nothing but the principles entrenched in the practices of a community, at least could use one argument in their favour. They could argue that there is a certain inevitability to some basic principles of ordinary language because such principles determine the limits of meaningful discourse within the community. To question such principles is to pass into the realm of meaningless. However, it is very difficult to see what inevitability is attached to the principles of which Dworkin speaks. Given his conceptual scheme and criteria, it appears impossible to argue for a particular social "game" as against say, the "game" of following the dictator, or against participating in a social "game" in which the basic rule entrenched in the community is that "might is right".

A comparison with Wittgenstein's ordinary language theory brings out the fact that Dworkin's theory

faces similar limitations as those which one usually finds in pursuing the viability and the intelligibility of notions of "language games" and of "forms of life". Such notions are helpful in distinguishing the spheres of discourse. But when it comes to justifying the practices found in these spheres, or in justifying the criteria used to set limits to these discourses, or in ranking the priorities of choices in them, these notions are of little help.¹⁸

As it turns out then, Dworkin's theory is faced with exactly the same shortcomings and problems as other positivist legal theories. The basic reason for this is that in all its essential aspects his theory, after all, is not very different from the general positivistic thought.

I turn now to an examination of another and the final version of legal positivism, a version that has been very influential in practice and hence calls for some serious attention. This is the theory of Karl Marx. Marx's theory involves a number of complicated issues, hence I will limit myself to an analysis of only the most crucial tenets of his theory which are relevant to the issues here.

The Marxist theory of law is an extreme version of legal positivism. Marx, like Austin, Hart and other positivists, believed that law is nothing but the dictates of certain people. Perhaps Marx took Austin, his immediate predecessor, very seriously and assumed his view to be presenting the truth. Just as it can be said of Jeremy Bentham that his analysis of the nature of law occurred almost obiter dicta in

the course of his total literary output in many related fields, the same may be said of legal theory in relation to the writings of Marx. Marx did not set out to examine the nature of law, or the conditions for the possibility or the necessity of a legal system. His view on law followed as a consequence of his general assumptions about the conditions of economic exploitation.

Marx asserts a particular version of legal positivism. The grounds for the peculiarities of this version can be seen to lie inherent in the Austinian or the Hartian account of law.

Unlike Kelsen, Hart thinks that law cannot have just any content. It must have a "minimum" content which has a "core of good sense" as found in the natural law doctrines. Hart, however, dissociates himself from Thomas Aquinas by saying that this minimum (moral) content is dependent upon the prior assumption that survival in "proximity of the other" is one of the aims which generates the necessity to have law. He tells us that due the "contingent" conditions, such as that men are vulnerable, limited in good will, intellectually and physically unequal and possess limited resources; it becomes "necessary" to have law.¹⁹ What he fails to notice is that these very inequalities and limitations can make it possible for the advantaged to interpret the "core of good sense" in such a way that they gain the most from it. The more resourceful also have a greater say in interpreting the "minimal content". It would not be wrong to state that it is precisely such

resourceful and less vulnerable people who come to be the 'officials' in England and elsewhere. The judges and the parliamentarians come, mostly, from the advantaged class of the society. If law is what they make it to be and if Hart is right in asserting that there is no external criterion for evaluating what law ought to be, or for limiting what the officials ought to do, then Marx is clearly right in asserting that law is nothing but the expression of the bourgeoisie.

Austin alleges that law is what the sovereign recognizes and dictates, Hart makes it to be what the officials recognize and dictate. Marx agrees with them. He only goes on to tell us that such officials ought not to be dictating the laws. The Marxist view on law thus stands or falls with Hart's or Austin's view; and Hart and Austin provide the grounds for the Marxist claims.

Insofar as Marxism accepts positivism, it shares its central shortcoming, namely, the inability to provide a criterion to distinguish between arbitrary rules of the dictator and laws. However, unlike the Austanian or Hartian legal positivism, the Marxist theory presents a deeper and a more serious kind of positivism because it, at least, faces the problems directly. It accepts, firstly that there is a direct relationship between the moral beliefs of the officials and the law, and secondly, it does not ignore the central question about the

position and the social status of the officials within the legal system. It attempts to give an account of both these issues in terms of the economic relations amongst the people.

However, although the Marxist critique attempts to present a useful analysis of the social position of the officials involved, when it comes to solving the central problem facing legal positivism - namely, the ability to provide the criteria by which one can distinguish between a system by fiat or force and a just system by the laws of the community as a whole, the Marxist theory does not fare any better. In fact, by taking a Hartian type of theory to be a true description of what constitutes law and by overtly identifying the arbitrary rules dictated by the dictator or the bourgeoisie with law, the Marxist theory makes it extremely problematic and difficult for itself to characterize the rules dictated in a communist society by the community as a whole. Since Marx identifies the laws with the ideology of the bourgeoisie, the absence of the latter entails the absence of the laws. But this creates the further problem of explaining the existence of rules in the communist society. Pashukanis,²⁰ Vyshinsky,²¹ and Lenin,²² amongst others, have attempted to solve the problem of the status of law in a communist society and the reason for its persistence. These further problems about the status and persistence of law in a communist society only arise if we accept the basic Marxist thesis that law is what is dictated by the bourgeoisie or the dictator.

If we do not accept such a legal positivism then the problems that arise on the cessation of the ideology of the bourgeoisie do not concern problems about the existence or the persistence of law. Since I find the basic Marxist belief, that law is whatever the bourgeoisie dictates, to be questionable and unwarranted, it is this issue that I shall discuss here. I shall not concern myself with problems such as those discussed by Pashukanis, Vyshinsky, Lenin and others, which arise only after one accepts the basic Marxist contention about what constitutes law. Notwithstanding the individual differences amongst these thinkers, the basic tenets which are common to all their views and which concern the issue at stake here, are, I think, clearly summarized in the following paragraph in the Capital :

It is furthermore clear that here as always it is in the interest of the ruling section of society to sanction the existing order as law and to legally establish its limits given through usage and tradition. Apart from all else, this, by the way, comes about of itself as soon as the constant reproduction of the basis of the existing order and its fundamental relations assumes a regulated and orderly form in the course of time. And such regulation and order are themselves indispensable elements of any mode of production, if it is to assume social stability and independence from mere chance and arbitrariness. These are precisely the form of its social stability and therefore its relative freedom from mere arbitrariness and mere chance. Under backward conditions of the production process as well as the corresponding social relations, it achieves this form by mere repetition of their very reproduction. If this has continued on for some time, it entrenches itself as custom and tradition and is finally sanctioned as explicit law. 23

Law, as understood by Marx and Engels and Marxists in general, does not get its legitimacy from some a priori principles, nor is it oriented to the idea of justice. Law is essentially a part of the ideological superstructure which arises above the material reality of the control of the means of production. Law, according to Marxism, is used mainly as a means of dominance and an instrument of the exploiters who use it in the interest of their class. Since the Marxist identify law with the power of the bourgeois, the question about which affects the cessation of which is interpreted both ways, law withers if the bourgeois goes, and vice versa. Accordingly, we find no significant place for law in the Communist Manifesto, except in terms of what is to wither away.

The Marxist view of law, thus, essentially amounts to the following contentions :

- i) the concept of law is totally exhausted by or reducible to class ideology;
- ii) the concept of law does not have an independent status, it is a part of the general superstructure of class ideology of which the concept of a political state is also a part; hence,
- iii) the general grounds or conditions for the existence and the withering away of the state are also the grounds and conditions for the existence and the withering away of law;
- iv) law is only the expression of the will of some human beings; in a deeper sense then, there is no concept of law, there is only a concept of class ideology.

Thus, for arguing that there is a concept of law one has to show the falsity of the above contentions. One has to show that law has a status independent of arbitrary class ideology and that the conditions for the existence of law are different from those for a political state.

Since Marx identifies the basis for law with that of the political state, the conditions for the legitimacy of the political state also become the conditions for the legitimacy of law. If the two conditions are identical then on what grounds can one justify the type of state which, according to Marx, needs to be first brought about - namely, the dictatorship of the proletariat? Evidently, one cannot justify such a government by saying that it is in accordance with certain rules of law, nor could one say that it is justified because Marx or some other Marxist tell us that it is, for that would amount to basing the political state on the arbitrary fiat of some or of one. The problem here, as Kelsen and others have noted, is one of self-stultification or contradiction.²⁴ By not providing a criterion for a non-ideology, the Marxist account is open to the charge of being another ideology.

Marx was evidently aware that his own doctrine of ideology endangered his social theory. It is probably for the purpose of defending his theory against the objection that it is an ideology, in the derogatory sense, that in his Communist Manifesto he asserts that at a certain

stage of class struggle "the bourgeoisie itself supplies the proletariat weapons for fighting the bourgeoisie, that a portion of the bourgeoisie goes over to the proletariat and, in particular a portion of the bourgeoisie ideologists, who have raised themselves to the level of comprehending theoretically the historical movement as a whole." ²⁵

Such an explanation, if true, provides an insight into the reason why the bourgeoisie (including Marx himself) comes up with a theory, but it still does not explain why one particular set of ideas must be accepted by the proletariat from amongst the various alternatives that the bourgeoisie may come up with at a particular time or the different views that the same bourgeoisie may present at the same time. In the absence of the criteria which can distinguish non-ideology from ideology (in the derogatory sense) the insistence that one must accept Marx's view becomes a matter of fiat or decree in the final analysis.

The very possibility of accepting or rejecting the Marxist theory, or any set of ideas for that matter, demands that there be some ideas on the basis of which particular philosophies of action can be accepted or rejected. There are indeed such ideas, to which even Marx appeals. These are the ideas of equality, justice, freedom, etc. The basis of our understanding of such ideas must be independent of the Marxist theory, for it is only when we think that the Marxist theory can lead to a greater equality, justice, etc., that we

accept his theory. If these notions are to be defined by his theory then there would be no grounds for arguing why one must accept his theory, or why some people accepted it in the first place. In the next part of the work I shall attempt to show how the notions of equality, freedom and other basic legal notions do not derive their legitimacy from any social or economic theory.

Even if we grant that many rules legislated by the bourgeoisie are to exploit the proletariat, it does not follow that every rule that the bourgeoisie legislates is law. It only follows that the bourgeoisie are exploiting others on the basis of some rules which they claim to be laws and they use force to demand obedience. To my understanding Marx has successfully shown that a great many rules dictated by the legislators, in fact, create the conditions for the exploitation of many by a few. But such an economic analysis makes it all the more necessary to distinguish between laws which do not exploit and arbitrary rules which do. In characterizing all laws as exploitative rules the Marxist theory not only cuts away the grounds for the rules it itself prescribes, in the last analysis, it is also unable to provide a distinction between a just social system (on the basis of laws) and an arbitrary social system on the basis of rules expressed, commanded or dictated by someone.

The idea of law, as I shall attempt to show,

cannot be rejected, for it provides the very conditions for the rejection and acceptance of ideas and theories. What we have to reject are the rules which the exploiters pass off as laws. To be able to do so it is evidently required that we clearly understand what are laws (which the people accept) and what are mere rules which the bourgeoisie (deceptively) imposes as laws. It is necessary, hence, to proceed to this task now. The next part of the work will examine the substantive requirements on fulfilment of which a normative system becomes a juristic normative system and legislates laws.

PART - IV

THE JURISTIC REQUIREMENTS OF A NORMATIVE SYSTEM

I. LAW AS A JURISTIC NORMATIVE SYSTEM.

The juristic requirements are those necessary and sufficient conditions on fulfilment of which a normative system can be a legal system.

To explicate the juristic requirements one must, I think, approach the question systematically by asking four basic questions:

i) What conditions make the legal system possible ?

The possibility in question here is not just material possibility. It is a basic formal or conceptual possibility.

What we want to know is this: given that there is a social order or a human world, what is so peculiar and specific to its nature that a legal system is at all possible ? Why is a legal system basically made possible by human beings ? Could the social order or the world not do without one ? This is the sense of the 'possible' that Kant called transcendental possibility. The question, in other words, is, how and why is the legal system transcendently possible ?

ii) What conditions make the legal system actual ?

The answer to the first question will only show why a legal system is possible, but everything that is possible is not necessarily actual. Entities which are logically impossible cannot, of course, be actual, in the sense of being tangible and useable, for example - square circles. But we cannot say this about entities which are logically possible.

That is, by merely thinking of a notion which is logically possible we cannot conclude that it can be actual, even if we can imagine it very vividly. The conditions required to make an entity actual are different from those conditions which are required to make it merely possible. Consider, for example, what requirements would have to be fulfilled to bring a logically possible entity such as the unicorn into actual existence; perhaps we would have to find some way of breeding horses with one horned cows ! However, whether or not we succeeded in this, in attempting to bring a unicorn into existence we would have learnt the important lesson that the conditions under which something is actual are not the same as those under which it is merely possible. The conditions which make a possible entity or states of affairs actual, are, what Kant called, the metaphysical conditions. The second important and systematic question hence, is : what are the metaphysical conditions on fulfilment of which a possible legal system becomes actual ?

iii) What conditions maintain the continuity of a legal system ?

Having found out what requirements make a legal system possible and actual, the next natural question is : what will maintain it in actuality ? When a system remains in existence it becomes dynamic or continuous. The conditions which spell out the direction or the way the continuity is maintained, tell us about the teleology that is involved in the continuity of the

system. The third important question can hence also be asked as : what are the teleological requirements of law ?

iv) What conditions make the legal system efficacious ?

An actual and dynamic legal system must be practically organized and operated in such a way that it becomes a viable system. Certain conditions are necessary for the possibility of efficacious legislation. Hence , the fourth important question can also be asked as : what are the legislative requirements of a legal system ?

The task in this Part of the work is organized in accordance with the four basic question mentioned above. The first section inquires into the possibility, i.e, the transcendental requirements of law. The second section examines the actuality conditions, i.e, the metaphysical requirements of law. The third section investigates the conditions for maintaining a continuity in the existence of law, i.e, it investigates the teleological requirements. The fourth section analyses the basic practical conditions which make a legal system work; i.e, it analyses the legislative requirements. The issues and the problems involved in each of these different types of requirements will be further explicated in their respective sections.

SECTION - I

THE TRANSCENDENTAL REQUIREMENTS OF LAW

I.

THE TRANSCENDENTAL REQUIREMENTS OF LAW

The transcendental requirements are those requirements on fulfilment of which something or some system becomes possible.¹ In the earlier parts of this work it was argued that the basic legal principles are necessary synthetic a priori normative propositions which must be followed if a legal system is to be created and maintained. But, from this, it does not follow that a legal system is itself necessary. The basic legal propositions will be absolutely necessary in all normatively possible states of affairs if the creation and the maintenance of a legal system is itself a necessary choice that must be made when it is possible to choose between various normative systems. In other words, it is necessary to show not only that the basic legal propositions are necessary for a legal system but also that a legal system is necessary in the social order. Otherwise, in the final analysis, the basic legal propositions remain only relatively necessary to the system by law and not absolutely necessary in the social realm. In this section I shall attempt to show that the legal system is itself absolutely necessary. If the legal system is necessary then it must be transcendently possible. That is, its transcendental possibility would have been shown if its absolute necessity has been established. I am not, of course, assuming that whatever is necessary must be possible, in this section I intend to show that law is necessary and possible.

II. THE IDEAL OF THE SYSTEMATIC TOTALITY.

If a legal theory is unable to explain why the legal system as a whole (in its totality) exists, the theory and our understanding of law remains unsatisfactory in a very fundamental way. The theory fails to enlighten us about the most basic reasons for which a legal system is brought into existence. It fails, in other words, to tell us about the basic ideals which the legal enterprise, in its totality, is attempting to achieve. The ideals of the systematic totality are presently referred to as the 'spirit' of law; this 'spirit' is distinguished from the letter of law. But what precisely is this 'spirit' ? Unless we can clearly and consistently characterize the 'spirit' of law how can we tell whether the letter of law is in accordance with the 'spirit' of law ? Or, what relationship holds between the 'spirit' and the letter ? The problem is not that we are using a medieval or an ancient term to refer to the ideals of the systematic totality of law, but that we do not know what this term exactly connotes even in modern times . To be able to know whether the letter of the law is appropriately related to the 'spirit' of law, it becomes extremely important to understand what the ideals of the systematic totality of law are.

An explanation ,which seeks to explicate the systematic totality, would consist of showing

why there is any legal system at all rather than there being no legal systems in the world. The principle of sufficient reason does not limit itself to a demand for the explanation of particular juristic propositions, it demands that the totality of the legal order itself be explained. The question why there is any law at all rather than no law, is indeed a particular case of the general Leibnizian question why is there something rather than nothing?

An analysis which seeks to understand the basic transcendental grounds for the existence of the legal system is certainly faced with many difficulties. But in so far as this task is the most important aspect of a legal theory, one can ignore it only at the expense of either creating a foundational structure, which can lend itself to dubious interpretations, or a superficial system of thoughts which may conceal rather than reveal its actual intents.

As far as I know, no recent theorist has attempted to show the uniqueness of the legal order among other social orders, or to justify it in its totality. Perhaps Fuller's 'eunomics' would have amounted to such an attempt if he had carried it to its logical conclusions.² Since recent legal theorists have not addressed themselves to this most basic and primary issue which confronts the legal enterprise, it becomes necessary to return to earlier philosophers, such as Leibniz and Kant who have dealt with these issues.

My analysis takes its roots in Leibniz's philosophy, mainly in his metaphysical views. A consideration of his views is necessary because many of Kant's responses, which I am going to consider in detail, are directly or indirectly (through Christian Wolff) related to Leibniz's views. In fact, as will become evident through the course of this part of the work, just as Kant's epistemology can be understood as a response to David Hume's questions, many of Kant's moral and legal views can be best understood as a response to and as a development of some basic Leibnizian views. Kant, it would seem, did not always find it important to indicate the historical roots of his thoughts.³ This is not to say that Leibniz's own views are totally original. As is known, they are a development upon amongst others, the views of the Schoolmen, of St. Augustine and even of Plotinus.⁴ However, it is necessary to take Leibniz seriously because there are many elements crucial to a development of the idea of law which are to be found in his philosophy but not in the philosophy of legal theorists before or after him. Leibniz's and Kant's views, as I shall show, complement each other in some important ways. I do not find myself in agreement with some of Leibniz's and Kant's major tenets, however, I do find some which are extremely valuable and which need to be further explored in the manner that follows.

III. FACTUALLY POSSIBLE AND NORMATIVELY POSSIBLE WORLDS.

The legal system is a part of the social world, it is not a system in nature. Since it belongs to the social world, unless we have a clear understanding about the notion of a social world and what distinguishes such a world from the physical world, it will not be possible to comprehend the role that the legal system plays in the social world. If we are to understand the 'spirit' of law—the ideals of its systematic totality - it will be necessary to understand the larger framework within which it is situated and the purpose that it serves, or is intended to serve, within this framework. The larger framework within which the legal system is situated is evidently the social world, which consists of not only the legal system but also cultural, religious, political, educational, recreational and other systems.

The distinction between the social world and the physical world that I am making here, is not a new distinction, it is as old as the human thought. The Greeks distinguished between the "physis" and the "nomos". The former being the physical realm and the latter the realm in which man's law, culture, etc are to be found. In the Indian tradition the distinction has been made between "Samsār" and "Prākṛiti", where the former is the realm within which man enacts his deeds and the latter is the physical realm. The legal system belongs to the "Samsār" and not to the "Prākṛiti".

The social world, as noted, consists of various systems such as the cultural, political, religious and educational systems. What is common to all these systems is that they are created and sustained on the basis of norms, hence it is best to give these systems a collective name by identifying a feature common to them all. I shall hereafter refer to them as the normatively possible systems belonging to the normatively possible world. The normatively possible world is to be distinguished from the factually possible world. This distinction is the same as the one made in the earlier parts of this work in terms of normatively possible states of affairs and factually possible states of affairs. The subsequent reference to this distinction in terms of 'worlds' is only for the sake of brevity, nothing more is implied. The two different kind of worlds are not like two different planets but they are two totally different sorts of orders. The qualitative differences between them is, of course, what this section intends to explore.

Leibniz distinguished between the physically possible and the morally possible. Morality is after all a set of norms. Besides, many descriptive propositions are norms and not factual propositions. Hence, it would be more appropriate to distinguish between the physically (factually) possible and the normatively possible, rather than between only physical and moral

possibilities. Normatively possible is a wider concept, it would include within itself the morally possible.

The normatively possible worlds created by human beings consist of various artifacts and normative systems, such as associations, committees, clubs, fashions, conventions, etc. There are morally good organizations, such as some religious organizations and morally bad ones such as the Mafia or the Black Market. The legal order is one social organization amongst numerous other organizations. Is such an organization just one convention amongst others? Is it like a fashion which may be in vogue for some time and cease to interest people later? A theory which attempts to provide the basic reason for the existence of the legal order must not only be able to distinguish it from other social orders, such as particular conventions, it must also specify its relationship to the whole of the normatively possible world, so that the legal order is uniquely located in such a world. Since the legal order is one possible system in the normatively possible world the characterization of its relationship to the rest of the world requires a deeper inquiry into the reasons for the existence of all possible worlds.

Leibniz raised two basic questions-- why is there something rather than nothing? -- and -- why are things as they are and not otherwise? He answered the first question by saying that God wills or desires there to

be something rather than nothing, it is God's nature to desire. He answers the second question by saying that God being perfectly wise creates the most perfect possible world. His wisdom behind the act, exemplified in the reason for the act, explains the fact that it is this world rather than another world which was created.⁵ God's choice of this world thus comes to serve as a substantive ground for the principle of sufficient reason since it explains why things are as they are and not otherwise.⁶ The world, according to Leibniz, is not only morally good but also metaphysically perfect.⁷ His view on this topic is perhaps best summarized in Theodicy 8, which reads as follows:

'Now this supreme wisdom united to a goodness that is no less infinite, cannot but have chosen the best. For as a lesser evil is a kind of good, even so a lesser good is a kind of evil if it stands in the way of a greater good: and there would be something to correct in the actions of God if it were possible to do better. As in mathematics, when there is no maximum or minimum, in short nothing distinguishable, everything happens in the same way, or if that is not possible nothing at all happens: so it may be said in respect of perfect wisdom, which is no less orderly than mathematics, that if there were not the best among all possible worlds, God would not have produced any. I call "World" the whole succession and the whole agglomeration of existent things, lest it be said that several worlds could have existed in different times and in different places. For they must needs be reckoned as one world or, if you will, as one Universe. And even though one should fill all times and all places, it still remains true that one might have filled them in innumerable ways, and that there is an infinitude of possible worlds among which God must needs have chosen the best, since he does nothing without acting in accord with supreme reason' 8

Grotius had earlier sought to establish a scheme of natural justice in a theory based on the needs of the human society alone, and had hence observed

that it would retain its validity even if God did not exist.⁹

Leibniz remarks upon this observation that it would still be desireable for men to believe in the existence of God for the sake of the consequent psychological inducement to behave rightly.¹⁰ But--and this is important to note-- he

nonetheless agrees with Grotius and states that "it is not a necessary requirement for the formal basis of justice that it should be a rule promulgated by a higher authority."¹¹

In asserting the autonomy of the idea of justice Leibniz is not denying God's perfection. For Leibniz, both the rules of logic and of justice are independent of God's existence; even God has to follow them in creating the world. God's perfection lies in the fact that he does so by his very nature. In his Discourse on Metaphysics (section 3-5)

Leibniz explains that i) God obeys the moral law, ii) causes no injury to any creation, and, iii) gives each monad his due. These three percepts of justice are evidenced in the process of creation and display the moral as well as the metaphysical perfection of God. Why is God bound to obey

these principles? Leibniz tells us that such principles of justice are binding upon any being capable of love and wisdom, that is, upon any being that can possess moral qualities through its having both reason and will. Since God possesses both attributes he is the author of justice by his very essence, not by his will.¹² The fact that God, like any

other spirit, is thus necessarily subject to the demands of justice means that he ought to behave in the best way; he is constrained by the moral necessity of his obligation. God has the duty to create the best of all possible worlds, although he is always free not to do so. The world from God's point of view, is contingent, but from our point of view it could not have been other than it is :

"And thus we have a physical necessity derived from metaphysics. For though the world is not metaphysically necessary, in the sense that the contrary would imply a contradiction or logical absurdity, it is nonetheless physically necessary or determined in such a way that the contrary would imply an imperfection or moral absurdity." 13

What Leibniz distinguishes here, and in general, is the difference between physical impossibility and moral impossibility. This distinction in Leibniz's moral theory finds its full expression in Kant, although, as we shall see, there are some crucial differences and confusions in the end. Leibniz's God, who acts by his own nature, becomes Kant's holy or fully rational will, and, as in Leibniz, any other being possessing both reason and will, who is not a holy will, is obliged to act morally. That is, reason constrains him to act morally. We saw that, according to Leibniz, God is obliged and constrained, albeit by his very nature, to create the best of all possible worlds. But to what end is the less rational will morally obliged or constrained? The answer to this is neither clear in Leibniz nor in Kant, although on analysis, it can be seen to be implicitly present in both their

moral theories. This is the point at which there is confusion in a major way in the end in Kant's theory. In the next section I shall discuss Kant's answer in detail because he, having developed on Leibniz's moral theory, had more to say on the issue. But before we can get to that it will be important and necessary to discuss the notion of moral impossibility and factual impossibility in a greater detail in Leibniz's theory.

As mentioned before, God, according to Leibniz, is bound not only by the percept of justice but also by the percepts of logic.¹⁴ He cannot create a world in which contradictory propositions exist, or in which a thing both has and does not have a property. Further, once he creates a particular object, that object can exist only with those other objects which have compatible properties, that is, which allow each other's mutual existence. Since there is a 'conflict' for existence, creation automatically produces the largest compossible set of possible individuals. (compossible is Leibniz's term for possible together). Only the compossible set has the maximal variety, according to Leibniz, for only such a set is a perfectly ordered series. Any random series might well leave 'gaps' into which further possible individuals could be fitted. The logical perfection of a complex system, such as the world, is thus understood as a combination of variety and order together. Such a combination generates the single Leibnizian concept of

harmony, which, is found when many things are summoned together into a kind of unity.¹⁵ The notion of the 'most perfect world' thus has a specifiable content, because there is only one way in which the criteria of order and variety could be satisfied at the same time. That is, there can be only one maximally compossible world.

The notion of maximum compossibility; for Leibniz, is required not only on purely logical grounds but also on moral grounds. That is, the best world is not only physically what it ought to be, but from the point of view of values, also morally what it ought to be. Any other world would make its creator unjust. Since God is just, the world that he creates must have all and only those moral predicates which it ought to have. If there were two worlds then they would be distinct due to at least one moral predicate, which one world would have and the other would not; but then neither of the worlds would be perfect and God would not have done his duty.

We shall see subsequently (while discussing the notion of the best normatively possible world) some possible confusions about the notion of the maximally compossible world. Here it will be important to pursue the central issue in detail, namely, the question of the role and the limitations of the creator, rather than of what he creates. Man too, after all, is a creator.

It is important to be able to distinguish a basic question which is always valid from some solutions to it which may be specific to one's time and place. Whether or not all of Leibniz's solutions are universal is a different type of inquiry. The appreciation of the basic question raised by him, which applies to all times and societies can, however, be done independently. It seems to me that since most philosophers have been involved with Leibniz's solutions the significance of his basic questions has failed to receive the attention that is due to it. An important and basic philosophical question raised by Leibniz is this: For anyone who wills to create, are there some necessary conditions which must be satisfied for creation to be possible, or is the process of creation a matter of random and arbitrary activity? Leibniz's answer, as we have seen, is that the process of creation is not an arbitrary and random activity; there are logical and moral conditions. For creation to be possible an object must be logically possible, physically compossible, and the activity itself must be morally possible. Leibniz does not explicitly say that logical possibility refers to objects and moral possibility to actions, but I think, he can be taken to be clearly implying this.

Now, we do not have to accept his metaphysics of monadology to appreciate his question. Nor do we have to accept the existence of the greatest monad (God), for even lesser monads (human beings) are involved in the

process of creation. It is not even necessary to accept the view, as put forward by some Christian theologians, that God created the complete compossible set all at once. He could be doing it gradually, a little everyday, even now. The question about the conditions of creation is independent of God's existence, even on Leibniz's own account. For, as noted, he too asserts, with Grotius, that the necessary principles of justice and logic are independent of any existing being. Thus, for one who disagrees with Leibniz, it is not enough to show that Leibniz's monadology is wrong or that God cannot be claimed to exist. One would have to show that the process of creation can proceed logically randomly and morally arbitrarily.

Why is the question about the conditions of creation significant for moral and legal theories? Any theory that grants that someone has a free-will entails that that agent can choose other than he has chosen and can thus create or construct his own possible world. To have a free-will is to be able to create according to one's desire and thus be the final cause for what is created. If there is only one agent having a free-will in the world then only one final cause and only one world is possible. However, if there is a plurality of free wills then there is also a possibility for a plurality of worlds. Any theory that grants that anyone other than God has a free will entails that there can also be more than one possible world. Of course,

most theories which grant a ~~plurality of free-wills~~ also make a qualitative distinction between the type of free-will that God is and the type that others are. Whereas God has infinite opportunities to will anything, others have a finite possibility. What they can create is limited. If there are two different types of entities in the universe, one infinite God and many finite human beings, all having free-will, then it follows that there would be one possible world created by God and many finite possible worlds created by human beings. The factually possible world can be taken to be created by God, and the many normatively possible worlds are created by many finite human beings. If we human beings are continuously involved in creating the normatively possible worlds in different ways, it evidently becomes important for us to know under what conditions it is possible to create, under what conditions it is possible to maintain what we have created, and under what conditions, that which we have created, would be destroyed. In a most fundamental way, moral and legal theories are nothing but attempts to answer these three basic questions.

Once we understand the concept of possible worlds in this manner, some puzzles and paradoxes raised by the followers of Quine, such as Bryce S. DeWitt¹⁶ on the one hand, and Leibnizians, such as Brandon Carter¹⁷ on the other, cease to be straight forward contradictions. As it turns out, the notion of possible worlds is a complex

notion which involves qualitatively different types of worlds. The complexity depends upon whether one assumes only one free-will to have created the world, or many free-wills to have created different worlds, or finally, if one thinks that willing is not involved in creating the world. Those who wish to hold with DeWitt and others that all possible worlds are actual, and those who wish to hold, with Carter and others, that there is only one actual world, are talking about different types of worlds. In the normatively possible world many possible worlds are actual. We can say this because we know that there are many finite free wills. In fact it can be noticed that those who have seriously contended the thesis of the plurality of actual worlds, end up, as Nelson Goodman does, talking about normatively possible worlds.¹⁸ Music, theater, painting and other similar phenomena which Goodman discusses, all belong to the normatively possible world, not to the factual world. Similarly, Benjamin Lee Whorf who proposes the many world theory in a different way also comes to such a conclusion by analysing language - another normatively possible states of affairs.¹⁹ Of the factually possible world we know only one, and if Leibniz and Carter are right there can be only one.

The direction of the analysis about possible worlds that I have only suggested above, no doubt raises as many problems as it attempts to solve. A deeper discussion of the metaphysical issues cannot be undertaken here. These brief remarks have been necessary to show, firstly

that what I wish to say about the normatively possible world through the course of this work is not without appropriate metaphysical underpinings, and secondly that the notion of possible worlds is much more complex than it is sometimes assumed to be. An understanding of the notion of the normatively possible world, in the manner outlined here, is necessary for appreciating a major problem that arises for this order of the world and not for the factually possible world. This is the problem of evil.

Leibniz's view that this is the best of all possible worlds seems to have one major flaw: if this is the best possible world why is there evil in it? Because of this problem his theory has not only been misunderstood but also came to be ridiculed by such men as Voltaire.²⁰ However, Leibniz was clearly aware of the problem. He devoted himself to it in the Theodicy. His solution to the problem of evil, as Bouillett has shown, is similar to those of Plotinus, Aquinas and St. Augustine.²¹ Leibniz explains:

"Where does the evil come from? ... Its source must be sought in the concept of the creature, in the nature that is contained in the eternal truths in God's mind, independent of his will. One must recognize that there is an original imperfection in the creature, even before it sins, because it is essentially finite; this means that it cannot know everything and can thus make mistakes and other errors." ²²

Leibniz's solution to the problem of evil has obvious parallels to the Scholastic and to some Greek philosophers; it has some similar difficulties too. It

is not necessary to discuss these here. However, what is important to note is that in granting that evil occurs independently of God's will, as Leibniz does above, he does not realize that he has at the same time removed evil from the best of all possible worlds which is created by God's will. In asserting that the source of the evil is to be sought in the creature and that the creature has a free will, evil becomes a part of the normatively possible world. When Leibniz talks about the best of all possible worlds, he is in fact only referring to the factually possible world, i.e., the world created by the free will of God; but he confusedly includes in it the world created by man. If he had observed a clearer distinction between the two types of worlds (which I shall argue Leibniz does confusedly observe) then the existence of evil would not be a contradiction, as it does become for Leibniz. That is, God would not be responsible for the evil in the world, since he did not create that world. Since evil is brought about by the human will into the normatively possible world, it can only be removed by the human will from that world. This, as we shall subsequently see, becomes a major factor in our understanding and applying the Criminal law. Here it is necessary to pursue the further consequences that arise when one distinguishes between different types of worlds.

Whether or not God exists, there is one thing that we can be certain of, and that is that we exist. As human beings we create a possible world. Computers and

cities, pens and policemen, lamps and libraires, the courts and coins, etc, have all been created by human beings, not by God. When the Bible says that God created us in his own image, or when the Gita says that the Ātamān is a finite aspect of the Parātamān, I think what they mean to say is that God's desire to create the best possible world is continuous in us. We too wish to create the best of all possible worlds.

Insofar as we are creative agents, we face precisely the same questions which any other creative agent (including God) would face : can creation proceed logically randomly and morally arbitrarily or are there some necessary constraints ? I, like Leibniz, have argued that the logical and moral constraints are universal, in the sense that they limit all creative agents, whether they are creating the factually possible world or the normatively possible world. These limitations and constraints are not external, in the sense of being regulated by someone else, they constitute the very conditions within which creation is possible for a creator.

The fact that we desire to create the best world does not imply that we are able to do so. We would be able to do it if we were like God, in that case we would do it by our very nature, and perhaps accomplish it in one stroke. But precisely because we are not like God, we have limited knowledge and moral perfection, the creation of the best of

all possible worlds becomes a task and a problem which can be formulated thus: Create the best of all normatively possible world . The problem is to find the means of creating such a world, which can be formulated as : Find and live by that normative system which will provide the conditions for the existence of the best of all normatively possible worlds. One may ask : why is the above issue a problem ? It is a problem because the creation of the best normatively possible world demands the resolution of many incompatible and conflicting normatively possible worlds. As we shall see, there can be only one best normatively possible world. Different free wills can, and often do, desire and attempt to create private normatively possible systems of a type which is not compossible with other normatively possible systems.

The important task for human beings, thus, becomes to design and operate a system which will make the creation of the best of all normatively possible worlds feasible.

This answers the question raised earlier, that, if God, who is a moral agent having both will and reason, is obliged to create the best of all possible worlds, what is the less rational agent, who also has both will and reason, obliged to do ? The answer follows that being less rational does not change man's obligation, it only makes its fulfilment problematic. Man being a moral agent like God is in the end obliged to do the same thing as God, that is to create the best of all possible worlds.

IV.

THE BEST NORMATIVELY POSSIBLE WORLD

Before we proceed to inquire into the type of normative system that can provide the conditions for the existence of the best normatively possible world, it will be necessary to spell out the idea of such a world in greater detail. The basic and relevant notions will be discussed here, other related issues will be touched upon in the next and subsequent sections.

Since each free-will desires to create its own system, that is, to mould the world in accordance with its understanding, the best of all normatively possible world will be one which will maximize the possibility for such creative activities. However, the one that maximizes this possibility cannot be one that allows each creator to randomly and arbitrarily create any normative system, since the aim of many normative systems is precisely to negate or destroy other normative systems. The best normatively possible world, hence, can consist of only those normative systems which are compossible, i.e., whose systematic aims either enhance each other or at least do not conflict. In such a state each free will can maximize its freedom.

By maximizing its freedom in a creative way in the normatively possible world, a particular will distinguishes itself from other similar creative wills. However,

the conditions of the best world put clear limits on the possible ways each will can succeed in distinguishing itself through its creative actions. Not every spontaneous or deliberated act can be required or be helpful in distinguishing oneself. These limiting conditions must be examined.

Firstly, the compossibility criterion tells us that there is no outer limit to how much freedom can be maximized but there is indeed a vectorial limit to the expression of freedom, that is, there is only one direction in which the maximal state can be attained.

Secondly, since the systematic aims of the normative systems in the best possible world do not conflict, it will also be the most harmonious possible world. The doing of evil, in one important sense, is the act of disturbing or destroying a normative system or its creator whose systematic aims are not immoral. Such an act, or the creation of a normative system which is instrumental for such an act, will be disharmonious with other normative systems whose existence is compossible with other systems. It follows, therefore, that in the best normatively possible world since there will be no disharmony, there will be no evil. (Although there may be disaster, calamities and accidents). The significant consequence of this (which can only be mentioned for the sake of completeness at this

stage) is that in such a world the branch of law which concerns itself with evil acts and evil normative systems, namely the Criminal law, will not be required any more. This does not of course rule out other branches of law. ²³

Thirdly, the best of all normatively possible worlds will also be one which will allow for the possibility of the maximum amount of variety. Since the normative world consists of feats, artifacts and systems, variety, in this case, would mean the most compossible set of feats, artifacts and systems.

The notion of the most compossible set of artifacts requires some clarification, since it has not been touched upon in the above discussion, directly or indirectly. Artifacts, as I argued in the last Part, are neither nominal kinds nor natural kinds. They, being articles produced by feats (i.e., artifeats) belong to the normatively possible world and are hence normative kinds. Roughly, it can be said that an object is an artifact when there are norms which characterize that object; otherwise that object is a thing. ²⁴ For example, this mass of wood and iron is a table because there are norms about the conditions under which a mass of wood and iron, when certain feats are carried out, may be called a table. The table as an artifact belongs to the normatively possible world; as wood and iron it belongs to the factually possible world. Similarly, a human

being is an artist, a doctor, a scientist, etc, because there are norms which specify the feats required to become an artist or a doctor, etc. In such social roles a human being belongs to the normatively possible world; as flesh and bone he belongs to the factually possible world. People, I think, hesitate to call a living thing an artifact because they seem to wrongly assume that the notion has something to do with 'facts', that is, non-living things. This is not so. Artists, doctors, and prime ministers are artifacts exactly in the same sense and for the same reason that books and cars are. Each is an artifact in a different normative system. However, my intention is not to correct ordinary language. For the purpose here it is sufficient to recognize that the ontology of the normatively possible world, which includes artifacts, is different from the ontology of the factually possible world, which includes things. As human beings, having a free will and being creators of the normatively possible world, we know this essential difference. It will be pertinent to illustrate this difference through an example. Suppose that we go to another planet and see objects there, we might not know at once whether we are looking at a factually possible world or a normatively possible world. We would perhaps assume the former. If in such a case we have any grounds for believing that a particular

object is not a mere thing but an artifact, then we would also have sufficient grounds for believing that the planet is inhabited with agents who have free-will and who have created a normatively possible world.

With the above understanding about artifacts, we can now simply characterize the notion of maximal compossible variety in the best of all normatively possible worlds as the possibility of the existence of a maximum number of compossible normative kind or artifacts. Again, it must be emphasized that a possible world which leaves open the possibility of maximum compossibility does not of course put any a priori limitations on the size of the population of the normative kind, it only restricts its development in a particular direction. That is, the notion of maximum compossibility is not the notion of the greatest number, with which it is sometimes confused.

What I have said above about the best of all normatively possible worlds is evidently Leibnizian, but it is also crucially different from his thesis. It was necessary to reconstruct the framework of ideas in this manner mainly so as to distinguish between the normative and the factual world and thus to locate where exactly the problem about law and evil exist and in what way the notion of the best of all possible worlds is of direct moral significance for us. Such a characterization of the best world

also avoids a possible error which is sometimes mistakenly deduced from Leibniz's theory. This error consists in concluding, for example, as Peter Geach does, that the notion of the best of all possible worlds is an inherently incoherent notion.²⁵ Geach compares the notion of the best of all possible worlds to the notions of the 'largest number' and the 'greatest happiness', and claims that just as there can be no 'largest number' or 'greatest happiness', since one could always add some more to it, there can similarly be no best world. The notion of the best world, as pointed out above, is categorically different from that of the 'largest number' or the 'greatest happiness'. Whereas the largest number is an aggregate of numbers, and greatest happiness can be taken to be an aggregate of happiness, the notions of the best of all possible worlds is not a notion of an aggregate. It is wrong to think of it as an aggregate of goods and then claim that it is not the best (greatest) because another good is still possible. The best of all possible worlds is not the sum of all goods, it is that state of affairs under which the sum of all goods can be increased infinitely. In other words, it is the description of that ideal model within which alone all possible goods may be generated.

We have seen earlier that the notion of the best or the maximally possible world is not just a logical notion but also a moral notion. Moreover, the best world is described not only by physical predicates but also moral predicates. Hence any attempt to interpret this notion must necessarily take the moral predicates into account. To interpret the notion purely numerically, as Peter Geach does, is to overlook the essential moral aspect of the problem.

One way of dealing with the notion of maximal compossibility, which takes the moral aspect of the problem into account, is to conceive the issue, as Leslie Armour does, in terms of 'unchangeability'.²⁶

If the moral predicates are taken to be positive values, and evil the absence of such values, then within such a scheme the best possible world cannot be changed in any way that will displace or eliminate a positive value, because then, the absence of the positive value will amount to an introduction of an evil into the world, which will make the world less than the best.

Conceiving evil as an absence of goodness is of course itself laden with problems, but it is not an unreasonable way to understand the moral phenomena. In the present context it does the interim duty of providing a distinction in terms of which the best world can be characterized.

From the fact that the maximally

compossible world cannot be changed in a way that will displace or eliminate a positive value thereby creating evil, it does not, of course, follow that such a world can not be changed at all. New positive values can always be added to such a world. The best world remains open in the direction of the addition of positive values but it is unchangeable in terms of the types of values that can be added to it. No such value can be added to it which will displace or eliminate a positive value.

Conceptualizing the best possible world in the above way gives a sense to it which is not merely numerical. The type of values involved in such a world evidently raises many complexities for a moral theory, but a discussion of these issues will lead us away from the central intent of the analysis here. I proceed now to discuss the significance of the above issues as they concern the normative systems in the present world.

V.

.THE BEST NORMATIVE SYSTEM.

Having described the essential details about the normatively best possible world, we must now turn to the important question : what means or methods must be adopted to create such a world ? That is, which normative system will provide the conditions for the existence of the best world ?

Let us start by seeing what such a system cannot be. First of all, we can rule out any system that attempts to imitate or model itself in accordance with nature. The impossibility of imitating nature does not arise from any epistemological reason, such as that we do not know enough about nature, or that different people know differently about nature. It arises for a logical reason which emerges directly from the idea of possible worlds. What we are looking for is a system which will allow for the possibility of many free-wills to exercise their freedom together. The factually possible world, or nature, is the exercise or the expression of either one free will, i.e., God, or of no free-wills at all. In either case knowledge about the factual world cannot provide any grounds for imitating it, insofar as one wants to build a system which will allow a number of creators to work towards diverse ends. Further, the decision to emulate any one natural system will, in the last resort, be arbitrary. We have no grounds for believing that any one natural system is superior to any other

All natural systems are equivalent. We cannot order them in a moral hierarchy. Lastly, propositions which describe facts are synthetic a posteriori. Building a normative system on the basis of such propositions is in fact an attempt to reduce it to some factual system. Such a choice involves one in a contradiction, since, as we know, we have no choice about synthetic a posteriori propositions, being as they are. Hence, such reductionist attempts amount to denying that we have any choice in constructing a normative system. Choosing to assert that we have no choice, i.e., asserting that a normative system is like a factual system, clearly involves one in a self-deception, what may otherwise be called a 'false consciousness', or a 'bad faith'. However, whether or not one recognizes that self-deception is involved in attempting to reduce a normative system into a factual system, since a factual system is regulated by either one free-will or no free-will, we can, a priori, know what such self-deception will lead to. It will lead to a system in which either only one free-will will be able to express itself, as in a totalitarian or a dictatorial structure, or in which no free will can express itself, such as in a chaos. There are many examples of such imitations, ranging from the Guyana cult of Rev. Jim Jones to the assumed factual Aryan superiority of Hitler's regime. In all such systems the people organize themselves into a normative order on the basis of aspects of factual system.

over which they have no control or for which they can take no credit, aspects such as the colour of their skin, their racial origin, place of their birth, etc.

If we cannot create the desired system by basing it on aspects of the factual system, can we model it after some particular normative system of the normatively possible world ?

There are many normative systems such as fashions, etiquette and customs, whose existence depends upon the creative activity of some individuals. Such normative activities are evidently temporary and arbitrary. It is their very nature to arise and then fade away, otherwise variety in the normatively possible world would not occur. The normative system we are seeking to identify and describe will be qualitatively different from any of these systems because it is not itself an outcome of variety. It is a system which will ensure that variety is always made possible and that no arbitrary limitation on compossible variety exists. For similar reasons such a system cannot be a particular convention. Conventions, like fashions, are the expression of the will of some definite agents. Conventions arise mostly for the sake of convenience ; and , as discussed in the last Part, they are made possible by assuming some arbitrary propositions to be the foundational propositions . Such principles or definitions are analytic a posteriori proposi-

tions. These propositions are necessary relative to a particular convention (say that of weights or of measure) but they are contingent from the point of view of all possible normative worlds.²⁷ The system we are seeking cannot be one convention amongst other conventions. It is something which makes the existence of various non-conflicting conventions possible. Also, its foundations cannot have arbitrary definitions which may be changed for the sake of convenience, as, for example, pound has been changed to kilogram and inch to centimeter.

This brings us to the third type of normative system, which is often presented as the best and the only model to fit the requirements. This is the system in which some human beings do not just set up arbitrary conventions for others to follow but command and compel others to follow them. A system built upon decree, fiat, compulsion or force will only make possible the existence of a normative system which is the creation of those limited individuals who have expressed their commands and have used force to ensure the desired behaviour. The systematic aims of such a system will be limited to the ones set by the particular individuals who are in control, hence variety in such a system will be limited. Such normative systems as the Mafia, the CIA, the KGB, the Army and the Police exemplify systems built on commands and force. Such systems have fix-

ed aims and a limited variety of feats and artifacts which facilitate the use of force or are instrumental to such an end. The system that we are looking for, which will allow optimal conditions for freedom and maximal compossibility of feats and artifacts, evidently cannot be of this nature, it cannot even have the essential features in common with it.

The above arguments have been negative. They are intended to eliminate what cannot be the model for the system which will make it possible for us to create the best of all normatively possible worlds. More will be said about such systems in the subsequent sections.

If the system which will allow for the creation and sustenance of the best of all normatively possible worlds cannot be modeled after nature and based on matters of fact, or based on conventions and analytic propositions, or on a system of commands and fiat, what is its positive characterization? I have already outlined the logical, epistemological and other formal aspects of such a system in the previous Parts. In the following sections, the substantive aspects of such a system will be discussed in detail. Here, in the positive characterization, I shall limit myself to the presentation of the minimal residual elements that remain after the rejection of the above three

models, and which directly concern the transcendental condition.

The required normative system will evidently be one which will allow for the creation and sustenance of the most compossible, most harmonious, and the most diverse set of normative systems, feats and artifacts. It will maximize the conditions under which each individual or group of individuals can realize themselves and attain their moral ends. The idea of such a system is the idea of law. That is, the legal system is that system which makes possible the creation and the sustenance of the best of all normatively possible worlds.

Now, having rejected all the above types of systems which allow for the activity of one or some free-wills, we are left with only one type of system that will maximize the possibility for the self-fulfilment of all free-wills. There can be only one system with regard to which all stand in the same relation. That is, there can be only one system that can satisfy the conditions which will allow for optimal compossibility, harmony and variety. Any other system will eliminate the development of at least one free-will, and thus will fail to be the type of system that we want it to be. It follows therefore that the legal system is not just relatively necessary but absolutely necessary. It is the only system that makes pos-

sible the best of all normatively possible world.

When people co-operate, their actions are compossible and when artifacts or things co-exist, their co-existence is compossible. Further, what I have termed diversity or variety here, is sometimes referred to as 'plenitude'. In these terms, what has been said above can be described as follows: The normative system, called the legal order, is metaphysically absolutely necessary because it is the only system which can maximize co-operation, co-existence, and in which the principle of plenitude can operate. When the principle of plenitude operates it makes the world not just possibly but actually (i.e., metaphysically) richer. Hence, it can also be said that the legal order is necessary because it is the only order which makes possible the metaphysical enrichment of the world.

VI. THE INTELLIGIBILITY OF THE NORMATIVELY POSSIBLE WORLD

Some basic notions discussed in the earlier sections are directly related to the thoughts of Kant and Leibniz. I shall examine these relationships in detail now so as to sharpen the distinctions between the view presented in this section and those of Kant and Leibniz. The discussion will also attempt to place the view presented here in a historical perspective.

In arguing that the idea of the best of all normatively possible worlds is the transcendental requirement for the possibility of a legal system, it may prima facie seem that I have contradicted the Kantian dictum that the idea of freedom provides the transcendental condition for the practical determination of the will by human reason. On a closer examination of Kant's various works, however, it becomes evident that there is in fact no conflict here.

Law, for Kant, is external morality. As he argues in the Metaphysik der Sitten, it ensures the 'outer form of freedom'. Freedom, in Kant's view, therefore, is a transcendental condition for both internal and external morality, i.e., for virtue and law.²⁸ Being the transcendental condition for both aspects of morality, the notion of freedom expresses itself in two different but related ways in the two aspects. From the point of view of the individual, freedom is expressed in the idea of autonomy, and from the perspective of the external morality for the community, the idea of freedom

is expressed in the idea of the Kingdom of Ends. The idea of autonomy and of Kingdom of Ends do not provide us two different transcendental ideas but the same idea from two different perspectives. In fact, as Kant tells us in the Grundlegung, the formula for the Kingdom of Ends - so act as if you were through your maxim a law-making member of a Kingdom of Ends - springs directly from the formula of the autonomy of the will - so act that your will can regard itself at the same time as making universal laws through its maxim.²⁹ The difference between these two formulations is that, whereas the first concerns the individual as a member, i.e., as belonging to a community, the second concerns him as an individual legislating maxims to himself.

The Kingdom of Ends of the Grundlegung takes the form of the 'Ethical Commonwealth', with some variations in details, in the Religion innerhalb der Grenzen der blossen Vernunft.³⁰ In the Metaphysik der Sitten Kant talks of the Ideal State, but the essential characteristics of the Ideal State are not very different from the Kingdom of Ends. In the Kritik der Urtheilskraft, Kant is very explicit in asserting that the necessary end of the possible world, whose transcendental condition is freedom and not causality, is to create the best of all possible moral worlds. It is only with regard to such an ideal that man's existence in the world can be understood.³¹ In such an Ideal State the free-

wills can maximize their freedom in a community.

I think Kant is undoubtedly right that the idea of Freedom is a transcendental presupposition for law and morality in so far as the individual's actions are concerned, and that the idea of the Ethical Commonwealth is the transcendental presupposition of law and morality from the point of view of the community, i.e., in so far as it concerns the individuals as members, I have myself emphasized that the transcendental idea of an agent's free-will, which is involved in his creating the world, is as significant from the individual's point of view as the correlated transcendental idea of the best normatively possible world is from the community's point of view. The creation of the best normatively possible world is the ideal end of the co-operative human actions. However, in not emphasizing the idea of the Kingdom of Ends, in the Metaphysik der Sitten, Kant seems to have misled his readers, who attempt to understand his theory of law by studying this work alone.

If the transcendental condition has these two distinct aspects, one from the point of view of the individual and the other from that of the community, one may ask why Kant himself has not made these distinctions clear? In Kant's analysis of morality and law there seems to be some basic confusion about the idea of the communi-

ty and about the relationship that the individual has to the community. This leads to various confusions. The network of these confusions seems to run through the whole of his moral and legal theory. I shall trace only one of these confusions, the one that has its roots in the problems concerning the idea of the possible world—since such a discussion bears upon the issues presented earlier.

Everything we say about objects or systems in the world, presupposes some beliefs about the nature of the world. Since the seventeenth century both the Atomists and the Cartesians have been impelled, by discoveries in the natural sciences, to separate the physical world from the order of the spirit or mind—the two realms which both the Platonists and the Aristotelians had held together by the same principles of order of the forms or ideas. Whether discoveries in the natural sciences should make one a cartesian is questionable, but the fact that philosophers have been involved with the problem of different realms in all ages clearly suggests that the source of the problem lies not in these empirical discoveries, but, as I have been arguing, in the conceptual a priori considerations of what is entailed in accepting that there is a plurality of free or autonomous wills. An autonomous will is a final cause, it determines itself. If there are two different types of final causes, one having

an infinite potential and the other a finite potential, then there are at least two different types of realms.

Leibniz distinguished between the Kingdom of Nature and the Kingdom of Grace. The Kingdom of Grace is a Kingdom of rational minds all of which are in communion with God. For Leibniz, as natural laws are determined by the best possible to have metaphysical necessity (though not a merely logical one), so moral imperatives have a moral (but not a purely logical) necessity. On these two kinds of laws the two Kingdoms of Nature and Grace are founded.³² However, the distinction between the realms is not always clearly defined by Leibniz. We saw earlier that because of this confusion he was not able to place evil in the appropriate realm. Even in the Kingdom of Grace Leibniz later on brings in a Kingdom of Light, which is supposed to be a superior kind of Kingdom of Grace.³³

Since Kant had the advantage of building upon Leibniz and avoiding his errors, the distinction between possible worlds stands out more clearly in his works. In his first major philosophical work, 'The Inaugural Dissertation of 1770', Kant sets out to examine 'The Idea of the World in General'. In this he distinguishes between the Sensible world and the Intelligible world.³⁴ From this work to the last 'Opus Postumum' there seems to be a gradual and continuous, but not always a straightforward and consistent, development in his idea of the world. Al-

though the idea of the Sensible world seems to get various consistent interpretations throughout Kant's works, becoming 'Corporeal Nature' towards the end in the 'Metaphysische Anfangsgründe der Naturwissenschaft',³⁵ - the same cannot be said for the idea of the Intelligible world. The history of this development evidently requires a separate work. In what follows, I shall only catalogue and mention the crucial points at which Kant makes substantive remarks about the idea of the world, which are of direct relevance to the idea of Law.

The following paragraphs: (20) and (21) of the 'Inaugural Dissertation', seem to suggest Kant's fundamental reason for believing that there must be at least two types of realms. This seems to be similar to the grounds that I have been arguing for; however, these paragraphs, at the same time, also exhibit what seems to lie at the core of Kant's inconsistent characterization of the Intelligible world:

The substances of the world are beings deriving from another, not, however, from different beings, but all from one. For suppose them to be the effects of a plurality of necessary beings; then, since the causes are without any mutual relation, the effects would not be in interaction. Accordingly unity in the conjunction of the substances of the universe is a consequence of the dependence of all upon one. The form of the universe bears witness to the cause of its matter, and only a single cause of all things can be the cause of its totality; there cannot be an architect of the world who is not also its creator.

If there were a plurality of first necessary causes with their effects, these would be worlds, not a world, because they would not be in any way connected to form the same whole. And *vice versa*, if there be a plurality of actual worlds outside one another, there is a plurality of first and necessary causes, with no interaction between one world and another, nor between the cause of one world and the world depending upon another cause.

It follows that a plurality of actual worlds outside one another is impossible not by its very concept (as Wolff wrongly concluded from the notion of a complex, or aggregate, a notion which he thought equivalent to a whole as such), but only under this condition, that there exists one single necessary cause of all things. If more than one be admitted, a plurality of worlds (in the strictest metaphysical sense), external to one another, will be possible.

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Although Kant accepts the plurality of possible worlds when there are many first causes, in arguing that there will be no interaction between them, he seems to be simply repeating something like Leibniz's view that the worlds (monads) are 'windowless' closed worlds, without reflecting on the implications that such a thesis entails for a moral theory. If the monads cannot interact there can be no community. The very possibility of a community presupposes that the possible (normative) worlds not only interact, but that they also resolve and unify themselves. The possible world that the different first (necessary) causes create is of course the normatively possible world, not the factual one. Hence the interaction between possible

worlds is an interaction between the normatively possible worlds. For the factually possible world the question of interaction does not arise in the same way, because we do not know whether there is more than one such actual world. The idea of the community is precisely the idea of the resolution of many conflicting normatively possible worlds into one world. One may characterize this as Parmenides' or Plotinus' problem of 'the One and the many' for the practical reason. The problem for the theoretical reason is how 'the many' can be resolved into 'One' in knowledge, whereas for the practical reason it becomes how 'the many' can be resolved into 'One' in practice. Since, as we have seen, law is the only means to the one best possible world, it becomes the only solution to the metaphysical problem of 'the One and the many' insofar as practical reason is concerned. The idea of the best possible world or the Kingdom of Ends is a practical idea used to bring into existence what does not exist but can be made actual by our conduct; it can be made actual through a legal system.

In the light of the above discussion, Kant's formulation of the moral principles (which applies to both the external and internal morality, i.e., to justice and to virtue) can also be understood as directly related to the problem of the 'One and Many' in the sphere of practical reason. By acting on the Formula of Universal Law -

act only on the maxim through which you can at the same time will that it should become a Universal law ³⁷ - many conflicting normatively possible worlds are resolved into one world in which all the laws apply to everyone. On the other hand, the Formula of the Law of Nature - act as if the maxim of your action were to become through your will a universal Law of Nature ³⁸ - presents to us an analogy. Nature has already resolved the conflict of the many and presents itself to us as one. If our laws were like the Laws of Nature, they would be laws of one world. But why does Kant say 'act', in the first formula stated above and 'act as if' in the second? This is precisely because he assumes, as I too have been emphasizing, since we cannot choose to act in the factual world, we can at best act as if we were acting in it so that our rules would be universal like the laws of the factual world. Although we can not act in it, we can, of course, nonetheless, act on parts of it and control it. This brings us back to the complex notion of the possible worlds and the difference between the normatively possible world and the factually possible world.

In his Inaugural Dissertation, Kant equates the Intelligible world with the Intellectual world and the Sensible world with the phenomenal world. He points out in that work (para 3) that his distinction is similar to the phenomenal-noumenal distinction of the 'older' and 'ancient' schools. In the Dissertation, the noumenal or

the Intelligible realm is known at least intellectually. By the time of the 'Critique of Pure Reason', the two realms are clearly distinct due to the fact that the fundamental principle of the phenomenal realm is Causality whereas the fundamental principle of the noumenal realm is Freedom. However, here he equates the noumenal realm with the "things-in-themselves", which are totally unknow-³⁹ able. Similar view is presented in the Groundwork of Metaphysic of Morals, where the thesis of two standpoints - that of the Sensible world and that of the Intelligible world - is said to resolve the paradox about viewing the same action as both necessary and free.⁴⁰ Here again the Intelligible world is not knowable.⁴¹ In the subsequent 'Critique of Practical Reason' Kant argues that the postulate of freedom is very different from that of God or of the Immortality of the Soul. Freedom implies the moral law and is reciprocally implied by it, thus its reality is affirmed.⁴² Here the Sensuous world becomes 'natura archetypa' and the supersensuous or the Intelligible world 'natura⁴³ ectypa'. Now, Kant tells us that an object of 'natura ectypa' is "an object of practical reason . . . possible through freedom".⁴⁴ Are such objects knowable or not? They must indeed be, because in the Metaphysik der Sitten Kant identifies the de jure possession of objects as intelligible or noumenal possession, and we indeed know the objects that we possess de

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jure and not just de facto. The de jure realm of mine and thine is an Intelligible or Noumenal realm.

Such as Intelligible or Noumenal realm, in which reason is used practically and not speculatively, is precisely that which I have been calling the normatively possible world. Such a noumenal realm is intelligible only because there are various synthetic and analytic propositions which function as norms in the realm, and which makes possible for us an essential knowledge of such a realm.

It may be argued that Kant's characterization of the Intelligible world is in fact consistent, that he always meant to say that the Intelligible world is knowable in so far as reason is used practically and not speculatively. This perhaps is the likely interpretation. However, as noted, Kant himself provides many grounds to show that this interpretation cannot be conclusive.

The basic reason for Kant's confusing treatment of the notion of the Intelligible world seems to lie, as mentioned before, in his incomplete analysis of the idea of the community. In the 'Inaugural Dissertation' (Para 16) Kant tells us: "In what principle does this very relation of all substances rest, which intuitively regarded is called space? The question of the principle form of the Intelligible world turns, therefore, upon making ap-

parent in what manner it is possible for several substances to be in mutual commerce, and for this reason to pertain to the same whole, which is called world".⁴⁶ Although Kant is right in asserting that the question turns upon making clear in what manner it is possible for several substances to be in mutual commerce, he is evidently mistaken about the fact that the principle for the Intelligible world, on which the relation of all substances rests, concerns space. For, as it finally turns out in the Metaphysik der Sitten,⁴⁷ the de jure or Intelligible, noumenal realm is not in space. Kant's error seems to stem from the fact that the 'mutual commerce' that he is considering is in fact not between all substances; as he seems to assume. He has only considered human 'commerce' with sensuous things, where sense perception is of major concern. Man's 'mutual commerce' with man is indeed different in principle from that of his 'commerce' with things. For, in such a 'commerce', amongst other things, there is a reciprocal relationship; as Existentialists like to state it: 'not only I objectify the other's subjectivity in perception and use, even the other objectifies my subjectivity.' There are hence different types of 'commerce' between different types of substances.

The above confusion in the Dissertation seems to have been carried over, without any significant change, into the 'Critique of Pure Reason'. Here Kant

presents the concept of 'community' (reciprocity between agent and patient) as a pure a priori category of the Understanding.⁴⁸ In the Third Analogy it becomes "the Principle of co-existence, in accordance with the law of reciprocity". Such a concept of community, in fact, seems to be the Leibnizian notion of Apperception, it is not the sense in which agents belong to a community in the Intelligible world, for here the reciprocity is not between agent and patient, but between agent and agent. It is in the phenomenal world that agents perceive sensible objects. It follows, therefore, that the concept of community which Kant presents in the Third Analogy is a category of the Understanding with reference to the phenomenal world. For the Intelligible or noumenal world, in which the legal enterprise exists, a different concept of community is needed. Kant's list of the Categories of the Understanding is hence incomplete.

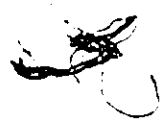
What interests us here is not the incompleteness or the inconsistencies in Kant's philosophy as such, but how such confusions affect the idea of Law. Since Kant's characterization of the Intelligible world is not clear, his distinctions within it also face similar problems. The central and the most significant distinction within the Intelligible world concerns what one opposes to

the best normatively possible world, that is, to the idea of the Kingdom of Ends; for, the legal order must provide the conditions for the best world, but this can only be done if it also somehow delimits the conditions for the worst world.

Since the Intelligible world is the normatively possible world, the opposition of the Kingdom of Ends or the Kingdom of Grace to the Kingdom of Nature, which Kant and Leibniz uphold, is indeed a misleading opposition. What has to be contrasted with the Kingdom of Nature is the normatively possible or the Intelligible world, not the Kingdom of Ends. The Kingdom of Ends or of Grace, is the best of all possible worlds. We do not know whether the Kingdom of Nature is the best of all possible phenomenal worlds, we do not even know whether there are many phenomenal worlds.

What has to be contrasted with the Kingdom of Ends is the State of Nature, especially of the Hobbesian kind, where all people are against each other. However, the phrase 'State of Nature' is misleading, it suggests that we are talking about the factual world, whereas we are really talking about a certain state of the social world. Perhaps the phrase 'State of Nature' is the cause of some confusions that we find in Leibniz, Kant and also in Locke and Hobbes.⁴⁹ Both the Kingdom of Ends and the State of Nature belong to the normatively possible world. When discussing the State of Nature we are not discussing

societies of ants or bees or monkeys or dolphins, we are still talking about the human society, the difference being that we are now talking about human society at its worst. Whereas the Kingdom of Ends is the ideal characterization of the best of all normatively possible or Intelligible world, the State of Nature is the ideal characterization of the worst of all normatively possible Intelligible world. In such a state everyone always uses the other as a means to something and never treats the other as an end in himself. It is the state of maximum conflict and maximum impossibility. Now, given a certain understanding of human nature and communities, it is doubtful whether the worst state ever existed or can exist in the future; that is, it is doubtful whether it is a historical fact. However, for the purpose of practical reason, it does not make any difference whether or not the worst Intelligible world is a historical fact. What practical reason needs to comprehend is the idea of the best and the idea of the worst possible world, whether they exist or not. Such a comprehension is necessary to give direction to personal and social actions.



SECTION - II

THE METAPHYSICAL REQUIREMENTS OF LAW

I. THE METAPHYSICAL REQUIREMENTS OF LAW.

The metaphysical requirements are the necessary and sufficient conditions on fulfillment of which a possible entity or a system becomes actual. In the last section I discussed the basic conditions in which the possibility of a legal system is grounded. I shall now proceed to examine what further substantive requirements have to be necessarily fulfilled if a legal system is to actually exist.

The clarity and precision with which one can define the principles which make a legal system actual will evidently depend upon how clearly one is able to distinguish law from other normative systems, and also, how distinctly one can specify the relationships that obtain between the legal system and some related systems.

To start with, we have three distinct ideas about normative systems whose relationships and distinctions need to be specified: the idea of a moral system, the idea of a legal system and the idea of a coercive system. Philosophers have often attempted to relate the idea of a moral system to that of the legal system, but they have ended up identifying the notion of a legal system with that of a coercive system. None of these relationships should be assumed as self evident, each needs to be explained and justified. The statement that a legal system is different from a moral system, and especially the statement that the

legal system is a coercive system, have been repeated so often that they have begun to sound like undeniable truths.

True as such assertions may sound, in the absence of appropriate justification, it would only be arbitrary to believe that a legal system is a coercive system. The statement must not be accepted without justification. As I shall attempt to show, the assumptions involved in such a belief are not as simple and clear as they have been assumed to be.

In what follows, I shall first examine the relationship that obtains between the idea of a normative system conceived as a moral system and the idea of a normative system conceived as a legal system. Having done this, I shall next consider the relationship that obtains between the idea of a normative system conceived as a coercive system and the idea of a normative system conceived as a legal system.

This analysis will establish some of the conditions that are necessary for a possible legal system to exist as an actual system. Having finally separated the idea of a legal system from all its extraneous elements I shall present and discuss some of the basic necessary legal propositions. Others will be discussed in the respective sections.

In the subsequent analysis the basic legal propositions will be discussed firstly from the perspective of the community and secondly from the perspective of the individual. This is required because, as we shall see, the two perspectives raise separate problems.

LAW AND ETHICS

In the last section it was argued that the legal system is transcendentally the best and logically the only normative system which can provide the conditions for the best of all normatively possible worlds.

If there is only one normative system that can lead to the best world and if such a system must be a moral system, then it follows that the legal system is indeed the moral system. Let us see how this comes about.

It has been shown that the possible world divides itself into two types, the factually possible and the normatively possible. Whereas the presupposition of the first is causality that of the second is freedom. Freedom as Kant has argued, must be presupposed to be a property of the will of all rational beings.¹ Human reason is involved in investigating both the principles of the factual world and those of the normative world. In the normative world, reason utilizes some basic principles to determine the freedom of the will when it involves itself in the practical sphere of individual and social activity. Such basic principles are the Laws of Freedom.

The determination of the will by reason requires that there be no obstacles. Traditionally, two types of obstacles have been conceived. In the first, the agent somehow becomes an obstacle to the exercise of his own free-will. In the second, other agents, in one way or another, become obstacles

to the exercise of the free-will of an individual. Laws of freedom concern the agent's freedom in both these senses. In Kantian terms, an agent becomes an obstacle to himself when his will is determined by inclinations and passions rather than by reason. In such a case his will is constrained. It blindly follows its inclinations for the satisfaction of some arbitrary end. A morally good action, in which a will is freely exercised, Kant tells us, must be done by an autonomous, self-legislating will. Our ordinary moral judgements, according to him, show that we locate the moral value of an action in its motive; we refuse, for example, to attribute moral worth to actions done from motives of self-interest or immediate inclinations, even though such actions are objectively in conformity with duty.² We judge that such actions would be morally good only if they were done from a motive of duty. By analysing the concepts of action done from a motive of duty we find that the action is determined through the thought that it is in conformity with the basic moral principles, or the laws of freedom.

In contradistinction to causal laws, the laws of freedom are moral laws. Now, in so far as the obstacles to freedom are internal, that is, the agent becomes an obstacle to his own free-will, laws which are directly about or which concern the internal obstacles

to freedom, may be called ethical laws.³ But when the obstacles are external, that is, from and due to other agents, laws which refer to external obstacles are juridical or legal laws. Positively, it may also be said that maxims which an agent legislates to himself and which are in conformity to the laws of freedom are ethical laws. This internal legislation of course concerns the moral ends chosen by the agent. In contrast to these, maxims which two or more agents mutually legislate for themselves and which are in conformity to the laws of freedom, are legal laws. This external legislation concerns the moral ends which are common to all the agents.

The above may be roughly said to be Kant's own view also. But his characterization of 'ethical' laws does not seem to be always consistent. He sometimes refers to the ethical laws as moral laws. Whereas according to his theory, the term 'moral laws' should refer to both the ethical and the legal laws, since both have to be in conformity with the laws of freedom which are moral laws. A typical example of the confusion in Kant's terminology can, for example, be noted in the following important passage.

"In contradistinction to natural laws, the laws of freedom are called moral laws. Insofar as they are directed to mere external actions and their le-

gality, they are called juridical; but when, in addition, they demand that these laws themselves be the determining grounds of actions, then they are ethical. Accordingly we say: agreement with juridical law constitutes the legality of actions, whereas agreement with ethical ones constitutes its morality." 4

The last conclusion is evidently misleading . It suggests that legal actions are not moral actions, which is evidently false within Kant's definition of juridical actions, which too conform to the moral laws of freedom. What the last proposition should read, if it is to be consistent with the lines above is "Accordingly, we say: agreement with juridical law constitutes the legality of actions, whereas agreement with ethical ones constitutes its ethicality" (if one may presently use the word to make the point). Kant often uses morality in an ambiguous way, in so far as law is concerned. He sometimes asserts that the concept of morality applies to both law and ethics. But sometimes he reserves the term morality for ethics alone, at such times he confusedly contrasts law to morality. This, as we shall see as we go along, is partly due to Kant's general confusion about the nature of law .

The freedom to which juridical laws refer is freedom in its external exercise, whereas the freedom to which ethical laws refer is freedom in the inter-

nal exercises of the will, insofar as the will is determined by reason. Since both the external exercise and the internal exercise of freedom are in accordance with the laws of freedom, which are moral laws, it would not be inappropriate to characterize law as the external morality and ethics as the internal morality, although Kant himself did not use the terms in this way. Such a distinction, I think, would make Kant's thesis about the laws of freedom more consistent.

The consistency will become evident if one considers the sense in which Kant meant law to be external, with reference to the moral laws of freedom. Law, for Kant, is external, firstly in the sense that it has to do with the relations of one person to another insofar as their actions -- as events in time -- can have an effect on one another; by this all actions which affect only oneself are excluded from the scope of law. Secondly, law is not concerned with the relations between how the mere wishes of one person may relate to the actions of another person; that is, it is not the business of law to prescribe benevolence to others.⁵ Thirdly, law concerns itself with the question of whether the exercise of free choice on the part of one can harmonize with the freedom of the other.⁶

Law is, then, external morality. What this means exactly and what such an idea contains will

be explained in detail in the course of this **section**.

The first evident, significant consequence of the above arguments is that for both ethics and law the starting point is the a priori propositions of pure practical reason, which are the supreme principles of morality, or the Laws of Freedom. Although the principles by themselves do not prescribe any specific actions as duties, but because they are the ultimate criterion of right or good actions we can derive from them moral laws which state what our rights and duties are.

The basic moral principles express the essence of free or rational actions; and because all moral laws are derived from these principles, they must state the condition under which human conduct is in keeping with man's nature as a free agent. Moral laws, Kant explains, "command for everyone, without taking his inclinations into consideration, merely because, and in so far as he is free and has practical reason." ⁷ They are laws for men, not as rational agents who desire some end, but simply as rational or free agents. The negative implication of such an assertion is that neither juridical nor ethical laws can be based upon the desire for happiness which pertains to man's sensuous nature. Both are laws of freedom, prescribing, essentially, the conditions of rational or universally valid actions rather than the means for attaining

happiness. This, of course, does not mean that happiness may never be achieved by acting ethically or legally, but only that happiness does not enter into the criteria of moral goodness.

In any legislation, Kant explains, we can distinguish two things: a law and a motive. The motive provides a determining ground of choice when a person or a group legislates.⁸ In ethics, pure practical reason of an individual is itself legislative, it provides not only the norm for conduct but also the constraint accompanying the norm.⁹ The motive is that of doing one's duty for the duty's sake. The situation for juridical laws are different. The difference consists of the fact that the pure practical reason is legislative not through one individual's will but through a collective decision taken by the community as a whole.

Since the juridical laws are laws of external morality, (although Kant does not make it clear), it follows that as in the case of ethical laws, the motive for the laws cannot be of a sensuous origin, nor can the laws be based on considerations of usefulness. As in the ethical case, the motive, once again, here is doing one's duty for the sake of doing it. The central difference in the two motives are the types of duties involved. Whereas in the ethical, autonomous legislation the duty is towards persons

(including oneself), in the juridical legislation the duty is not towards persons but towards the community as a whole.

The duty is to create and sustain a civil-society which is the best of all normatively possible worlds. Such a duty is of a non-sensuous origin and it must be done for its own sake. Since the moral goodness of our actions lies in our motives, the duties enjoined by juridical legislation must be actions which are morally necessary, independently of our attitude of will.

It follows from the above thesis that not only acting according to ethical principles for the sake of duty is morally good, but also that acting according to legal principles for the sake of duty is morally good.

The fact that law as external morality must finally be based on non-sensuous motives is, of course, my view and not totally Kant's view. Kant, once again, seems to have opted for different alternatives at different times.

Having characterized law as rules for external freedom, in accordance with the moral laws of freedom,¹⁰ Kant confusingly assumes that juridical legislation cannot concern itself with the interior determination of choice through a non-sensuous motive. He thinks it can only employ natural sensuous means of constraint. Since there can be no action without a motive, and since juridical legislation is concerned that certain actions

be committed or omitted, according to Kant, it supplies a motive - namely, fear of punishment, which should be effective if others are wanting.¹¹ Now, such a view, which makes the motive for legal action fear rather than some sense of duty, not only contradicts Kant's general thesis that law is moral, at least in so far as it is in accordance with the Categorical Imperative, it even conflicts with his thesis that we have a duty to maximize the possibility of external freedom for everybody. It was he himself who argued in Theory and Practice that we have an unconditional duty to create and maintain a civil-¹² society in which outer freedom can be obtained for all.

If we really do have such a duty then evidently the reason for acting legally lies here, and not in any fear or anxiety. As it seems then, Kant overlooked the relationship between his two findings: law as external morality, and the duty to build and sustain a legal system in a civil society so that outer freedom may be maximized.

What distinguishes law-what the community legislates for an individual and ethics-what an individual legislates for himself-is the mode of legislation and the type of duty involved, not the type of constraint imposed, as Kant and other thinkers have wrongly concluded. For, just as no one can constrain an autonomous will to act ethically, no one can constrain him to act legally.

For an act to be ethical or legal the agent must act of his own free-will. Kant and others have thought that the fundamental difference between the ethical and the juridical legislation is that in ethical legislation pure practical reason has only the thought of duty with which to exercise necessitation on choice, whereas in juridical legislation the legislator can force people to act legally. This is both conceptually and empirically false, for, as we have seen, in juridical legislation too, pure practical reason has the thought of duty towards the community with which to exercise necessitation on choice, and secondly, if legislators could force people to act legally all crime and evil would have been suppressed a long time ago. There is enough nuclear armament to threaten and force people to act legally! Since acting legally is acting morally, people must voluntarily act legally. Nobody can constrain and force anyone to act legally. External constraint or compulsion is required when a moral agent fails to act legally, i.e. morally, not so that he will act legally. But this involves us in conceptualizing the relationship of law to coercion in a totally different way and calls for a detailed analysis of its own. I shall devote the next section of this part to this question. Here it will be important to summarize the essential thesis of this section.

It is by considering the laws of freedom accompanied by the one or the other type of duty that we determine the nature of juridical and ethical laws. Laws and ethics must consist of rules, expressing, each in its own terms, conditions for free actions and the basic ends to be achieved. Since all moral laws are derived from the laws of freedom, which express the laws of pure practical reason in its applications, every moral law is accompanied by the constraints of pure practical reason alone. Whether the laws arise in juridical legislation or in ethical legislation, morally legislative reason, in both cases, constrains us to fulfil the duty from the thought of duty alone. In law, the principles of pure practical reason are regarded as the principles of the communal or the general will, whereas in ethics we regard them as principles of our own will and then go on to obtain from them the system of duties to which they, so regarded, give rise. In requiring that the actions described by the juridical laws be done merely for the sake of their rationality, one evidently asserts that juridical laws are based on principles of pure practical reason. If this were not so, the constraint imposed upon people who fail to act legally would never be reasonable or rational, it would be indistinguishable from mere violence.

III.

LAW AND COERCION

One of the most serious and perhaps the most harmful misunderstandings that has plagued humanity seems to be the confusion between the idea of law and the idea of a coercive order. The principles and the systematic aims of a coercive order are very different from those of a legal order.

A legal system is not a convention, hence it is not founded on principles which go into creating and sustaining a convention. Neither is it a system of force, fiat or decree, hence it is not founded on principles of command, whether they be dictatorial or martial. It is not even a factual system which can have principles of nature at its foundation. A legal system is a system of external morality founded on the laws of freedom of pure practical reason. As such, it is not possible to coerce any one to behave legally. Enforcement, of law is hence a contradiction in terms. ('Enforcement of morals', a phrase which Lord Patrick Devlin used, betrays a double confusion.¹³ Morality is precisely the kind of behaviour which can never be enforced).

Force is used when people fail to behave legally; and then, the aim of using force is not to

make them act legally but to prevent them from acting illegally in the future. This is all that compulsion or coercion can achieve, it can not bring about lawful acts.

Lord Devlin and his opponents have for a long time debated whether or not law must enforce morality ! Such a debate clearly presupposes that law and morality are the types of principles which can be forced on someone. The foregoing discussion shows that such a presupposition is unwarranted and groundless, hence the extensive debate - whether law must enforce morality-is misconceived at its very foundations. In what follows I shall attempt to make the roots of this confusion explicit.

The reason behind the confusion between the legal order and a coercive order seems to lie inherent in a deeper confusion concerning the idea of justice itself. One way in which the basis of this confusion can be made explicit is by analysing Kant's treatment of the notion of Justice. However, the analysis would be applicable to any other similar idea of justice which makes law into a coercive system.

In the Metaphysik der Sitten Kant tells us : " Justice is therefore the aggregate of those conditions under which the will of one person can be cojoined to the will of another in accordance with a universal law of freedom";¹⁴ and also that : " Justice is united with the authorization to use coercion . "¹⁵ Using these two principles as

premise, Kant goes on to conclude that "Strict justice can also be represented as the possibility of a general reciprocal use of coercion that is consistent with the freedom of everyone in accordance with universal laws." 16

Now, is the above conclusion legitimate? It seems to be a case of standard logical fallacy. From the proposition 'p entails q', if one is given p, it would be legitimate to infer q; but if one were to infer p when given only q that would indeed be an invalid conclusion. But such a fallacy is precisely what Kant seems to have committed. From the premise: the concept of justice entails the concept of coercion, Kant seems to have wrongly inferred in the conclusion, that reciprocal coercion is entailed in a just system. All that follows from the proposition that justice is united with the authorization to use coercion, is that coercion can be just, it does not follow that whenever there is justice there is coercion. In other words, the truth of the statement that justice is united with coercion entails only that we can justly authorize some people to use coercion, but it does not entail that a system in which just actions are done is a coercive system. Kant does not make it clear in what sense of 'united' is justice united with coercion. The sense of this union would become clear if we ask: when is justice united with the authorization to use coercion? The answer is: only when people have failed to act justly of their own accord, or when they have done some unjust acts. In either case coercion enters in or becomes necessary, only when just actions are absent.

It is only required in the last resort, to keep some people away from a system in which (most) other people are carrying on with their just acts. If by such coercion these same people are reformed and are willing to carry on with just acts of their own accord then coercion is not used on them anymore. That is, they are not prevented by coercive means to join the larger system in which most people act autonomously.

Kant's two definitions of justice, uniting justice with coercion, thus conceal the truth that they refer to two totally different classes of people. Coercion is not used on the people who are co-operating and participating in a just system, but on another class of people who are not acting justly, or are, at least, acting illegally. Kant does not observe this difference in his definitions, he is thereby led to a false conclusion, in which he seems to assume that the class to whom the laws of freedom apply is also the class to whom coercion applies.

Hence, Kant's conclusion that 'justice can be represented as the possibility of reciprocal coercion' is both logically and referentially false. Justice can never be represented as the possibility of reciprocal coercion. So long as people are acting justly in a system, they are not coercing each other in any way. In fact, all law abiding citizens are acting justly because they either think that it is their duty to do so, or that it is the

right, moral way to act. They are not so acting because their friends, neighbours, relatives or some government officials are coercing them all the time to act in this manner. There is no reciprocal coercion between citizens, friends, relatives or acquaintances, so as to make them act justly. Of course, all citizens are aware that if they act unjustly then coercion can be used to stop their future unjust acts. But this is altogether a different matter, because when coercion is so used, people who have acted unjustly are (physically) removed from the arena in which just actions are done, such that the question of reciprocal coercion does not even arise for them.

The idea of law is not the same as the idea of justice. These are two different, although related, ideas. The idea of law is the idea of a social institution at work. The idea of justice provides the ends and means that such a social institution is trying to achieve. If these are two different ideas, how does Kant move from the idea that justice is coercive to the idea that law is coercive? This is evidently by using the tacit premise that a legal system is a just system. From such an equation one can conclude that if a just system must be coercive then so must a legal system. But, as we have seen, a just system is a free, voluntary enterprise between human beings. If such a social system consisting of just actions, must be non-coercive, and if law is a

just system, then it follows that law must also be a non-coercive system.

What is the root of Kant's erroneous idea that in a legal system (a just system) everyone coerces everyone else reciprocally? This is, perhaps, not too difficult to unearth.

Kant's belief that 'justice can be represented as the possibility of reciprocal coercion' is based on the belief that "Any opposition that counteracts the hindrance of an effect promotes that effect and is consistent with it"¹⁷. He tells us this at the very outset of the discussion about coercion. This belief in turn, as it becomes clear when he 'constructs' the notion of justice in the subsequent paragraph, is based on a principle that applies to the factually possible world. Kant tells us "Justice exhibits this (reciprocal coercion) concept in a pure a priori intuition on the analogy of the possibility of the free movement of bodies under the law of the equality of action and reaction"¹⁸. Kant gives us no grounds for believing why such an analogy must hold. He seems to arbitrarily take a principle that belongs to the factually possible world, and apply it to the normatively possible world. This particular error (as noted while discussing Kant's idea of the community) seems to have been carried through all his works. One of the factors which,

distinguishes the noumenal realm from the phenomenal realm, is precisely the truth that the Newtonian law of equal action and reaction (reciprocity) cannot be said to apply to the noumenal realm. It is only because of this, for example, that when someone steals my coat I can give him my hat too, I do not in turn have to steal his coat; or, when someone hits me on one cheek I can present to him the other cheek too, I do not have to hit him back. In fact, as Kant himself argued, all moral actions are done for their own sake, unconditionally, not because one receives a reciprocation of equal and opposite worth, although, no doubt sometimes one may be psychologically inclined to think otherwise.

Kant is thus also wrong in believing that any opposition that counteracts the hindrance of an effect promotes that effect. Coercion can never promote freedom in the true sense of the word. It can at best restrict the actions of some people, so that others may act freely. As a matter of fact, history shows that coercion promotes the employment of more coercion, just as violence leads to more violence. In any case, Kant's gravest error seems to be in his failure to see that his whole moral theory is based on the very possibility that man can transcend the Newtonian law of reciprocity, and thus do moral actions in the noumenal realm, in a way that no reciprocal results of his actions are either required or necessary. This over-

sight seems to have its worst consequence for law, i.e., external morality, where the question of coercion comes up in a major way for the first time.

If the proposition 'justice is united with the authorization to use coercion' is in fact a complex conjunction of at least two propositions, the proposition that a system of just actions exist and the proposition that when someone acts unjustly coercion may be authorized to prevent him from doing so, then it follows that insofar as justice is concerned, there is not one but two distinct problems for pure practical reason to solve. The first one requires that we find out how to create and sustain a just normative system, and the second requires that we find out what to do when someone acts contrary to the principles of such a just normative system. The first problem is the problem of building and running a legal system, and the second is that of substituting an alternative system for it when the system does not work or when some agents in it fail to conform to the rules.

Pure practical reason tells us (through the principle that justice is united with the authorization to use coercion) that under the conditions of failure force may be justly substituted for reason and that such a substitution will not be violence, it will be justified coercion. Of

course, what makes such a substitution (of reason by force) just must be observed very carefully. There are two elements to this, firstly that force is used only by people who themselves belong to the legal system as fully autonomous moral agents, and secondly it is done only when a genuine failure of law has occurred, that is, when reasoning with the person or persons has not worked. This may be taken to have occurred when one or many people have tried their best to reason the matter with the person who has acted unjustly (this is done in the lawyer's office or eventually in the court) and when it has been proven beyond reasonable doubt that the person acted contrary to the principles of the just normative system. What constitutes 'proving beyond reasonable doubt' is indeed a difficult legal question. Realizing the central significance of the problem, lawyers and jurists have naturally devoted themselves to an extensive examination of this notion, and there is indeed sufficient clarity for practical purposes. But since what 'reasonableness' consists of cannot be determined totally a priori, one must expect a natural development of the concept in the legal literature as the enterprise matures.

Pure practical reason thus provides for two sorts of normative systems: the legal system and a morally inferior (second best) coercive normative system, which replaces the legal system if it fails to come into

existence. A coercive normative system is one such as that which exists by the command and rule of the police or the army. When people fail to live by the rule of law, they are forced to live by the command of the police. In such a situation (as can be witnessed presently in downtown Chicago or Manhattan) the rule of law, i.e. law itself, does not exist. Life is structured by rules of force.

The legal system, as noted, is based on principles of reasoning, which involve such activities as debates, discussions, fact finding, study of cases, systematic observations and listenings, etc. The working of a coercive normative system is based on principles of force, which involve acquisition and expertise in arms, the ability to move quickly in space and time, cunning and skill, such as who can plot and plan more probable schemes to outwit the other, etc. The two types of normative systems are thus qualitatively different types of systems.

It follows from the foregoing account that the police and other coercive systems are neither a part of the law nor its extension. Far from being coercive, law cannot even entertain the possibility of having coercive elements as its extensions.

If a legitimate coercive system, such as the police, is a substitute for a legal system and not its extension, what is its relation to the other institu-

tions of the civil-society?

The coercive system is an extension and an instrument of the state, specifically, the political system.

The political system is not the same as the legal system, the two are distinct systems which are distinguished not only in terms of their basic structuring principles but also in terms of their systematic aims. Besides the confusion about law and morality, there seems to be an equally pervasive confusion concerning the distinction between the legal system and the political system. Although most thinkers ordinarily seem to feel and accept that legal and political systems are distinct, the basic foundational distinctions do not seem to have been spelt out clearly. However, in this work I shall not examine in any detail all that is contained in the idea of a political system, for that concerns the idea of the state, and thus demands a separate work by itself. But in so far as the idea of law is distinct from the idea of the state, the unique characteristics which distinguish a legal system from a political system must be clearly spelt out through the course of this work. In earlier chapters I have already argued that legal systems are distinct from political systems in terms of the foundational principles they are based on, that is, whereas legal systems are based on syn-

thetic a priori propositions, other types of systems are based on analytic propositions which work as foundational propositions for conventions. The difference between the legal system and the political system will be further sharpened as we go along in the work. Here I will concentrate on the theme of this section - namely, coercion, which further distinguishes legal systems from political systems.

For the sake of clarity, perhaps it will be best to spell out the differences between political and legal systems as distinct points, in so far as they relate to the issue of coercion. Although these points are overlapping, they highlight different problems related to the question of coercion.

1. Legal systems are systems of autonomous co-operative activities, always aiming to be just. Political systems are systems of autonomous activities whose aims depend upon the necessities of the time and the society, including the necessity of controlling human action by force when people fail to live by the rule of law. That is, the political activity extends into a just coercive activity through the police, under limiting stipulations specified by reason, which defines the conditions under which one can infer law not to exist.

2. The conditions under which reasoning cannot take place are also the conditions under which law cannot exist. Under such conditions, however, a political system (such as the dictatorial or totalitarian or martial system) can exist. What this implies is that whereas a legal system is epistemologically self-validating, in the sense that its justification calls for reasoning and the possibility of reasoning requires a legal system (i.e. it is transcendently justified), the political system is not self-validating. Its justification requires utilitarian grounds (one of which, as we saw, is the prevention of further injustice by using coercive means). Since a political system is not self-validating and since coercive activity is a function of the State, it follows that coercive activity will always stand in need of moral (legal) justification.
3. The legal system aims at an absolute value - justice - its fundamental principles are synthetic a priori propositions, while political systems function according to conventions, depending on the social needs; moreover their foundational principles are analytic. This entails that while political systems, being conventional, can

greatly vary in their structure and function from nation to nation, all legal systems must be alike in their essential features and purposes; and as different legal systems develop and mature they will all turn out to be alike. However, since coercion is a function of the political system, it follows that the methods and types of coercion can greatly vary from place to place and at different times.

4. The legal system being transcendentally and metaphysically justified, independently of all other systems, and also being the only normative system which provides the conditions for the best of all normatively possible world is the only system which can provide grounds for the existence of all other systems. All other normative systems (including the political one) are authorized to exist and work by the legal system. They are legal and hence justifiable only in so far as they exist and act within the limits of such authorization. In concrete terms this means that whereas the judge is authorized to do what he does on the basis of human reason, the politicians and their coercive extensions, namely the policemen, the army-men and other

similar people , are authorized by the legal system to do only what they ought to do according to the legal system.

Having purified the legal system of some of the elements which, in fact, belong to the political system, we can proceed to state in exact terms the conditions under which the political system may use coercion through its instruments designed for this end.

- a) A legal system may hand over a person to a political system if the courts find that a person has acted contrary to the ~~duties~~ that he has towards creating and sustaining the normatively best possible world. The conditions under which some basic duty towards the normatively best world can be taken to have been violated are described in the criminal law of a legal system. (This issue will be discussed in detail while discussing the grounds for the individuation of laws). In such a case of violation, the agents of the political system use coercion to confine the criminal's or the deviant's existence in the normatively possible world, either partly or totally. (That is, they can put him in jail, in a reformatory school, or on parole etc.).

b) Two or more people may have to be coerced because the court did not succeed in reconciling the aims of their activities with the ultimate set of legal ideal ; that is, when the court did not succeed in negotiating and settling the issues such that the activities of the disputants would be in conformity to the laws of freedom.

c) Someone may have to be coerced because the law, though rational, was not understood by the agent's irrational will. The limiting case is when a person is grossly irrational, i.e., is insane. But in such a case it would first have to be argued and justified in the court that the law is, indeed, rational, and that it is the person who is, in fact, irrational.

In all the above three cases, the issue is handed over to the political authority which may or may not set the police on the person or a group, and which may or may not bring them to justice. But even if it is successful in doing so, in every case the coercive activity is not part of the law, but always its failure or absence. The law itself does not imply coercion nor does it exist on such a basis, one follows the law because it is in conformity with, or at least does not violate, the dictates of reason.

Since the only reason why any legal system allows a person to be coerced by the political system is that the legal system must continue to provide the conditions for the best possible world for all its members, the limits to which such coercion can be justified as reasonable follows deductively and becomes self-evident. The legal system can authorize the agents of the political system to use coercion only in ways and to the extent which is necessary for sustaining the legal system. That is, the political authorities are justified in using only the minimum amount of coercion which is necessary to maintain the possibility of the legal system. Any coercion which is beyond this limit or which is not related to maintaining a legal order, is unjustified and is violence.

In distinguishing between legal and political systems and in arguing that the political institution, and not law, is coercive, I do not intend to say that coercion is all that there is to the function of the political system. It has, indeed, various other functions, some of which will come up for discussion later. But here it has been necessary to focus on only the coercive aspect of the idea of State, since it is this aspect which is often mistakenly described as belonging to the idea of law.

Having distinguished the legal system from a coercive system, and having noted that the idea of

law is purely the idea of external morality, it becomes possible to clarify and resolve a basic problem that has often been posed for the legal theory.

Theorists who equate the legal system with the coercive system naturally get very puzzled when they find a system which claims to be a legal system but which does not have efficient (or even inefficient) coercive measures to regulate those who violate the law. Such is the case with International law.

The basis on which a legal system is built and sustained, as we have seen and as we shall see in detail further, is very different from that of a coercive system; the latter is only a substitute for the legal system, it is not the legal system itself. Hence if a legal system does not have an efficient substitute it follows that the political system which substitutes coercion for law is either not well organized or is inefficient. It does not follow that the legal system is not a legal system on the grounds that it cannot coerce efficiently.

The problem of substitution arises in different ways for every level of legal jurisdiction. The type of coercive system that can be substituted for law at the municipal level is different from the type that is needed at the national level. These two are different again from the type of coercive system that can be substituted for law at the international level. This is so because the political

system functions differently at each of these levels.

However, the nature, the structure and the basic principles of the legal system are the same whether at the level of an isolated community on some unknown island or at the international level.

The theory by which International law, or any level of law for that matter, is to be explained, is the same at each level. The problems inherent in the substitution of coercion for law are what make each level of law different. The political problems appear at each level in different ways. There is no conflict between different levels of law, insofar as their nature and functions are concerned. Hence we do not need different theories to explain their basic principles. However, we do need different political theories to solve the political problem of coercing people, so as to provide the possibility of maintaining a legal system. The limits of coercion, even at the international level, would once again be defined and regulated by the basic principles of law.

Since the criteria by which the legality of a coercive system, at every level, is appraised, is provided by the basic principles of law, it becomes a matter of utmost importance to be clear about these principles. I turn now to an analysis of these normatively synthetic a priori propositions of reason which apply to practice.

IV.

THE MORAL PROPOSITIONS OF
PURE PRACTICAL REASON

Kant often writes about the 'supreme' moral principle — The Categorical Imperative — as though this formulation contained the key to understanding the whole of morality. It is the Categorical Imperative which has the all important place not only in his moral theory but, subsequently, also in his legal theory. The ensuing literature on his moral theory has naturally centered mostly around the principle of universality. ¹⁹

However, in the Groundwork itself Kant not only provides us with five different moral principles, but in the 'Review of the Formulae', he also tells us that all maxims have a form, a matter and a complete determination, and that a moral principle cannot be comprehended until all three aspects have been considered. The formula of the form is: "Maxims must be chosen as if they had to hold as universal laws of nature"; the formula of the matter is: "A rational being as by his very nature an end and consequently an end in himself, must serve for every maxim as a condition, limiting all merely relative and arbitrary ends;" and the formula of complete determination is: "All maxims proceeding from our own making of law ought to harmonize with a possible kingdom of ends as a kingdom of nature." ²⁰

He also tells us that the progression (in legislating a maxim) may be said to take place through the

unity of the form of the will (its universality), through the multiplicity of the matter (its objects — that is its ends); and through the totality or completeness of its system of ends.²¹

If the form, matter and complete determination are essential for every maxim, and if progression takes place through unity, multiplicity and totality, which Kant's first Critique clearly argues that it must,²² then it follows that we must pay a far greater attention to this complexity in considering moral principles, than to Kants frequent assertion that only the Categorical Imperative is the supreme moral principle. On the above grounds, the Categorical Imperative will only provide us with the mere 'unity of the form of the will.' To know this is still to know very little about the maxim, we must also consider its matter and complete determination, besides what is involved in its progression.

Since Kant thinks that the Categorical Imperative is the only supreme moral principle, it is only this principle of universalization which he applies to both ethics and law. In law, the universalization principle turns up not only in the definition of justice — as principles consistent with the freedom of the will of all —²³ but also in the consideration about publicity of legal forms — all laws must be known by all so that each person can act

freely upon them.²⁴ However, if Kant's above arguments in the Groundwork and in the first Critique, about the maxims' form, matter and determination, on the one hand, and their unity, multiplicity and totality, on the other, are correct, then it follows that one must not only apply the universalization principle to law and ethics, all other principles must also be so applied. It also follows that the Categorical Imperative is not the only synthetic a priori proposition, all other basic principles of morality are also synthetic a priori propositions of pure practical reason. Of course, since the modes of legislation in law and in ethics are different, these propositions will apply differently in law and in ethics.

We will subsequently see how these different propositions apply to law, but first it will be necessary to present and discuss them.

One reason why Kant chose to apply the universalization formula to law and ethics, and to neglect the others, seems to be due the fact that he (mistakenly) thought that the various formulations of the moral laws that he had presented were merely different ways of saying the same thing. He seems to clearly imply this when he reviews his own formulae.²⁵ He also tells us that the difference between the various moral principles, as he outlined them are only " subjective, ... intended to bring an

idea of reason nearer to intuition (by means of a certain analogy) and thereby nearer to feeling." ²⁶

In assuming that the various moral principles are only different formulations of the same Categorical Imperative, Kant seems to be clearly mistaken. All these formulae seem to me to be making different points, each of which is 'supreme' and necessary in its own way. In what follows, I shall briefly attempt to show the distinctive relevancy of each formulae, even though Kant did not see them in this way. It may perhaps be argued that Kant's formulation of the laws of freedom are not the best expressions of the propositions of pure practical reason. I will not try to improve upon them here in any way. For the purposes of this work, I shall present and discuss them in the form and in the terms that Kant has presented them to us.

As discussed in section I, at a deeper transcendental level the legal enterprise seeks to solve the problem of the 'One and the many' in the noumenal realm through practical reason. Such an enterprise entails the resolution of many normatively incompatible possible systems into one best of all normatively possible worlds. The formula of universal law : "Act only on that maxim through which you can at the same time will that it should become a universal law" ²⁷, provides us with the formal criterion according to which such a resolution, from many

to one , can be affected. If a universal law is pervasive, it can cut through all different normative systems and apply in all of them. Now, if all the laws were universal, all the normative systems would be alike in their form, although they might be different in their actual content. There will, thus, be a formal 'identity of the indiscernibles'. Since all the laws will be universal it will not be possible to discern the normative systems formally. Thus, formally, there will be only one normatively possible world.

Human beings belong both to the factually possible and the normatively possible worlds. They belong to the factually possible world because they are embodied beings and they belong to the normatively possible world because they have a free-will and can act autonomously. Or as Kant would have it, the human self belongs to the phenomenal world as the empirical self, but as the non-empirical self (what Kant called the transcendental self) the human self belongs to the noumenal realm. Although we cannot decide how the processes and things should be in the factual world, since we cannot act in it, we can, nonetheless, act on such a world to create artifacts , which then belong to the normatively possible world . Since we cannot act in the factually possible world , we may at best act as if we can. The moral advantage in doing this is that since the factually possible world has already resolved itself into

one world and thus made all its laws universal, if we emulate such a world we would be making all our norms universal. The factually possible world, thus, presents itself as an ideal model, but only insofar as all its laws are universally quantified. Since we cannot act in it, Kant tells us : "Act as if the maxim of your action were to become through your will a universal law of nature." ²⁸ The laws of nature are universal, hence the only way that we can act as if our maxims are such laws, would be when they are universalizable.

In the normatively possible world, however, where we can certainly act, the question of acting as if does not arise. We have therefore : "So act that your will can regard itself as making universal laws through its maxims." ²⁹ This formula concerns our actions only in the normative or the noumenal realm, hence it is not the same as the previous one.

The three mentioned moral formulae thus make three different points and are relevant in distinct ways. However, as yet, they only provide us with the form of the maxim which can bring about a legal progression towards unity. We have still to consider the progression towards multiplicity and complete determination.

In the normatively possible world individual human beings are not only autonomous agents, but also members of a community. Hence pure practical reason

in concrete contexts must not only determine what each individual ought to do as an autonomous being but also what he ought to do as a member of a community. Pure practical reason must, thus, necessarily provide two different sorts of synthetic a priori propositions which can determine the agent's will, one which applies to him as an individual and the other which applies to him as a member. Kant presents the synthetic a priori formula, which concerns the human being as an individual autonomous will, as follows:

"Act in such a way that you always treat humanity whether in your own person or in the person of any other never simply as a means, but always at the same time as an end." ³⁰

The synthetic a priori proposition which concerns the individual as a member of a community, is formulated by Kant as follows:

"So act as if you were through your maxim a law making member of a kingdom of ends." ³¹

The above two formulae provide the conditions for what Kant calls a progression towards multiplicity and totality of maxims, respectively.

— Kant's Categorical Imperative cannot by itself form the basis for law or ethics, for the obvious reason that every act can be described in various ways, from different perspectives. Which principle one wishes to universalize as a law will depend upon which description of

the act one takes to be expressing the maxim. The Kingdom of Ends principle, however, avoids the problem of treating each maxim in isolation from other rules. It asks us to work out an ideal system of rules, such that the matrix for considering each proposed maxim as a universal law is the set of all other rules that every member in the Kingdom of Ends would necessarily accept, and in which each person will be regarded as an end in himself. In considering maxims in this way, their matter, and their relation to the rest of the system (i.e., their complete determination) would also have been taken into account. One would not have merely considered their form.

As it turns out then, the formula of the Universal law is the criterion for the form of the maxim; the formula of the End in Itself is the criterion for the matter of the maxim from the individual's point of view; and the formula of the Kingdom of Ends is the criterion for the complete determination of the maxim from the community's point of view. All three formulae are synthetic a priori propositions which are necessarily involved in any moral legislation.

Since morality has two aspects, internal and external, all three propositions will apply both to ethics and law, but they will function differently in each since the modes of legislation and the duties involved in law and ethics are different. Since my interest in this work is in legal legislation, I shall only discuss this aspect of moral legislation. Ethical legislation requires a separate treatment.

V. THE LEGAL PROPOSITIONS OF PURE PRACTICAL REASON

Law is concerned with optimizing and safeguarding human freedom. The Kingdom of Ends principle is intended to emphasize the optimization of freedom of action; it is, hence, the most apt principle for describing the basis on which laws can be legislated.

The notion of a Kingdom is the notion of a community. (Kant seems to have used the term in the sense of a 'realm'. Its English translation as 'Kingdom' is misleading since it suggests political ideas such as those related to monarchy, which Kant evidently did not intend to imply. I shall, hence, hereafter use the more neutral term 'Community of Ends' interchangeably with the expression 'Kingdom of Ends', wherever necessary. By the use of this expression, however, I do not intend to imply anything other than what Kant meant by 'Kingdom of Ends'.) What Kant meant by Kingdom of Ends, as he tells us in the Groundwork, is: "A systematic union of different rational beings under common laws." 32

Although Kant does not use the term 'Kingdom' in any significant way outside the Groundwork, the sense that is given to it here finds frequent use in all other works. Thus, Kant sometimes uses the term "commonwealth" in a similar sense; 33 in other works he describes the "Ideal State". To obtain a complete picture of the Kingdom of Ends it is thus necessary to take into account not only what Kant says in the Groundwork but also what he says elsewhere.

In the light of these wider considera-

tions, to start with, the Kingdom or the Community of Ends can be characterized in the following way. The Community of Ends is a system in which the legislators of laws are bound by the following rules:

- (a) Every rule willed by the legislator(s) must be such that any and every individual can act in conformity to it when he wants or needs to do so.
- (b) Every rule willed by the legislator(s) must take into account that each member of the community is an end in himself.
- (c) Every rule willed by the legislator(s) must make possible the use of every autonomous member by other members, but it must never make possible the use of any member solely as a means for the ends of other members.

The above propositions are the principles of pure practical reason in their concrete application to law. These propositions generate other related propositions, which we will subsequently discuss.

The idea of such a Community of Ends is entirely the idea of a set of ideals. It does not depend upon any factual description, except the assertion that there are rational agents capable of being conceived as ends in themselves.

We might ask why is it necessary to accept the model of the Community of Ends? Is it not itself an

arbitrary a priori moral assumption?

To pose this question is, however, to assume a world in which acceptance and rejection are really possible. It is also to assume that propositions must always be considered, and those which are acceptable by some criteria should be accepted while the others should be rejected. This is to demand optimal conditions for acceptance and rejection.

What the Community of Ends model provides is the social condition for optimizing the possibilities for acceptance and rejection themselves. Actually, it supposes precisely a system in which choices are made by free decision and not by force or by fiat. The denial of the existence of ends in themselves and the denial of their equality is precisely the assertion that some propositions (i.e., those which distinguish arbitrarily between some rational agents and others) should be accepted by force or by fiat. The Community of Ends model thus provides the optimal and the only condition in which any and every question can be asked, considered and answered, including the above question concerning the Community of Ends.

Being able to reason and make the right decision in accepting or rejecting propositions is one of the basic ideas of the Community of Ends model. The ability to make such decisions, however, requires the knowledge of all the relevant possibilities. The Community of Ends

principles thus prohibit any arbitrary limitation on the availability of knowledge. Such legal ideas as the freedom of the press, of speech, and the access to education, which are instrumental in the acquisition of knowledge and being able to make the right decision, thus follow directly from the Community of Ends principles.

Since these principles are synthetic a priori, they must be accepted as true and binding, prior to the experience which leads to the actual acceptance or rejection of specific propositions. They tell us a priori what the limits of the legal system are, namely, those conditions under which a Community of Ends can exist, and also what the legal system must contain, namely, the conditions for the Community of Ends. They also specify the priority of the principles within the legal system. All those principles which are essential to the Community of Ends will take precedence, they will be the supreme criteria for judgement, which include the various fundamental legal freedoms and rights. These will be followed by all those principles which enhance the possibility for a Community of Ends. Third preference will be given to those legal principles which do not at least prohibit the possibility of a Community of Ends. Such a classification of legal propositions allows for a legislative openness, with a realm of permissible decisions, which is necessary for all legal systems. It also gives a notion of an overall

systematic aim to the legal system which can give a sense to consistency in application.

The fact that the Community of Ends model for a legal system, as characterized in its richer and more elaborated form here, is implicit, in Kant's description of a legal society, would become evident if one were to take into account not only what he had to say about law in the Metaphysik der Sitten but also in Theory and practice. There, in criticizing Hobbes he tells us:

"The Civil-State, viewed purely as a legal State, is thus based a priori upon the following principles:

1. The freedom of each member of society as a human being.
2. The equality of each member with every other member as a subject of the State.
3. The independence of each member of the community as a citizen."

He continues: "These principles are not laws given by a State already established, but they are the only laws that make it possible to found a State in accordance with pure rational principles of external human laws as such."³⁴ The above three notions of freedom, equality and independence involved in a legal system, receive a more detailed expression in the Metaphysik der Sitten, as :

The members of such a society (*societas civilis*), that is, of a state, who are united for the purpose of making laws are called *citizens* (*cives*). There are three juridical attributes inseparably bound up with the nature of a citizen as such: first, the lawful freedom to obey no law other than one to which he has given his consent, second, the civil equality of having among the people no superior over him except another person whom he has just as much of a moral capacity to bind juridically as the other has to bind him; third, the attribute of civil independence that requires that he owe his existence and support, not to the arbitrary will of another person in the society, but rather to his own rights and powers as a member of the commonwealth (hence his own civil personality may not be represented by another person in matters involving justice and rights).

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However, Kant does not make it clear how the three notions presented here, those of freedom, equality and independence, relate to his moral theory in general. Nor does he attempt to explain why the civil state when viewed purely as a legal state must have these notions. Kant's analysis in the Theory and Practice does not make it very clear what is meant by or involved in viewing the civil state as purely a legal state.

Only when we view the notion of the Kingdom of Ends, and its relation to the idea of the civil society, in a richer and larger perspective, as done in the manner here, can the above three notions be bound together within a conceptual

scheme.

In light of the analysis presented here, the three notions necessary for the idea of the civil state as a legal state can be shown to be derivable directly as corollaries to the principles of the Community of Ends, in the following manner. (Since the above three principles are derivable from the Community of Ends principles they become conceptually posterior, however in their moral and legal significance they are just as important as other legal propositions of pure practical reason.)

The first principle which guaranties the freedom of each human being follows directly from the idea that each human being is essentially a rational free-willing agent and that the agent's self-realization as a moral agent can only be achieved in so acting. A possible civil state can only become a legal state if the agents in it in fact exercise their freedom and realize themselves as autonomous agents.

The substantive equality of each human being follows from the idea that the essential humanity of each being, his dignity as a moral agent, or as Kant says, his worthiness in being priceless, lies in being an end in himself; and thus, for every maxim, he serves as

a condition which limits all merely relative and arbitrary ends. Procedural equality, on the other hand, follows from the principle that no person is to be ever treated solely as a means, and also that all laws must be universal. Since law must never treat anyone solely as a mean, and since it must abstract from individual differences while legislating, it follows that every judge stands in the same formal relation to every person that he is judging. That is, the formal procedures by which the judge is to pass a judgement on a person must be the same for all people.

The idea of human independence, however, cannot be derived from Kant's legal theory without marking the radical revision discussed before, namely, that law is not coercive. It can be derived from the Community of Ends principles as presented here, however, because this major revision in the idea of law has already been incorporated into these principles.

If law is a priori entitled to coerce, then the independence of each agent to act morally is not absolute. Law must guaranty that everyone may pursue his moral ends in the manner that seems best to him, provided he does not infringe upon other people's independence to pursue their ends. Or, as Kant would have it, law must allow the pursuit of moral ends by each agent, so long as he does not become an obstacle to another's right to do whatever can coexist with everyone's freedom under a possible Uni-

versal law. For the actualization of such an independence it is evidently necessary that the moral agent not be coerced in anyway, to do anything, even that which is morally right; for to coerce anyone to do something which is morally right is to disregard his autonomy and dignity. Coercion enters in only to stop the person from doing something which is legally wrong, not to make him act legally or morally, and when coercion does enter in this way it is not the task of law but that of the state to see to it that a minimal amount of coercion, which is authorized to it by law, is used to maintain a legal order.

The formulation of the Community of Ends principles raises various questions for a theory of justice . such as, what are the various detailed contents of substantive and procedural equality, what are the various related ways in which independence can be defined, etc. But it must be remembered that the limited task of this work is to specify the theory of law and not to examine a theory of justice. The idea of law and the idea of justice are different though related ideas. They are related by the fact that just conditions are what law is trying to achieve. But then the theory of law, which concerns the idea of law, must tell us what type of social institutions based on what justifications and grounds, bring about just conditions. This is distinct from a theory of justice (which concerns the idea of justice) which specifies and

justifies the criteria of what constitutes just conditions.

In practice, of course, no legal system can work without involving the theory of justice, just as it cannot work without involving a theory about the State. But from the point of view of understanding, it is perhaps best to divide the conceptual labour into working, defining and discussing the three ideas separately. This work shall, hence, not discuss problems in the theory of justice in any detail.

However, it will be necessary to, at least, point out how problems for a theory of justice arise from the propositions of pure practical reason; problems which are related to law but which need independent analysis in the theory of justice.

The proposition of pure practical reason says that law must make possible the use of only autonomous members; here arises the first problem for a theory of justice. What criteria defines and distinguishes the use of an autonomous member from a non-autonomous member? Most theories of justice, I think, would now say that children and the insane cannot be taken to be autonomous members. Law must, therefore, not make possible their use by the community, or at least it should limit it in all necessary ways. Other theories have argued for the use and abuse of all sorts of members on various grounds. Any theory would, of course, require justification.

Secondly, the principle of the Community of Ends allows that every member can be used as a means, but never solely as a means to some end. However, since there has to be a division of labour in the society, people have to be used as means (although not solely). This has to be done in such a way that the use does not violate the person's dignity. Here arises the second main problem for the theory of justice. It has to find out what sort of use would not violate the human dignity. If the use that people make of other members of the community can be compensated in some way such that their original dignity and integrity is retained, then it is evidently the task of a theory of justice to state what such a compensation would be. A theory of justice may thus be divided into the a priori part, which specifies the conditions under which a just use of a person has been made; and the empirical part, which specifies what would count as a just compensation when someone has been used. The latter question turns up as an issue in political economics, it, evidently, belongs equally to what may be called 'juridical economics'. As an example of the issues concerning the first part of the problems of a theory of justice one may cite John Rawls' Theory of Justice ³⁶; and as an example of the problems of the second part of a theory of justice, one could mention Karl Marx's Das Kapital. ³⁷ I am, of course, not suggesting that one has to accept Rawls' or Marx's solutions. The aim here is only to make clear that although the principles of the Community

of Ends generate problems for both a theory of justice and a theory of law, the nature of these problems is distinct.

Returning to the theory of law then, it will be important to mention in conclusion that since the principles applicable to the Community of Ends, as specified here, together with the derivative ideas of equality and independence, form the rational basis for the existence of a legal system, it follows that these basic legal propositions are the ones that constitute the reality principles for law. That is, the metaphysical requirements which can make the transcendently possible legal system actual are specified by these existential conditions. For a possible legal system to be actual these conditions must be satisfied, or conversely, the existence of these conditions will actualize a legal system.

These reality or existential conditions tell us that a legal system, or any law in it, cannot be said to really exist if it is found to exist only in the books and not in practice. Freedom of speech for example will exist in jurisdiction X if the citizens of X have actually spoken freely and continue to do so. It would be wrong to say that freedom of speech exists in X because it is written in their Constitution, although no one has ever actually cared to speak freely. If the citizens of X have not cared to speak freely or have not been allowed to do so for some reason, then it would be false to say that freedom of

speech exists as law in X.I shall discuss this issue in detail in the section on the legislative requirements of law.

Since the Community of Ends principle forms the rational basis for the existence of a legal system, and since the idea of a Community of Ends is a set of ideals - the only conditions in which every human being can realize his moral ends - it becomes morally obligatory for all of us to work towards such an ideal. We obviously know that presently we are far from the ideal; what do we do in the mean time? We must, as Kant had it, always act as if we are members of an existing Kingdom of Ends, although for the moment we are not. This is the only way to bring such a Kingdom into existence.

The conditions in which we can try to actualize the ideal community is met in a civil society. Hence, as Kant and others have argued, it is our duty to maintain a civil society. In an actual Kingdom of Ends what a person legislates for himself will also be what the community legislates for the individual. That is, in a civil society which is actually a Kingdom of Ends, the division between law and ethics will not exist, in contents the two will be the same. Such a synthesis can only be achieved in a civil society, not in a State of Nature. Therefore, I proceed now to some basic considerations about the civil society as it relates to the idea of law. This would require considering the civil society both from the point of view of the community and from that of the individual.

VI. THE COMMUNITARIAN REQUIREMENTS OF LEGAL ONTOLOGY.

By the communitarian requirements of legal ontology I mean those necessary metaphysical conditions on fulfillment of which a community actually populates the normatively possible world in such a way that it has a legal identity and a defined legal jurisdiction.

The first condition is that a community must define its identity and jurisdiction in a self referential way. The meaning of such a communal legislation is examined and discussed in the first part of what follows. (Section - VI.1).

The second requirement is that a community must actually create and sustain the legal system. Some basic principles involved in such a creation and sustenance have already been examined and explained. It remains to be seen, now, what types of actions actually need to be done in accordance with these principles, to bring about and sustain a legal system - whether we need to contract or merely to consent or to surrender, etc. The following two sections -- (Sections VI. 2 and VI.3) - examine and discuss this problem. The appropriate conceptual scheme which best characterizes the actions done to create and sustain a legal system are also discussed.

VI. 1).

COMMUNAL LEGISLATION

When a community legislates laws to itself it determines the course of its collective actions. In terms which Michelet made popular after the French Revolution, the collective actions are performed by "the people". Communal legislation by the people involves, firstly, some way of deciding what to do, secondly, some way of giving effective form to that decision, and thirdly, some way of following through to see that the form persists long enough to achieve whatever ends are in view.

Thus, we have the Indian Constitution which begins with the statement "We the people of India..."; similarly, the American constitution reads, "We the people of United States...". These are self-referential propositions, the people are referring to themselves and giving a constitution to themselves. If we are to make any sense of such self-referential propositions involved in communal legislation, we must assume that some action has actually taken place in making these performative utterances. The entity to whom the constitution is given is the people and the giver is the people also. It becomes necessary therefore to assume that 'the people' refers to something actual. The constitution is a community's most serious and important document, as such its very opening line cannot be untrue or meaningless, referring to nothing and portraying a non-performance.

The uneasiness that many philosophers

seem to exhibit in asserting that the notion of the people refers to something actual, can be traced to their mistaken metaphysical view that all entities must either be of a natural kind or a nominal kind. As discussed in Part-III, legal entities are neither natural nor nominal kinds. 'The people' refers to a normative kind. It would, hence, be wrong to claim that 'the people' does not exist because it cannot be observed like the natural kinds, or because it is an abstract entity like the nominal kinds. The notion of the people is just not available for such observations or analysis. Being a normative kind it is intelligible in terms of norms. Its intension, described by the norms, determines its extension, and the meaning of the term is known to us essentially. That is, we not only know what 'the people' means, but also what it means to be the people.

The people is thus an actual entity of the legal system. Which group of persons will constitute a particular people, is a question of class-membership. The answer is usually provided by the Laws of Citizenship.

The notion of the community, as Kant's first Critique argues, is a category of our understanding. As argued in the last Part, in the noumenal realm this category has a different role to play. It does not just inform our understanding, it gives form to our deeds so that a number of individuals can, through their deeds, bring a community into existence and constitute themselves as a people.

Implicit in the notion of the people giving a constitution to itself, is the notion of an agency. Since an individual agent wills his activities, many thinkers, including Rousseau, have been led to discuss the activity of the people as an expression of the 'general will'. Rousseau's concept of the 'general will' is equivocal, it seems to make it both transcendent and empirical.³⁸ This has naturally led to many controversies. However, in the various discussions of the notion of the 'general will', the real issue behind the notion seems to be lost. The real issue is : in what sense does the people legislate laws to itself ? It was this question too which Rousseau was trying to answer. The question remains significant independently of his solutions to it. In what follows I shall attempt to pursue and clarify this question itself, rather than discuss the correctness of Rousseau's answer. Analysing Rousseau's answer would, of course, be important, but that would be a different task than the one intended here.

From the point of view of the community, the question is : in what sense does the community legislate laws for the individual?; and from the point of view of the individual, the issue is : in what sense can the autonomous will of an individual be understood as constituting the will of the community ?

Since the basic legal propositions, in their application to the concrete instances, provide universal

laws, if the individuals act in accordance with such universal legislative laws of freedom, a general law will result from their joint decision. This is one sense in which the will of the individuals could be understood as constituting the will of the community. The autonomy of man, as an end in himself, would further mean that a legal norm possesses truly legitimate binding obligation only if it has been created by the free participation of all those who are subject to it. From the point of view of the community, however, only within the frame-work of the principles of the Community of Ends can a free decision be realized as an expression by autonomous agents legislating for the will of all.

The will of all, i.e., the will of the community, is thus, not the name of one more will in addition to the various individual wills. It only specifies a general condition in which a particular maxim can be taken to be legislated, and to be consistent with the freedom of all individual wills.

VI. 2).

THE COMMUNAL GENESIS OF LAW

I shall consider, here, the idea of the civil society in its legal aspect only. In itself the notion is very complex; it would include within itself not only the political and economic institutions but also others, such as the religious, the educational and the recreational ones.

The main aim of this section is to show that the notion of a pre-legal society is a myth. The difference has always been one of degree and never of kind. There can neither be a conceptual nor an empirical discontinuity in so far as evolution of societies as legal societies is concerned. A theory which portrays sudden leaps into legality cannot be describing the truth.

If law is based on practical reason then sudden leaps in the social structure would involve sudden leaps in man's practical reason and nature. The belief that the evolution of man's practical reason has been discontinuous, seems to me to be a farfetched theory. It seems more plausible to believe that the evolution of human reason and nature has been gradual and continuous. However, in what follows, I will not attempt to develop this thesis from the point of view of human reason, but limit the work to a criticism of those

theories which portray discontinuity in social evolution from a pre-legal to a legal state. This primary task is more important at this stage. Towards the end of this section I will suggest what sorts of concepts and theories are appropriate. This will be done in a rudimentary way.

Since the legal system is the only system which provides the conditions for the best normatively possible world, it is the most fundamental system of the civil-society; and as argued before, it is the one which justifies and regulates all other normative systems of the civil-society. Further, law justifies its own existence and derives its authority to regulate human behaviour from human reason and not from human will. Since law is the protector and the justifier of all other normative systems it follows on this account that we need the legal system for a civil-society; and it is not the case that we need a civil-society first in order to later have a legal-system. That is, we have a legal system so that we may have a civil-society. It is wrong to think that we have a civil-society so that we may have a legal system.

Now, simple as this distinction may seem at first sight, it has not only been the grounds for a great deal of confusion in the legal theory, but, as I shall try to show, it has also led many philosophers to theo-

rise wrongly about the justification for a civil-society in so far as it concerns law.

This distinction distinguishes Locke and Hobbes from Kant. Locke and Hobbes seem to have taken the second option and thought that civil-society is needed and justified on the grounds that only in it can we have a legal system. Hobbes argued that the civil-society was to be preferred to the State of Nature for reasons of enlightened egoism. Locke argued that it was preferable on grounds of utility and the possibility of a legal punishment. Kant, however, found both of these theories suspect on both empirical and moral grounds. Scientifically, he argued, the theories are really fantasies of a priori sociology, for how can we ever test, through experiments, whether people are happier in a civil-society or in a State of Nature? Moreover, Kant made the point that no amount of happiness or self-interest could establish the moral worth of a civil-society, unless it could also be shown that the institutions were compatible with the demands of freedom and justice. Kant is thus in agreement with the first option, namely, that we have a legal system because it is good in itself and as such it provides the conditions for a civil-society. In what follows, I shall examine the two options in some detail.

Essentially, Locke's justification for a civil-society is grounded in his two basic beliefs:

first, that man has a natural right to punish others, and second, that such punishment can be actualized only in a civil-society. The crux of his theory is perhaps best expressed in his own words, as follows:

Man being born, as has been proved, with a Title to perfect Freedom, and an uncontrouled enjoyment of all

the Rights and Privileges of the Law of Nature, equally with any other Man, or Number of Men in the World, hath by Nature a Power, not only to preserve his Property, that is, his Life, Liberty and Estate, against the Injuries and Attempts of other Men; but to judge of, and punish the breaches of that Law in others, as he is perswaded the Offence deserves, even with Death it self, in Crimes where the heinousness of the Fact, in his Opinion, requires it. But because no *Political Society* can be, nor subsist without having in it self the Power to preserve the Property, and in order thereunto punish the Offences of all those of that Society; there, and there only is *Political Society*, where every one of the Members hath quitted this natural Power, resign'd it up into the hands of the Community in all cases that exclude him, not from appealing for Protection to the Law established by it. And thus all private judgement of every particular Member being excluded, the Community comes to be Umpire, by settled standing Rules, indifferent, and the same to all Parties; and by Men having Authority from the Community, for the execution of those Rules, decides all the differences that may happen between any Members of that Society, concerning any matter of right; and punishes those Offences, which any Member hath committed against the Society, with such Penalties as the Law has established: Whereby it is easie to discern who are, and who are not, in *Political Society* together. Those who are united into one Body, and have a common establish'd Law and Judicature to appeal to, with Authority to decide Controversies between them, and punish Offenders, are in *Civil Society* one with another: but those who have no such common Appeal, I mean on Earth, are still in the state of Nature, each being, where there is no other, Judge for himself, and Executioner; which is, as I have before shew'd it, the perfect state of Nature.

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(Besides the quoted passage (87) above, other passages, such as 89, 95, 96, 97, also clearly bring out Locke's view that we need a legal system in a civil society so that we may protect the rights that we already have.)

Thus, Locke's justification for a passage from a pre-legal to a legal order in a civil society is his claim that we, provisionally, give up or entrust to the government the natural right to punish others or to own some property. We could, of course, punish each other in a State of Nature, but this is not efficient or practical. In order to secure a more efficient practice of punishment or ownership, we entrust this power to the government in the civil society. We, hence, need a civil society first so that it can create a legal system in which all offenders can be efficiently punished.⁴⁰

Now, whether or not we accept Kant's criticism that a fantastic a priori sociology is being assumed here, there is a serious conceptual difficulty in Locke's theory, which needs an independent resolution.

Punishment, as Hobbes too has noted, is, paradigmatically, a legalistic notion, and what will constitute a just punishment (as opposed to mere violence or use of force) cannot be established without a recourse to a legal system in a civil society.⁴¹ Hence, the belief that we have a natural right to punish is unintelligible in a pre-civil, pre-legal society. In such a society no one would know what it meant to punish, as opposed to merely using force, because the

ability to distinguish punishment from violence itself, depends upon the possibility of distinguishing what is legal from what is illegal. Such a possibility evidently does not obtain in a pre-legal society. Punishment demands, at a minimum, three conditions: a system of rules, a legitimate authority to legislate these rules, and another legitimate authority to enforce sanctions for breaches of these rules. These conditions distinguish the mere infliction of social harm from punishment. These conditions are not present in Locke's pre-civil society, hence the notion of punishment is unintelligible. As a matter of fact, as we have seen, coercion is used only when the legal system is unable to make a person act rationally. But in such a situation, evidently, the existence of the legal system is presupposed. What I have said about the notion of punishment may also be said about the notion of right, namely, it is a legal notion, intelligible only within the schemes of a given legal order, not prior to it. Locke's theory about the move from a pre-legal to a legal-state is, thus, not only empirically but also conceptually problematic

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from the very beginning.

Hobbes explains the origin of civil-society in terms of a conception of man as egoistic and anti-social. He explains why men move from the state of Nature (a pre-legal state) into civil-society by identify-

ing what causes them to do so. In the State of Nature, men are essentially at war with each other. Since they are selfish and anti-social, they are indifferent to the concerns of each other. But to pursue his interests a man must have the power to prevent others from harming him. The consequence of all this is that life is miserable, short and brutish in the State of Nature. Men move into a civil-society, according to Hobbes, because reason tells them that peace and tranquillity are necessary for pursuing their own interests and experience shows that this is impossible in the State of Nature. The people give up their individual powers and contract into a commonwealth, in which the sovereign, who may be one person or an assembly of persons, has all the powers. Man, then, regulates the civil society through authoritative coercion (which is law in this definition). The sovereign is not bound by the contractual obligations that the rest of the people are, he has all the power. ⁴³

Kant thinks that the Hobbesian theory is wrong on two grounds. Firstly, it gives a wrong kind of advice, because it tells statesmen and citizens alike that the only thing men respect is power; and secondly, the question whether a government has a right to coerce becomes whether it has the power to do so. Kant tells us, "Once we are talking not of rights but of power only, the people

may try their own power and jeopardize every legal constitution." ⁴⁵

However, what Kant does not notice is that just as with Locke, there are some basic conceptual problems in the Hobbesian theory which make it problematic in theory also. The question whether the Hobbesian theory is historically true, comes only later.

If the people are really selfish and anti-social in the State of Nature, how can they ever get out of it? For the very act of coming together to unite in a pactum sociale requires unselfishness and sociability. The very possibility of a social contract demands that men be willing to reason together and behave morally so that they may be able to bargain. Contracting is not a morally neutral activity which may be done if men are said to behave as they do in the State of Nature. Given the Hobbesian characterization of man in the State of Nature, contracting would be impossible and the move from a pre-civil to a civil society could never occur. It would simply be impossible to win everyone's trust and lodge it in one sovereign, when, in the first place, no one had any grounds to trust anyone else. Even physically it would be impossible to contract because each person would not only fear the other's presence, if they do finally manage to sit together, they would also have no grounds for believing the

truth that the contract would be kept by all or any once it had been made. The notion of contract, like the notion of punishment is essentially a legal notion. Only after the legal system (of even some simple kind) has come into existence does it make any sense to talk about contract or punishment. The very possibility of contracting or punishing presupposes some sort of a legal system.

Kant's own position on the relationship of the notion of contracting to the genesis of the civil-society is not very clear. Although Kant does believe that the notion of contract is a legal notion and hence cannot be used to explain the existence of law, he also wants to somehow retain the belief that it is still a necessary notion for law. He tells us :

Here we have an original contract on which alone a civil and thus consistently legal constitution among men can be based and a community established.

Yet this contract, which we call *contractus originarius* or *pactum sociale*, as the coalition of every particular and private will within a people into a common public will for purposes of purely legal legislation, need by no means to be presupposed as a fact. It is not necessary first to demonstrate historically, so to speak, that a people, whose rights and duties we have inherited, must really have performed such an act *at some time* and must have left us, by word of mouth or in writing, some reliable news or instrument of it, before we are to consider ourselves bound by an existing civil constitution. It is rather a *mere idea* of reason, albeit one with indubitable practical reality, obligating every lawmaker to frame his laws so that they *might* have come from the united will of an entire people, and to regard any subject who would be a citizen as if he had joined in voting for such a will. For this is the touchstone of the legitimacy of all public law. If a law is so framed that all the people *could not possibly* give it their consent—as, for example, a law granting the hereditary *privilege* of *master status* to a certain class of *subjects*—the law is unjust; but if it is *at all possible* that a people might agree on it, then the people's duty is to look upon the law as just, even assuming that their present situation or the tenor of their present way of thinking were such that, if consulted, they would probably refuse to agree. 45

The interpretation that Kant gives to this 'idea of reason' (i.e., the social contract) is, in fact none other than his universalization principle. What he is telling us once again in the above paragraph is that public law is legitimate when it has the consent of the will of all those who are governed; that is, when it is universal. The universalization principle has already been justified by Kant as an a priori principle of practical reason. The notion of social contract, as interpreted here, does not add anything more to the criterion. In other words, Kant can be taken to have shown us that no contractarian theory is required to explain the origins of law in a civil-society, and at best it can function only as a universalization principle.

One might ask : if Kant has shown that law derives its legitimacy from reason, and that it can be justified as external morality independently of any historical account, why is he still entertaining the notion of social contract, even as a helpful 'idea of reason'?

It seems to me that in giving some attention to the notion of social contract, Kant is still labouring under not only a central misconception which limits his inquiry, but also under something which can be considered to be a dogma of the whole of Western tradi-

tion, a misunderstanding which must certainly have its roots deep down in the Western psyche for it surfaces every now and then, including in our own time as in Rawls' work. Maybe what we notice here is a historical phenomenon that has been psychologically reversed. The effect has been taken to be the cause. The roots of this psychic reversal could possibly be traced back all the way to the Moses, David or the Deucalion Covenant in the Hebrew and Greek experiences. These covenants were possible after the wars, when some sort of peace and harmony had already set in. Creating covenants and contracts requires some minimal civil-conditions. It is a result of peace and friendship and not the cause of it. What seems to have remained in the forefront of the Western psyche is the memory of the covenant, an important event which was later assumed to be the cause of peace and harmony, instead of its result.

Even in our own time we can notice that treaties are signed between nations after there is some sort of civil-relationship between them, not while they are at war with each other. The treaty is not the cause of the civil-relation and friendship, but an effect of it. Of course, once the treaty has been signed further friendship and civil-relations may ensue. This would not mean that historically or conceptually th

treaty, covenant or the contract was the prior ground for the existence of the civil-relationship . Legal ways of mutual behaviour give rise to the possibilities of treaty, contract and other mutual bindings, the legal way of behaving is not itself grounded in these. Law is the condition for a civil-society, we do not contract into a civil-society so that we may have a legal system.

The falsity of any attempt to explain or justify civil-society and the juridical system in it by a contractarian thesis, can be perceived on even a *prima - facie* preview of the working and the elements of the Law of Contracts.

Pollock defined Contract as "a promise or a set of promises which law will enforce"⁴⁶ . Later the notion finds a more precise articulation in Sutton and Shannon as "an agreement which law regards as conferring personal rights and imposing personal obligations, which it will protect and enforce on parties to the agreement."⁴⁷ Clearly, both these definitions show that the practice of law is presupposed in the practice of contracting. In any case it will be best to discuss the issue in detail before this conclusion can be asserted with emphasis.

Contract needs to be distinguished from some related notions. To start with, the liability for breach of contract and the liability in tort is distinguish-

ed by the fact that i) the duties in tort are primarily fixed by the law while in contract they are fixed by the parties themselves; ii) in tort the duty is towards persons generally while in contract it is towards some specific, designated person(s).⁴⁸ Contract is distinguished from trust by the fact that whereas contract creates right in personam, trust creates equitable rights, indistinguishable in practice from rights in rem.⁴⁹ This property of creating rights in personam further distinguishes contracts from conveyance of property, etc, which too create rights in rem. Contract is also distinguished from exchange in general, which only involves the barter of goods for goods, because of the fact that promises requiring mutual transfer are not involved and nothing further remains to be done. (Only when collateral promises, such as warrantys, accompany exchange do they become contractual).

According to this account, then, contracts are collateral promises creating further expectations and rights in personam, the liability for the breach of which is mutually fixed by the parties.

Perhaps the most widely accepted legal definition of contract is the one that appears in Section 1. of the Restatement of Contracts: 'A contract

is a promise or a set of promises for the breach of which the law gives a remedy or the performance of which the law in some way recognizes as duty." ⁵⁰

The above definitions make it obvious that law is not legitimized by any contract but that we need law first so as to legitimize any contract, or even to recognize some set of actions as being an instance of contract.

Lawyers usually define the essential components of a valid contract as consisting of:

- i) Offer and acceptance.
- ii) Consideration.
- iii) Competent parties.
- iv) Genuine Consent.
- v) Legal purpose.

(There are different ways of ordering the elements in Common Law and in Civil Law, however, in whatever priority they are arranged, the above five elements are common to most of them. The difference of approach, but the similarity of issues, can be seen, for example, by comparing 'Cheshire and Fifoot's Law of Contracts' ⁵¹ and 'Chitty on Contract: General Principles'.) ⁵²

These five elements, in fact, state the necessary conditions under which a valid contract can be taken to exist. They can be spelt out as follows:

1. There must be a genuine offer by one party and a genuine acceptance by the other. Not any action can be taken to be an offer or an acceptance. The conditions for what would constitute a genuine offer and acceptance are beforehand spelt out in detail in law.
2. There must be due Consideration. Consideration is a theoretical term in law which stands for the recompense given by the party contracting to the other. The classic statement describing Consideration can be taken to be that which was presented in Curie v. Misa: "A valuable Consideration in the sense of law, may consist either in some right, interest, profit or benefit accruing to the one party, or some forbearance, detriment, loss or responsibility given, suffered, or undertaken by the other." ⁵³ A due consideration is one which is real and legal. One may not, for example, enter into a contract which involves promising a bribe to a public official. What constitutes a real consideration or an illegal Consideration, is usually spelt out first in detail in law.
3. The parties who are contracting must be competent. For example, they may not be minors or insane persons. What constitutes a competent party is once again defined in law.

4. Genuine consent must be given by both parties to the contents of the contract. They must, for instance, not be under compulsion, or in a confused state of mind due to the influence of drugs, or in ignorance of the relevant facts. What constitutes genuine consent is defined in law.
5. The purpose for which the contract is being made should not violate the systematic aims of law. For example, one may not contract to kill someone.

On the basis of the ways in which the above five conditions are satisfied, lawyers distinguish between different types of contracts, such as 'simple contracts', 'contracts under Seal', etc. However, for the purpose here it is not necessary to discuss different types of contracts. What is important is to notice the relevant conceptual relation, between the law in general and the Law of Contracts in particular, that is revealed by the above five necessary conditions. What is revealed is that for each necessary principle of the Law of Contract, the law in general first spells out the meaning and the application of each essential notion involved in the principles. That is, it shows that the knowledge of what 'contract' means, cannot be obtained without a detailed knowledge of law. For a valid contract to exist, law has to first define all the conditions.

If the notion of a contract becomes intelligible only if some legal system is first defined then one cannot explain law in terms of contractual deeds. The validity of a legal system cannot be derived, as the philosophers have attempted to show, from the validity of an actual or a hypothetical contract; but, as the lawyers have rightly seen, the validity of a contract must be derived from the rules of a valid legal system. The fact that the idea of law is conceptually prior to the idea of a contract becomes totally evident if one peruses the lengthy and important portions in Pollock's, Chitty's, Sutton's or any other standard text book on the Laws of Contract, that are devoted to the notion of illegal contracts. Clearly, discussing what is an illegal contract would be impossible if one did not independently know before hand what it means to behave legally.

Contracting, as most writers on this aspect of the law have emphasized, is a very useful legal device to ensure a certainty of actions which may not be possible otherwise. Contracts guaranty a regularity of deeds and expectations on the basis of which collaborative social actions become easier to execute. It, thus, has a useful role once the legal system has come into existence, not prior to it.

It will be important to emphasize here once again that law does not force us to keep our contracts. Pollock's Sutton's and other's definitions of contract, which assert that law enforces the keeping of contracts,

would thus stand in need of revision. Their definition embodies the general confusion that law, including Law of Contracts, is coercive. Since law does not force people to keep their contracts (promises), it seeks to find the best remedies when conflicts arise. In fact a closer look at actual cases would reveal that litigations involving breaches of contract do not consist of setting armed men after people, but in finding reasonable remedies which will satisfy the needs of both parties and which will be equitable, given that the promises are not being kept or that they cannot be kept for various reasons. Since contracts are utilitarian devices, law always seeks to find solutions of maximal utility such that they do not violate the systematic aims and ideals of law. It is, hence, constantly concerned about the consequences that will arise when contracts cannot be kept, rather than with any so called 'enforcement of the morality of promise keeping'. Law attempts to see to it that the consequences are in conformity with its basic principles. Since utility is the basic criterion for judging the practicability of a contract (although not its legality), it can often happen that it is more reasonable to break a contract than to keep it. Such a situation can arise when a person, after making a contract, realizes or discovers that a greater loss or harm will result from keeping

the contract than from breaking it; for instance, if a person, who has contracted to build a house for someone at a particular place for a set price, on starting the work discovers that the ground is solid rock and that he would have to invest twice as much on laying the foundation as he could earn on the total job, then the law will recognize his difficulties, it will seek a reasonable compensation rather than attempt to force the contractor to keep his promise.

If the idea of law is prior to that of the contract and if the law is not coercive it clearly follows that we must theorize about the grounds for a civil society in a very different way than any contractarian theorist would require of us. It also follows that essentially people must be very different from how any Hobbesian or Utilitarian theory describes them.

Before I proceed to examine what sorts of concepts are necessary to explain the genesis and development of law, I must comment on one remaining theory which attempts to suggest an a priori sociology, albeit, in terms which do not at once exhibit its apriority. This is the theory of H.L.A. Hart.

Hart's thesis about how one moves from a pre-legal to a legal state is very ambiguous, because unlike Locke or Hobbes, Hart does not provide any metaphysics of community or of the nature of man. Sketchy as the theory

is, however, it seems to present an alternative to the contrarian thesis because it is presented from a different perspective. This, as I shall argue, is, however, not the case.

The addition of the rules of recognition, change, adjudication and other second order rules is, says Hart, "a step forward so important to society as the invention of the wheel ... the step from a pre-legal into a legal world." ⁵⁴ Hart does not make an inquiry into history or sociology, nor does he suggest that any such inquiry should be carried out, hence it is difficult to understand at what stage, according to Hart, it suddenly (or slowly) became necessary to add second order rules to the primary rules.

However, the important point to note is that even if we grant Hart the a priori sociology - that it became necessary to add second order rules to the society's first order rules at some stage of its growth - it would still not prove the point that Hart intends to make. As we saw in Part - II, the property of having primary rules and secondary rules is a property of normative systems in general, and not of law specifically. Hence, even if what Hart says is historically true, all that it would prove is that a normative system came into existence, not that a legal system did. For, as we have noted, not just any addition of second order rules to the first order rules can constitute the growth of a legal system.

In any case, Hart's a priori sociology,

although it is presented without the contractarian fabrications, seems to me to be empirically false.

It is dubious if human beings have ever lived in a society in which there were only primary rules. Given any organization, whether modern or primitive, that has primary rules defining social practices and institutions, one will soon find out, I think, that the same organization also has secondary rules. The primary rules of all sorts of religious behaviour, for example, were accepted as valid due to the secondary rules by which the priests, the witch doctor, the church, etc, were recognized as a legitimate legislating authority. Similarly, the primary rules of the Dharmśāstras were accepted by the commoners and the kings alike, due to the secondary rules which recognized the special place of the Sāstris within the social system, as the legitimate interpreters of the Sāstras. Even in simpler and smaller social organizations, where the validity of the primary rules has been based on the authority of a single person, the authority has been recognized by the acceptance of some secondary rules, such as the fact that the person spoke on behalf of God, and whoever proclaims God's words must be obeyed.

As far as history can tell us, all human societies have existed with a hierarchy of rules. This is something which seems to uniquely distinguish human societies from the societies of other gregarious creatures. Perhaps, the only creatures that we can point to, which live purely by

primary rules, are ants and bees. Even here we are discovering that there are rules of recognition about which queen bee has the final authority.

What has changed in the development of societies is not the sudden or gradual addition of secondary rules to primary rules, but the very nature of primary and secondary rules together. The manner in which the secondary rules of recognition, change, etc., have been developing is, of course, also a matter of historical and sociological interest.

However, as concerns our interest here, a mere historical or sociological study of the change of primary and secondary rules will not do, because, as we have seen (even in the examples above), co-lateral changes in the primary and secondary rules are true of all normative systems. Hence, such a study can tell us only about the notion of normative systems, it will not provide any grounds for arguing why the legal system must be one type of normative system and not another.

Theories which portray sudden, arbitrary or miraculous moves from a pre-legal to a legal state, thus assume arbitrary and even groundless history and sociology.

I shall proceed now to outline the conceptual basis on which the creation and the continuity of legal systems can be appropriately described, a conceptual basis which does not require any fantastic or a priori sociology.

VI. 3).

CO-OPERATION

In philosophy, as elsewhere, perhaps the simpler theory is the one that is closer to the truth. The simpler theory that explains how and why civil-society came into being would, I think, be one that bases itself on the notion of co-operation rather than on contract or punishment. People have co-operated to build a civil-society so that freedom and other moral ends may be optimized and achieved.

In fact, it seems to me that a theory of civil-society could be based only upon the concept of co-operation for the following reasons.

1. The concept of co-operation is a very fundamental social notion. The answer to the question 'what does it mean to co-operate?' can perhaps be learnt only by doing a co-operative activity with the other. The notion of co-operation seems to me to be an epistemologically basic and primary notion, one which explains other notions which involve human actions that are done together, and is itself not explained by them. Co-operative activity is different in some fundamental ways from mere participation and interaction with others.⁵⁵ Instead of

trying to argue this here , I shall attempt to illustrate its truth through the next point.

2. Unlike the notion of contract, punishment etc. the notion of co-operation is conceptually and empirically prior to that of law. That is, co-operation is not explained in legal terms, nor does it presuppose law for its legitimacy.. In fact law is to be explained as a co-operative social enterprise. Co-operative activities are carried out by all human beings to fulfil their duties of creating and maintaining a legal system so that a Community of Ends may be actualized. Only such an explanation would constitute a genuine explanation for the existence of the legal system because it does not utilize a notion to explain law which is itself legal. That is, it does not assume a notion in the explanan which itself belongs to the explanandum. Since the notion of co-operation is conceptually prior to that of law, we can carry on what may be called true co-operative activities with others without having to be explicitly aware of what is the law, but we cannot carry on what may be called true contracting, punishing, or any other legal activity for that matter, without having to ex-

explicitly co-operate with others. The internal working of the legal system, itself, demands that those involved in the legal profession must co-operate with each other so that it becomes possible to carry on the day to day business of the court.

Since co-operative activity is presupposed by law it cannot ask, command, or even request people to co-operate. It must presuppose that in fact, by and large, people will continue to co-operate with each other to carry on the various economic, political, educational, religious, recreational and other social activities. If people fail to co-operate, law cannot force them to do so, for then it would be trying to bring into existence something which it must already presuppose.

3. The notion of co-operation does not require one to posit or to hypothesize some imaginary a priori sociological state of affairs such as the State of Nature or The Veil of Ignorance. It tells us that men have gradually co-operated to build better and better legal systems. There is, thus, a continuity in building a better and better civil-society.

4. Since co-operation is involved in all social activities, including the legal one, this concept explains that legal systems have worked in the same manner as co-operative activities generally do, i.e., more co-operation brings about better legal systems and less co-operation poorer systems. The difference is only one of degree, never of kind. Since cooperation and reasoning are involved, at least minimally, in every social activity, there is no point at which 'pre-legal' states of affairs can exist. One can only say, at one point the legal activity is minimal and at another more extensive. Such an understanding does not lead us to the false social theory that we have built a civil-society so that we may have a legal system (as though co-operation in a civil-society were a product of the legal system). Instead, this understanding leads us to the truth that we have bettered our legal systems so that we may have a better civil society.
5. Lastly, the notion of co-operation preserves the moral uniqueness of law. Law being a moral enterprise can only be based on a practice which is itself moral. Co-operation is always a moral activity. For co-operative activity to actually take place it is necessary that the agents follow the basic moral principles, such as being honest with each other, telling the truth, trusting the other's integrity, etc.

What we have ~~discovered~~ so far then, is that the idea of law is the idea of a co-operative social activity which is possible on the basis of some basic moral propositions. Co-operation is always non-coercive, hence, law, which is co-operative activity governed by the external morality, must also be non-coercive."

Now, the term which best expresses the idea of such a system is the Sanskrit term Dharma. The idea of law is the idea of Dharma. Dharma means the external non-coercive moral order which holds a community together and leads towards a moral ideal. Etymologically, the word is derived from Dhri, which means to hold together in a steadfast manner.

It will be of interest to note here that the word justice derives its linguistic roots from the Sanskrit root term Yu or Yuj which means : to join. The words justice and join, thus, have the same roots. Yuj becomes ius in later Latin, and changes through ius to joust in old French, which retains the meaning : to join.⁵⁶ Yukti in Sanskrit means a principle which is instrumental in joining a means to an end, and Yojna is a plan to that end. Yoga, in its basic sense means that which joins man to the transcendent being. Justice, as opposed to Yoga, in its basic sense, then, means, that which joins man to man.

My statement, that the idea of law is the idea of Dharma, is not intended in anyway to imply that

what I have done in this work is to present something in English which is already known in Sanskrit. By equating the two I wish to make clear that if the idea of law has received any clarification and explication in this work, then so has the idea of Dharma. The latter notion stands in need of just as much clarification as the former.

In the Judeao-Christian-Islamic tradition the idea of law has been confused mainly with the idea of the political system. In the Indian tradition, Dharma has been understood as an independent and supreme moral notion, but it has been confused with various elements which actually belong to a religious system. Since I have approached the issues in this work from the perspective of law, I have concentrated on defining it by separating it from ideas belonging to the political system. When the same task is attempted from the perspective of Dharma, the idea would have to be purified of various ritualistic and customary practices. But in grounding the idea of Dharma in pure practical reason, the most fundamental step towards distinguishing the idea from merely ritualistic, conventional and arbitrary factual beliefs of religious practices has already been taken, and thus an attempt has been made to explicate the essential features of the notion.

If co-operation has brought about the legal system and the civil society, then it clearly follows that men have always been acting co-operatively to a greater

or lesser degree. Moreover, since co-operation requires acting on moral principles it also follows that men are basically not evil, they are moral agents and well intentioned beings for the most part. They do not always act for selfish ends or principles of self-interest. Lastly, since law is non-coercive, it also follows that human beings act rationally without any compulsion or fear. The notion of a human being that law, thus, requires, is completely different from what any utilitarian legal theory assumes or asserts.

Having analysed the requirements of law from the perspective of the community, I turn now to an analysis of the notion of a legal entity, which includes within itself the essential characterization of humanity that is necessarily involved in the legal enterprise. Such an analysis approaches the requirements of law from the perspective of the individual.

VII. THE INDIVIDUALISTIC REQUIREMENTS OF LEGAL ONTOLOGY.

By individualistic requirements of legal ontology, I mean those necessary metaphysical conditions on the grounds of which certain types of individual entities can be said to be actually populating the legal system. This issue can be approached by raising the question: what sorts of entities qualify to be members of the legal system? Is the membership arbitrary or are there some specific principles which governs legal membership?

The answer to this question would in fact require discussion at two levels: firstly, that which spells out the criterion on the basis of which an entity qualifies to be a legal entity, and secondly, that which spells out the essential nature of such entities. The two issues are indeed related since the criterion cannot be independent of the nature of the entities. However, for the sake of clarity, it will be best to discuss the two issues separately. In what follows, I shall discuss the question of the criterion first and then, subsequently, attempt to examine the nature of the entities in which the criterion can be grounded.

VII. 1). THE DETERMINATION OF LEGAL ONTOLOGY

The types of entities that can belong to a legal system are specified by the basic legal principles. Since such principles are not arbitrary definitions, not any arbitrary entity can be made to belong to the legal system. The principles which regulate what may and what may not belong to a legal system, determine the ontology of law. In what follows I shall define such basic legal propositions and argue that these rules of inclusion and exclusion are necessary for every legal system.

The basic unit around which a legal system is built has traditionally been taken to be a person. Attempts are then made to distinguish a juristic person from a physical or a natural person. The traditional approach is to divide Private law into three parts: the Laws of Person, the Laws of Obligation and the Laws of Property. The question of legal ontology is discussed mainly under the first division, in terms of 'status', 'natural personality' and 'corporate personality'. However, the problem of defining the criterion which regulates the legal ontology is pervasive. It turns up in discussions of Public Law whenever the ontological status of the State comes under scrutiny. A satisfactory theory ought to provide a unique definition which will encompass the ontology of both Private Law and Public Law. That is, an appropriate criterion of legal ontology must apply to law as

a whole and not to just some parts of law, as most current criterion seem to do.

The basic problem of legal ontology surfaces primarily in practical difficulties. Firstly, due to the fact that not all entities seem to possess a full legal capacity, eg: children and insane; and secondly, sometimes one does not wish to grant a legal personality to beings who ought to possess it. One is then required to justify one's decisions. We find, thus, that in some past legal systems, slaves were regarded as mere chattels, and aliens were not allowed to bring suit in the courts. Even women were sometimes excluded from the system. The question gets further confused when one finds that for practical purposes legal personality has to be granted to entities other than individual human beings, such as groups, funds, trusts, companies, etc. The lack of clarity about the criterion which determines legal ontology has sometimes led to granting legal personality to idols⁵⁷ and animals.⁵⁸

Typical responses to the question of legal ontology have taken two basic approaches.

In the first approach physical, natural or rational human beings are distinguished from associations, companies, trusts, etc. To provide a unified theory of juristic persons, either the ontic reality of

the first or that of the second type of entity is then denied. We have thus R. Ihering affirming that only physical human beings are real, and defining corporations, companies etc., as legal formulae having only a technical worth.⁵⁹ On the other hand, Kelsen denies that the notion of a physical or natural human being has a legal reality. For him corporations are legally real exactly in the same way that natural persons are, the notion of a juristic person is all that is required. He does not, however, tell us why this is so.⁶⁰ A third and a middle-of-the-road response, is to grant some sort of ontic reality to physical persons as well as to corporations, companies, etc. We find Gierke speaking of a group as having a real will, a real mind and a real power of action. He even divides up its functions in terms of the functions of the parts of the human body.⁶¹

However, none of these legal theorists has attempted to show why the option they prefer is morally justified or superior. If the criterion of choice is only that of technical ease and facility, then, in the final analysis, the choice becomes a matter of arbitrary fiat or decree. For what may seem technically easy to one may not be found to be so by another; moreover, techniques are bound to change frequently.

The second typical approach to the problem of legal ontology has been the shifting of the

question from one of the Law of Persons to one of the Law of Obligations. Juristic persons are then defined as those capable of possessing legal rights and legal duties. Hohfeld, Kelsen and Hart, among others, have advocated this approach.

Now, such a definition is what has traditionally been called a verbal definition, not a real one, and, moreover, it is even circular. By saying that legal persons are those who possess rights and duties and at the same time defining the possessor of rights and duties as legal persons, one has not answered the real question of legal ontology at all. What we want to know is who shall have rights and duties? By replying 'legal persons', only a verbal answer has been given. Or, if the question: 'who shall be a legal person', is answered by: 'those who possess legal rights and duties', then the issue is only evaded. But this is precisely what Hart and other positivists seem to do.

Hart's analysis seems to confuse the issue further by suggesting, a la Wittgenstein, that to understand the concept of a legal person one must refer to different legal systems and see what rules enable one to make true or untrue statements about legal entities within that system. Such an experiment will no doubt make a person knowledgeable about what different types

of entities are accepted as legal entities in different legal systems, but will it tell him why there are these differences? On what grounds will he appraise these differences? If such a person wishes to argue that 'slaves' ought not to be populating a particular legal system, he evidently cannot do so by merely pointing to other legal systems which do not have slaves. For, then, it would be like saying that people in culture A should not be wearing hats because people in culture B do not wear them. Or that citizens of nation X should wear neck-ties because citizens of nation Y do so. Clearly, to argue that a legal system should not allow for slaves, such a person would require arguments which are independently right, whether or not any legal system practices them. We do not criticize the Athenian State, which allowed for slaves, on the grounds that ours now do not, but certainly on the grounds that it is morally wrong to do so at any time. The Athenians did not have enough moral knowledge. The question of legal ontology is not a factual matter which can be settled by mere observation. To make the issues clear the question should be exactly formulated as: Who shall possess rights and duties and be a legal person?

Following Hans Vaihinger, it has, perhaps, become common practice amongst lawyers and jurists

to refer to some legal entities as 'fictions'.⁶³ Despite its modern, complex, technical use in legal discourse, this term seems to have retained its original confusions. The confusion stems from the fact that, like the term illusion, fiction has both an epistemological and a moral implication. An over emphasis on the epistemological implications seems to lead away from seeing the direct relationship that the issues have to morality. Thus, one even finds Fuller discussing the problem of legal 'fiction' as though it were only a matter of epistemological concern.⁶⁴ Fuller says that legal 'fictions' are theoretical constructs of law and that they function almost in the same way that the theoretical constructs of mathematics, physics and other sciences do. Here, he clearly seems to have been misled by the prima-facie procedural similarities that seem to exist when one only considers the fact that the theoretical terms of law are defined within the operations of law, just as the theoretical terms of the sciences and mathematics are defined in their operations. The real difference between legal science and other sorts of sciences cannot be grasped by merely observing the procedures, for the differences are substantive.

As discussed in Part III, theoretical terms of law define and refer to a totally different kind of entities which can neither be classified as natural

kinds nor as nominal kinds. They define and refer to normative kinds. The theoretical terms of mathematics lie at one end of the moral spectrum, those of law lie at the other extreme. That is, mathematical terms may be taken to be morally neutral, or at least related to morality in a very indirect way, whereas legal terms are immediately and fully morally relevant. How one defines or accepts one's mathematical ontology may, only very indirectly, be the grounds for some injustice in the world, but how one defines or accepts one's legal ontology affects the existence of just or unjust conditions immediately. If numbers and triangles are said not to exist in all or some possible worlds, there is perhaps, not much to worry, but if some people or groups are said not to exist in all or some worlds there is certainly a great deal to worry. For to deny them existence is to deny them their duties and rights and hence the possibility of achieving their moral ends.

What is a permissible legal ontology, then, is evidently a moral question; and it is a question of the sort which cannot be answered by talking in terms of legal rights and duties because it is already presupposed by the Law of Obligations. Nor can any enlightenment be gained by studying and applying mathematics or physics to legal ontology, for the normative entities are

qualitatively different from natural or nominal entities.

Where, then, must one look for the solution? In so far as law is a systematic enterprise to bring about certain conditions in the society, the answer to the question : ' who may be its members ' , must clearly depend upon what is taken to be the systematic aims of law. In other words, the criterion concerning who shall possess duties and rights and thus be a legal entity is dependent upon what we take to be the ends of law.

The necessary relationship between the criterion for class membership and the ends of a system is not something which is peculiar to law, as argued in Part-II, it is true of all normative systems. If, for example, we want to create a team which will play football well, the criterion for membership is good health, ability to control the ball, etc. Similarly, if we want to create an administrative system for the country , we select men with certain educational and technical qualifications, or if we wish to prepare a system which will defend the country against external invasions, the criterion for class membership of such a system is such that alert, healthy and obedient men are chosen . In order to decide the criterion for class-membership of any system which is meant to achieve something, we must naturally take into account the goals or

purposes of creating that system.

As we have seen, the transcendental ideal of law is to bring about the best normatively possible world - one that will be most harmonious, will contain the most compossible set of normative systems, and will allow for optimal variety in deeds and thoughts.

The metaphysical conditions which make such a possible world actual are those of the Community of Ends, which involve the conditions of freedom, equality and independence. As such, the answer to the question 'who shall possess rights and duties and be a legal entity', is evident:

Every agent within the jurisdiction about whom there is no evidence that he, she or it will be, or is, an obstacle to the achievement of freedom, equality, independence and the best normatively possible world, must be explicitly recognized by law as being a legal entity.

The 'must' in the above case arises from the fact that every moral agent has a duty towards creating the best possible world. Those involved in the legal profession also have the same duty. Since maintaining a legal system is necessary for fulfilling such a duty, and since having members is a necessary material condition for maintaining a legal system, it is a necessary duty of

all involved in the legal profession to see to it that the legal ontology is appropriately maintained on the basis of the above criterion.

The principle is formulated negatively because although it can be known a priori what ideals a legal entity must attempt to achieve, it cannot be so known- who actually will attempt it. Hence, here as elsewhere, law must assume everyone to be a moral agent, doing good, unless there is evidence to the contrary. What this means is that the starting point for every autonomous legal agent is a full legal existence, having all the duties and rights that is due to him. The extent of his rights and duties and hence his legal existence is directly related to his capacity to act as an autonomous agent.

From the point of view of evidence, this formulation thus brings five different types of entities under consideration:

1. Entities about whom we have clear evidence that they will not enhance the ends of law; such entities can never become legal entities. Functionally corporate bodies, such as the Mafia and the Ku Klux Klan, fall into this category. Such entities do not exist in the legal realm, they are, as the word rightly goes, outlaws.

2. Entities, at the other end of the spectrum, about whom we have clear evidence that they will enhance the ends of law; the law facilitates the existence of such entities. For example, groups who work for the welfare of the handicapped, fall into this category.
3. Entities about whom we do not have either any positive evidence that they will enhance the ends of law, or any negative evidence that they have attempted to do the contrary; the majority of individuals and groups fall into this category. All such entities must necessarily be recognized as members of the legal system, on the assumption that their ends are consistent with the ends of law.
4. Entities about whom we have some, but not conclusive, evidence that they will get in the way of the ends of law; such entities are recognized but their existence is restricted by limiting their activities. Groups or individuals who deal with alcohol or weapons, for example, fall into this category.
5. Entities about whom we have some, but not conclusive, evidence that they will not get in the way of the ends of law; such entities are not legal entities. The existence of such entities is restricted by limiting their activities in many ways. For example, groups or individuals who deal in prostitution fall into this category, since although we know how the activities of such groups or individuals leads to numerous evils we do not fully understand why their activities effect the achievement of the ends of law. This makes this category different from that of the Mafia, which, as we clearly know, acts against the legal ends.

The principle determining the ontology of law is synthetic , in the sense that it informs one about how the legal system is to be populated, but it is also a priori because it bases itself on human reason rather than the experience of any particular legal system . It is a normatively synthetic a priori proposition.

This principle overcomes a major confusion concerning the notion of a juristic person . As noted , the confusion about the notion of a juristic person arises because people think that this notion has to do with some empirical factor. On discovering that human beings have physical bodies and corporations, trusts, etc, do not possess one, elaborate schemes are made to either reduce corporations, etc, to an assembly of rational persons , or to reduce natural persons to fictions. The above formula tells us that the characterization of an entity as a juristic person does not depend upon material factors, such as whether the agency consists of one or many bodies, or whether they are made up of matter, anti-matter, organic or inorganic substance, etc. It depends totally upon a priori moral considerations, which arise out of the internal nature of law itself .

Insofar as any agency can act in ac-

cordance with the systematic aims of law, he must be recognized as a legal entity. To the degree and extent to which he does not so act, his existence as a legal entity must be restricted. The notion of a legal entity is intelligible in the normatively possible world since it is an idea of that world; as such no factual attributes belonging to the factually possible world enter into the criterion of legal ontology. The legal enterprise itself, it must be remembered, belongs to the normatively possible world created by human beings.

As a corollary, the above formula also answers the traditional question 'what is common to physical persons, corporations, trusts, etc.' What is common to all of them, qua and when they are legal entities, is that they share the same teleological ends, that is, none of them are obstacles to freedom, equality and independence, and all of them, insofar as they are acting legally, attempt, directly or indirectly, to enhance the ideals of law.

Since the principle is normatively synthetic a priori it regulates the constitution of the legal ontology, but it leaves open the empirical considerations about when exactly a biological existence starts or ends. It also leaves open the possibility of creating an infinite number of novel and different legal entities,

because ~~although~~ the legal ideals can be known a priori, it cannot be known a priori in what different ways various legal entities will actualize these ideals.

The main virtue of the above principle, however, lies in the fact that it provides a unified theory for both Private and Public Law. From the point of view of law, an association of men to form a political party is first of all an association in the same sense as a corporation or a company is an association. The main difference, of course, lies in the ends for which these different types of associations are formed. But insofar as the political party (including the one that gets the majority of votes and forms the government) is an association of men, the principle that law applies to every other association, it applies to this association, too. Law, in this fundamental way, is impartial. All associations of men, for whatever purpose, are to be judged by the same rule. What this means in practical terms is that, only if the systematic aims of the association of men who form the government are consistent with those of law, can they be a legal entity; otherwise they are illegal. If the association of men that forms the government is to be referred to as the State, then the principle of legal ontology tells us that only a State which actualizes the ideals of freedom, independence, equality and of the normatively

best possible world, will exist in reality as a legal state, otherwise it would only be a system by decree, force or fiat.

This principle does not exalt the association of men that becomes the legislator into a peculiar type of entity whose activities are not accountable in law. In fact, since the legislators are those people to whom society has entrusted the special task of regulating the path towards the best possible world, the legality of their actions becomes a matter of utmost importance .

Negatively, the principle lays down a strict restriction for legislators and those involved in the codification of law. It requires that, in deciding whether or not an entity can become a legal entity, only those aspects of its existence be taken into consideration which are relevant to the achievement of the ends of law. Factors over which an individual or a group has no control, or which it cannot determine for itself, cannot, evidently, be the aspects which are relevant to the achievement of ideals such as freedom, equality and independence. Such factors as the colour of one's skin, one's caste, the place of one's birth, the religious creed one is born in, are obvious factors which an individual or a group cannot determine for itself, and which are thus not conducive to the achievement of the ends of law. In other words, biological, sociological, geographical and other factual attributes cannot be the basis for defining legal entities. Only legal attributes can characterize a legal entity.

VII. 2). THE CONCEPT OF A LEGAL PERSON

The actualization of the idea of law requires that human beings co-operate to sustain and develop the legal system. Co-operation involves working on moral principles, since it is a moral activity. This, itself, suggests the first attribute of a legal person, namely, that legal persons are co-operative moral agents. The moral principles which the agents act upon are those of the Kingdom of Ends, and the ideals that they are working for are those belonging to the idea of the best normatively possible world. In brief then, legal persons are co-operative moral agents working in accordance with the principles of the Kingdom of Ends for the ideals of the best normatively possible world.

This description is a functional definition of a legal person. It characterizes him in terms of the purpose of his actions, but, as yet, it does not give us a definition which tells us what is substantively involved in the concept of a legal person.

In the Groundwork Kant tells us that essentially or substantively man is unique because he has dignity. Dignity is what distinguishes man from all other creatures. A thing has a price if any substitute

or equivalent can be found for it. It has dignity or worthiness if no substitute can be found for it. ⁶⁶

But why does man have dignity ? If a human being is just one more material thing amongst other material things in the world, then evidently, if human beings have dignity then so do lamp posts and stones. If the latter do not have dignity then there are no grounds for believing that human beings have it either. On the other hand, if a human being is just another living thing amongst other living things, and if human beings have dignity on this account then cockroaches and bacteria do too. If the latter do not have dignity then there is no special reason why human beings must have it.

The worth of a rational being, according to Kant, consists in his autonomy from the course of mere phenomenal nature . His dignity consists in being a self-legislating member in a Kingdom of Ends. In Kant's words, "morality is the only condition under which a rational being can be an end in himself ; for only through this is it possible to be a law-making member in a Kingdom of Ends. Therefore morality, and humanity so far as it is capable of morality , is the only thing which has dignity." ⁶⁷

It has been noted by H.J.Paton that Kant's definition of morality in terms of freedom , and freedom in terms of acting morally, leads to a problem of

circularity. Consequently we do not come to know more through the concept of morality than what we already know through the concept of autonomy or freedom.⁶⁸ J.G. Murphy attempts to overcome Paton's charge that Kant's arguments are circular by distinguishing between free Wille and free Willkür; i.e. between the freedom of choice to act on the basis of a moral law, and the spontaneous free-activity of a person, respectively. Murphy thinks that Kant meant man's dignity is grounded in possession of a free-Willkür, which therefore does not make Kant's argument circular.⁶⁹

Such an interpretation seems to me to be questionable, for Kant himself not only distinguishes between Wille and Willkür, but also clearly states that it is the free-will, only in the former sense, that is involved in law and morality.⁷⁰ However, whether one interprets free-will as autonomy or spontaneity, in so far as the notion of dignity is concerned, the circularity remains. If dignity is to be explained in terms of having a free-will (in either sense) or being moral, then, in learning that man has dignity, we have not learnt anything more than what was already conveyed through the concept of morality or freedom.

Kant's characterization of human dignity as depending on free-will and on autonomous

actions , makes it a matter of analytic truth, a definition which merely repeats that man is a moral agent.

Analytic a priori truths, even by Kant's own account, do not inform us anything more than what we already know.

Hence, if human dignity is to be a synthetic notion something which tells us more than the fact that man has a free-will it cannot be a matter of mere, verbal definition.

A synthetic notion which tells us more than the fact that man has a free-will, is indeed worked out and presented by Kant. This is contained in his discussion of the immortality of the soul . However, as I shall presently argue, the grounds for human dignity cannot be derived even from the postulate of the immortality of the soul without making some very radical changes in the thesis.

In the Critique of Practical Reason

Kant tells us:

"The achievement of the highest good in the world is the necessary object of a will determinable by the moral law. In such a will, however, the complete fitness of intentions to the moral law is the supreme condition of the highest good. This fitness, therefore, must be just as possible as its object, because it is contained in the command that requires us to promote the latter. But complete fitness of the will to the moral law is holiness, which is a perfection of which no rational being in the world of sense is

at any time capable. But since it is required as practically necessary, it can be found only in an endless progress to that complete fitness; on principles of pure practical reason, it is necessary to assume such a practical progress as the real object of our will.

This infinite progress is possible, however, only under the presupposition of an infinitely enduring existence and personality of the same rational being; this is called the immortality of the soul." 71

There are two additional synthetic notions concerning human free-will which Kant presents here, which he does not seem to have maintained consistently elsewhere. Firstly, that pure practical reason must necessarily assume that a free-will can become a holy-will if it progresses far enough, and secondly the existence of such a free-will must be assumed to be enduring infinitely to allow for the actualization of its moral end. The idea of a perfectly holy and immortal will, as Kant tells us (in the very next section after the one quoted above), is indeed the idea of God. 72

Now the idea that the ordinary human will can eventually become a holy-will, (i.e., a Godly-will) certainly generates the notion that man can have dignity, at least eventually, when his will becomes a holy - will. But what happens in the meantime? On what basis can human will be said to have dignity while it is still an

ordinary rational will? Clearly law, such as in the Universal Declaration of Human Rights, explicitly asserts that human beings have dignity right here and now, whether they be immortal or not. That is, each human being is to be recognized as having dignity in this very life. The Universal Declaration of Human Rights states:

"Whereas recognition of the inherent dignity and the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world..."

Also, Article-1 of the same Declaration continues:

"All human beings are born free and equal in dignity and rights...."

Now the thesis that all human beings have inherent dignity, and are equal in this respect right here and now, cannot be held without making some very radical changes in Kant's assumptions.

The first change required is that the belief that human will can become holy-will and thus be deserving of complete dignity, must not be a mere postulate of reason but must actually be true. That is, the possibility that a human will can be a holy-will, and thus morally perfect, must not be taken to be a mere epistemological possibility, a matter of mere thought, but an actual i.e., ontological possibility, for law does

not just postulate human dignity in reason, it wants to assert that each human being actually has dignity.

In the first Critique, Kant had called the idea of freedom a postulate of reason. However, by the time of the second Critique, he tells us that the idea of freedom is real, it is not a matter of mere thinking. We come to know of the reality of freedom through our moral actions in the noumenal realm. What I am suggesting above is that if Kant had continued to make his moral theory consistent he would also have had to accept the possibility of a rational will becoming a holy-will as ontologically true and not just an epistemological issue. The idea of law demands this.

The second radical revision which is required to make the notion of legal dignity intelligible follows from the first revision. If the idea of a moral progress from a rational will to a perfectly holy-will is not only epistemologically but also ontologically true then it follows that the existence of the rational will is ontologically continuous with the existence of the perfectly holy-will. If an ontological discontinuity is postulated at any stage of the moral progress, then a rational will can never actually be a holy-will, the progress will arbitrarily be cut off at some stage. The continuity in moral progress must not only be in knowledge but also in being a person.

The thesis that there is not only an epistemological continuity between a rational will and a fully holy or moral will entails the following conclusion. We can legitimately make, not only an epistemological, but also an ontological claim about man. Epistemologically, from the point of view of a rational will, a perfectly holy or moral will is a perfectly rational will, and from the point of view of the perfectly holy or moral will a rational will is nothing but a very imperfect holy or moral will. Similarly, ontologically, from the point of view of an autonomous or moral person a perfectly autonomous or moral person is a holy or divine person; from the point of view of the holy or divine person an ordinary autonomous and moral person is a very imperfect holy or divine person. Since there is a continuity in moral progress, how we characterize a rational will or a moral person depends upon which end of the path we choose to make our frame of reference.

If, with Kant, one wishes to hold that the idea of a perfectly holy-will is the idea of God, then the second revision above can be summarized as the thesis that there is an ontological continuity between man and God. The point, in the above paragraph, tells us that just as God can be characterized as an infinitely rational and moral person, a person can be characterized as a very

finitely rational and moral God. That is, a person is God himself in his finitude. His moral goodness is due to his Godliness and his evil is due to his finitude in reason and action. The difference between an ordinary rational will and a perfectly rational will is one of degree, not of kind. Being Godly, human beings are capable of not only self-legislation, i.e., moral actions, but also unconditional love, caring, kindness, compassion, charity, benevolence, etc. But being finite in reason and controlled by passion, at times they are capable of evil. The essential nature of a person is that of a finite divine being who is always capable of becoming a holy-will. The finitude is only temporary, if it were a permanent feature of human nature no moral progress could ever be made. The idea of moral progress would be unintelligible. Human beings are thus inherently, essentially and unconditionally good; evil is not essential to their nature, it is something that their circumstances, education, society, etc. make them. ⁷³

Whether or not the idea of a continuous moral progress, from being a rational will to a holy-will, requires the immortality of the person, is a question for moral theory. In so far as law is concerned, what it must accept as real if it is to work at all is that a person is a finite holy-will who can become a holy-will again through

moral progress, and that it must do so at least, and certainly, in this very life, whether or not it be immortal. Similarly, whether or not any perfectly rational, divine will actually exists is a question for rational theology. Insofar as law is concerned all that it has to accept as real is all that it finds, i.e., embodied (very) finite holy-wills.

Each human being has unconditional and inherent dignity because right now, in this very life human beings are finite, divine, holy-wills. This is the only ultimate ground on which the idea of human dignity can be sustained in law. Being divine evil is ~~accidental~~ to human nature - an abnormality which must be eradicated and remedied. If law took evil to be a natural aspect of human behaviour, not only would it lose the fundamental basis for asserting that human beings have inherent dignity, it would also lose the central motivation for attempting to remedy or reform evil persons or situations.

Hence, as it turns out, the only grounds on which human dignity can be sustained in law is that which recognizes the idea of rational or moral progress to be inherent in the concept of a legal person. Any reductionist theory makes the notion of human dignity untenable, and thus makes the legal enterprise a meaningless and arbitrary affair.

The idea of the self, which is a co-

operative agent working on moral principles and which is striving for moral perfection and is essentially divine, is conceived more appropriately as an Ātaman than as a Soul. The being of the Ātaman is ontologically continuous with the being of the absolutely divine will, and it is the idea of the divinity within finitude.⁷⁴ As such, it has unconditional and total dignity, because it is always capable of realizing its infinitude. The idea of the soul has been characterized as ontologically distinct from God. As such, it does not have unconditional and total dignity, because in the final analysis it can never become as morally perfect as God, i.e. it can not itself become God and thus gain a worthiness that is equal to what a divine will deserves. Only God and not man would have dignity in such a scheme.

The idea of the soul has, sometimes, also been characterized as infested with 'original sin', or being innately evil or sinful. Such a thesis is also damaging to the legal idea that all men have inherent and equal dignity. Legally, goodness must be conceived as innate and evil as an abnormality. The grounds for dignity is divinity.

The idea of the self as an Ātaman is compatible with the legal belief that human beings have dignity, right here and now, in this very world. The question of immortality, in the strict sense, does not arise for

the Ätaman because it is conceived as not being in time. One must recall that Kant's transcendental ego, too, is not in time, and it is this ego which, as noumenal self, participates in the noumenal realm, which is the legal realm in Kant's final Metaphysik der Sitten.⁷⁵ Kant does not seem to have realized the difficulties in his various accounts of the self as the transcendental ego, the empirical ego, together with the unexplained thesis about the self as a soul.⁷⁶ A consistent Kantian theory of the self would, I think, have to clarify his notion of the transcendental self, which would then be closer to the notion of the Ätaman.

The concept of a legal person then, is the concept of an Ätaman. Kant's dictum : 'treat everyone as an end in himself', substantively means : 'treat everyone as an Ätaman.' This last proposition is the synthetic a priori proposition of pure practical reason which is the substantive individualistic requirement of legal ontology.

The concept of a legal person as a rational, moral agent who is the divine will itself in its finitude, and who manifests a teleology in which the self wants to transcend or liberate itself from all its finitude, generates complex questions about the sort of teleology that is involved in such a moral progress and the course of such a progress. I shall discuss this issue in detail in the next

Section. Here it is important to note that if the notion of such a self, which manifests a telos is inherent in the idea of law, then evidently the main function of law becomes to provide the conditions for the fulfilment of such a telos for the self.

To treat human beings as Atamans, i.e., as legal individuals is to treat them with full dignity and as equals, it is also to recognize all their rights, duties and freedoms which are instrumental in the realization of their ends, namely, becoming a perfectly rational and divine will. Moreover, to treat people as Atamans is also to help them to proceed on a legally defined course of actions, if and when they deviate from fulfilling their expected teleological end. Of course, what constitutes deviation and help must be decided in and through procedures in which all are still treated as Atamans.

There are various normative systems which do not, or have not, treated their subjects in the way mentioned, but which have nonetheless claimed to be legal systems. Since the concept of a legal person is the concept of an Ataman, any system which does not treat (or continue to treat) its subjects as Atamans is not a legal system. Such systems, which do not operate with the concept of a legal person, are systems by fiat, force or command, they can never be legal systems.

SECTION - III

THE TELEOLOGICAL REQUIREMENTS OF LAW

I. THE TELEOLOGICAL REQUIREMENTS OF LAW.

Law is a dynamic system. Major and minor changes occur fairly regularly in any legal system.

The question that I wish to consider here is : are these various major and minor changes related to each other, in some general way, such that a pattern can be discerned in the systematic development of laws ? There is a second question that arises related to this first question and which demands consideration : if there is a pattern in the development of law, how is it conceptually best characterized ?

I shall argue that a general pattern can indeed be discerned; the development of law is regulated by certain teleological requirements. The direction and the change can be better recognized if one considers the legal phenomena not only at its micro level of individual changes in the law, but also at the macro level of the systematic changes.

The teleological requirements of law define the necessary and sufficient conditions which constitute a legal way of changing or amending the system. That is, they define what constitutes a legal course of action . Actions not done in accordance with these criteria would fail to be legal actions, they could be political actions, crime, vendetta , or other types of actions. When actions

are carried out in accordance with the teleological requirements, then, there is a continuity in the growth of the legal systems. But deviations from the normal course of legal development can lead to a breakdown in this continuity.

II. THE DYNAMICITY OF A JURISTIC CYBERNETICAL NORMATIVE SYSTEM

What distinguishes a juristic cybernetical normative system, i.e., a legal system, from, on the one hand, open dynamic normative systems such as modal music, and on the other, cybernetical systems such as language, is not only the uniqueness of its foundational norms but also the uniqueness of its norms of amendment. Such norms, which are in accordance with the teleological requirement, are synthetic a priori propositions of pure practical reason, like the other basic propositions of law. However, as we shall see, they play a totally different role.

A legal system belongs to the normatively possible world. The dynamism of such a system cannot be understood independently of the larger context in which the system exists.

Since law is aimed at creating the best possible world, the self-regulation and adaptation on the basis of the laws of amendment cannot be arbitrary. Only those amendments will enhance the actualization of the systematic ends which are congenial to its continued existence and

growth.

Since law is given actual form by human reason, the growth or dynamism of law must also be the growth or dynamism of human reason. Moreover, since law is a co-operative enterprise, the development of law is the development of co-operative reasoning. The more reasonable a people are the more legal their behaviour, and vice-versa. The development of law, thus, naturally entails the development of all those factors which will facilitate reasoning between people, such as, codification of law to make it easily accessible, gradual simplification of procedures and rules, improvement of the technology to communicate the laws, etc. The dynamics of law thus involves a continued development of **cooperative reasoning** so that the ideal states of the Community of Ends may be actualized, which, as we have noted, consists of elements such as freedom, equality, independence, harmony and compossible diversity. In the development of co-operative reasoning there can be no sudden jump from a State of Nature to a legal state. The progress is gradual, and the possibility of various errors and deviations from the normal course must be expected.

This account, however, only outlines the uniqueness of the teleology involved in law, it does not as yet tell us about the peculiarity of the amendment procedures involved in such a vectorial progress. I shall proceed now to discuss the the specificity of the amendment procedures involved in law and the conceptual scheme within which it may be best conceived:

III.

GROUND'S FOR THE NORMS OF AMENDMENT

To discuss the specificity of the principles of legal amendments, I shall turn to Kant's third critique, the Critique of Judgement, for it is here that Kant discusses the problem of teleology in detail. Kant's discussion provides a penetrating analysis which one can fruitfully exploit. Evidently, this is not the only method of approaching the issues. My analysis will once again attempt to express itself by assimilating and building upon what seem to me to be the right elements in Kant's view, rather than by starting ab-initio. I shall, naturally, only refer to those elements in the third Critique which relate to law directly.

The aim of Kant's third Critique is to show how the two different realms, the factual and the normative, have something in common. The common ground presents itself when one considers the issue of teleology. It will be recalled that hitherto, in the first and the second Critique, the factually possible and the normatively possible worlds were conceptually totally distinct. As Kant tells us in the third Critique the first type of world is understood in terms of 'natural concepts', and the second type is intelligible in terms of 'concepts of

freedom.¹ The 'natural concepts' are the ones which apply to nature, and are thus related to the concept of causality. The 'concepts of freedom' apply to the noumenal realm and are related to the concept of morality. However, in the third Critique Kant finds one concept which applies equally to both the phenomenal i.e. factual realm, and the noumenal, i.e. the normative realm, this is the concept of purpose.

The concept of purpose, however, belongs neither to pure reason nor to the understanding in Kantian terms, but to their use or application in, what he calls, judgement. "Judgement in general is the faculty of thinking the particular as contained under the universal."² Our capacity for thought has three aspects, understanding, which is the ability to have knowledge of the universal; judgement, which is the capacity for subsuming the particular under the universal; and reason, which is the capacity for determining the particular through the universal (for making deductions from principles). The understanding furnishes a priori laws of nature i.e. for the factual world; reason furnishes a priori laws of freedom, for the normative world. Judgement, is not an independent cognitive capacity, however. It does not provide us with concepts (like understanding) or ideas (like reason).

If the concept of purpose belongs to judgement, and judgement is not an independent cognitive faculty but only the application of reason and understanding, then it clearly follows that there must be two distinct types of applications of the concept of purpose: one through understanding for the factual realm, i.e., nature; and the second through reason for the normative realm, i.e., the realm of freedom.

Kant, in fact, does make the distinction between two types of judgement, the reflective and the determinate. In the first, as he tells us, "The understanding legislates a priori for nature as an object of sense - for a theoretical knowledge of it in a possible experience."; whereas in the second: "Reason legislates a priori for freedom and its peculiar causality."³

On the basis of the above account that Kant presents in the Introduction of the third Critique, one would naturally expect Kant to explore the two distinct uses of the concept of purpose, and tell us not only about how it is involved in understanding nature but also how it is used by reason to determine the 'peculiar' causality of the realm of freedom. One would expect him to explain what is so peculiar when the concept of purpose is involved in the normatively possible world. But Kant does not do so.

In the third Critique, Kant makes use of the teleological concepts, such as the concept of purpose, only in so far as the interpretation of nature is concerned. Teleology in nature, he tells us, is merely an epistemological principle, not an objective ontological one. In other words, the principle that nature is purposive belongs to the reflective and not the determinant judgement.⁴ When we judge that the purpose of the heart is to circulate blood through the body, the concept of purposiveness of nature is introduced to assist our reflection of the object under consideration, not to give it conceptual determination. It has a heuristic and investigatory value, according to Kant, but it does not require that we believe that this is how things really are.

The physical sciences have some fundamental principles without which, as Kant argued in the first Critique, not merely physics, but all experience would be impossible. The most important principle, from the point of view of natural sciences, is that every event has a cause. The main thesis of the teleological section of the Critique of Judgement is that the biological sciences have a basic principle of their own, which is sometimes expressed as 'nature does nothing in vain', but which Kant expresses more clearly as: "An organized natural product is one in which every part is reciprocally

both ends and means." ⁵ Nature is unintelligible to us unless we assume that everything in it is purposively designed in a mutually helpful way. The teleological principle of the biological sciences is, as noted, a regulative and not a constitutive principle; it is to be used only as a maxim to guide us in our enquiries. This teleological principle is, thus, to be contrasted with the proposition that every event has a cause, which according to Kant, is objectively true of phenomena.

Now Kant's aim in the third Critique once again seems to be to deny knowledge so as to make room for faith. That is, he wishes to show that any claim to knowledge concerning Providence or God's design can at best be speculative. But in carrying out this task he has once more overstepped his own limits. By denying a certain kind of knowledge about nature he has also, without any justification, denied another sort of knowledge about the realm of freedom i.e. the normative realm. In the normative realm Reason legislates a priori for the realm of freedom. The will is determined by Reason through the concept of freedom; for such a determination one requires knowledge about this realm. Hence, although the judgement about the purposiveness of nature may be a matter of mere reflection producing speculative knowledge, judgement about purposiveness in the normative realm is

not a matter of mere speculation, it is a matter of determined actions, and one does have knowledge about such actions.

As concerns nature, Kant is quite right in saying that judgement can at best be reflective.

We have not after all created the natural world, hence what goes on in it is a matter for discovery and reflection. But as concerns the normatively possible world, we do not have to merely reflect on it, we have ourselves created it, and men who have done so have mostly declared their purposes. We can actually know what these purposes are, we do not have to speculate about them.

As noted before, Kant himself tells us that there are two types of legislations. When reason legislates for the normatively possible realm the principle of purposiveness cannot be merely regulating our thoughts, it constitutes such a realm. This is so because, for such a realm, actions and reactions are not merely to be understood through the notion of purpose, but purposeful activities are to be done so that various deeds will constitute the normative realm. The use of the teleological principle for the noumenal realm does not generate any speculative knowledge, nor does it remain only a heuristic principle through which the Intelligible realm is to be comprehended. The actuality is that the noumenal

realm is intelligible because people have performed actions which are purposive, and which are done on the basis of norms. We do not have to regard the normatively possible world as if deeds in it were purposive in mutually helpful ways, for here they may or may not be so enacted. The teleological principle for the noumenal realm is hence not just an epistemological principle, it is an objective ontological one. The teleological principle is just as objectively true for the realm of freedom as the principle that every event has a cause is true for the phenomenal world.

What is this teleological principle for the normatively possible world, the realm of freedom? It needs to be defined.

In the third Critique, Kant explains that so long as we leave mankind out of consideration we cannot explain why nature even exists. Man and his needs and purposes can form the ultimate ends of nature only because he, unlike other natural beings, can form his own ends and designs. This is so because man is the only being in nature who possesses autonomy of the will, and because, in particular, man can, indeed, set before himself, as his ultimate objective, the achievement of the supreme moral good. "Only in man, and only in him as the individual being to whom the moral law applies, do we find un-

conditional legislation in respect of ends. This legislation, therefore, is what alone qualifies him to be final end to which the whole of nature is teleologically subordinate." ⁶

Now if the above is true, and I do think it is, then we have already transcended the situation of the biological sciences. Here we have man whose teleos we do not have to keep guessing, we can ask him what it is, we can ask ourselves. This is a radically different situation, here man must set before himself his own purposes. The teleological principle is no longer a mere epistemological principle which helps us to guess or opine on what we or the others are doing or want to do, it gives actual form to the human deeds. It tells us that we must constitute our activities in such a way that every act is reciprocally both end and means. Since the ends are moral, the means have to be moral too; only in such a situation 'nothing will be done in vain.' Perhaps nature does nothing in vain, but since we are self-conscious beings we are free either to do deeds in vain or not to so do them. We have to legislate the teleological principle to ourselves.

Hence, just as the biological sciences have a teleological principle which is different from the causal principle of the natural sciences, the legal science

has its own teleological principle which is radically different from that of the biological sciences. It is radically different because it does not just give a shape to our thoughts but it gives a shape to our deeds in the social world. This is possible because man, being conscious of the telos in nature, i.e., being self-conscious of his nature, unlike all other creatures, is free to either follow or not follow the telos.

The teleological principle of the legal enterprise may be stated as follows:

Attain all moral ends only through moral means, so that every act is reciprocally both end and means.

The above principle is the normatively synthetic a priori teleological principle of law. It is a basic legal proposition.

Since morality consists of both ethics, in which moral principles are internally legislated, and law, in which the moral principles are externally legislated, the above teleological principle is actually a principle of both ethics and law. For ethics alone, it may be read as: 'attain all ethical ends only through ethical means'; and for law as: 'attain all legal ends only through legal means...'. However, the formulation presented above which covers both ethics and law, is more appropriate since it is a principle which applies both in the

present social world and also in the best normatively possible world. In the best world, under the Community of Ends principles, it will be recalled that the ethical and the legal become one and the same, since what a person legislates for himself is also what he always legislates for all. Prior to the attainment of the best possible world, that is presently, one may, if one wants, read the teleological principle specifically for law as 'attain all legal ends through legal means . . .'; but then it must be remembered that in so reading it one is saying nothing other than 'attain all externally moral ends through externally moral means, so that every act is reciprocally both end and means'.

We shall see in the next section what this teleological principle actually entails and involves. It mainly generates what Kant called the 'peculiar causality' of the realm of freedom. Kant, as noted, does not explain or explore the role that the teleological principle plays in the noumenal realm. It is to this 'peculiar causality' that we must turn next. But before we do that it will be important to end this section with a few relevant remarks on Kant's Critique of Judgement.

Both the intent and the content of the third Critique have been matters for debate.⁷ This is partly because, as I have suggested, Kant himself seems

to have caused the confusions. His main aims in the third Critique seem to have been twofold : first, to rule out speculative discourse about purposiveness in nature, and secondly, to provide an answer to Hume's scepticism about making legitimate inductive generalizations from particular observations. Kant's answer seems to be that there are synthetic a priori principles in both natural and biological sciences on the basis of which legitimate inductive generalizations can be made. In raising problems about induction, Hume was interested in explaining our knowledge about nature, and so is Kant. But in doing so, as I have argued, Kant seems to forget that there is something more at stake than biology and natural sciences; the legitimacy of inductive generalizations in the social sciences, in the realm of freedom, has also to be explained. Perhaps Kant does not discuss the teleology of the realm of freedom because he thought he had already done so, six years earlier, in the 'Essay Towards a Universal History from a Cosmopolitan Point of View.'⁸ There he had discussed the progress of the civil-society in terms of the unsocial-sociality of man, i.e., the desire in man for both privacy and community. However, it is difficult to say, whether Kant had this essay in mind while writing the third Critique.

The net result of the discussion of teleology in the third Critique is to reinstate man in the centre of the conceptual scheme in terms of which the rest of the universe can be explained. In telling us that the final purpose of nature

is to produce man and through man the ideal rational community, and in asserting that it is only in this way that the working of nature can be understood, Kant is putting forward none other than what has recently been called the 'anthropic principle' or the 'reality principle', a principle which states that reality can be understood only by considering man's role in it.⁹ We have already had occasions to discuss this issue in Section-I. The anthropic principle of the third Critique raises serious doubts about Kant's conception of his work as a Copernician revolution. A discussion of this issue is evidently a matter for another occasion. The limited implication of the anthropic principle for the social realm must, however, be explored here.

Kant's concern in the third Critique is to show where the capacity of reasoning stops and where speculation begins. However, as noted, even if we grant that speculation about the telology of the factual world is illegitimate, reasoning about the teleology of the normatively possible world need not be speculative. In such a world the anthropic principle can be directly applied because we ourselves choose and set the telos. Reason is used in its practical capacity to determine the telos. The 'peculiar causality' that is involved in the teleology of the noumenal realm, i.e., the social order, when practical reason is applied to it, must be explained. I shall now proceed to discuss what sort of 'causality' is involved in the actions in the social order.

IV.

THE LEGAL COURSE OF ACTION

The principle of legal teleology generates the notion of a legal course of action. This notion is fundamental to an understanding of the legal enterprise.

The notion of a normal course of development in the normatively possible world is qualitatively different from the notion of the process of a causal chain of action and reaction that occurs in the factual world.

The significance of the notion of a normal course was noted while discussing the concept of a legal individual and also the concept of cooperation. In what follows, I shall examine the notion of a normal course, firstly from the perspective of an individual and then, secondly, from the perspective of a group or community. It will be necessary to examine both the meaning of the notion of a normal legal course and the concepts in terms of which the notion can be made intelligible.

The notion of the normal course of legal action is prior to the creation of the positive law, because the latter has to be created through a legal course of action, otherwise it becomes a system by fiat or force. Let us see what such a course can be.

IV. 1).

The Individual's Course And Individual's Deviance: The Issue Of Amending A Person.

If our aim is to do morally good acts and if we adopt morally good means to achieve this end, then we have already done a morally good act while enacting the means to it. This is the only way in which morally good acts will always be done whether or not we are able to achieve the intended ends. The achievement of an intended end may or may not be possible, but adopting morally good means to achieve this end is possible for us; hence the teleological principle tells us that every means adopted should also be viewed as an end in itself, and as such it must be moral in the same way as the intended end. That is, every act is simultaneously both a means to a certain moral end and an also an end in itself. (Of course, means must never become only ends in themselves.)

The teleological requirement, together with the transcendental requirement that every agent has a duty to create and sustain the normatively best possible world, generates the notion of a normal legal course that leads from the normatively worst possible world, i.e., the

State of Nature, to the normatively best possible world. That is, it generates the idea of a continuous series of actions rather than an isolated moral act.

While discussing the concept of a legal individual we saw that the notion of a normal legal course arises when we consider the possibility of moral or rational progress. The idea that an imperfectly rational will can become a perfectly rational will or a holy will involves, as Kant argues, an idea of the immortality of the soul, that is, the idea that the personality of the person is continued. Law is not concerned with immortality, but it is concerned with the fact that while each person is living it should be possible for him to make the desired moral progress. Law does not dictate, but it expects that each person will either attempt to realize his moral end or will, at least, not work against it. Through its various codes, law outlines the permissible course of action. What it protects is the possibility for the actualization of the legal telology.

When considered from the point of view of the community the notion of a normal course of action defines the normal path which a community must necessarily follow if a continuity is to be maintained. At any given time there is a certain understanding about what constitutes a legal course of action for an individual and a community and also what constitutes a deviation from it.

The substantive aspects of the legal course are defined by the transcendental, metaphysical and the teleological requirements, together. Those actions which actualize the ideals of the normatively best possible world from the central channel of the normal legal course; those which at least do not go contrary to such ideals form the permissible deviations; and all those actions which violate the realization of the ideals fall outside the legal course, they are the abnormal or the totally deviated actions.

The teleological requirement demands that all legal ends be achieved through legal means. When actions are done in this way they are bound together in a series which is not causally related but conceptually related. From the individual's point of view the actions are intelligible as a chain of purposive actions aimed at becoming a perfectly rational will; from the communal point of view the actions are intelligible as a chain leading to the best world. A series of deeds which are not causally connected but which still form a series, since they have been enacted for the same reason, evidently does not belong to the factual world, but to the noumenal, i.e., the normative realm. This explains the 'peculiar causality' which Kant mentions when considering human actions.

Now, such a series of deeds, which are intelligible in terms of norms and are conceptually related through reason in the noumenal realm but not causally related in the phenomenal realm, is what the Indian

philosophers have called Karma. One's Karma is the series of deeds which one has performed in the noumenal realm and which are intelligible only normatively.¹⁰

The notion of Karma is associated with the notion of reincarnation. From the individual's point of view, the notion of continuous moral progress, as Kant noted, requires the continuation of the self as a soul. This continuation is supposed to be somewhere outside the world. The Indian philosophers have similarly thought that, for moral perfection, a continuation of the self is required. However they have not conceived of this continuation as somewhere outside the world, but as within the world itself, in terms of being born again at the same level of moral perfection which one had achieved in the last life. The moral progress, thus, always continues within the world and not outside it. However, in so far as law is concerned, just as it is not required to concern itself with the immortality of the soul so it is not required to concern itself with the reincarnating Ātman. Law is directed at only the present embodiment of the self.

The notion of Karma in the Indian tradition has sometimes been confused with various ritualistic and religious notions. The notion itself is neither ritualistic nor religious; it is an a priori notion of reason which tells us that different human deeds form a series (lead-

ing towards either moral perfection or degeneration) and that the series is intelligible in a normative discourse, not a factual discourse. When the idea of law is approached through the notion of Dharma, the notion of Karma would have to be purified of its religious and ritualistic overtones. Here it will suffice to mention the task. In explicating the notion of a normal course of action, however, I have also explicated the notion of Karma, they are the same notion.

Law is, then, eventually based on a Karmic theory. It requires a fundamental notion of a normal course of action. Law's aim, thus, is to see to it that the course of one's actions remains the legal course of action. In other words, it sees to it that one's Karma follows the Dharmic path.

Although philosophers of law have not discussed or explicated the notion of a normal legal course or a path, which is central to the working of the legal enterprise, lawyers and jurists have nonetheless directly or indirectly employed the notion in actual practice. According to the thesis argued here, they would naturally be led to such an employment in the process of the development of law, if they have not already discovered it. This is so because the notion of a normal course is implicit in the idea of law. It is only on the basis of the notion of such a course

that many current legal practices become intelligible. For example, the practice of evaluating or punishing a person on the basis of his past record, instead of a single isolated act, is understandable in terms of the idea that what law takes into account is the whole course of a person's acts rather than one particular act. In fact if we understand the teleology of law we would be judging every person in this way rather than attempting to punish them for isolated acts. The teleology of law directs us to take into account the whole series of acts, or as much as we can find out, when judging or evaluating a person; what has to be considered is whether or not the person has been following the course which leads to the normatively best possible world, and if he has deviated from it, whether the deviation is within the permissible limits.

In fact, the very idea of deviation and reform, which is talked about so much these days, becomes meaningful only on the assumption that there is a non-deviated way of acting, that there is a proper form of action. To attempt to reform someone or to correct their deviance is not to seek amendment in one isolated act, it is to attempt to bring the person back to a proper moral course of action.

Similarly, the whole of tort law, for example, is based on the notion of non-tort i.e., a

non-distorted line of actions. To know what is a dis-
torted line of action one has to first know what is the
proper course of action. When actions are distorted they
become the types of actions which do not fall in line with
the legal course of action. Law then attempts to reconsti-
tute the state of affairs so that the conditions under
which the normatively best possible world can be actualized
are brought about once again. The main aim or thrust
of law in a tort case is to reconstitute the conditions
for the best world and not to reform a particular indivi-
dual to act as a member of the best world. The latter is
the main aim of the Criminal law.

The notion of strict liability, to
mention as a last example, can also eventually be justi-
fied and understood only in terms of an appropriate course
of legal action leading to the normatively best world.
The central concern, in sustaining the idea of strict liabi-
lity, is to express the central legal point that the main
aim of law is to maintain the conditions and possibilities
for the best world. Since this is the primary aim there
are no excusing conditions in certain cases, the conditions
simply must be restored. Finding out who is responsible
for the misdeeds is, of course, important, because someone,
after all, has to restore the conditions for working towards
the actualization of the best world; but although the loca-

tion of the person who will restore or compensate for the situation is important it is not the motivating grounds for stipulating strict liability. The motivating or the justifying grounds for stipulating strict liability is the legal aim of protecting the conditions for the actualization of the best world, wherever possible. The notion of strict liability is just one device to effect such an actualization. As law progresses we must expect many more such devices to be forthcoming.

So far I have been discussing reforms and corrections of individuals and some particular situations; but what about the reform and correction of a large group of people? Does the teleological principle become different when applied to groups? Evidently not, the teleological principle concerns the actions in general whether they be done by an individual or a group. It does not depend upon how many people are doing it, but what actions are being done. Hence the teleological principle applies exactly in the same way to one person as it does to many, even if the 'many' be the one who form the association called government, or the elected legislators of rules. I turn now to a discussion of the question of amending or reforming group deviance.

IV. 2).

The Group's Course And The Group's Deviance: The Issue Of Civil-Amendment

The teleological principle of law requires that all legal ends must be attained through legal means. Since the legal means are ones of cooperation and reasoning together, it follows that all amendments in the social structure, institutions and in the civil-society in general, must be attained through co-operative means. Amendments within the body of the legal codes or of public offices are, in fact, brought about many times in this manner. There are specific amendment procedures within law which direct the people to change, even some parts of law, by co-operative means. Smaller legal amendments are often brought about by the courts in some, similar co-operative manner. But what happens when a group of people or a majority of people ~~thinks~~ that the political party or the legislators which form the government, are acting contrary to the legal ideals and principles? Even in such a case, the teleological principle does not authorize the people to act illegally or violently; it still says : attain legal ends through legal means. Since legal means are ones of co-operation, in this case what they must do is not cooperate with the people or the group who they consider to be acting il-

legally and co-operate only with the people or group who, in fact, they take to be acting according to the legal ideals and principles. In so doing they will be non-co-operating with the political party or the legislators in charge and co-operating with some other people. That is, from the point of view of the illegally acting legislators or governments, they will be non-co-operating, but the same actions will constitute co-operation from the point of view of the legally acting people. In this non-co-operation, the people who dissent will still be acting according to all the legal principles and ideas. Non-co-operation is thus the only amendment method which the teleological principle of law provides, whether the amendment be large or small. Non-cooperation, it must be emphasized, is not acting violently against the people who are acting illegally, this the law can never allow. They are only co-operating with a different set of people who are acting legally. The test of whether one is acting legally or not is clearly provided by the propositions of pure practical reason, as spelt out in the course of this work. All legislation, by whatever method it has come into being, must not contradict the basic legal propositions of practical reason if it is to be law. Its legality does not depend only upon whether or not the appropriate people have legislated it. This issue will be discussed in depth in the

following section.

Co-operation and non-cooperation are, thus, not opposite ways of acting. Both involve co-operative ways of acting; what the 'non' signifies is that the class of people with whom one was co-operating earlier is now different.

Only when people have non-cooperated to bring about an amendment can it be said that they have acted legally. All other modes of social or anti-social actions to bring about a change are illegal actions. Non-cooperation may take the form of a minor local work strike or a major civil-movement, all of them are governed by the same principles of legality. They are all rational, co-operative and non-violent. Non-cooperation, as M.K. Gandhi rightly called it, is Satyāgraha, Satya means truth and āgraha is benevolent persuasion.¹¹ Satyāgraha is thus benevolent persuasion based on true principles i.e., on truth. The true principles, or the truth in this case, are the synthetic a priori propositions of pure practical reason. Satyāgraha is, thus, the only method which the human reason warrants to be a legal method. The efficacy and the practicality of Satyāgraha has already been tested in large scale social changes. This has been done by various men, including Mahatma Gandhi himself, but small scale Satyāgraha is ubiquitous, we often act in this manner in our daily life.

Although Satyāgraha is well understood from the point of view of activism, its theoretical basis has been unclear. I have attempted to show its appropriate philosophical basis by explicating the true propositions of human reason to which Satya refers and the meaning of co-operative activity, to which āgraha refers.

The practice of attempting to amend the behaviour of the legislators has been confusedly termed civil-disobedience by the legal positivists. This term is a misnomer because it rests on false assumptions about law. It assumes that people are obeying the law, when as we have seen, the truth is that people are autonomously following the law insofar as it accords with the demands of reason. The term civil-disobedience, thus, has its basis in the imperialistic ideology where the people are commanded to obey the law.

What we need, therefore, is a neutral term to refer to civil action, for it may either be legal or illegal. The term 'action for civil-amendment' seems to me to be more appropriate. The legality of the action for civil amendment can be judged independently of the positively legislated rules.

This completes the essential characterization of the notion of a normal legal course. I turn now to the discussion of two important conclusions which emerge directly from the notion of the normal legal course. The first concerns the grounds for fundamental human rights and the second the plurality of methods which accord with the teleology of law.

V.

GROUNDS FOR FUNDAMENTAL HUMAN RIGHTS

Looking at the United Nations Universal Declaration of Human Rights one may wonder why it is only so long and not any longer! Why does the list include the right to many things such as the right to self-determination, civil rights, etc., and not to many other things. How many rights must it necessarily include and why must it include only those particular rights? Legal codes of nations, too, have a list of rights, such as to free speech, worship, locomotion, education and so on, but why must it include only these and not others? In other words, is there an organizing principle behind all these various rights which are enumerated in various codes, or is the list arbitrary?

It is not clear if the authors of the Declaration or the Charter or other similar legal codes had any specific subjective principle in mind while enumerating these rights, at least the documents do not specify any such principles.

What we evidently need is a principle on the basis of which all those rights mentioned in the Declaration and other documents, and many more which may be discovered in the future to be necessary, can be ration-

ally generated. That is we need an objective generative principle for rights..

The transcendental principle - that every human being has a duty to create and sustain a legal system by acting in accordance with the principles of the Community of Ends and by actualizing the ideals of the normatively best possible world, together with the teleological principle that all actions so done must be reciprocally both ends and means, provides precisely such a generative principle for rights. The principle may be formulated thus:

Every human being has all and only those rights which are necessary to make it possible for him to fulfil his duty of creating and sustaining the normatively best possible world and acting in accordance with the principles of the Community of Ends.

The above is a basic normatively synthetic a priori proposition of law. It tells us that every human being has a right to all that is instrumental in letting him(or her)fulfil his duty, but this formula by itself does not, a priori, tell us what these rights actually are. This discovery is a matter of further conceptual analysis, together with the empirical observation of the human and social conditions. We find, for example, that having knowledge is instrumental in being able to fulfil one's duty, so is being able to work, express oneself freely, protect one's body, belong to a legal juris-

diction, and so on. Hence, a person has a fundamental right to all these. Although the list is always open for adaptation to the context, there are evidently some necessities which are common to all the contexts for being able to fulfil one's duty, such as being able to live, to express oneself, to be able to know all the possibilities, to work, etc. Such necessities require the right to everything that is instrumental in the actualization of these necessities, such as the right to education, the right to sufficient economic means (which may be translated as the right to property or right to a minimum wage, depending on the social context) and other instrumental necessities such as the right to medical services and the right to legal aid. The required rights cannot be (and need not be) decided all at once, because in different social and historical conditions we may discover different sorts of requirements which are instrumental in being able to fulfil one's duty, but on the basis of the generative principle it will always be possible to include specific rights which need to be emphasized in that social and historical situation. However, it must be remembered that although the list is open on the basis of the generative principle, it is not arbitrary or a matter of fiat or decree, the direction and the scope are very strictly limited and defined. It is an aspect of what law itself

is - an open cybernetical juristic normative system. The inclusion of rights has a defined teleological limit and direction.

The ground for Fundamental Human Rights, thus, is Fundamental Human Duties which are involved in the teleology of law. It is only by understanding the teleology that we can make the notion of necessary rights intelligible. The rights are necessary to the human and legal teleology. They are necessary because they are instrumental in being able to fulfil or actualize the legal teleology.

What is important to notice here is that all rights are derived on the grounds of the transcendental duty and the teleology of law, hence the notion of duty is conceptually prior to the notion of right. The duty is unconditional, the existence of the right is conditional upon the fulfilment of the duty.

The last point needs to be explicated. We may, of course, say that, theoretically, people have some specific rights, but the empirical effectiveness and actualization of what these various rights assert is conditional upon the prior empirical effectiveness and actualization of what the duty asserts. Only when the duty to create and sustain a legal system has been fulfilled by a community or a person can there be a possi-

bility for the actualization of what the various rights assert. A person, for example, who has never expressed himself freely, and has, thus, not done his duty in creating and sustaining the legal system, has only a theoretical right to freedom of speech, it has never been actualized. For him to defend his right to freedom of speech, or for others to defend it, can only become an actual issue if the person has spoken freely in the first place. Similarly a person who has committed crimes and is in jail, can only claim in vain that he has a right to education. For such a right to be actual, and not just possible, a person would first have to do his duty towards the best world, that is, he would actually have to educate himself and thus make himself more rational, wherein his right to education, would have been actualized.

Similarly a community which has not done its duty to create and sustain the legal system cannot expect the actualization of various legal rights. A society which is rendered chaotic by internal civil disorder and strife, or which is in a habit of living by the command of a dictator rather than by reason, can hardly expect what the various legal rights assert to be true for the society. The possibility of the actualization of what the various legal rights assert presupposes the actualization of the fundamental legal duties by the community.

What we have to argue and contest for, therefore, is firstly, the fulfilment of Fundamental Human Duties defined by the principles of the Community of Ends and secondly, for the actualization of the ideals of the normatively best possible world. The minimal content of these duties can be expressed by the proposition that what is first of all required is the fulfilment of the duty to create and sustain a legal system if we want the Fundamental Human Rights to really actualize themselves in any society.

Thus, although the United Nations Organization may use all its means to propagate the notion of Fundamental Human Rights, and may try its best to persuade everyone that basic human rights must be respected, all such efforts would remain empirically ineffective, especially where its effects are most required. What it must first of all tell everyone about is Fundamental Human Duties. It must see to it that the legal system is first of all understood and established everywhere, so that the actualization of the human rights becomes possible. That is, the United Nations must aid and direct every community in fulfilling its basic duty -- the duty to create and sustain a legal system. It is only a legal system that can provide the conditions in which the propositions of human rights can become true propositions.

The question about the existence of law will be dealt with in detail in the next section. I will conclude this section by drawing the final conclusion.

VI.

THE PLURALITY OF LEGAL METHODS

Since all that we know a priori about legal teleology is that the means, as well as the ends, adopted must meet the juristic conditions, the empirical question about what actual methods will be adopted in different social situations for different social purposes, which are within the bounds of the juristic conditions, cannot be decided beforehand. That is, the teleological principle allows for a legal pluralism in methods. It cannot be said, therefore, that only adjudication, for example, is the legal procedure. Mediation, conciliation and election, for instance, are equally legitimate legal methods. They are, evidently, distinct methods necessary for solving very different types of problems and needs. Other problem and need solving procedures may very well be invented or discovered in the future, and those which are necessary now, may not be so important at another historical stage with different social problems and issues.

Since which particular method is taken as most important depends upon the social needs and problems, we cannot, therefore, assert that a particular society is or was legally primitive or advanced merely by considering their legal methods. To appraise a society all other legal principles would have to be considered and one would have to find out to what degree the various basic legal propositions are actually effective in the society. Thus, the mere fact that a society solved all its problems through mediation and did

- not practice adjudication, does not make it primitive; nor does the fact that another society practices adjudication make it legally advanced.

As we can see now, Fuller's insistence that a legal theory must account for legal pluralism¹² (which was noted in Part-II of this work) is not without substance. The analysis of this section has not only described what is legal pluralism but also attempted to show its basic philosophical foundations. Legal pluralism in method, which are within the bounds of the juristic requirements, is not only possible but also necessary given the diversity of our social problems and needs.

I proceed now to examine the fourth and the final requirements of law, namely, the legislative requirements.

SECTION-IV

THE LEGISLATIVE REQUIREMENTS OF LAW

I.. THE LEGISLATIVE REQUIREMENTS OF LAW

The legislative requirements of law are those practical necessities on fulfilment of which a possible system becomes actually efficacious.

To start with there are two such basic practical requirements. First that a number of rules be presented which can be possible candidates for becoming laws; and secondly, that such rules be applied to the community as laws.

The first requirement can be further simplified as consisting of two elements:

- i) there be a body of men who present or create the rules;
- ii) such rules satisfy the requirements under which the rules become laws.

Similarly, the second requirement can be further simplified as consisting of two elements:

- i) the rules be classified so that they can be applied; (this requires a division of laws).
- ii) there be a certain specific body of men whose statements are to be taken to be the final verdict on how the rules are to actually apply in particular situations; (this evidently requires that

there must be judges whose role is well determined.

As concerns the first requirement - what kind of men create a body of rules - most books on law rightly point to customs, common practices and to the political representatives as the 'sources' of such rules. The further requirement concerning the conditions that must be satisfied so that the created rules can become laws, is not just a matter of identifying the sources. It requires spelling out and justifying the criteria on the basis of which the identified rules can be taken to be laws. The issues concerning such criteria shall form the first part of the discussions to follow.

The second legislative requirement mentioned above, demands individuation of laws. Law is usually divided into Public and Private law. Each division has further sub-divisions. What justifies such divisions? An inquiry into the basic reasons for such divisions will form the second part of the discussions in this section.

The second legislative requirement also makes it necessary that judges apply the laws to the society. A discussion about the role of the judges will form the third and the final part of this section.

II. 1).

THE EXISTENCE OF RULES.

Let us consider the first question :
what kind of men can create the rules which can become laws ?

It seems to be now generally agreed that only the will of some specific people, the legislators, can be instrumental in creating rules which can become laws. The common law tradition, however, recognized common practices and customs as sources which can present rules. These rules were willed by some arbitrary (unknown) individuals. In recognizing the primacy of specific legislators, has the Common law tradition moved away from its basic understanding ? Even in the Civil law tradition the body of law came mostly from the prevailing practices. In recognizing the political legislators as the only people whose will is involved in creating law, has the tradition moved away from the basic belief that the will of the people has to be involved in the creation of laws ? This is not so, for from the side of the political theory, we must remember, the political legislators are supposed to be the representatives of the people. Insofar as they are assumed to be representing the will of the people, the will of each person is still instrumental³ in creating the rules, albeit only indirectly now.

Thus, from the point of view of law, the answer to the first question - whether rules willed by any person can be a candidate for law - the answer is yes. Although law always demands that the will of all be involved

in communal legislation, ~~such a~~ demand can, evidently, remain unsatisfied if the political legislators are not true representatives of the people's will. One must organize the society in such a way that the will of all is truly represented by the will of some. But how this is to be done is a political question. The legal theory cannot provide an answer to this.

It need not be assumed a priori that any one political theory or system provides the right or the best answer to the legal demand that the will of all be instrumental in the legislation of external morality. The best arrangement by which the will of the people will be expressed by a chosen group of people would vary from society to society. It would depend upon various cultural, historical, economic, and other factors. The inquiry into this issue, as mentioned, is a concern of political theory and hence need not concern us here, its relationship to the legal theory, however, is important to note.¹

One may rightly ask how do we know whether the method of choosing the political representatives creates a legitimate body of men who can legislate the rules? The idea of law, as shown, is independent of and prior to that of a political system. Basic legal principles, on the basis of which further laws can be created by the political system, are prior to the creation of any political party. If the methods followed to create a body of men who will be the legislators do not violate the basic synthetic a priori legal propositions,

then they would be legally legitimate methods. Election is one such procedure which works in accordance with the basic propositions of law. The basic principles of election are grounded in the teleological principle of law, namely, that to achieve good ends only good means are legitimate. This, as we have seen, is a principle of Satyāgraha.

From the fact that we have a legitimate body of men who present us with rules, can it be inferred that whatever they present can become law? The legal positivists have assumed this to be so, but such an assumption cannot be made. For to accept this is to assume that the legislative conditions are the same as the metaphysical conditions for the existence of laws. This, as we have seen, is not so. The exact conditions for the effectiveness of laws must now be specified.

II. 2).

THE EXISTENCE OF LAWS

A rule may come to exist as a law if the agents act in accordance with it. But under what conditions can they so act? (One must not speak of obeying the rules because that suggests that the agents are not autonomous and the rules are commands). The people can act in accordance with the rules if they are reasonable. The rules will be reasonable only if they do not contradict any synthetic a priori legal propositions of pure practical reason, namely, the mentioned transcendental, metaphysical and teleological principles of law.

If we call the legislation of rules by a legitimate body of men the validity condition, then the point of the above argument is that the existence condition of rules as laws are not the same as the validity condition. The existence condition and the validity condition are met in two totally different ways. The validity condition for a rule is grounded in human will being instrumental in a legitimate way, that is, there must be a legitimate will for a legitimate rule (valid rule). But the existence condition is grounded in the way human reason applies to the normatively possible world. For a valid rule to come into existence as law, it must not only meet the conditions of human will but also the conditions of human reason.

A particular rule would have to thus meet the following requirements before it can come into existence as law:

- i) It must be a valid rule. (A valid rule is any rule willed by the people or its legally chosen representatives).
- ii) The rules must not contradict any principle which will prevent it from becoming actual. (That is, it must satisfy the transcendental, metaphysical and the teleological requirements).
- iii) There must be acts done in accordance with the rules.

If condition ii) and iii) are missing then the rules would be only valid rules not laws. If even condition i) is missing then the rules can at best be fiats, decrees or commands, they would not even be valid rules.

Condition iii) partly presupposes condition i), that is, for the people to act in accordance with the rules there must already be a body of rules created by the people. It is only partly presupposed because for people to act in accordance with the rules it is not necessary that they be indirectly legislated through the political representatives. So long as the people have willed the rules which have been accepted, there would be rules in accordance with which people can act. Given this, if only conditions i) and iii) are present what we get is customs or common practices, not yet laws.

However, since condition iii) partly presupposes condition i), if we have only conditions ii) and iii) we once again have laws and not just rules. That is, if all the customs and common practices of a society are such that they are in accordance with the existence conditions of law (condition ii) and if people are acting in accordance with it, then the laws exist. What this means is that it is not necessary to have indirect representation of the will through political legislators to have laws, they could be created and sustained totally through customs and common

practices. But, evidently, this is an idealized situation, it is precisely because customs and common practices conflict that we need the political representatives. What condition ii) and iii) together tell us is that the need for political representatives is an accidental feature, it is not essential feature for the validity of rules, other ways could be found to get the will of the people instrumentally involved in creating a body of rules.

We must thus distinguish between what is politically necessary, namely, the indirect representation of the people's will through some chosen men, and what is legally necessary, namely, the creation of the rules by the people so that the rules can exist as laws.

The failure to distinguish between the political and the legal requirements is the central shortcoming of legal positivism. It mistakes the requirements for valid rules, the expression of which is a political problem and requires a political theory to justify indirect legitimate expression of the people's will, with the requirements of the existence of laws. In short legal positivism confuses the validity conditions with the existence conditions of laws.

One clear example of such a confusion, to start with, can be seen in Kelsen. Kelsen distinguishes the validity of a norm from its effectiveness. A law exists for him, he says, only if it is effective. But then what does

effectiveness mean ? It means, he tells us, that the laws should in fact be acted upon by most or some people. If it is so acted upon then the law exists. But then, we must ask, what does validity mean ? Kelsen tells us, it means that the laws exist. Since, for Kelsen, validity means that law exists and effectiveness also means that law exists, at times he is led to argue that law exists when it is valid and also, at other times, to argue that law does not exist even if it is valid, because it is not effective. The following quotations, all of which belong to the same section, reveals this confusion.

"By the word 'validity' we designate the specific existence of a norm." ... "The existence of a positive norm, that is to say its 'validity' - is not the same as the existence of the act of will, whose objective meaning the norm is." ... "Since the validity of a norm is an ought and not an is, it is necessary to distinguish the validity of a norm from its effectiveness." ... "A minimum of effectiveness is a condition of validity." ... "A legal norm becomes valid before it becomes effective, that is, before it is applied and obeyed." ... "Effectiveness is a condition of validity in the sense that effectiveness has to join the positing of a legal norm if the norm is not to lose its validity." 2

It is evident that Kelsen's assertions do not at all make it clear which way the relationships hold and what these relationships are. He is led into such obvious contradictions because, after positing three distinct notions that of existence, validity and effectiveness, he, like other positivists, confuses these notions.

In Hart's analysis, this confusion appears in a different way. Hart asks : what does it mean for a rule

to exist ? He answers this in terms of "acceptance". Acceptance does not mean mere moral approval or a feeling of being bound. It must also be the case that the rules are complied with and a deviation from the rule is a fault open to criticism. As noted before, to have such a critical attitude, is to have, what Hart calls, an internal point of view.³ According to Hart, thus, a law is said to exist if it is accepted with an internal point of view. He tells us :

There are therefore two minimum conditions necessary and sufficient for the existence of a legal system. On the one hand those rules of behaviour which are valid according to the system's ultimate criteria of validity must be generally obeyed, and, on the other hand, its rules of recognition specifying the criteria of legal validity and its rules of change and adjudication must be effectively accepted as common public standards of official behaviour by its officials. ⁴

In defining the existence of the legal system in terms of acceptance of valid rules, Hart is not providing us with any independent criteria for the existence of law. The notion of acceptance that he mentions applies to normative systems in general. Even the rules of grammar of a language are accepted with an internal point of view. The important question - the answer to which will distinguish the existence of laws from other rules - is not raised by Hart. This is the question : can the members of a group accept any rule or are there conditions which make it impossible to act in accordance with the rules without violating some basic principles of law ? As argued, not every rule can be accepted and made to exist as law. Besides the material and formal conditions, there are legal conditions which need to be satisfied.

Although, like Kelsen, Hart evidently realizes that there are three distinct notions - validity, existence and effectiveness - he conflates these distinct notions by equating both validity and effectiveness (acceptance) with existence. That is, Hart asserts that if a rule is valid then it exists, he also asserts that if a rule is accepted then it exists. As a consequence of this equation, after inquiring into the conditions of validity (and equating these conditions with the existence of laws) Hart does not inquire into the conditions for the acceptance of laws (since he assumes these have already been defined by the conditions of validity).

Our concern, however, is not limited to Hart's and Kelsen's confusions between validity and existence. It applies to legal positivism in general. Positivists, commonly (and rightly), claim that 'the validity of law is one thing and its existence another', but as it turns out, no positivist actually follows the consequences of this proclamation. Having made the claim he also goes on to maintain that every valid law exists, that is, the validity of law is one thing (and since every valid rule exists as law according to the positivists) its existence is the same thing. A theory consistent with the belief that the validity of law is different from its existence, would show the difference by providing distinct criteria for these notions.

In conclusion, then, since a rule must not only satisfy the validity conditions of our will but also the existence conditions of our reason so that we may be able to accept it and act in accordance with it, it follows that only that is law, or can be law, which ought to be law, not any arbitrary rule can be willed and accepted in practice to exist as law.

If law is only what it ought to be, how do we characterize the different institutions which presently take themselves to be legal systems? The appropriate characterization would be that each of these systems are legal systems to different degrees. What presently goes under the name of a legal system is actually a very complex institution consisting of some laws, some valid rules, some conventions, some common practices and even some illegal political practices. The difference between the various systems, which are presently called legal systems, is in the composition of these elements. In an ideal legal system all valid rules and norms will be laws. It must be emphasized here that in arguing that there is a difference of degree in the legality of the present institutions, I do not mean to say that the contents and the limits of a legal system can be stretched in any way. The contents and the limits are set by the basic principles of law and any system that violates these principles ceases to be a legal system. The differences in the present institutions arise due to the non-legal elements, such as rules, conventions, etc.

III. GROUND FOR THE INDIVIDUATION OF LAWS.

Law can be divided into classes in a number of ways. Within a legal system the division of law has at least two practical objectives: firstly, the creation of a conceptual scheme that will enable the rules to be so interrelated and so effectively and succinctly stated that they may be more easily understood, applied and developed; secondly, the creation of an order that will enable the lawyers and judges to find and cite the laws with greater ease. The question about how to classify the laws cannot be appropriately answered without understanding why the laws are to be classified in a particular way. This latter question belongs to the philosophy of law and it is this question that I attempt to answer in this discussion.

Traditionally, legal rules have been classified in certain ways: from the point of view of their purpose, according to their logical form, according to their source of origination and even from the point of view of legal education.⁶ However, the Roman distinction between jus privatum and jus publicum has been accepted as the most fundamental distinction in the corpus juris. Public law is taken to comprise the rules which specially relate to the structure, power, right and activities of the State. Private law includes all those rules which specially concern the subjects of a State in their relationship to each other, together with the rules which are common to the State and

its subjects. Besides the Public and Private law, the third main division has traditionally been the Law of Procedures. Private law is usually divided into the Law of Property, the Law of Obligations and the Law of Status or Persons. Under Public law comes the Constitutional law, the Administrative law and the Criminal law. Writers have differed on the details of the actual classifications. Sometimes there have also been major differences, for example, Salmond placed Criminal law in the division of Private law,⁷ whereas Paton and other recent writers place it under Public Law.⁸

What are the basic grounds for such divisions of laws. If both the Constitutional law and the Criminal law are to be placed in the division of Public Law, is there any essential difference between them in terms of classification or individuation of laws? That is, although both a Constitutional law and a Criminal law are to be individuated as belonging to the Public law, on what grounds are they to be distinguished within the Public law. The same question would apply to other branches of law. For example, if both the Law of Obligations and the Law of Persons are to be placed under Private law, on what grounds are their differences to be justified?

A classification of laws in terms of the relationships that obtain between the individual and the State, or between the individuals themselves, no doubt provides us with a necessary criterion to individuate the laws, but such a criterion is not sufficient. We

saw ,for example,that on the basis of this criterion alone, we cannot distinguish between the Constitutional law and the Criminal law.It is necessary,therefore,to look deeper into the basic grounds for the divisions of laws.

It has been noted that all legal propositions are descriptive,they are not ought statements or commands. Since the legal propositions are descriptive,it is necessary to ask what are they describing ? What they are evidently describing are the states of affairs of the normatively possible world.It is only when we realize that the essential characteristics of such a world must naturally be reflected in the legal discourse,can we begin to understand the principles behind the division of the discourse.

Since law strives for the normatively best possible world,the corpus juris must first of all describe the states of affairs in the normatively best possible world, and secondly,the states of affairs that do not belong to the best world.This provides the first major grounds for the divisions of laws.

The states of affairs in the best possible world are described in the Constitutional law .The description depends upon the knowledge that the constitution makers have about such states of affairs.Some of this knowledge may be expressed in terms of the freedoms , duties , rights, liberties and the equality and independence that the

people have. Propositions, such as that we have freedom of speech, political and economic freedoms, or that we have fundamental rights, etc., are either partially true or not at all true in the present state of the normatively possible world. In many ways we are not really free or independent or equal. But these mentioned propositions, and other similar propositions of the constitution, are not describing the present normative world. They are describing the best normative world in which all these propositions are indeed true. Since we have not created the best world as yet, these propositions presently appear to us as ideals, but in the best world they will be ordinary true propositions. We have to strive to make these propositions true (which would amount to the same thing as creating the best normatively possible world). The conception of Utopia or the ideal state is already contained in the notion of a legal system, it is not an external or additional notion that human beings sometimes mention. It is only when we understand the constitution in this way, can claims, such as that of Eugene V. Rostow -- that the present legal codes describe the ideals to be achieved -- be made intelligible.⁹ If a metaphor is permitted, the legal constitution sets the stage on which moral deeds can be enacted to create the normatively best possible world.

The present constitutions do not describe the best world exactly, but in terms of the synthetic a priori legal propositions, some can be taken to be describing

it better than the others. Those which violate the basic legal propositions, evidently, do not describe the best world. However, since the necessary legal propositions tell us only the *a priori* conditions for the best world, the actual details are left open to discovery as we progress. Each constitution must, hence, keep improving so that it gets nearer to the description of the best world. Such improvements normally occur in the course of the various amendments of the constitution.

The second aspect of the first major division of the legal edicts, as noted, describes what are not the states of affairs of the best possible world. This description is, in fact, what Criminal law is all about. Criminal law describes those conditions and actions on the occurrence of which a person is taken to have steered himself off the normal course which leads to the best possible world. That is, it tells us what sorts of actions do not belong within the boundaries of the legal course. The Criminal law, thus, consists of a description of the elements of the worst possible world, specifying in detail the persons, artifacts and feats belonging to it. Its second correlated function is to describe what must be done when people have deviated from the legal course so as to get them back on this course, and thus, to once again make possible the conditions for the normatively best possible world. People's deviation from the wrong path may be corrected through reform, rehabilitation, appropriate education, etc. As society progresses towards the best world and as Criminal law develops, the legal

teleology will necessitate discovery of measures which will bring people efficiently back to the normal legal course , rather than of measures which will give them physical or mental pain . Attempting to rehabilitate or reform a criminal is nothing other than to attempt to make him act in accordance with the basic principles of law, such as treating each other as ends and never solely as means, etc. In the normatively best possible world since everyone would already be acting in accordance with the basic legal propositions such reformative conditions would not be required. The Criminal law would then become a chapter in past history.

Although the Criminal law will not be required in the normatively best world, Constitutional law and other branches of law would not only be required, but, as noted, they would be ordinary true features of daily life. They would provide conditions in which the individual's and the community's moral goals can be freely actualized.

The development of law, thus, does not consist in the withering away of law. It consists of a complex solidification of one aspect and the withering away of another aspect. The ideals discovered through the Constitutional law become more and more actual, and the events and the entities described in the Criminal law become more and more unlikely to occur . The transformation of Criminal law, thus, occurs in a direction which eliminates its own necessity to exist.

Between the Constitutional law and the Criminal law, is the Civil law. It describes the different

types of actions that may be enacted in the present world, on the stage set by the Constitutional law. Civil law regulates the actions in the present world in such a way that none of the rules violate conditions of the ideal world. The legislators, generally, attempt to do this (i.e., when they are legislating laws and not dictating by fiat). For example, the six elements of contract law - Offer, Acceptance, Consideration, Competent parties, Genuine consent, Legal purpose, - are notions all based on principles which take human equality, freedom, dignity and independence into account. That is, they are ultimately based on principles of the Community of Ends, some of which are expressed in the present Constitutions.

Added to the three divisions is another division in law, but this division is of a different nature. It arises not from the substantive principles of law, but from the manner in which all substantive principles are to be applied. The basis of all procedures in law, as we have seen, is in the teleological principles of law.

The laws of procedure are common to all the three divisions of law mentioned before. Each division is concerned with different issues, hence, each division applies the laws of procedure in a different way. In Constitutional law, the laws of procedure take the form of election laws and amendment laws. In Criminal law the laws of procedure appear as the laws governing trials and other criminal procedures; and in Civil law as the laws governing civil procedures.

Hence, essentially, we have a tripartite division of substantive laws and one separate division of laws of procedures which applies to all.

One must not expect to find such clear boundaries in the way the present corpus juris are divided. This is partly because the codification of such texts is conceptually muddled, and partly because the makers of these codes tend to follow the historical conventions in constructing the codes rather than the conceptual ones. However, in whatever manner the present codes are constructed, the divisions mentioned here are all present in these codes in one way or another.

Thus, as we see, the grounds for the individuation of laws cannot be understood if we consider only the formal relationships between the State and the individuals. We have to know why such relationships obtain, i.e., we have to know what ends are intended to be achieved in relating the people or the people and the State. An appropriate answer to such questions, must, I think, eventually base itself on the type of considerations presented here.

I proceed now to a discussion of the next and the last important legislative requirement.

IV. THE JUDGE'S DUTY.

Once we know what the idea of law is and what the legal enterprise is all about, our understanding of the role that the judge is to play in such an enterprise, follows naturally from such a knowledge.

Being a citizen, a judge is first of all bound by the same duty as all other citizens, - namely, the duty to actualize the normatively best possible world; but I mention the judge's duty here because there is something unique about his situation.

There are various offices and stations that have been created within the social structure. The duties and the rights attached to each of these stations and offices are specific and special. For example, it is the educationist's moral duty to educate as well as he can, the doctor's moral duty to cure the people as well as he can, the business man's moral duty to do honest business, and so on. Each profession and station has its own special duties and rights besides the general moral duties that always oblige all persons commonly. Thus, besides the general ethics, we have medical ethics, legal ethics, business ethics, and so on; there are also ethics involved in other professions although one may not spell them out clearly; for example, there is the army ethics, the basic principle of which is that one must be patriotic and must fight when ordered to

do so. It would be inconsistent to be in the army and to refuse to fight on the grounds that one is a pacifist. One can, of course, be a pacifist and believe in non-violence, but not while being in the army, because the duty in the army requires actions to the contrary.

Society creates the office of the judge and chooses people for this office for a specific purpose. This office, therefore, is bound by its own specific duties and rights. The judge's duty is unique in the whole social structure, in virtue of the fact that his office is the only office in society where the duty attached to the office is exactly the same as the duty that binds every ordinary citizen. That is, the judge's professional duty and his personal duty as a citizen are one and the same. The duties attached to every other office or profession are different from those that arise from being a citizen. The judge is, thus, doubly bound by the duty to create the best possible world. He has his own duty and also the duty given to him by the society.

In Indian terms, the above fact can be expressed by the proposition that the judge is the only person whose Sāmanya -Dharma (common Dharma) is the same as his Varna-Ashrama-Dharma (the Dharma of the profession or the station).¹⁰

Having this unique two-fold duty, the judge is, hence, also entitled to a two - fold correlated

right : the right to the protection of the expression of his ideas as an ordinary citizen and the right to the protection of the expression of his ideas through his office. That is, his office must be totally protected from any external force that may limit the actualization of his duties; his office must have total freedom of speech.

The special right that belongs to the judge's office evidently presupposes that the judge is, in fact, doing his duty. How do we know whether he is doing his duty or not ? This becomes easy to answer because of the unique nature of his office. Since the judge is doubly bound by the same duty by which all citizens are, and since all ordinary persons are bound by the duty towards the best possible world (the principles of which are specified in the Community of Ends) the judge is acting according to his duty if he is acting in accordance with the principles of the Community of Ends, that is, acting according to the basic legal propositions.

If the judge's duties are defined by the principles of the Community of Ends and the criteria of the normatively best possible world, which also defines the duties of the ordinary citizens, it follows that by whatever political or administrative means the judge is appointed to his office, his duty and his role remain the same as that of the ordinary citizen, that is, to act according to the basic legal principles and actualize the normatively best possible

world. It does not, under any circumstance, become a duty to further the ends of the political party that has appointed him, or to further the interest of the administrative bureaucracy that has elevated him to that position.

The judge not only judges persons, he also judges rules. He does this when he reviews the rules legislated by the legitimate authorities. In reviewing such rules, his duty does not become any different, it still remains one that binds all ordinary citizens. Hence, it is his duty to let only those legislated rules pass as laws which are in accordance with the basic legal propositions, i.e., rules which will increase the freedom, equality and independence of all and which will maximize the possibility for harmony, diversity, creativity and commpossible normative systems in which all are treated as ends and never solely as means.

If a metaphor may be permitted again, the judge's role can be characterized in a simple way. The judge, in his office, acts as a filter between the political system and the legal system. He lets only those rules filter into the legal system which are laws, whether the rules come from the legislators, customs or common practices. To use a better metaphor, the judge, like the proverbial swan of the Gulmarg lake in Kashmir, when given milk mixed with water, drinks the milk and leaves the water. The judge, like the swan, separates and absorbs the laws from amongst the rules coming from

various sources ,he then discards the illegitimate rules and gives back the laws to the people. He is able to do so by the discriminatory power he has gained through the knowledge of the idea of law and the meaning of the legal enterprise. A judge who is not able to so discriminate , evidently does not have the knowledge about law, he is then acting in accordance with the dictates of the politicians or some other people. How well a judge is able to discriminate between a mere rule and a law depends upon how well and how deeply he understands the idea of law. The frontier of the knowledge about law is just as open as the frontier of any other branch of knowledge.

Review and Conclusions - IV.

TYPES OF LEGAL THEORIES.

The essential characterization of the idea of law has now been completed. These concluding remarks are about the type of legal theory that has been presented in this work and not directly about the idea of law. The aim of these remarks is to place the legal theory in relief by contrasting its basic features with other types of legal theories so that the status of the theory may become clearly defined.

In his Prolegomena to any Future Metaphysics Kant raises and answers the question: "how is pure mathematics possible?", "how is natural science possible?", and "how is metaphysics as a science possible?".¹ He does not raise the question "how is ethics possible?" or "how is legal science possible?" Nonetheless, he went on to write the Grundlegung and the Metaphysik der Sitten, in which he derived the possibility of morality, like that of mathematics and natural sciences, from reason itself. Notwithstanding the discrepancy between the questions and answers, and assuming that Kant's theory is reasonable and plausible insofar as it derives the possibility of morality from reason, some significant consequences follow for the legal science. According to Kant, metaphysics as a science is possible if the possibility of synthetic a priori proposition is demonstrated.

Further, mathematics and the natural sciences are possible because they are based on their own synthetic a priori propositions. In general, any science is possible if its basic synthetic a priori propositions can be shown to describe states of affairs independently of other synthetic a priori propositions which may lie at the foundations of other sciences. It follows, therefore, that the legal science is possible as a pure and independent science only if its basic principles can be shown to be synthetic a priori and independent of all other foundational propositions. Otherwise, legal science can at best be a part of political science, theology, sociology or some other social science.

I have shown in this work that law has its own synthetic a priori propositions and also that these propositions are independent of other foundational principles. I have, therefore, shown the possibility of a pure legal science, which is neither a part of political science or of theology or of sociology, or of any other branch of knowledge, for that matter. The corollary of this conclusion is that only a science based on the basic legal propositions, outlined in this work, can claim to be a legal science, otherwise it will reduce itself to something else. 

Since all basic legal propositions are provided by reason and are also justified within the bounds of reason, the second very significant conclusion is that

epistemological rationalism , which does not neglect empirical considerations and which does not appeal to any extra-legal authority, is not only tenable but also the only viable theory of law.

Since law is external morality, the classification that Kant makes of moral theories also applies to legal theories.² All legal theories may be classified into heteronomous legal theories and autonomous legal theories. Heteronomous theories base the grounds of legal obligation on factors other than the individual's capacity to determine his actions. Autonomous legal theories, on the contrary, justify the basis of legal obligation on the individual's capacity to determine his actions.

Heteronomous legal theories, since they base the grounds for legal obligation on factors other than the individual's will to determine his actions, reduce the obligation into a fear of coercion by others or by some factor in nature. Such reductive theories can be distinguished in terms of the distinctions that have been explored through the work, namely :

- a) conceptual schemes based on principles of force; and
- b) conceptual schemes based on principles of nature.

Into the first type of conceptual scheme, as we have seen, fall the theories of Hart, Kelsen and other legal positivists. Since their theories base the grounds of

legal obligation on factors other than the individual's own will, they reduce the obligation to external compulsion. Legal obligation, in such theories, means nothing other than political compulsion, since the external compulsion that they legitimize is the one that is done by the political system. Hence, although such heteronomous theories talk about legal obligation, they fail to characterize this notion. They are, in the final analysis, talking only about political coercion and not legal obligation.

A theory that mistakes political coercion for legal obligation may either permit one person to coerce others, or it may permit some to coerce others, or it may permit all to coerce each other. The first type of theory comes from Austin, who allows the one sovereign to coerce ; the second type from Hart, who allows some officials to coerce everyone; and the third type from Marx, who allows all to coerce all, in the dictatorship of the proleteriat.

There can also be heteronomous legal theories which attempt to base the grounds for legal obligation in some sort of utility. Although there have been various heteronomous utilitarian moral theories , a serious and consistent attempt to come up with a heteronomous utilitarian legal theory does not seem to have been made. D. H. Hodgson, for example, explores the consequences of utilitarianism for a legal theory. He argues against the act-utilita-

rian ethics and shows that rule-utilitarianism is also unsatisfactory for the purposes of a legal theory.³ However, he nonetheless maintains that a different type of utilitarianism is tenable. Even if one grants his thesis, the analysis does not bring out what kind of utilitarianism, if any, can justify the grounds for the obligation to follow the law. To say that one must follow the law, or that one has the obligation to follow the law, merely because it is useful, is to assert something which can be seen to be empirically false. Many times, following what such a theory takes to be law can be of serious disutility (as can be the case in following the commands of the dictator, or even in ordinary cases such as paying the fines or accepting punishment). In any case, even if one convincingly argued that following the law is useful, it would only prove that it is prudential to act according to the law, it would not show why we have an obligation or a duty to follow the law.

As I have attempted to show, all heteronomous theories, whether they be based on coercion or utility, are erroneous because they reduce the legal assertions to commands or rules of prudence. The notion of legal obligation then turns into either the notion of fear or of self-interest.

Heteronomous legal theories which attempt to base the grounds for legal obligation on some factor in nature, i.e., the factually possible world, also fail to define

the sense of legal obligation. For, as we have seen, we do not have the choice of either following or not following the laws of nature. The Stoics, for example, have attempted to base obligation on some factors in nature, but since legal obligation cannot be based on any such factor, such attempts can only lead to arbitrary rules.

A second type of heteronomous theories which attempt to ground the basis of legal obligation in nature are those which eventually ground it in the will of God. Legal obligation, in such a case, really becomes the obligation to follow what God wants us to do, not what the individual's will determines for itself. Such a theory obliterates the grounds for the distinction between religious obligation and legal obligation, and, in fact, it reduces the latter to the former. We have already noted the difficulties with such reductive theories, namely, that the notion of God is understood differently by various religions. God's command can be a good reason for action but not a legal reason for action.

The basis for legal obligation can, thus, neither be grounded in the will of the sovereign nor the will of God. It can only be grounded in what the individual himself wills in accordance with his reason. Such an obligation can only be explained by an autonomous legal theory.

Autonomous legal theories are based on a conceptual scheme applicable to the created social order.

However, such autonomous theories cannot take arbitrary forms which conflict with the possibility of reasoning. Autonomous legal theories are usually of two types:

- i) a conceptual scheme based on individual or communal mystical experiences;
- ii) a conceptual scheme based on rational principles applicable to the created social order.

Mystical autonomous legal theories appeal to the individual's or the community's experiences in order to justify legal obligation. Mystical autonomous theories seem to show up only infrequently in the Western tradition. For example, Milner. S. Ball has recently attempted to justify the legal obligation in terms of a Christian notion of "the Beginning".⁴ Such theories are untenable because they appeal to experiences available only to some individuals. The legal system, being a mode of cooperative reasoning, requires that it be based on experiences which are available to all, whether they be Christians or Buddhists.

In the Indian tradition mystical autonomous legal theories have been more frequent. In Buddhism, for example, the idea of Dharma is grounded in a cosmology which is ultimately intelligible only through some mystical experiences. The difficulty with such a theory is the same as the one with Ball's theory. It grounds it self in experiences which are not publicly available at all times.

The reason why mystical autonomous legal

theories are more common in the Indian tradition and heteronomous coercive legal theories are more common in the Western tradition is not too difficult to understand. In the Indian tradition, as argued, the idea of law is mostly confused with some aspects of religious systems which have various mystical elements, and in the West, the idea of law is mostly confused with some aspects of political systems which have various coercive elements.

Kant's legal theory has many of the aspects necessary for an autonomous rationalistic legal theory, but in the end it confuses the grounds for legal obligation. Kant, therefore, comes up with an autonomous ethical theory but a heteronomous legal theory. Such a position makes Kant's philosophy inconsistent. Since ethics and law are both grounded in pure practical reason, they are both autonomous theories, all heteronomous legal theories are spurious.

The theory that I have presented in this work is a conceptual scheme based on the application of human reason to the created social order. One could refer to it as The Autonomous Theory of Law.

To live by the Rule of Law, thus, is not to live by the command of the sovereign or the decree of the legislators or the will of God, as theories about law have hitherto asserted, it is to live by the rules of pure practical reason which makes cooperative reasoning possible. Only a community which lives in accordance with these rules lives by the Rule of Law.

The expression "Rule of Law", as used here, has a different meaning from what the positivists have usually meant by it. Since legal positivism does not specify the basic rules of law its use of the expression connotes nothing other than 'the rule of the political authority', where the term 'rule' actually means 'to rule', i.e. 'to govern'. But this is a basic misunderstanding. The term 'rule' in the expression 'Rule of Law' refers to the basic rules of pure practical reason, as specified, and does not mean 'to rule'.

The expression "Autonomous theory of law" has also been used to sometimes refer to the view that the judge must have total autonomy in deciding cases. This is not the sense in which the expression is intended here. I have argued that the judge is bound by certain principles. By using it I intend to convey its original etymological sense, that is, a theory that is 'auto' to the 'nomos'. In this sense the theory is an internal and necessary requirement of the normatively possible world.

It may be rightly claimed that the traditional natural law theories have also sought to explicate the necessary legal requirements for the normatively best possible world. In what specific ways, then, is the view presented here different? The traditional natural law theories have not been clear in distinguishing between the internal (transcendental) conditions for law from the external (transcendent) and empirical conditions.⁵ As a consequence although they have sought to explain certain conditions for law these relate more to the transcendent aspects of law than to its transcendental

aspects. That is, the conditions specified relate more to the external constraints on law than to its internal constraints. However, in this work my treatment of the traditional natural law theories has been superficial. This has been so because my aim here has been to explicate the various internal constraints in the existence and the working of the law and not so much to compare and contrast my views with the traditional natural law theories. Such a work would be important but a separate task, and although it would be of historical interest, in the context of this work, it would have required deviations which did not seem to me to be necessary for the central aim of the work. Some essential aspects which further distinguish the theory presented here from the traditional natural law theories, should, however, be mentioned.

At each step in the work I have specified the meaning of 'nature' or 'natural' that is being rejected. These have been mainly to do with propositions which turn out to be synthetic a posteriori -- concerning the natural physical world, or analytical a posteriori -- concerning customs or conventions which may be asserted to be natural, or analytic a priori propositions which too may be claimed to be natural in some sense. But, of course, the traditional natural law theories have not concerned themselves only with transcendent conditions -- such as those arising out of the nature of God, or only with empirical conditions -- such as living according to nature. Insofar as traditional natural law theories have specified the internal (transcendental) conditions for law

the view presented here is complementary to them. Thomism, for example, specifies one very general internal condition, namely; do good and avoid evil. My attempt to deepen our insights into the internal conditions for law is continuous with Thomism and complementary to it in this respect. But Thomism goes on to seek the transcendent conditions for law. It is possible that there are various transcendent conditions constraining law externally. However, the view presented here gets distinguished from Thomism due to the fact that unlike Thomism the theory seeks to establish the conditions for law on purely transcendental grounds provided internally by human reason. It does not go beyond it. Such grounds can be justified independently of all religious and customary beliefs or dogmas. It is important to note that although there may be transcendent conditions regulating law, these can be possible conditions for law only insofar as they do not contradict the internal transcendental conditions. One may, of course, speculate freely about the transcendent constraints on law, but such speculations would belong to what Kant would call 'speculative reason'. Speculative reason, as Kant has argued, does not suffice to serve the practical purposes of the application of reason.

Unlike Thomism, natural law theories, such as that of Grigorio Del Vecchio, seeks to establish the conditions for law by looking inwards towards the ontological status of man. Here the transcendent conditions relate only to the nature of a person and not to any external factor different from man.⁶ Although this kind of moral idealism

rightly elevates the moral and legal status of the self, in the final analysis it leads to subjectivism. The subjectivism to which Del Vecchio's theory leads, has two major shortcomings. Firstly, it fails to provide an understanding about how the self is related to the others in the community; and secondly, it fails to provide objective principles on the basis of which one can understand the activities of the community as a whole. His moral idealism, thus, is not wrong, it is incomplete in a major way. Although it clearly grasps the common factors involved in being individuals, it loses sight of the common factors in the individual and the communal becoming which is manifested in cooperative human reasoning and other activities.

Moral idealism which emphasizes the status of the individual self but neglects the role of reason, is more common in the Indian ethical theories than one usually finds in the Western theories. Such Indian theories would face the same practical difficulties as one confronts in Del Vecchio's views.

One may compare F.S.C. Northrop's legal theory to that of Del Vecchio's. Northrop, who is attracted to the objectivity of mathematical principles, leads us in the opposite direction. He, like many other deontic logicians who seem to be similarly fascinated by the mathematical objectivity, seeks objective principles in the social sciences like those of the mathematical sciences. Such Cartesianism loses sight of the ontology that is involved in the social sciences. It neglects the social status of the person and

thus, deprives itself of any understanding of the teleology involved in the metaphysics of the self or of the community.

An appropriate legal theory must overcome the shortcomings in both directions. It must retain and explicate the ontology of the self and of the community and at the same time it must also be able to provide the objective principles commonly employed by human reason. The theory presented in this work attempts to achieve such a synthesis; and insofar as it succeeds, it is distinct from both the natural law theories of the type presented by Del Vecchio as well as of the type presented by Northrop.

Some major aspects of this work have been developed with reference to Kant's views, hence, in the concluding remarks, it would be important to distinguish my views from some recent neo-Kantian theories.

Kelsen reacted against Sociology of law and Sociological Jurisprudence and attempted to present a theory based on Kantian epistemology. However, as I have tried to show, although he distinguished the normative sciences from the natural sciences in a Kantian manner, his theory cannot be called Kantian because his view of the transcendental and the a priori aspects of epistemology is very different from that of Kant's. Moreover, he accepted ethical relativism which too contradicts Kant's ethics. Therefore, the usual claim that Kelsen's epistemology is neo-Kantian, is without grounds. To establish the view that there is an internal morality necessary to law one has to show why ethical relativism is mistaken. I have not discussed Kelsen's account of

ethical relativism, but I have in fact attempted to counteract what seems to me to be the most serious arguments leading to ethical relativism, namely Quine's and other's criticisms of the synthetic a priori propositions. Basic moral and legal propositions which are not relative but which are true for all moral and legal systems, are, as we have noted, a type of synthetic a priori propositions.

A more important type of neo-Kantian attempt is to be found in the works of Gustave Radbruch. Radbruch has drawn connections between the autonomous spirit and the jurial reality by viewing law as a value related phenomena of culture.⁸ Radbruch's distinction between value and reality is similar to Kelsen's distinction between imputation and causality, and both these distinctions parallel Kant's distinction between freedom and causality. However, although Radbruch, like Kelsen, begins by making Kantian distinctions, he too ultimately accepts ethical relativism thus moving away from the core of Kant's epistemology of absolute synthetic a priori principles.

It is doubtful if Radbruch's or Kelsen's ethical relativism is consistent with their views about democracy or cultural liberalism. Both democracy and liberalism would, I think, in the end require the assertion of certain absolute values, especially those concerning rights and duties. A discussion of these issues is evidently a matter for another occasion. Here it should suffice to mention that although I have not discussed ethical relativism within Radbruch's works, I have directly dealt with the problems raised by ethical relativism, skepticism and agnosticism. The legal theory presented here is hence, distinguishable from the related neo-Kantian views.

NOTES TO THE INTRODUCTION

1. See : Raz, Joseph., Concept of a Legal System. Oxford: Clarendon Press. 1970. See also his Authority of Law. Oxford: Clarendon Press. 1979. .
2. Finnis, John., Natural Law and Natural Rights. Oxford: Clarendon Press. 1980.
3. See: Stokes, Eric., The English Utilitarians and India. London: Oxford University Press. 1959.
4. See Sir. J. Fitzjames Stephen's letters of 1 st March, 1883 and of 4 th January, 1878 to The Times. See also : "J. Fitzjames Stephen", in Hunter, Sir William Wilson., Life of Mayo. London: Smith, Elder & Co. 1875. Vol. ii. p. 169.
5. See: Hart, H. L. A., " Positivism and the separation of Law and Morals." 71 Harvard Law Review. 593. 606-615. 1958.
6. Kant, Immanuel., "Uber den Gemeinspruch : Das mag in Theorie richtig sein, taugt aber nicht fur die Praxis." Translated by E. B. Ashton , as, On the Old saw: That may be Right in Theory but it won't work in Practice. Philadelphia: University of Pennsylvania Press. 1974.
7. For some interesting discussions of the notion of authority see: Harris, R. Baine., (Edited) Authority: A Philosophical Analysis. Alabama: University of Alabama Press. 1976. See also: Adelman, Frederick J., S. J., (Edited) Authority. The Hague: Martinus Nijhoff. 1974.

NOTES TO PART - I

1. Aristotle., Analytica posteriora , in W.D.Ross, ed. Works, trans: G.R.G.Mure. Oxford: Clarendon Press.1927-52.
Vol - I.
2. Descartes,Rene., Meditation on First Philosophy, and Discourse on Methods , in The Philosophical Works of Descartes, trans:E.S.Haldane and G.R.T.Ross. Cambridge: Cambridge University Press. 1931.
- 3.For a detailed analytical account of the natural sciences see: Nagel,Ernest.,The Structure of Science, New York: Harcourt,Brace & World,Inc., 1961.
4. For a detailed analysis of formalism and non-formalism see: Horovitz,Joseph., Law and Logic: A Critical account of Legal Arguments, New York: Springer Verlag.1972.
5. Toulmin,Stephen Edelston., The Use of Arguments, Cambridge:Cambridge University Press.1964. See also his The Philosophy of Science: An Introduction. London: Hutchinson University Library.1967.
6. Perelman,Chaim.,Justice, Law and Argument, (Synthesis Library,v.142) Dordrecht,Holland:D.Reidel Pub. Co. 1980.
7. For some discussion on axiomatic systems see; Tarski, Alfred.,Introduction to Logic and the Methodology of the Deductive Sciences.trans; rev: Olaf Helmer. New York: Oxford University Press.1966.See also his : Logic,Semantics and Metamathematics. (Papers from 1923 to 1938)trans:H.H.Woodger.

- Oxford: Clarendon Press. 1956. To compare Tarski's account with a recent one, see : Haack, Susan., Philosophy of Logics. Cambridge.(Eng) : Cambridge University Press. 1978.
8. Dworkin, R., "No Right Answer", in Hacker and Raz (Eds): Law Morality and Society: Essays in Honour of H.L.A. Hart. Oxford: Clarendon Press. 1977. See also his, "Can Rights be Controversial", in Taking Rights Seriously. Cambridge, Mass.: Harvard University Press. 1977.
9. See, for example, Tammelo, I., Outlines of Modern Legal Logic. Wiesbaden: Franz Steiner Verlag. CMBH. 1969. p. 90. Raz, J., Authority of Law. p. 61. Smith, J.C., Legal Obligations. Toronto: Toronto Press. 1976. p 209; Raz, J., Concept of a Legal System. Oxford: Clarendon Press. 1970. p. 170.
10. See: Austin, J.L., How to do Things with Words. (Eds) J.O. Urmson and Marina Sbisa. Cambridge University Press. 1957. See also, Searle, J.R., Speech Acts. London: Cambridge University Press. 1969. In the Indian tradition the Mīmāṃsika philosophers, who have been concerned with the interpretation of Vedic injunctions and of the Dharmasāstras, have, since long, recognized the significance of performative utterances. The literature is extensive.
11. Taken from : Martin's Annual Criminal Code. 1979. Agnicourt: Canada Law Books Limited. 1979.
12. Taken from : Model Penal Code. (Proposed Official Draft) Philadelphia, Pa.: The American Law Institute. 1962.
13. See, for example, Tammelo, Ilmar., Outlines of Modern Legal Logic.; Smith, J.C., Legal Obligations.

14. Fuller, Lon, L., The Morality of Law. New Haven, London: Yale University Press 1964. p. 39.
15. Klug, Ulrich., Juristische Logik. 2nd. edn. Berlin-Göttingen, Heidelberg. 1958.
16. Wright, Georg Henrik von., An Essay in Deontic Logic and the General Theory of Action. Amsterdam: North-Holland, Pub. Co. 1968. Norm and Action: A Logical Inquiry. New York: Humanity Press. 1963. "Deontic Logic", Mind. 60. (1951), 1-15. "A New System of Deontic Logic." Danish Year Book of Philosophy. 1964. 173-182.
18. Ross, Alf., Directives and Norms. London : Routledge & K. Paul. 1968. pp. 78-105. Anderson, Alan Ross., The Formal Analysis of Normative Systems. (Technical Report: No. 2, Contract No: SAR/Nonr-609, 16). Office of the Naval Research Group Psychology Branch. New Haven. 1956. Reprn. as : Logic of Decisions and Actions. N. Rescher, ed. Pittsburgh: University of Pittsburgh. 1967.
17. See, for example, Anderson, Ross., "A Reduction of Deontic Logic to Alethic Modal Logic." Mind. 67. (1958). pp. 100-103.
18. Kanger, Stig., "New Foundations for Ethical Theory." In Risto Hilpinen ed. Deontic Logic: Introduction and Systematic Readings. Dordrecht Holland: D. Reidel. 1971.
19. Porn, Ingmar., The Logic of Power. Oxford : Basil-Blackwell. 1967. Tammelo, I., Modern Legal Logic. 1969.

NOTES TO PART - II

1. Alchouron, Carlos.E. and Bulygin, Eugenio., Normative Systems. New York: Springer Verlag. 1971.
2. Carnap, Rudolf., The Logical Syntax of Language, trans: Amethe Smeaton. London: Routledge and K.Paul. 1967.
3. The original sense of the term feat is similar to the non-scholastic use of the latin 'factum', which is the subjunctive use of the noun singular of 'factus' or the past participle of 'facere' i.e, DO. The word feat in the sense used here is derived from the original Old French 'fait', 'fet' or later, 'facit'. See Oxford English Dictionary. Vol: IV. p. 118. I am using the word in sense 1. only. Oxford English Dictionary. Oxford: Clarendon Press. 1961.
4. The word fact is used here in the sense in which the Romanic equivalent of 'factum', as used in scholastic latin, has been traditionally used. As distinguished from the non-scholastic use, 'factum' in scholastic latin is restricted to refer to occurrences whose existence is independent of the activities of human beings. See Oxford English Dictionary Vol. IV. p.12. I am using the term fact in sense 4,5,6, and 7 only, and not in sense 1,2,3. The sense

1,2,3, of 'factum', i.e, the sense in which 'fact' means a deed accomplished, still finds place in modern legal discourse as 'legal facts'. If a consistency in language is to be maintained, 'legal facts' should actually be called 'legal feats', since the term fact is not used in the old sense any more.

5. Fuller, Lon.L., The Morality of Law. p.39.
6. Ibid. p.39.
7. Ibid. p.39.
8. The notion that law is a hierarchy of norms permeates Kelsen's legal theory, but see in specific: Pure Theory of Law. pp. 193 - 278.
9. Pashukanis, Evgeny, B., Law and Marxism, trans: Barbara Einhorn. London: Inks and Links. 1978. pp.85-108.
10. Hart, H.L.A., The Concept of Law. Oxford: Clarendon Press. 1961. pp. 77 - 96.
11. Ibid. p. 113, 151.
12. Sartorius, Rolf., "Hart's Concept of Law". 52 Archiv Fur Rechts Und Sozialphilosophie. 161 (1966).
13. Fuller, Lon.L., The Morality of Law. p.129. See also his "Positivism and Fidelity to Law." 71 Harv.L.Rev. 630, 661 - 669. (1958).

14. Fuller, Lon: L., The Morality of Law. p.129.
15. Ball, Milner-S., The Promise of American Law. Athens: University of Gorgia Press. 1981.
16. Summers, Robert S., "Professor Fuller on Hart and Morality." 18 J. Legal Education. 1.(1966).
17. For some discussions and explications in English see:
 Danielou, Alain., The Rāgas of North India. London: Barrie & Rockcliff. 1968.
 Cooper, Robin., "Abstract Structure of the Indian Rāga System." Ethnomusicology Vol: XXI .No: 1. Jan.1977.
 Powers, S. Harold., "Language Models and Musical Analysis." Ethnomusicology. Vol: XXIV. No:1. Jan.1980.
18. See for example, Tammelo, I., Modern Legal Logic. p.90.
19. Any talk about a counter-example, of course, presupposes that a legitimate or a valid sentence is one that is in actual use , not the one that a generative grammar may provide. One who takes his generative grammar to be truly applying to the language would have to argue that the conditions for legitimacy or validity for a true sentence in the language is provided by his grammar, that the use may soemtimes err. A counter example would then not be a counter example but a grammatically false sentence. A Chom-kyian theory would argue that its grammar provides valid or legitimate sentences for a language. See : Chomsky, Noam.,

The Syntactic Structures. The Hague : Mouton. 1965.

20. Waismann, Friedrich., "Verifiability", in Antony Flew ed.

Logic and Language. Garden City, New York: Doubleday, 1965.

21. International Covenant on Civil and Political Rights.

General Assembly Resolution 2200 A (XXI). Article. 5.

22. Kelsen, Hans., Pure Theory of Law. p. 352.

23. Ibid. pp. 353-355.

24. Ibid. p. 350.

25. Allen, C.K., Law in the Making. Oxford: Clarendon Press.

1964. 7th. edn. pp. 482-530.

26. Ibid. p. 491.

27. Ibid. p. 526.

28. Curtis, C.P., "A Better Theory of Legal Interpretation."

3, Vand. L. Rev. 407. (1950).

Gottlieb, Gidon., The Logic of Choice. London: George Allen and Unwin. 1968.

The view that I have presented here bears upon the following discussions also: Holmes, O.W., Collected Legal Papers. New York : Peter Smith. 1952. p. 203-4.

Frankfurter, J., "Some Reflections on the Reading of Statutes." 47. Col. L. Rev. 527. (1947).

Sutherland, Edwin H., Statutes and Statutory Constructions. John Lewis ed. 2nd. edn. Chicago : Callaghan. 1904.

Llewellyn, Karl N., The Common Law Tradition. Boston: Little Brown. 1960. pp.24-26 , 226.

29. Gottlieb, Gidon., The Logic of Choice. p.91.

30. Curtis, C.P., "A Better Theory of Legal Interpretation." pp.407 , 424.

31. Hart, H.L.A., "Theory and Definition in Jurisprudence." 29, Proceedings of the Aristotelian Society. Suppl. Vol, 1955. pp: 258 - 64.

32. Kelsen, Hans., Pure Theory of Law. pp.195 - 196.

33. Ibid. p.196.

34. Pāṇini ., Aṣṭādhyāyī, ed. and trans by Böhtlingk, Otto von. Leipzig, 1887. Reprn. Hildesheim : Georg Olms. 1964. —Trns. L. Renou. I-III. Paris. 1948-54.

See also: Scharfe, Hartmut., Pāṇini's Metalanguage.

Philadelphia: American Philosophical Society. 1971.

Misra, Vidya Niwas., The Descriptive Techniques of Pāṇini The Hague: Mouton. 1966.

35. For a detailed explication of the notion of a cybernetical system see, for example:

George, Frank Honywill., The Foundations of Cybernetics.

London: Gordon and Breach. 1977.

Parsegian, V.L., This Cybernetic World. Garden City, New York:

Doubleday & Co.Inc.1972.

Ashby,W.Ross., An Introduction to Cybernetics. London:
Chapman & Hall. 1970.

Notes to Review and Conclusions - II.

1. Each of these Reviews and Conclusions is a second order note within this work about legal theories, whereas the body of the work is about the idea of law. Notes about legal theories have hence been separated from the description of the idea of law. This point is only of structural importance in terms of the levels of discourse within this work. It may be ignored for all other purposes and the work must be read as one continuous discussion.
2. Fuller,Lon.L.,and Braucher,Robert., "The Role of Contract in the Ordering Process of Society Generally" in Basic Contract Law. St. Paul, Minn: West Pub.Co.1964. Also in The Principles of Social Order. Kenneth I. Winston ed. Durham,N.C: Duke University Press.1981.pp.170-187.
3. See the relevant discussions in, Fuller,Lon.L., "Human Interaction and the Law. American Journal of Jurisprudence. Vol.14. September.26. 1969. Also in Kenneth.I.Winston ed. The Principles of Social Order . pp.212-246.
4. Winston,K.I., *ibid.* pp. 16-23.
5. *Ibid.* p.33.
6. *Ibid.* pp. 30-33.

.NOTES TO PART-III.

1. See: Quine, W.V., "Two Dogmas of Empiricism", The Philosophical Review. Vol.60.1951.
White, Morton, G., "Analytic Synthetic: An Untenable Dualism".
in Sydney Hook ed. John Dewey: Philosophers of Science and Freedom. New York: Dial Press. 1950. pp. 316-360.
2. For Leibniz's view see: Couturat ed. Opuscles et fragments inédits de Leibniz. Paris: Felix Alcan. 1903. pp. 16-22.
Also, T.V. Smith and Majorie Green, trans. eds. Philosophers Speak for Themselves - From Descartes to Locke. Chicago: University of Chicago Press. 1957. pp. 306-312.
For Kant's view see: Kant, Immanuel., Critique of Pure Reason.
trns. Norman Kemp Smith. London: Macmillan & Co. 1953. pp. 41-55. (B1-B30, A1-A16).
3. See: Kripke, Saul., "Naming and Necessity", in Donald Davidson and Gilbert Harman ed. Semantics of Natural Languages. Dordrecht, Holland: D. Reidel. 1972. Also his, "Identity and Necessity", in Milton K. Munitz ed. Identity and Necessity. New York: University Press. 1971. pp. 135-169.
4. Hanson, N.R., "The Very Idea of Synthetic a Priori", Mind XXI. 1962. pp. 521-524.
5. The process involved in conceiving the necessity expressed in analytic propositions raises various problems. Three different points of view concerning these issues can be examined by comparing the views of Quine, Chomsky and Piaget. See: Quine, W.V., and Ullian, J.S., The Web of Belief. New York:

Random House:1970; also:Quine,W.V.,From a Logical Point of View.Cambridge:Harvard University Press.1953; and:
Mathematical Logic.Cambridge:Harvard University Press.1951.

Piaget,J.,The Construction of Reality in the Child.New York : Basic Books.1954; _____, and Inhelder,B.,The Child's Conception of Space.London:Routledge & K.Paul. 1976.

Chomsky,Noam.,Language and Mind. New York:Harcourt Brace & World.1968. _____,Cartesian Linguistics:A Chapter in the History of Rationalistic Thought.New York:Harper & Row.1966.

6. Kant,Immanuel.,Metaphysic of Morals,Part-I translated as The Metaphysical Elements of Justice, by John Ladd. New York : Bobbs-Merrill Co.1965.. pp.51-72.

7. Ibid. p.57.

8. This is the famous Goldbach Conjecture about numbers .

I find it interesting that this relationship obtains between prime numbers,although I have not understood why.Perhaps the observation is mathematically trivial and it may not be true for all prime numbers.The point,however,is not about numbers.

It concerns the thesis that analytic propositions are not informative.If there is a proof for this observation then, evidently,one has been informed about something new,even if the proof is totally deductive.

9. An understanding of what is a transcendental argument in Kant's philosophy would,I think,involve a study of the whole of his Critique of Pure Reason,for,besides the epistemolo-

gical aspects of the transcendental arguments (which alone have been mentioned in this work), there are also its ontological and metaphysical aspects. The following sections in the first Critique may, however, be noted since they are directly relevant here: A 84 (B117)-A 95 (B129); A 737 (B 765); A 190 (B233)-A 211 (B256). There are various discussions about the transcendental arguments, the following important ones may, however, be noted:

Crawford, P., "Kant's Theory of Philosophical Proof." Kant Studien. 1961-2.

Grams, M. S., "Transcendental Arguments." Nous. 1971. Vol. 4. No. 1.

Strouds, B., "Transcendental Arguments." The Journal of Philosophy. 1968. Vol. LXV. No. 9.

Korner, S., "The Impossibility of Transcendental Deduction." Kant Studies Today. La. Salle, Ill.: Open Court. 1969. pp. 230-244.

Schaper, E., "Arguing Transcendentally." Kant Studien. 1972.

Hintikka, J., "Transcendental Arguments: Genuine and Spurious." Nous. 1972. Vol. 6. No. 3.

10. Duhem, Piere., The Aim and Structure of Physical Theories. trns. P. Weiner. New York: Atheneum. 1962.

11. Quine, W. V. O., "Two Dogmas of Empiricism", in From a Logical Point of View. pp. 42-43.

12. One form of the liar's paradox is : "I only speak lies", am I then speaking the truth or a lie ? The barber's paradox is that there is a barber who shaves all those who do not shave themselves. Does the barber shave himself ?

13. See, for example, : O'Neil, Peter., Fundamental Concepts of Topology. New York: Gordon and Breach Science Publishers. 1972. pp. 247 - 257.
14. For a detailed discussion about different types of necessity, see: Platinga, Alvin., The Nature of Necessity. Oxford: Clarendon Press. 1974. For a detailed discussion about metaphysical necessity see: Fisk, Milton., Nature and Necessity. Bloomington: Indiana University Press. 1973.
15. Kripke, S., "Naming and Necessity".
See also, Putnam, Hilary., "Meaning and Reference", The Journal of Philosophy. LXX. (Nov. 8. 1973).
16. Locke, John., An Essay Concerning Human Understanding. A.C. Fraser ed. New York: Dover. 1959. Vol. II. p. 22; pp. 296-297.
17. Lewis, C.I., An Analysis of Knowledge and Valuation. La Salle, Ill.: Open Court. 1946. pp. 39-40.

Notes to Review and Conclusions - III.

1. The essential arguments are developed by John Austin in his : The Province of Jurisprudence Determined , 1832. New York: Noonday Press, 1954.
2. Hart,H.L.A., "Legal and Moral Obligations",in A.I.Melden ed. , Essays in Moral Philosophy, Seattle: University of Washington Press,1958. pp.82-107.
3. Austin,John., The Province of Jurisprudence Determined. pp. 186 ff.
4. Hart,H.L.A., The Concept of Law , p. 107.
5. Ibid. p.104.
6. Ibid. pp. 86-88.
7. Ibid. pp. 189-195.
8. Golding,Martin P.; Philosophy of Law,Englewood Cliffs, New Jersey: Prentice Hall,Inc. 1975. p. 46.
9. Kelsen,Hans., Pure Theory of Law , p.201.
10. Ibid. p.202.
11. Ibid. p.202.
12. Kant,Immanuel., Critique of Pure Reason.trns.Kemp Smith, p. 96. (A56-57,B80-82.)

13. Kelsen, Hans., Pure Theory of Law. p.202 (Emphasis is mine).
14. Ibid. pp. 219-221. See also p.111 ff. for Kelsen's account of the delict.
15. This account of Dworkin's view is based mainly on his: Taking Rights Seriously, Cambridge, Mass: Harvard University Press. 1977.
16. Finch, John., Introduction to Legal Theory. 3rd edn. London: Sweet & Maxwell, 1979. pp. 136-144.
17. Wittgenstein's own position concerning the different spheres of discourse and his other relevant philosophical views are set out in his: Philosophical Investigations, trans. G.E.M. Anscombe, 3rd edn. Oxford: Basil Blackwell, 1968.
18. I have discussed some basic problems facing the Wittgensteinian approach as it concerns normative problems in : Singh, Chhatrapati., "Can Wittgenstein's Philosophy Yield a Theory of Justice ? " , in Edgar Morscher and Rudolf Stranzinger. Eds. Ethics: Foundations, Problems and Applications. Vienna, Austria : Holder-Picher-Tempsky. 1981.
19. Hart, H.L.A., The Concept of Law. pp. 189-195.

20. Pashukanis, Evgeny B., Law and Marxism: A General Theory.
ed. Chris Arthur, trans. Barbara Einhorn. London: Inks
Links. 1978.
21. See : Soviet Legal Philosophy. trans. Babb. intro. by
Hazard; Twentieth Century Legal Philosophy Series.
Cambridge, Mass: Harvard University Press. 1951. Vol. 5.
pp. 303 ff.
22. Lenin, V.I., State and Revolution. The Little Lenin
Library, Vol. 14. New York: International Publishers. 1932.
23. Marx, Karl., Capital. London: ~~Lawrence~~ and Wishart. 1972.
Vol. III. p. 793.
24. See: Kelsen, Hans., The Communist Theory of Law.
New York: Frederick A. Praeger, Inc. 1955. p. 6.
25. Karl Marx, Friedrich Engels : The Communist Manifesto.
A.J.P. Taylor ed. Pelican Books. 1967.

NOTES TO PART-IV

NOTES TO SECTION—I.

1. For an explication of the transcendenatal, metaphysical and empirical requirements, see: Kant's Critique of Pure Reason. A 218 (B 265) - A 226 (B 274).
2. Fuller, Lon, L., The Principles of Social Order. Edited by Kenneth I. Winston. Durham, N.C. : Duke University Press, 1981.
3. J.N. Findlay's work traces the origination of some basic Kantian concepts, such as that of 'the thing in itself', and that of the 'noumena'. Kant mentions 'older' and 'ancient' thinkers on these issues in his Inaugural Dissertation of 1770. See: Findlay, J.N., Kant and the Transcendental Object : A Hermeneutic Study. Oxford: Clarendon, Oxford University Press. 1981. See also : Polonoff, Irving I., Forces, Cosmos Monads and Other Themes in Kant's earlier Thought. Kantstudien Ergänzungshefte - 107. Bonn: Bouvier Verlag Herbert Grundmann. 1973.
4. For a detailed account of the history of ancient Greek thought I have found Dillon's work very helpful, see : Dillon, John., The Middle Platonists. Ithaca, New York: Cornell University Press. 1977.

Hostler's detailed discussion of Leibniz's moral philosophy is helpful in locating the historic roots of Leibniz's ideas,

See: Hostler, John., Leibniz's Moral Philosophy. London :
Duckworth. 1975.

5. Foucher de Careil, A. : G.W. Leibniz - Nouvelles lettres et opuscules inedites. Paris, 1857. p. 171.
6. Bodemann, E., Die Leibniz Handschriften in der Königlichen Öffentlichen Bibliothek zu Hannover. Hildesheim, 1966. p. 58.
7. Gerhardt, C.I. : Die philosophischen Schriften von G.W. Leibniz. Halle, 1860. VI. p. 242.
8. Leibniz, G.W., Theodicy. Diogenes Allen ed. trns. E.M. Huggard. Don Mills, Ont., : J. M. Dent . Dent University Paperbacks. 1966.
9. Grotius, H., De iure belli ac pacis. Amsterdam, 1712. Prol. 11.
10. Leibniz, G.W., Sämtliche Schriften und Briefe. Preussisches Akademie der Wissenschaften. Berlin ; 1923. VI. i. p. 431.
11. Grua, G., G.W. Leibniz-Textes inedites. Paris, 1948. p. 665.
12. Dutens, L. : G.G. Leibniti opera omnia ... Geneva, 1768. Vol. IV. 3. p. 273.
13. Gerhardt, C.I. : Die philosophischen Schriften von G.W. Leibniz. Halle, 1860. Vol. VII. p. 304.
14. According to Leibniz there is only one percept of Justice which is expressed in God's wisdom, but there are two basic percepts of logic, principle of contradiction and the principle of compossibility.

15. The notion of metaphysical harmony here is not to be confused with Leibniz's thesis about the pre-established harmony, the view that the perception of a given monad corresponds with those of all the others. For a clear distinction of the two senses see: Grua, G.: G.W. Leibniz- Textes inedits. p.12
16. DeWitt, Bryce S., "Quantum Mechanics and Reality" Physics Today. Vol.23, No: 9. pp. 30 - 35.
17. Carter, Brandon., "Large Number Coincidences and The Anthropic Principle in Cosmology", in, Confrontation of Cosmological Theories with Observational Data; Proceedings of the Second Copernicus Symposium. ed. M.A. Longair. Dordrecht: D.Reidel Publishing Co. 1974.
See also the interesting discussion on possible worlds by: Gale, George., "The Anthropic Principle" Scientific American , Dec.1981. Vol.245. No.6. pp.145-171.
18. Goodman, Nelson., The Ways of World Making , Sussex: Harvester Press. 1978.
19. Whorf, Benjamin Lee., Language, Thought and Reality, ed. John B. Carroll. Cambridge , Mass.: M.I.T. Press. 1956.
20. Voltaire, F.M.A., Candide , ed. J.H. Brumfitt. London: Oxford University Press. 1968. Chp. 19.

21. Bouillett, M.N., Les Enneades de Plotin. Paris. 1857.
Vol. I. pp. 431 ff.
22. Gerhardt, C.I., Die philosophischen Schriften von G.W. Leibniz. Halle, 1860. Vol. VII. p. 114.
23. The status and the function of the Criminal Law is indeed a complex issue, a detailed discussion of its nature will be discussed in the subsequent sections.
24. The point that I am making here would have been easier to present if the term 'fact' had retained a consistent use in the English language. In 'artifact' the term 'fact' is being used in the original sense of the Latin 'factum' which means a deed or a feat. The term 'artifact' should hence really be 'artifeat', since 'fact' in English has been chosen not to be used in the sense of 'deed'. The term 'artifeat' clearly conveys what is meant, that is, articles created by the feats of human beings. The term 'artifact' can mislead one into believing that what is being talked about concerns facts, or the factually possible world.
25. Geach, Peter., The Virtues. London: Cambridge University Press. 1977. pp. 90-99. Cf. p. 98.
26. See: Armour, Leslie., "Necessity and the Concept of God". in Papers of the Michigan Academy of Science, Arts and Letters. Vol. LI, 1966. See especially the author's: "A Reply to Professor Mavrodes". Papers of the Michigan Academy of Science, Arts and Letters. Vol. LI. 1966.

27. Some times analytic a posteriori propositions are presented as if they were necessary, like the synthetic a priori propositions. In such cases people find themselves bound to a custom or a tradition and think that they have to necessarily abide by it, that either that is the only way of doing things or that there is no way of changing the customs or the tradition. One can observe that propositions concerning arranged marriages, dowries, family structures, professional division of labour, etc, are often presented as a priori, necessary propositions. The people concerned tend to think that there is no other way of doing things. A proposition which seems to have caused great harm by presenting itself as a necessary and a priori proposition seems to me to be Article II. (B. Amendments of the Constitution), of the American Constitution. It reads : "A well-regulated militia being necessary to the security of a free state, the right of the people to bear arms shall not be infringed." This is evidently a logically false argument. If a well regulated militia is what is necessary for the security of the free state, then it follows that it is the militia which has the right to bear arms or which needs arms, it does not follow that the people as a whole have a right to bear arms. From the premise that the militia needs arms, two erroneous conclusions are drawn, not only that the people need arms but, moreover, even that they have a right to bear arms : If the whole of the people are treated as if they constituted the militia, then violence as a way of life is what one would natur-

ally expect, for it is natural for the militia to be violent.

28. Kant, Immanuel., Metaphysik der Sitten, Royal Prussian Academy in Berlin Edition. Vol. VI. See especially the "Introduction", pp. 211-228.

29. Kant, Immanuel., Grundlegung zur Metaphysik der Sitten. Royal Prussian Academy Edition. Vol. IV. pp. 431-434.

30. Kant, Immanuel., Religion innerhalb der Grenzen der blossen Vernunft, translated by Theodore M. Green and Hyot H. Hudson as Religion Within the Bounds of Reason Alone. New York: Harper & Brothers. (Harper Torchbooks). 1960. Book - III. pp. 85-89.

31. Kant, Immanuel., Kritik der Urtheilskraft, translated as Critique of Judgement by J.H. Bernard. New York: Hafner Publishing Co. 1951. # 83, #84. pp. 279-286.

32. Leibniz, G.W., Principles of Nature and of Grace, Founded on Reason. (1714), trans. Mary Morris. New York: Everyman's Library; Dutton. 1956. pp. 21-23.

33. Baruzi, Jean., Leibniz. Paris: Bloud. 1909. pp. 365-368.

34. Kant, I., "Disputatio de mundi sensibilis atque intelligibilis forma et principiis." in Inaugural Dissertation of 1770, trans. W.J. Eckhoff. New York: Columbia College. 1894.

35. Kant, I., Metaphysische Anfangsgrunde der Naturwissenschaft. Translated by J. Ellington, as Metaphysical Elements of Natural Science. New York : Bobbs-Merrill Co. Inc. 1966.
36. Kant, I., Inaugural Dissertation, and Early Writings on Space .trans. John Handyside. Chicago : OpenCourt Publishing Co. 1929. pp.68-69. (Reprn. Westport Conn: Hyperion Press Inc. 1977).
37. Kant, I., Grundlegung zur Metaphysik der Sitten. Royal Prussian Academy Edition. Vol. IV. pp.420-421.
38. Ibid. p.421.
39. Kant, I., Critique of Pure Reason , A 236 (B295)-A260(B315).
40. Kant, I., Grundlegung , pp.449-457.
41. Ibid. p.458.
42. Kant, I., Kritik der praktischen Vernunft. Royal Prussian Academy Edition. Vol.V. pp.4-14.
43. Ibid. pp.42-51.
44. Ibid. pp. 58.
45. Kant, I., Metaphysik der Sitten. Vol.VI. pp.248-252.
46. Kant, I., Inagural Dissertation and Early Writing on Space.. Para. 19.
47. Kant, I., Metaphysik der Sitten. Vol.VI. pp.245-257.
48. Kant, I., Critique of Pure Reason. A80(B106) and A211(B257)-A215(B262).

NOTES TO PART-IV

Notes to Section - II.

II. Law and Ethics.

1. Kant, I., Grundlegung. pp.446-448.
2. Ibid. pp.397-398.
3. The term 'ethics' has been generally used in three different but related ways, signifying (1) a general pattern or way of life, (2) a set of rules of conduct, i.e. a 'moral code', and (3) inquiry about a way of life and of conduct, in this sense it is sometimes also called 'metaethics'. I am using the term through this work only in the second sense. For a detailed discussion about the different approaches to ethics in the three different senses, see: The Encyclopedia of Philosophy, ed. Paul Edwards, S.v. "Ethics, History of" by Raziel Abelson and Kai Nielsen. See also, S.v. "Ethics, Problems of," by Kai Nielsen. For a detailed discussion of Kant's use of the term "ethics" see : Gregor, Mary J., Laws of Freedom . Oxford: Basil Blackwell, 1963. pp.2-33.
4. Kant, I., Metaphysik der Sitten, p.214.
5. Kant, I., "Uber den Gemeinspruch : Das mag in Theorie. Richtig Sein, taugt aber nicht fur die Praxis", trans. H.B.Nisbet in Kant's Political Writings, Cambridge: Cambridge University Press.1970. This work is also translated by E.B.Ashton , as , On the Old Saw: That may be Right in Theory but it won't work in Practice. Philadelphia: University of Pennsylvania Press.1974. (I shall refer to the

work generally as 'Theory and Practice' . Page references shall as usual be to the Royal Prussian Academy Edition).
Vol. VIII. pp. 298-299.

6. Kant, I., Metaphysik der Sitten. p.230.
 7. Ibid. p. 216; 222.
 8. Ibid. p. 218.
 9. Kant, I., Handschriften Nachlass. Royal Prussian Academy Edition in Berlin. Vol. 23. p.377.
 10. Kant, I., Metaphysik der Sitten. pp. 229-231.
 11. Ibid. pp. 218-221.
 12. Kant, I., Theory and Practice. p.300.
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III. Law and Coercion.

13. Devlin, Patrick., The Enforcement of Morals. London: Oxford University Press. 1965.
 14. Kant, I., Metaphysik der Sitten. p.230.
 15. Ibid. p.231.
 16. Ibid. p.232.
 17. Ibid. p.231.
 18. Ibid. p.232.
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IV. The Moral Propositions of Pure Practical Reason.

19. For a detailed analysis of Kant's moral theory see:

Paton, H.J., The Categorical Imperative, London :
Hutchinson . 1963.

20. Kant, I., Grundlegung. p. 436-437.

21. Ibid. 436.

22. Kant, I., Critique of Pure Reason. A64(89)-A181(B224).

23. Kant, I., Metaphysik der Sitten. p. 230.

24. Kant, I.,

25. Kant, I., Grundlegung. p. 436-437.

26. Ibid. 437.

27. Ibid. 421.

28. Ibid. 421.

29. Ibid. 431.

30. Ibid. 429.

31. Ibid. 434.

V. The Legal Propositions of Pure Practical Reason.

32. Ibid. 433.

33. Kant, I., Religion Within The Bounds of Reason Alone.
pp. 85-89.

34. Kant, I., Theory and Practice. p.290.
35. Kant, I., Metaphysik der Sitten. p.314.
36. Rawls, John., A Theory of Justice. Cambridge, Mass: Harvard University Press. 1971.
37. Marx, Karl., Das Kapital

VI.1). Communal Legislation.

38. Rousseau, Jean Jacques., The Social Contract. ed. Lester G. Crocker. New York: Pocket books. 1967. See specially Book -II: III, VI; Book - IV: I, II;.

VI.2). The Communal Genesis of Law.

39. Locke, John., Two Treatises of Government. ed. Peter Laslett. Cambridge: Cambridge University Press. 1960. Besides the mentioned passages see also : 124. ; 125.; 126.; 127.
40. Ibid. 89.
41. Hobbes, Thomas., Leviathan. ed. Michael Oakeshott. London: Macmillan. 1962. pp. 229-236.
42. For some related discussions see: Murphy, G. Jeffrie., Kant: The Philosophy of Right. London: Macmillan. 1970. pp. 113-127.

43. Hobbes, Thomas., Leviathan. pp. 129-133.
 44. Kant, I., Theory and Practice. p. 306.
 45. Ibid. p. 297.
 46. Pollock, Fredrick., Principles of Contract. 5 th.edn.
Toronto: Carswell. 1889. p.1.
 47. Sutton and Shannon on Contracts. 7th.edn. London:
Butterworth. 1970. p.3.
 48. Winfield, Percy Henry., Province of the Law of Tort.
Cambridge: Cambridge University Press. 1931. p.380
 49. This seems to be the commonly accepted legal view, despite
Maitland's opinion to the contrary. For Maitland's view
see: Maitland, F.W., The Constitutional History of England.
reprn. Cambridge : Cambridge University Press. 1974.
 50. "Restatement of Contracts" No. 1. of The American Law
Institute.
 51. Chesire, Fifoot., The Law of Contract . 8th edn. London:
Butterworth. 1972.
 52. Chitty on Contracts. 23rd.edn. Vol.I.: General Principles.
London: Sweet and Maxwell. 1968.
 53. "Curie. v. Misa".: Law Review. (1875). 10.Ex.153,162.
 54. Hart, H.L.A., The Concept of Law. p.41.
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VI. 3) Cooperation.

55. I have discussed the notion of cooperation in detail in my M.A.Thesis (unpublished) entitled: Logical Conditions of Social Activity. One essay from this text, which has been published, is of relevance here. See: Singh, Chhatrapati., "Communication : The Autotelicity of the Basic Mode of Social Activity". Indian Philosophical Quarterly. Vol.V, No.III. April, 1978.
56. See: The Oxford English Dictionary. Oxford: Clarendon. 1961. Vol. V. p.639 for 'Just' and then, p. 594 for 'Join'. A more detailed etymological study is to be found in: Patridge, Eric., Origins. New York: Macmillian Co. 1966. See p. 325 No. 7 for 'Just', but mainly p.321 for 'join'.

VII. 1). The Functional Definition of a Legal Entity.

57. See: Pramatha Nath Mullick v. Pradyumna Kumar Mullick. (1925) L.R.Ind. App.245. Discussed by P.W.Duff in 3.Camb. L.J. (1927). 42.
58. See cases concerning roosters and caterpillars in: Keeton, G.W., The Elementary Principles of Jurisprudence. 2 nd. edn. London: Pitman. 1949. p.149.
59. Ihering, R., Geist des romischen Rechts. Leipzig, 1872. i, 202. Trns. O. De Meulenaere, as 'L Esprit du Droit Romain'. Paris: Mareseg. 1880.
60. Kelsen, Hans., Pure Theory of Law. pp. 168-191.

- 61 . Gierke, Otto von., Natural Law and Theory of Society
Reprn. Beacon Hill, Boston: Beacon Press. 1957.
- 62 . Hart, H.L.A., "Definition and Theory in Jurisprudence".
70. L.Q.R. (1954). 37.
- 63 . Vaihinger, Hans., Der Philosophie des Als Ob. Berlin, 1911.
Trns. C.K.Ogden, as The Philosophy of As If .2nd edn.
Reprn. New York : Barnes & Noble. 1966.
- 64 . Fuller, Lon, L., Legal Fiction . Stanford, Califf : Stanford
University Press. 1967.
- 65 . What I have said here about the notion of a legal entity
is a detailed discussion of some of the essential points
made earlier See:
Singh, Chhatrapati., "The Ontology of Law" in Language
and Ontology. Vienna, Austria : Holder-Picher-Tempsky. 1982.

VII. 2). The Concept of a Legal Person.

66. Kant, I., Grundlegung : pp. 434-437.
67. Ibid. p.435.
68. Paton, H.J., The Categorical Imperative 6th edn. London:
Hutchinson. 1963. pp. 168-169.
69. Murphy, Jeffrie, G., Kant: The Philosophy of Right. London:
Macmillian. 1970. pp.80-86.
70. Kant, I., Metaphysik der Sitten. p.213.
71. Kant, I., Critique of Practical Reason. pp. 121-122.

72. Ibid. pp. 124-133.

73. Kant argues that evil cannot be an essential attribute of man since he is capable of morality. See his Religion Within the Bounds of Reason Alone, pp. 15-79. However, he does not seem to realize the significance of this view for his legal theory as presented later in his Metaphysik der Sitten.

74. For a discussion of the concept of Atman, in English, see: Organ, Troy Wilson., The Self in Indian Philosophy. The Hague: Mouton & Co. 1964.

The continuity of the human will with the divine will is not accepted by many schools of Indian philosophy. The Visist-Adavita-Vedanta of Ramajuna and others, for example, see a distinction between the will of Iswara and the Jiva. The Nyāya school of Gautama, Udyotakara and others accept a similar view. On the other hand, the thesis about the continuity of the wills is not foreign to Western philosophy. Hegel, Schopenhauer and many other thinkers share this view. In fact, its clearest expression can be traced back as far as to Origen, if not further. See: Origen., On First Principles. trans: C.W. Butterworth. Gloucester, Mass : Peter Smith. 1973. Bk. II, Chp. I, Sec. III. pp. 76 ff.

75. Kant, I., Metaphysik der Sitten. pp. 245-257.

76. For a detailed discussion of Kant's idea of the self, see: Banerjee, N.K., Kant's Philosophy of the Self. New Delhi Arnold-Heinemann. 1974.

NOTES TO PART-IV

NOTES TO SECTION-III.

III. Grounds for the norms of Amendments.

1. -- Kant, I., Critique of Judgement, trans. J.H. Bernard.
New York: Hafner Publishing Co. 1961. p. 10 (II).
2. Ibid. p.15 (IV).
3. Ibid. p.32 (IX).
4. Ibid. p. 243-248. (74,75).
5. Ibid. p.222. (66).
6. Ibid. p.286. (84).
7. See ,for example: McFarland, J.D., Kant's Concept of Teleology. Edinburgh : University of Edinburgh Press.1970.
8. Kant, I., "Essay Towards a Universal History from a Cosmopolitian Point of View." trans. in Kant on History by Lewis White Beck. Indianapolis : Bobbs-Merill. 1963.
9. Gale, George., "The Anthropic Principle" Scientific American. Dec.1981. Vol.245. No:6. pp.145-171. I have discussed the related issues earlier in Section-I.
10. For some relevant discussions see: Dasgupta, S.N., A History of Indian Philosophy. Cambridge: Cambridge University Press. 1922. Vol.I. Ch.4.

11. See: Gandhi, M.K., The Story of my Experiments with Truth, trans. Mahadev Desai. Ahmedabad : Navajivan Press. 1940.

---- Satyāgraha in South Africa, trans. Valji Govindji Desai. Madras: S.Ganesan. 1938.

---- Non-Violence in Peace and War. Ahmedabad: Navajivan Press. 1942.

---- Delhi Diary. Ahmedabad. Navajivan Press. 1948.

For a detailed discussion of the notion of Satyāgraha see: Bondurant, Joan V., Conquest of Violence. Los Angeles: University of California Press. 1971.

12. See: Fuller, Lon, L., "The Role of Contract in the Ordering process. of Society Generally" in Basic Contract Law. St. Paul, Minn.: West Publishing Co. 1947. Also, reprinted in Kenneth I, Winston, ed. The Principles of Social Order. Durham, N.C. : Duke University Press. 1981.

NOTES TO PART-IV

NOTES TO SECTION - IV.

1. I have discussed some basic questions related to this issue in: Singh, Chhatrapati., "The Idea of Political Representation" De Philosophia. September, 1981. No. 2.
2. Kelsen, Hans., Pure Theory of Law. p. 10. see also: pp. 193-214.
3. Hart, H.L.A., The Concept of Law. p. 86.
4. Ibid. p. 113.
5. Ibid. p. 203. Cf. pp. 187-207.
6. Hall, J., "Some Basic Questions Regarding Legal Classification for Professional and Scientific Purposes." 5, Journal of Legal Education. 329. (1953).
7. See: Williams, Glanville., edited. Salmond on Jurisprudence. London: Sweet Maxwell. 1957. pp. 532-37.
8. See: Paton, G.W. and Derham, David P., edited : Jurisprudence. Oxford: Clarendon. 1972. pp. 354-356.
9. Rostow, Eugene V., The Ideal in Law. Chicago: The University of Chicago Press. 1978.
10. See: Prasad, Rajendra., "The Theory of Puruṣārtha: Revaluation and Reconstruction." Journal of Indian Philosophy. 9(1981) pp. 49-76.

Notes to Review and Conclusions.- IV.

1. See: Kant, I., Prolegomena to any Future Metaphysics.
trns. Lewis White Beck. Indianapolis, New York : Bobbs-
Merrill Co. 1950. p.27.(p. 279-280 in the Royal Prussian
Academy edition.).
2. Kant, I., Grundlegung. pp. 440-445.
3. Hodgson, D.H., Consequences of Utilitarianism. Oxford:
Clarendon Press. 1967.
4. Ball, Milner, S., The Promise of American Law. Athens:
University of Georgia Press. 1981.
5. I am using the distinction between 'transcendental' and
'transcendent' in the manner employed by Kant. For Kant's
view see: Kant, I., Critique of Pure Reason. A 12, 296; B 25, 351.
6. See : Del Vecchio, G., General Principles of Law. trans:
F. Forte. Boston: Boston University Press. 1958.
7. See: Northrop, F.S.C., The Complexity of Legal and Ethical
Experiences.
8. See: Radbruch, G., Rechtsphilosophie (1932), in IV,
20th Century Legal Philosophy Series, The Legal Philosophy
of Lask, Radbruch and Dabin. (K. Wilt, trans, 1950).

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- _____, Politics. trans. ed. Ernest Baker. London: Oxford University Press. 1958.
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- _____, Categories and De interpretatione. trans. J.L. Ackril. Oxford: Clarendon Press. 1974.
- _____, The Works. Ed. W.D. Ross. Oxford: Clarendon Press. 1927-52.
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APPENDIX :

ABSTRACT OF THE THESIS

The work seeks to understand and explain the nature of law. It does so by attempting to comprehend the nature of basic legal propositions. It is argued that the answer to the question 'what is the basis of legal authority?' cannot be provided unless the nature of basic legal propositions is first explicated.

Basic legal propositions are distinguished from derivative ones and their form and contents are presented. It is shown that a basic legal proposition must be a type of synthetic a priori proposition, hence the basis of legal authority cannot be grounded in human will. Human will must be instrumental in establishing the truths of human reason.

The results of the analysis of basic legal propositions are applied to the existing legal theories. It is argued that a simple division of all legal theories into Natural law and Positive law theories is unwarranted, this dichotomy does not have sufficient explanatory power. The work attempts to provide a better conceptual scheme for the division of legal theories. All legal theories can be conceptualized as belonging to one of the following three conceptual models: those based on principles applicable to a system by force, those based on principles applicable to the natural physical order and those based on the principles applicable to a created social order. The nature of the basic propositions in each of these models is shown to be different. For each model the

theorist who occupies the ideologically central and most sophisticated position is discussed in detail. To the first model belong H.L.A.Hart and Karl Marx. To the second belong Hans Kelsen and the Stoics; and to the third, Lon.L.Fuller and Immanuel Kant. The first model is rejected on the grounds that its basic propositions do not qualify to be legal propositions. The theories belonging to this model are, thus, unable to distinguish law from a system by fiat or force. The second model is also rejected on similar grounds. In the third model Fuller's theory is shown to be in the right direction but very inadequate; Kant's theory is shown to have the most right elements for a legal theory but it is still unsatisfactory. An appropriate legal theory, it is argued, can only be presented by developing Kant's legal theory in ways which include some basic moral and social concepts that are to be found in Indian philosophies.

On developing the appropriate legal theory the relationships between law and the police, on the one hand, and the legal system and the political system, on the other, are seen to be different from how they have been hitherto characterized. These relationships are discussed and specified.

In terms of exposition, the work proceeds from a notion of a system to the notion of a normative system, and finally to the notion of a juristic normative system. These three notions have to be distinguished to identify and characterize the idea of law.