Jurisprudence

The Role of the Law in the Twentieth Century: From Law to Laws to Social Science [1]

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I am a lawyer, by choice and by profession, trained in the Inns of Court in London and crossing half the world to go there, proud to share in the traditions and the spirit that dwell in those historic halls and fields within a stone's throw of the Old Bailey and its injunction that we protect the poor and the weak and do justice and show mercy to all.

That injunction, as we all know, was not always honoured, but it lived and lives. For law, I believe, is one of the great achievements of the human spirit, a humanity and an expression of humanity long before we dreamt of social science as either distinct or somehow scientifically, behaviouristically inhumane, teaching us only who gets what, where, when, and how. If that is all that realism means, I am not a realist. I believe that ideals and traditions, forms and procedures, are historically active. They help to make us what we are, and they do so precisely because they need not be fossils representing only the dead weight of the past. There are vital, living, creative traditions, flexible and responsible, capable of judging with compassion and also with precision, capable of incorporating new social concerns and demands while maintaining a sense of order, coherence, interdependence, and fundamental values. The law is or can be such a tradition, transcending both the totality of laws and statutes current at any one time and the legislators, state, and judges that make law and enforce it.

This is why the dialogues that take place in court, and the profession, the judge and the jury, play such a central part in our law. Even bad

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judges and perverse juries have more on their minds and in their minds than the state of their digestion, politics, money, and self-interest. They participate in an activity they did not invent. They have attitudes, conscious and unconscious, shaped by its existence. In America, this is quite remarkably so. It is simply not possible to conceive of American society or American greatness without the remarkable extent to which law, as something more than a collecting of laws or the will of the state, has become part of the very texture of this society and the means by which it changes. It determines what is done and how it is done far outside the public hearings, in elections, in inquiries, in administration, in the management of business and enterprise, in relations between neighbours. It insists even that legislation to cure new evils or protect new interests conform to, or be fitted into an existing framework of rights and procedures, that the legislator take account of the effects of legislative action on the fundamental values and principles incorporated in the Constitution or take action to amend it. That Constitution lives precisely because it is not an inflexible strait-jacket, but a set of rules and principles to be interpreted by courts. Criminals and various radical groups may be quick to assert that they stand outside this law and this society, and treat them with contempt—but they are prone to recite and rely upon *their* rights, if not those of other people. The countries that have such law and rights are better off than those that do not—in most cases much better off.

We live, like most generations, in the best of times and in the worst of times, in an age of hope and despair, of protestations of humanity and respect for rights, liberty, equality, and fraternity, and an age of much terrible inhumanity, hatred, oppression, torture, poverty, and soul and life-destroying deprivation. There are conflicts between our ideals and our realities, and conflicts within and between our ideals themselves.

One of the West's greatest achievements in the last 150 years is the growing recognition and acceptance of the fact that slaves, then workers, then the poor, then women, then Asians and Africans, then indigenous peoples, are people like ourselves, deserving of and entitled to David Houses' sort of sympathy—not compassion, but the fellow feeling that makes us wince when others are cut, cry when others suffer, because they are "ourselves once more", people as we are people. Our imagination has extended as basic need and insecurity recede. The situation is less promising in the non-Western world precisely because there, basic needs and insecurity have receded less. Nevertheless, the primary motto of both culture and law—"nothing human is alien to me"—makes headway, in recent decades certainly and over the last two centuries as well, if not always in a middle term that included Hitler and Stalin, the Turkish massacres of Armenians and Kurds, Auschwitz and Buchenwald, right-wing and left-wing terror squads, drug barons and Idi Amin, Boer South Africa and Pol Pot's horror-relocations. If this is life, and law is abstraction and alienation, give us law—but a law that is not simply the will of the state or the decree of a legislator. Give us a systematic law and judicial practice that are rooted in the peaceful pursuits and perceptions

of men and women, in traditions of social stability and individual development, in moral values and infra-jural facts, a law that treats human beings and human activities as ends, not means, and sees itself as part of the community, not as standing above it.

That is what we in Common Law countries mean by calling our law the *jus communis*, the common law—not the king's law, or even the republic's law, or Australian law (i.e. the law made by Australian governments). To make these demands is to do more than require a particular type of legal culture; it is to say that law is an integral part of culture and loses its character without it. It is also to say that there is culture and not only cultures. Divorced from culture as the exercise of rationality, sensibility, and imagination, law becomes arbitrary, oppressive, and, in an important and continuing sense recognized by all ages, illegal, unjust. Legal positivism—the belief that law is law no matter what its content, if it is properly enacted by the legally constituted source—makes good preliminary analytical training for first year students in law and philosophy. But it falsifies both the historic role of law as a carrier and developer of values rooted within the legal tradition itself and the reciprocity and concepts of legitimacy involved in human interaction and the formation of stable government. It also falsifies the very nature of the judgement of justice, of judicial decision-making. Law has not only served "society" or its rulers; it has also controlled them and revolutionized them.

H.L.A. Hart, in his positivist analysis of the concept of law, does concede or inject what he calls a minimum content of natural law needed to get a legal system going—the limitations to be placed upon the greed, selfishness, and violence that would otherwise lead to Hobbes' war of all against all—and the support to be given to the human need for partnership, friendship, society. But the nations of Eastern and Central Europe that are now rejecting the view that law is simply the enacted will of the state or an instrument for managing society are saying much more than that—they see law as a generator of rights *against* the state; of ideals and traditions within society; of hard-won historical enclaves and agreements of liberty, justice, and accountability. They are inspired by their own legal traditions and by those of others. They are still rejecting an annexation that was illegal, an act of power, a bargain between lawless and brutal dictators. It is only in affluent democracies that some students chant, "Law alienates, dehumanizes. Law is bad". As the Russian proverb has it, "Dogs get rabies from too much fat".

Central to the notion of law as a specific social tradition and social institution, and central to the concept of justice, is the requirement of treating like cases alike. Formal that requirement may be, but it already involves an entire ethical presumption in favour of the intellectual, of reason and argument, of establishing the facts, of avoiding unfounded inequality and discrimination. Law thus carries with it what we might call the ethic of intellectual enquiry and argument. It rejects lies, misstatements, distortions and confusions, as well as force, prejudice, and

myth. It insists on getting things right, on paying attention to what is said rather than who said it, on having to consider opposing opinions, on not changing rules or the meaning of words in midstream for no reason except to win the argument or to favour a protagonist. For these ideals, as we all know, hundreds of thousands of human beings, great and little, have gone to martyrdom. Justice presupposes and requires truth and honesty and fights against their opposites. It also presupposes an equality that strengthens and supports much more than mere formal equality. It creates a bias, a presumption in favour of equality generally.

That bias has in fact worked itself out over time. It has given heart and strength in law-governed societies to those who say "Why are we not treated the same?" The American civil rights movement was deeply rooted in the constitutional guarantees and amendments that sought to actualize the quality of men and women before the law. It was the demand that life correspond to law. Nature may imitate Art; life imitates law. So it is with anti-discrimination legislation and provisions for affirmative action today—provisions that elevate dangerous powers to favour and protect others, in the confidence that our legal system is strong enough and fair enough to strike a balance, to vindicate ultimately equality for all, by calling a halt, by redefining protected groups, by not forgetting that individual injustice is as serious as group injustice. The movement from the demand for formal equality to the demand for substantive equality is not extra-legal or anti-legal in its ultimate source or hope, though it may be pressed with a desperate self-centredness that is more palatable in the deprived than the non-deprived, but dangerous in both.

The injunction that we treat like cases alike is not by itself a sufficient signpost to justice or equality. It is a *sine qua non.* The problems begin when we seek to determine the criteria for deciding which cases are alike for this purpose or that. If those problems did not exist, law would be replaced by logic or totally reducible to it. Deciding that cases are alike for the purpose of doing justice in a particular instance involves an irreducible element of classification, that is, of valuation or evaluation, of saying that this characteristic is more important than that. This cannot be done by logic or rationality as logic alone. The decision is not and cannot be automatically rational; it requires attitudes, *Weltanschauungen.* But the decision must be reasonable, must conform to some accepted standards, expectations, norms, principles, traditions. Otherwise it does not satisfy our, or a community's, sense of justice. Law as a system is an attempt to limit, strictly, the arbitrariness, bias, or caprice that can enter into such valuations unless we lay down rules, precedents, and principles that guide the judge in making these decisions, in selecting what is to be given weight and what is to be ignored, in distinguishing one case from another, in determining what class a particular situation is to be subsumed under. That is indeed a crucial part of the judgement of justice. It can hardly be done, and can certainly not be done well, without taking into account past experience, wider social sentiment, the

life and logic of the law, the consequences that will attend a decision one way or another.

This process is so complex that our law has to incorporate presumptions, open-textured concepts, flexible standards. To call this enterprise, and not just biased or clumsy distortions of it, abstract and alienated, is to know nothing about law or about life—unless one treats as alienating all that which does not satisfy one's own desires immediately and without reference to others. Nor is it to know anything about language which provides for the lawyers an enormous fund of community sentiments, attitudes, and valuations, armory of groupings and distinctions on which he or she can and must draw.

Elsewhere, most recently in Korea and again St. Louis before another audience, I have argued that the Western legal tradition has a specially developed and self-conscious appreciation of the tasks of law, of the requirements of doing justice, and of the social role of a legal tradition and legal profession. Precisely for that reason, it is becoming the legal tradition of humankind. It has its limitations and its undesirable consequences, but it has spread world-wide precisely because its merits far outweigh these. Law, after all, normally relies on something more than direct coercion or the ultimate threat of coercion; it relies on the notion of rightful authority, of binding norms and sources of norms, on concepts of justice, universality, and reciprocity. The Western idea and ideal of law have been triumphing over their competitors because they develop these ideals more wholeheartedly, at least in theory, and through a separate legal profession, and because they were more systematic and more thoroughgoing in the end in subjecting the state and the sovereign himself to the rule of law. Above all, Western law has in it an implicit rejection of extra-legal status—a strong bias toward formal equality before the law. That formal equality has, and continues to have, a tendency to promote actual equality as well.

In all societies, it is often forgotten, law is not for long merely the utterance of power; it both represents and produces a significant degree of social consensus. Without that, law would lose its distinctive character, its legitimacy as promoting and safeguarding the normal capacity of human beings to live together, to respect each other's humanity. Law thus stands halfway between violence and education, and partakes of both. Even in its coercive function, Professor A.M. Honoré has reminded us,[2] it operates not as a battering ram but as an arch. It makes pressure tolerable and fair by distributing it evenly or at least impersonally. Legal systems that did not have or accept the concept of the impersonal application of rules have almost without exception given way to those that have. The government of laws does increasingly replace the government of men

[2] A.M. Honoré, 'Societies, laws and the future', in A.E-S. Tay and Eugene Kamenka (eds.) *Law-making in Australia*, Edward Arnold (Australia) Pty Ltd, Melbourne, 1980, at 4.

in all societies worth living in. Where it does not—as during the Great Proletarian Cultural Revolution—disaster follows.

The great American jurist Roscoe Pound, tracing the development of law largely in Western societies (but the point can be broadened), emphasized that legal systems elevate—in succession, he thought—certain elements or moments in the ideal of governing and living by law.[3] First, there is the ideal of a peaceful ordering of a community, the suppression and elimination of lawless self-help, of recourse to violence in place of the court as if it were a normal way of resolving disputes or righting a wrong. Next is the often almost-magical reverence for strict law and the literal meaning of terms—harsh in its application but helping to establish the ideal of certainty and uniformity in the law. Then—in the West and in the East largely through the influence of religion—equity and the concept of natural law are incorporated in the king's law, introducing the notion of good faith and or moral conduct based on reason. The certainty and universality of law become tempered by moral considerations of individual worth, of the individual motive and the particular circumstances. More recently, individualism—the idea of individual rights, especially against the state and the community—and then, in reaction, an emphasis on social interest and material welfare have been increasingly incorporated in the Western ideal of law and in the consciousness of the world. They lead to new problems; but they can be no longer ignored.

Many of these newer concerns for rights and for social welfare have been expressed, for good reason, within the forms, concepts, and procedures bequeathed us by the Roman law of Justinian, collected and codified some 1,500 years ago. For behind the beliefs of common-law lawyers, of the Western legal tradition generally, and of many lawyers throughout the world, there stands a more general set of conceptions that they have in common. These conceptions, and the Western legal tradition itself, are rooted in the remarkable impact that the ideas of law and legal technique introduced and developed by the Romans have had on Western civilization generally and, more so than is commonly supposed, on Jewish and Islamic thought. They amount to the fundamental belief that law counts; that it is not only an outstanding feature of social organization but that its rules, procedures, and techniques are capable of dealing, justly and under the framework of general precepts and conceptions, with all important human activities. The Romans, indeed, whatever their other habits, were like the Jews, a 'law-inspired' people; they had created such a system of law, capable of counting in their own time and of again inspiring subsequent civilizations. The three great, original characteristics of Roman law as a living system up to the time of Justinian, as Professor Geoffrey Sawyer has put it,[4] were, firstly, a complexity which enabled

[3] R Pound, *The Spirit of the Common Law*, Marshall Jones Company, Boston, 1921, at 139-142.
[4] G. Sawyer "The Western Conception of Law", in Konrad Zweigert (eds.), *International Encyclopaedia of Comparative Law II-1* (Tüingen, 1975) pp 14-48 at 18.

it to cover the main social relationships of human life; secondly, a degree of abstraction enabling many of its principles to apply to a wide range of social relationships and over long periods of time without major change; and thirdly, an autonomy of structure and development which gave law an independent role in the development of society as a whole. Behind this lay the remarkable Roman Republican insistence that all authority was limited, in time and scope, by constitutional provisions. The subsequent history of Roman and Roman-inspired law, from the sixth century A.D. to the present, and of its relation to and interaction with Christianity, canon law, Germanic and other legal customs and procedures, is a complex story. But the ideal of a society based on law became stronger and stronger within that history, uniting the English common-law lawyer and the Continental civil-law lawyer and reaching its apogee in the U.S. Constitution with its amendments and in the great legal debates and reforms of the nineteenth century.

The idea and ideal that have been at work in this developing and increasingly international conception of law, were grasped most clearly, oddly enough, by one of its sharpest critics, the Soviet Marxist E.B. Pashukanis, murdered by Stalin. At the very basis of the Western conception of law, Pashukanis argues,[5] stands the conception of the juridical subject confronting all other juridical subjects, including the state and the King, on the basis of equality and equivalence. The categories and principles of law, as opposed to the principles of parental control, military organization, or bureaucratic administration, presuppose the legal subject as an individual acting freely in his or her relations with other individuals, and all other legal subjects and all interests in a society are, for the purposes of law, equally entitled to consideration and judgement. Their freedom may be a fiction; their legal equality may be undermined by their social powerlessness. But legal judgement must be rendered in the light of publicly recognized and acknowledged rules and principles binding on all. It must be based on sound reasoning and sound morals. This is central to the Western legal tradition, especially to its common-law variant found in the United Kingdom, the United States, India, Canada, Australia, and other former British and American possessions. Legal judgement has made it possible for that tradition to change law and legal interpretation to recognize diminished responsibility, duress, and social inequality where they threaten the operation of justice. Justice, for lawyers, is *not* an abstraction.

Perhaps no modern English judge has been more willing to use the concept of justice *ex cathedral*, to give judgement according to the reason of the thing, with scant reliance on authority and much readiness to pronounce new principles, than that radical judge in appeal, Lord Denning. Yet for him, too, justice is not an abstract thing and in his lectures, *The Road to Justice* (London 1955, p. 6-7), he writes:

[5] E.B. Pashukanis, *Obshchaya teoriya prava i Marksizm* (*The General Theory of Law and Marxism*), Moscow, 1929.

> When you set out on this road you must remember that there are two great objects to be achieved: one is to see that the laws are just; the other that they are justly administered. Both are important, but of the two, the more important is that the law should be justly administered. It is no use having just laws if they are administered unfairly by bad judges or corrupt lawyers . . . (A) country cannot long tolerate a legal system which does not give a fair trial.

This concept of justice as involving a fair trial, linked with and promoting the more general conception of justice as fairness, is indeed for the common-law lawyer a *sine qua non*. It is not, of course, exclusive to or especially of, the common law. As the rules of 'natural justice'—a technical term in the common law today—it has been summarized in the form that no man should be condemned unheard and that every judge must be free from bias. As such, they derive from the Latin tags *audi alteram partem* and *nemo judex in re sua*. They have been held, in the common law itself, to be general principles of law common to civilized communities—belonging indeed to the common consciousness of humankind rather than to the science or specialized tradition of law. The rules of natural justice in the technical common-law sense, however, are not an adequate statement of the canons of a fair trial at common law. They enunciate, rather, the minimum standard that the common law sets for all manner of hearings and tribunals, public or domestic, that have a duty to act judicially or quasi-judicially, or that make determinations that affect the lives, significant interests, and property rights of citizens and are not covered by specific exclusions. This supervisory role of the common law, long exercised through the prerogative writs and in America by the Constitution as amended, and the courts, still rooted in a common-law tradition, is based historically on the prerogative power of the Crown to do justice throughout the realm; it has opened up a whole field of administrative law in which the rules of natural justice or due process are both central and the subject of detailed consideration. Such consideration in recent years has led to the gradual substitution for them of the single, less formal concept of acting fairly, which in turn has made it easier to import a wider body of common-law attitudes and principles, if not formal canons, on the subject of acting fairly.

Within the work of the common-law courts themselves, the notion of a fair trial has had a more specific content. It is not easily derivable from the Latin maxims alone (though incorporating them) or from the common opinion of humankind, which has seemed to common-law lawyers less than satisfactory in its views on the conduct and administration of courts. The canons of a fair trial at common law presuppose the forms and procedures that evolved in England, no doubt slowly and uncertainly, but in the end decisively. They have been summed up as involving the independence of judge and jury and the absence of personal interest in both, the hearing of both parties and consideration of all evidence (but evidence properly put before the court and not hearsay), the presentation

of strong cases on both sides, the personal integrity—incorruptibility and impartiality—of the judge, the carrying out of their proper roles by counsel with propriety in the search for truth, and the giving of reasons by the judge for his decision. These must be reasons that show he is deciding on the evidence according to rules and doctrine and not caprice. To this we may add, as Lord Hewart did, for instance, in *The New Despotism* (London 1929), the fact that the case must be heard in public, that the parties be treated as equals, that the judge be identified and personally responsible in the moral sense for his decision, and that appeals to a higher judicial tribunal from a court of first instance or judicial review be in principle possible.

These canons have not been empty phrases. They, like the rules of natural justice, have been given flesh, applied in detail to a vast range of circumstances, to new situations and new types of hearings and determinations, by a vast body of case law and affected, for particular purposes, by statute. In the United States, under the 'due process' clause of the Constitution, they have had even more technical discussion and a more formal, though not necessarily greater, general influence. In both countries, recent legislation has had the peculiar and not wholly desirable effect of appearing to separate the canons of a fair trial from the concept of just adjudication generally—something that the common-law lawyer has not traditionally done as sharply. New circumstances, as we shall see, have not left these canons totally unchallenged. Governments seek, by statute, or by powerful pleading of affairs of state, public interest and policy, convenience and desirability, to exempt some of the activities of their servants and agencies from these canons. Both governments and citizens have urged, in the name of substantive equality, that parties should not always be treated as equals, that the full protection afforded by these canons should be set aside, in part, to minimize delay or cost that hits one party more than another, and that there are types of enquiry and decision-making involving important interests of citizens or of the state that are not best conducted on a legal basis. There is force in all these points, and judges and legislators have recognized that and are continuing to recognize it. But the presumption of the common law is always in favour of natural justice and the canons that apply in the particular activity. That is common-law tradition. Lord Hewart was not wrong and not out of tune with public opinion in satirizing the alternative, attractive to the bureaucrat and the social engineer:

> The inhabitants of these islands are within measurable distance of an El Dorado where there will be no judges at all. In those Isles of the Blest . . . all controversial questions will be decided in the third floor back of some one or other Government Department; the decision so reached will not be open to appeal . . . by any means whatsoever; no party or other person interested will be permitted to appear or offer any evidence; the whole law will have been codified in a single interminable statute . . . no lawyers will be tolerated except a group of advisers, departmentally appointed; any questions

> likely to excite difference of opinion will be submitted to those advisers beforehand on hypothetical facts and behind the back of the parties; and the Lord Chancellor himself will have been exchanged for a Minister of Administration for whose office any knowledge of law, however slight, will be a statutory disqualification. Meanwhile, and until that happy day arrives, our fellow countrymen seem somehow to think not too unkindly of judicial decisions given in open court upon real cases by perfectly independent and impartial judges, who are individually responsible and who have heard both sides.[6]

The common-law canons of a fair trial are now, in the common-law world, to some degree and in some areas under attack as allowing formal justice to impede substantive justice, but the basic tradition remains and is strong. It is, in its details, neither a deduction from reason nor a conception of legal operation common to all civilized communities. Those raised in the civil-law tradition and the more bureaucratic arrangements of continental Europe seem to have as much difficulty in grasping and sympathizing with the English or American law of evidence as they have in grasping the concept of a trust. Common law insistence that the role of the judge is not inquisitorial often strikes them as being commended neither by the interests of truth nor those of morality. Yet that law of evidence (discounting some inconveniences and irrationalities that should be and are being excised) forms in the main a most important and integral part of the common law's conception of a fair trial and its search for truth. (The simple story unchecked by rules designed to keep it testable, delivered straight from the heart and as the teller sees it, is almost always a pack of lies, unconscious self-deception, and malicious innuendo.) But pride in these rules of evidence and insistence on the non-inquisitorial role of the court lie very deep. They are no external, accidental, inessential thing. Thus, the English court of Appeal in *Jones v. National Coal Board* (2 (1957), Q.B. 55) ordered a new trial when it found that the trial judge, with the best of motives and intentions, in order to clarify the issues before the court and expedite the conduct of the trial, had interfered frequently in the course of argument by counsel on both sides and had taken upon himself the function of examining witnesses. Lord Denning, giving the judgement of the court on appeal, said this:

> . . . In the system of trial which we have evolved in this country, the judge sits to hear and determine the issues raised by the parties, not to conduct an investigation or examination on behalf of society at large, as happens, we believe, in some foreign countries. Even in England, however, a judge is not a mere umpire to answer the question 'How's that?' His object, above all, is to find out the truth,

[6] Lord Hewart, *Essays and Observations*, (London, 1930), at 122-3, cited in F.E. Dowrick, *Justice According to the English Common Lawyers* (London, 1961) at 38-9.

> and to do justice according to law; and in the daily pursuit of it the advocate plays an honourable and necessary role. Was it not Lord Eldon, L.C., who said in a notable passage that 'truth is best discovered by powerful statements on both sides of the question?' (*Ex parte Lloyd*, (1822) Mont 70, 72n). And Lord Greene, M.R. who explained that justice is best done by a judge who holds the balance between the contending parties without himself taking part in their disputations? If a judge, said Lord Greene, should himself conduct the examination of witnesses, 'he, so to speak, descends into the arena and is liable to have his vision clouded by the dust of conflict' (*Yuill v. Yuill* (1945) P. 15, 20).

It is this non-Cartesian, indeed anti-Cartesian, conception of truth and justice as emerging from conflict rather than formal analysis, as requiring the balancing of claims and interests that are best urged in the first instance by those present and affected, that is distinctive of the common law. It constitutes, I believe, its great contribution to the theory of freedom and of justice. It is pluralist, empirical, conscious of human error and human limitation. It treats neither man nor the principles of law as abstractions under which real people and events, real claims and conflicts, are to be subsumed. It does not suffer from the illusion that enlightened self-interest, or the moral law, or the principle of utility, establish directly and by themselves what either human beings or judges ought to do in the complex situations of the real world in which one decision constantly affects a myriad of others. It does not formulate as a regular procedure hypothetical cases or play thought games with "original positions" and unhistorical persons.

This is why, as Professor Bernard Rudden has argued,[7] the common-law trial can be characterized as consisting of three interwoven dialogues. There is the dialogue between the judge and his or her predecessors as he or she turns to and examines the precedents. There is the dialogue between the judge and counsel who set out the case before the court by presenting argument and the evidence of witnesses and also usually seek to guide the court in different directions—to hear differently, to appraise differently, to choose different principles or analogies, to decide differently. There is finally the dialogue between the judge and the jury (or himself or herself as substitute for the jury) in which the judge must sum up the evidence and explain the law in terms that bring it into relation with the understanding and the experience of the ordinary man or woman. Professor Reinhold Zippelius, surveying our law from another tradition, has correctly and sympathetically characterized this process as based on and embodying the empirical belief that truth is reached by a process of trial and error.

[7] B. Rudden, "Courts and Codes in England, France and Soviet Russia", *Tulane Law Review* XLVIII (1974), at 1010-28.

Together with the process of trial and error that the dialogues embody and facilitate stands another process which to the common-law lawyer is of the very essence of justice—the balancing of facts, interests, and principles and can not in practice be brought to a coherent unity or reduced to a common measure, that requires, in fact, the specific judgement of justice. A great American judge and jurist, Benjamin Cardozo, summed this up,[8] characteristically, by way of specific example, In law, as he says, the measure of care imputed to that standardized being, the reasonable person, around whom so much of our legal measure of justice revolves, is dependent upon the value of the interests concerned:

> The law measures the risks that a man may legitimately take by measuring the value of the interest furthered by his conduct. I may accumulate explosives for the purpose of doing some work of construction that is important for mankind when I should be culpably reckless in accumulating them for pleasure or caprice. I may risk my life by plunging into a turbulent ocean to save a drowning man when I should be culpably reckless if I were to make the plunge for sport or mere bravado. Inquiries that seem at the first glance the most simple and unitary—was this or that conduct negligent or the opposite?—turn out in the end to be multiple and complex. Back of the answers is a measurement of interests, a balancing of values, an appeal to the experience and sentiments and moral and economic judgements of the community, the group, the trade. Of course, some of these valuations become standardized with the lapse of years, and thus instantaneous or, as it were, intuitive. We know at once that it is negligence to drive at breakneck pace through a crowded street, with children playing in the centre, at least where the motive of the drive is the mere pleasure of the race. On the other hand, a judgement even so obvious as this yields quickly to the pressure of new facts with new social implications. We assign a different value to the movement of the fire engine or the ambulance. Constant and inevitable, even when half concealed, is the relation between the legality of the act and its value to society. We are balancing and compromising and adjusting every moment that we judge.

The canons of justice and of a fair trial, as the history of Western law and especially of common law shows, have not been empty phrases. They have been used to strike down the decisions of courts and ministers, to extend and protect the liberty of the subject, to make government action subject to judicial review, to safeguard consumers, and to protect the otherwise helpless. In a world in which religion and traditional moral systems have largely lost their institutional power and their authority, this conception of law and the view of people and society, of government

[8] Benjamin N. Cardozo, *The Paradoxes of Legal Science*, Columbia University Press, 1927 at 74-5.

and human rights, that it implies have become one of the most powerful moral forces we have.

I have put before you the ideal, not an abstract, disembodied ideal like that of the perfect society, of a clear and distinct idea, or of the rational man or woman, but the ideal as a historic force recognizing complexity, conflict, and the necessity to weigh and balance against each other the multiplicity of human interests. To recognize the nature of this ideal is to recognize that neither community sentiment nor scientific administration can be trusted to take the place of law, much as they may do to help. E.B. Pashukanis, Marxist that he was, rightly saw the freedom of the legal subject as a legal fiction—though he failed to see how powerful a force for good such fictions can be. Under socialism, he thought, law would be replaced by social policy and administration. Not individual rights and duties but socio-technical norms would be used to determine action. Society would be run like a hospital according to the rules of health and the social purposes of a hospital. Criminals would be seen as patients or as forms of social danger, to be released when they were cured and no longer menaces. Today, we know that hospitals themselves, like any human community, cannot be run by the rules of health or the science of administration or the precepts of medicine alone. They need to respect the rights of nurses and patients, of doctors and relatives; they need to balance interests, weigh evidence, respect persons. They do so better and they do their jobs better in societies that have and respect a living tradition of law. Nor are we comfortable—rightly, I think—with aversion therapy not entered into voluntarily.

A living tradition is not a fossil. It changes shape, expands in some areas and contracts in others, alters its articulations. It has constant need to adapt but also to purify itself, to guard against the corruption that comes from within: self-satisfaction, insensitivity to others, lack of imagination, status seeking, and caution. Professional deformation has been much emphasized of late; the values of professionalism perhaps have been under-emphasized. There is a fundamental tension, as Daniel Bell has reminded us, between the elevation of efficiency in many areas of social life, of equality in others, and of self-expression and self-determination in others still. The demands made on law in a society of mass production, mass consumption, and mass delivery of services, increase rapidly—threatening the hard-won link between law and common sense and the coherence and surveyability of the legal system. Law is overwhelmed by a mass of laws and, at the same time, by the results of surveys, public opinion polls, and the findings of social science. Traditional and fundamental concepts of our past law—especially the concept of property—in many areas have become so divorced from individual acquisition, labor, will, and enjoyment that they no longer appear as private rather than public. As actual inequalities in society come to seem less 'natural' and exclude fewer people from being heard, the tension between legal equality and social inequality increases—for law operates best where the legal equality and equivalence of parties is matched by

actual equality and equivalence in social life and power. Increasingly, we look to social policy and social legislation to protect us and our children as well as the less fortunate. Lawyers no longer dismiss public policy as an unruly horse. We no longer see private law as based only on the voluntary will of the parties, or public law as separate because it arranges a hierarchical set of obligatory norms and rules to which the individual is subordinated. We more and more often mix the two.

The bureaucratization of law, with its increasingly administrative character, is offset by the continued elevation and expansion of legally protected human and individual rights and of appeals against administrative action. As our horizon expands, we become aware of other traditions that do some things at least better than we do. The traditional *Gemeinschaft* societies of much of Asia, in their emphasis on sub-legal mediation and conciliation, on reconciling the parties, thus allow each side to a conflict to keep face and help to restore harmony. Much of our labor law now operates in that way. In a world of unprecedented change with far-reaching but not always obvious consequences, we do require as part of our decision-making more and more studies and information and consequently more and more investigations and administrative control. We have learned to pass laws based on genuine social investigations, to monitor their effects and alter them in the light of the results.

To believe, as I do, that the legal system and legal ideals I have outlined are a *sine qua non* for a society that will at least try to be good and just is not to believe that everything can be done by law or that the Anglo-American legal tradition, or even legal traditions generally, provide the only way to handle social conflicts or to reach proper decisions. They do provide the only just and effective way of establishing a general social climate and a system of appeal, that will fight injustice, oppression, and high-handedness, that will recognize that all interests have a right to be heard and individuals as individuals are precious. For this reason, they are inextricably linked with democracy. In much of the world, the battle to establish such a system of law and its attendant legal culture is still being fought as part of a battle for democracy. Evidence mounts that taking another path—that of alleged enlightened dictatorship, monocratic socialism, rule by experts, etc.—leads to greater and more concealed injustice, disaffection, stultification, and inefficiency—not to speak of the loss of liberty. In our own societies, blessed with free elections, law, and stable forms of administration, there are other problems—urgent, complex, not all of them to be solved simply by passing more laws. But the concept of the rule of law over politics, over natural and social science, and in administrative and everyday life is needed as much as ever. So is creative innovation and adaptation—capacity to be seized by the spirit and not only to live by the letter. Our capacity to do that in an increasing variety of ways makes it the best, not only the worst of times.

To grasp the ideal, the paradigm, firmly and with conviction, is not

to solve the problems of the world or of the neighbourhood just like that. Much of law operates in conditions of tension and conflict, of evil or of just, but irreconcilable, claims. It is a childish game, but the game of a wicked child, to jeer at legal ideals and procedures because they cannot safeguard us totally from self-seeking, corruption, and insensibility or because they provide no easy solution to what we should do with murderers, rapists, embezzlers. The problem that evil forces its opponents to use similar weapons is not a problem created by law; on the contrary, our struggle against evil is humanized by law. It is for that reason that we look to law to perform more and more tasks: to resolve conflicts between individuals or legal personalities; to promote honesty, decency, and social peace; to act in the interest of distributive justice by controlling or influencing the allocation or spread of rewards and disincentives, of material goods in the society, while giving concrete expression to all sorts of public policies. There is thus no single nature and function of law; it has many roles and functions that call for different styles and approaches, for different natures. Its coercive aspects can make it a ready tool for tyranny only if we destroy its spirit first, and it can tempt into law people who see it as an instrument for promoting personal or sectional ends.

In law schools, understandably but distressingly, the concept of law has been increasingly overwhelmed by the study of laws. The internal revenue regulations loom as large in the mind of the average lawyer as the concept of justice; yet even the internal revenue is subject to the demands of due process and natural justice. It takes a strong mind, rather than a woolly one, to remember that the multiplicity of laws, with all the variations and inconsistencies between them, complicate but do not invalidate the concept of law and a legal system.

In recent years, as the powers of the state and the demands made upon it increase, many see law more and more as an instrument for social control and social change, not as a tradition. Like E.B. Pashukanis, they want to substitute social policies and administrative direction for law and legal values and procedures. They elevate purposes over tradition, the forward-looking over the backward-looking, the dynamic over the static. In fact, we need both parts of each alleged dichotomy. For a period many, and now some, have believed that such policy can be derived from reason unaided by experience of social conflict or a tradition of justice, unaided that is, by the trial-and-error process of judicial determination. Social science, they thought, would give us the right social policies and the social policies would give us the correct laws and such correct laws should be obeyed, not challenged.

Our philosophical understanding of society, I hope, is more sophisticated now. Social science can give us important information. It constantly does. Such information provides the minor premise in reaching social conclusions. If it is wrong, the conclusion will be unsafe. But policies require, as a major premise, goals, ideals, interests. These conflict and cannot be brought to a common measure. Each policy will benefit some

and not others, will produce some wider goods and initiate some new harms or exacerbate those we already have. Both multiplicity of laws on the one hand, and social policies and moral science on the other hand, do not free us from the need to listen to those actually affected, to weigh and balance competing interests and a multiplicity of consequences, and then to reach responsibly and without external pressure of a disreputable kind, the judgement of justice. That *the law*, the law, not laws or politics, does best.