

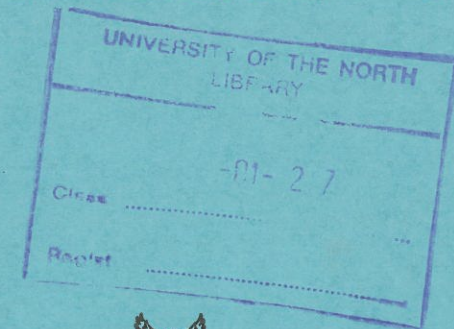
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SOME PHILOSOPHICAL REFLECTIONS ON THE CONCEPT OF JUSTICE

by

Z. POSTMA-DE BEER



PUBLIKASIES VAN DIE UNIVERSITEIT VAN DIE NOORDE
PUBLICATIONS OF THE UNIVERSITY OF THE NORTH

Reeks/Series A No. 14

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1971

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PK. SOVENGA
PUBLICATIONS OF THE UNIVERSITY OF THE NORTH
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"l'homme n'est rien d'autre que ce qu'il se fait".¹

In this essay an attempt will be made to outline some of the uses of the concept of justice in order to clarify somewhat the logic of the concept. Modern philosophy does not tolerate mysticism in the usage of concepts and the point of departure in modern philosophy, and in this essay, is that concepts have functions to fulfil. These discoverable functions constitute their meaning and these meanings are constituted within the world of experience. Our concepts form a logically interrelated 'framework' of knowledge within which there are certain logical possibilities and impossibilities. This framework must be regarded as incomplete to the extent that both human knowledge and experience are incomplete and partial and limited. Human experience is inter-subjective; there is no meaning outside this context. Meaning is public – conveyed by means of language, or rather, by means of the concepts of language. Different languages contain many concepts in common; if this were not so, translation from one language to another would not be possible. By means of the language or languages which we speak, and the concepts contained in those languages, people **give** meaning to the world in which they find themselves. We explain our limited, partial experience in terms of publicly accepted and used words. As experiences change, as the human scene shifts, develops and alters, so the words we use may change their meanings and may be given new meanings/functions/uses and new words are constructed to reflect the changed circumstances of our lives.

Thus it is submitted, right at the outset, without wishing to detract from the importance of 'law', the need of reverence for and submission to duly constituted laws, that

- (a) the concept of justice does not refer to an immutable set of commandments or a law or laws of nature,
- (b) the concept of justice is relative to the conditions of life in which people find themselves and
- (c) even when the concept is supposed to refer to some immutable, transcendental set of principles, the applications thereof would be relative, as they would be dependent for their execution and interpre-

1. *"L'Existentialisme est un Humanisme"*, by Jean-Paul Sartre, p.22.

tation on people of different persuasions and temperaments. In short, the applications would depend upon people who have different views of life.

The concept of justice is one of a whole family of concepts such as 'right', 'legitimate', 'fair(ness)', 'privilege', 'duty', 'legal', 'equitable', 'impartiality'. Let us look at these concepts to see in a preliminary, eliminative kind of way where and how they are used. This may help us to decide what kind of concepts they are.

§ 'Justice', the quality of being just, is a term found typically in the following kinds of context: there are 'courts of justice'; the judges in these courts are referred to as 'justices'; there are 'justices of the peace'; people who feel they have been wronged, call or plead for 'justice'; 'justice' is meted out to people who transgress the rules of a society; two parties in a civil dispute may go to court in order to obtain 'justice', or 'judgment' for or against the one; we speak of a 'just' man or cause or war; also of a 'justified' or 'justifiable' remark or complaint, error or mistake. And certain actions are regarded as 'just' or 'unjust'. Many more examples of usage could be given, but they do not answer the question which will have to be put: 'What are the bases for these phrases and the propositions in which they are found?' But first a glance at some of the related concepts.

Usages of 'right' in the sense of 'on your right'; 'the right hand side of the road'; the 'right' or 'starboard' side of the ship, seem inappropriate next to the usages of 'justice' which have been noted. In the latter an element of more than factual judgment (not purely right or left as in a description) was involved. Similar usages of 'right' would look more like the following: 'Mr. Wortworthy is the right man for the job'; 'In this dispute they have 'right' on their side'; 'X is the right answer to the question'; 'the right decision was given'; 'X has the right to use the road/receive his pay/speak his mind ...'; 'the behaviour of X was right'; 'right is might'; 'right and wrong'; 'it is your right to behave so'. These usages contain an element of evaluation. They are not purely factual. But this is a question yet to be gone into.

Further, we speak of a 'legitimate' child; a 'legitimate' complaint or

conclusion; also a 'legitimate' ruler. When do these expressions make sense? Again, avoiding the usage of 'fair' meaning 'beauty', we find 'all's fair in love and war'; 'fair play'; someone has a reputation for 'fairness'; being strict but 'fair'; and so on. Of the other concepts on our list, 'privilege' and 'duty' seem to go together. Perhaps 'right' and 'duty' would make a better pair, but one speaks of someone having 'many duties but also many compensating privileges'; members of parliament have parliamentary 'privileges'; they can commit 'breaches of privilege'; someone can receive 'unfair privileges'. As for 'duty', one hears that it is a 'duty' to fight for one's country; it is the 'duty' of the junior staff-member to make tea and it is a 'duty' to shew respect for one's elders. Not relevant here is 'duty' in the sense of tax or levy.

'Legal' and 'equitable' seem to be used in close proximity if not in the same ways. One speaks of 'legal obligations' 'legal rights' and 'legal claims' upon someone to do something. 'Equitable' is said of a claim which is not a legal one; a Will may make an equitable distribution of a testator's worldly goods. Lastly, 'impartial' and 'impartiality' seem closely connected with 'fairness'. A judge is said to be 'impartial' it is his duty to be 'impartial'; 'impartiality' is a virtue; etc.

The above list may appear somewhat dreary but some further attention must now be given to it. Does any pattern emerge and do these concepts possess any common features? Several remarks could be made in this connection:

1. In each of these statements or phrases, reference is made to some human activity/interest/relation(s). There is no reference to a 'natural' state of affairs or one in which human interests/motives are not involved. There is no talk of 'equity', 'justice' or 'legality' in the context of 'nature', the absence of man.
2. If we ask how statements of these kinds are to be tested for truth or validity, useful similarities and differences may emerge. Between
 - (i) 'Mr. X is a Justice of the Peace' and
 - (ii) 'X gave a just decision', and between
 - (iii) 'One of the duties of a judge is to pass sentence on convicted persons' and
 - (iv) 'A judge has a duty to be impartial' there are differences in

function (meaning) and in verification.

Statements (i) and (iii) can be easily verified by reference to actual states of affairs — 'facts'. Does Mr. X in (i), hold a certificate of appointment or not? Does a judge, in (iii), actually have the competence or function described? Statements (ii) and (iv) cannot so easily be dealt with. They are not to be verified by referring to matters that are purely factual. These two statements express attitudes and cannot be verified simply by referring to some facts. Whether we consent to, or reject them, will depend upon our own attitude and our own principles. We can only 'justify', 'validate' such statements (not 'verify' them) and do so in terms of principles, rules for behaviour. Disagreement 'in principle' is always possible as people may adopt (and do adopt) differing attitudes to their experiences. In (i) and (iii) the concepts 'justice' and 'duty' were used in a non-evaluative way. 'Value' words may often appear in propositions which can be verified in a factual way. For instance, (i) and (iii) are really factual statements. Statements such as 'Percival is the legitimate child of his parents' and 'The public has the right to use the public highways' are more complicated. The speaker may be expressing his attitude to the relation between the child and its parents, or defending the rights of the public. Then the statements could in so far be regarded as value statements. On the other hand, the speaker might merely intend to state facts, i.e. that in terms of known and existing rules (or laws, customs etc.), Percival stands in a certain legally recognised relation to his parents and that in terms of other known and recognised rules, customs, laws or bye-laws, the public is permitted access to certain areas. These rules are themselves based upon values and attitudes, but referring to them is not *ipso facto* adopting an attitude to them.

3. When used in their 'evaluative' sense (i.e. to express attitudes), — the sense which interests us here — concepts such as 'justice', 'fairness', 'duty', 'right' are abstract, 'second-order'. We cannot see 'justice' or 'duty'. These concepts do not refer us to visible, tangible objects, but rather, as may be suspected from paragraph 2, refer more or less indirectly to actions, behaviour or a whole pattern of behaviour. To say that someone has acted 'justly' or has done his 'duty', is to give

an evaluation of a whole situation, a complex set of facts, actions and attitudes. Acting 'justly' or doing one's 'duty', does not necessarily refer to one specific action but rather to an extended pattern or sequence of actions. In both instances evaluation of a situation, based upon attitudes concerning that situation, is involved. The relation between evaluation and that which is evaluated, it need hardly be stated, can be and often is, immensely complicated. All kinds of factors may be involved, such as personal likes and dislikes, lack of knowledge of 'all' the facts, prejudices, levels of personal development, different customs, backgrounds, etc., etc. And what one person thinks of another's actions may influence those actions and alter them, and this in turn may make it necessary for new evaluations to be made concerning a person. This 'dialectic' in the context of evaluation must not be lost sight of.

4. Some of these 'value' concepts have a wider or more general usage than others. We very frequently hear the words 'right', 'duty', 'justice', 'fair', and less frequently words such as 'privilege', 'impartiality' and 'equitable'. Having regard to the fact that these are already abstract terms, it seems the more general the concept, the more difficult it will be to pin specific meanings to them. What is 'just' may perhaps be definable in the abstract, but what of applying the word correctly to the particular events, actions and situations of everyday life — the only context where the concept can be derived from and be applied to — that one wishes to qualify or evaluate? Abstract definitions of concepts such as 'duty' are notoriously difficult to apply in particular contexts. We have seen this in the writings of both Kant and Sartre.¹ A proposition containing a concept such as 'impartiality', which is not, I think, as often used as 'right', can more easily be justified. There are not as many contexts in which the question of whether or not someone is 'impartial' can arise as contexts in which it can be asked whether or not someone is 'just'. This limitation in usage may make it easier for disputants to arrive at the bases of their disagreements, whether they be based on fact or on principle or both. In short, it is much easier to 'understand' the implications of what is meant by a

1. Op.cit., pp. 39-43.

judge being 'impartial' than to understand what the implications are of his being 'just'. In the latter case, of course, it may only mean that he is applying the law, but usually it will mean that approval or disapproval of the judge's actions is being expressed. It is in this last connection that the generality of the concept leads to difficulties. The same difficulty will be experienced with any such general value term. To say someone is 'fair', 'right' or 'dutiful', is to raise issues formidable in their complexity.

But these concepts are used. How we justify their usage has been pointed to above. In general terms, we justify a value statement by referring to principles. We refer to some **reason** for accepting such statements as 'X gave a just decision' and 'A judge has a duty to be impartial'. These reasons will be found in the context of those principles that we feel are applicable to the particular case. We may have to think hard before deciding what attitude to take in any particular case, and we may fail to really reach satisfaction and feel doubtful about our eventual attitude. But whatever attitude is eventually adopted, it will rest upon an **evaluation** of the relative factors in the situation. A choice, which in principle would be repeated under similar circumstances, will have been made.

Now, there is a distinction to be drawn between the choices made by individuals based upon their own, individual, assessments of the relative importance of the values to be decided between, and the choices made in a community, for a community. The 'rules' which govern the behaviour of an individual may be known and even accepted by others. In any case, it is only from a person's actions that we deduce what his priorities are and in so far as his actions do not negatively affect one, we are inclined to be indifferent to them. But if value-statements, and values themselves, rest upon principles, rules, and if there is a need for principles or rules in the context of a society, then the situation is somewhat different. Several points emerge:

- (i) We could not be indifferent to rules of society as we could be indifferent to the 'rules' of a private individual – for the former are applicable to everyone and thus affect each of us.
- (ii) The rules of a society must be known or at least knowable. After

all, rules are made by people for themselves and others and would be extremely ineffective if unknown.

- (iii) The rules, being known, must be accepted or generally approved of. It is unlikely that a rule which is bitterly opposed, resented and is completely repugnant to most people will long retain its legal status. To try and maintain such a rule would probably have the effect of bringing law itself into disrepute.

One of the points it is wished to make in this essay, is that the concept of 'justice' is constantly used in the context of rules, and that in the absence of rules, there cannot really be talk of 'justice'. Let us look at actual legal practice. A judge tries a case **in terms of** many and diverse kinds of rules. There are rules for evidence, which determine what kind of statements may be accepted by the court. For instance, in some countries a wife may not give evidence against her husband and her statements, in a case involving her spouse, would then be discounted. Or, evidence extracted in the absence of a lawyer or a magistrate, may be discounted. Then too, there are rules which determine whether the court has jurisdiction in a particular case. A case can only be heard if there are rules which make of the facts of the case a legally triable complex and which give the court authority in such a case. There must exist objective legal rules applicable to the situation to be judged. If no rule exists, then recourse may be had to legislation – the making of a rule – if it is felt that one should exist. It is then that laws, bye-laws, club-rules, game-rules, etc., come into existence.

To recapitulate, it seems that 'justice', 'acting justly', and the related 'acting rightly', 'having rights', 'doing one's duty', 'being legal' all have in common that they make sense in the context of rules which are recognized, accepted, or approved of. Outside the context of some rule or other, there could be no talk of such concepts. Depending on the context, the rules will be more or less formal, more or less *ad hoc*, more or less well-known, more or less general.

Now where do these rules find their justification; in terms of what principles or ideas do we come to accept rules, and the kinds of punishments which attend their transgression? This is a most vexed question. Religious people, who wish to solve their problems in the service of God,

try to obtain divine approval for the attitudes which they adopt and therefore refer themselves to sacred writings and mystic signs for the justification of their actions and attitudes. However, I do not think it is necessary to go into a discussion of comparative religion. The modern Western state, on the whole, is a secular one containing a diversified population. In South Africa, there are many faiths, sects and primitive people who adhere to no known faith, not to mention ideologists, atheists, theists, agnostics, free-thinkers and the like. The state must accommodate all these people without trying to decide between the relative merits of their beliefs or unbeliefs. Such cannot be the function of a political body.

The rules of the heterogeneous community – and this includes communities of many different kinds, such as the traffic community, clubs, dramatic societies, businesses, etc. – must of necessity be pragmatic, accommodating and compromising in nature. In short, they must work in everyday life and find their justification in that life and not try to justify themselves in terms of unprovable abstractions or religious beliefs held by sections of the population.

But this does not help us to explain how the rules which *do* function in the context of human relations come into being or how one establishes their validity or argues about them. For, rules are not simply found in the world, only waiting to be accepted by reason or the rational man. Men are not wholly rational, in any case, nor do they interpret 'facts' in the same ways. Saying that rules must be justified in terms of experience, in terms of daily life, gives no indication of how difficult it may be to develop such rules. The practical difficulties, i.a. the differing points of view of the legislators, the constantly changing world, are enormous. Perhaps we should speak of the differing points of view of the legislators as a theoretical difficulty, since these differences in view are often based on the different theoretical interpretations of the world to which the people concerned adhere.

Very few rules seem to go on through the centuries without being radically altered. Those that do, seem to be rather vague generalities: such are the 'golden' rule, and Kant's 'categorical imperative', which are susceptible of many interpretations and can be put into practice in many ways – even conflicting ones. The bulging statute books of most countries

supply ample evidence of the difficulties of providing rules for every contingency.

By now, it is hoped, the concept of 'justice' has lost its well-rounded completed appearance and has begun to appear like unfinished business in the context of the uncompleted business of living.

At the risk of sounding obvious, another feature of the usage of the concept must be mentioned; it is that the word is used to qualify or evaluate what are, in the last analysis, issues arising out of human relationships. Once again, despite strong temptations to do so, one must discard 'man to God' relations (an exception being laws concerning e.g. blasphemy – an apparent rather than a real exception, as these laws regulate human behaviour in an interrelational situation between men) as well as 'human–animal' relations (laws on cruelty to animals and sodomy being also but apparent exceptions) and animal–animal relations. Perhaps this point can be put as follows: it is man who is the sole possible subject of laws, only man can be accused or excused (A company, to be legally recognised, is given a *persona* and is then to all intents and purposes treated like a real person.).

The conclusion all this leads to is then rather obviously that 'justice' is strictly a human affair, the concept denoting a certain quality/harmony/balance in human relationships of certain kinds. More must be said about the quality of these relationships in order that the particular nature of the concept of 'justice' may emerge.

To state the obvious again, human relationships are very complex indeed. But it must be made clear in dealing with the quality of such relations, that more is involved than pure factualities. Much the most important issues between human beings are decided on the bases of attitudes, outlooks on life, which are not reducible to facts. Such attitudes are not, however, usually 'just taken up', although this is possible (frivolous people do exist). These attitudes are adopted and accepted in a number of ways, – by tradition, inculcation, imitation of others, 'rational' appreciation of a situation and even as the result of indoctrination, to mention a few possibilities. But still this says nothing about their acceptability, their justification or validity, even their 'appropriateness', 'relevance'.

A rule and/or a value can be justified only in terms of another more general rule or value, or to put it differently, by reference to another, general attitude held by whoever has posited the value or made the rule. If one were to press someone to justify an attitude from which certain rules flowed or in terms of which the person explained a value, then no doubt an 'ad hoc' hierarchy of values/rules/attitudes would emerge, in terms of which that individual acts, or at least professes to act and perhaps desires others to act. (The term *ad hoc* is used advisedly, as it is unlikely that people have neat hierarchies of values ready-made for every possible occasion. After all, in justifying our actions, motives sometimes appear, and preferences are clarified, which we might hardly have suspected we had). This hierarchy is certainly not a static, immutable one, but remains subject to shifts and changes, depending on the individual experiences and the changing interpretations of the world, of the person who possesses the values.

Some values/attitudes/rules, very few it seems, are more generally accepted throughout the world than others and some, perhaps the same ones, seem to be more stable, less liable to radical reinterpretation than others, in this connection one thinks of attitudes concerning murder and theft. But no matter how generally accepted or how stable a value may appear, these factors in themselves do not constitute an **argument** as to the validity, the applicability of these values in the world of present experience. At best, the persistence of a value is a reason for careful and reverent examination of the more general values or attitudes upon which it is based. It is always possible to find that these general values or principles are still valid, or on the other hand, that the value is based upon an outmoded or an anachronistic view of the world. (For example, values which were appropriate in a feudal kingdom will not necessarily be relevant in a modern industrial republic.) Whether or not a view of the world is anachronistic will no doubt in most cases give rise to the most furious argumentation. But at least, I hope, it cannot be denied that a view, a value or a principle **can** outlive its use. (People who use values as slogans might ponder this point).

In view of the possibility that a value might be or become obsolescent, it seems rather a frightening responsibility which we assume when we

punish people in terms of some law or rule, if we regard the law as an expression of the values subscribed to by people at a given time. (That laws, rules, are indicative of current attitudes has been mentioned above, but the following may be added: if it were not so, then how is it that not only do new laws come into being, but that old laws are sometimes revoked or are claimed to have lapsed? These things would only happen if people wanted them to happen — when their attitudes have changed concerning the matters legislated for or to be legislated for.) We look back in horror, not only at some of the punishments meted out to 'criminals' of the past, (burning, whipping, breaking on the rack and on the wheel etc.) but also at what we regard as the absurdity of some of the charges brought against these people (witchcraft, consorting with the devil, high treason — as when Thomas More refused to approve the divorce of a venal king, a person cooking on Sundays etc.). And then the severity of the sentences in relation to the crime shocks us. Children could be hanged for stealing half a loaf of bread in England, as late as the beginning of the nineteenth century.

Now it could perhaps be objected that the justice of a time reflects the actual situation of that time. Brutal remedies, it may be said, are called for in brutal times. And that with increasing enlightenment all round, more enlightened and merciful sentences will be passed. We cannot, so it may be argued, treat the mediaeval peasant or baron in the same way as one would treat a contemporary graduate farmer or businessman and expect to keep an orderly society. To do so would lead, or have led, to chaos and contempt of law. Perhaps. Possibly. But it could be argued, that for all his ignorance and brutality, the peasant did not make the savage laws, nor in so far as he was not the highest authority in the land, did the robber baron. The law came from the law-maker and perhaps it can be argued — charitably possibly — that the latter's brutality stemmed not from innate brutality or self-interest, but from ignorance, lack of enlightenment or even fear.

§ But what of our present situation? Having become aware of the relativity of the law, having as it were become self-conscious about it, can we still confidently assert the necessity or appropriateness of at least

some of our more frightful or frightening punishments? And won't our behaviour also appear barbaric at some not so far distant date? That is one accusation that most people who regard themselves as civilized, would like to escape. The question seems to resolve itself – in a preliminary way to: "How to enforce civilized laws in a civilized way" or "How to civilize those relations between people which fall within the field of law" or "How to ensure that our reactions to transgression of our laws do not come to appear excessive, ludicrous or unjustifiable".

Now one can easily become entangled in a very dense thicket of problems. Statements such as the following may serve as illustration of this: "Law and order must be maintained"; "Remove punishment from the legal system, or so moderate it that it has no deterrent effect, and the possibility of civilized life disappears completely"; "The law must have a sanction, for if it is correct to reward people for certain actions, then it must logically be possible to punish them for other actions"; "It is part of the positive-negative balance sheet of life that people should be punished". No doubt. But these statements are not, I think, quite relevant, despite their popularity in arguments on crime and punishment. The necessity for the rules of a society, and for sanctions if they are transgressed, has not been denied in what has been said above. What is being examined – and must be examined – is the relation between the rule and the punishment for disobeying the rule; and further, the relation between the rule and reality (concerning the concept of 'reality', let us cut the Gordian knot and say that the function of the concept is to refer to the totality of accepted views on the world at any given time). We shall deal with the latter relation first.

Rules of Society (laws, fashions, codes, etc.) and Reality

As has already been remarked, rules are made for people and in the context of a society of people. One person on his own does not construct rules of behaviour in this sense but at the most lays down for himself a code of conduct which he may or may not adhere to. Outside the living context of a society of people, rules of grammar, rules for the usage of the concepts 'fairness', 'equity', 'right', the very sense of the relationships implied, are non-existent. A Robinson Crusoe, without his man

Friday, does not enter into any relations with his environment that call for the application of any of the listed concepts.

Now, as rules or laws are only found in societies of people, and have as their function the regulation of human relationships within that society, the rules will be drawn up to meet the requirements and aims of the societies concerned. Of course, these aims and requirements may be more or less enlightened, more or less clear, more or less realistic, etc. To use a banal example which has at least the advantage of simplicity the rules constructed for the game of tennis are different from those of football because of i.a. the different way of scoring, the difference in balls used, etc., although the rules for membership in tennis clubs and football clubs will probably not exhibit great dissimilarities. Much more important, however, are those rules which affect many people in many relationships, more complex relationships than those obtaining in a club with relatively few and possibly very similar kinds of people belonging to it. The rules I have in mind, are the laws which are applied to all the members or citizens of a society, or rather, a country.

But, although immensely more complicated and numerous, the basis for the laws of a country, even if in some cases derived from antiquity, is the same. They too, reflect the views (held at some time) of the people constituting that variegated community as to what human relations should be – how people should behave. They are the reflection of the values held by people. (Note: Of course, this is putting the matter without regard to such instances where laws are simply obeyed because they are there without anyone questioning their validity. Amongst other things, this article is an attempt to criticize that attitude which assumes that laws are immutable and must not be changed, but blindly obeyed. This is not to imply that laws must not be obeyed while they are in force, although circumstances can arise where refusal to obey an obsolescent or asinine law would appear to be the only course of action. In such a case it would be up to people to decide whether the sanction of the law should descend on the law-breaker or whether the law should be repealed.)

Now rules are certainly not – one can only hope – 'just made'. They come into being, as has been said, to meet the requirements and aims of a given society. These aims and requirements vary greatly from one

country to another and from one time to another in the same country. Is it really necessary to enlarge on the kinds of changes that make new laws come into being? Perhaps a few examples will suffice. The coming of the steam engine and industrialization brought about gradually a whole series of laws about conditions and hours of work in factories, about the relations between industrialists and workers (strikes, lock-outs, minimum wages etc.); the internal combustion engine brought into existence third-party legislation, safety regulations, speed-limits on roads; on another level, the dis-agrarianization of society made 'usury' respectable as money became a marketable commodity next to land and livestock; the increasing recognition of women as individuals – due to real social changes – has brought about many changes in marriage laws as well as in sexual legislation, e.g. no longer is adultery in South Africa a crime; medical progress has caused a flurry of legislation concerning such matters as the privacy of patients, the moment of death and is causing much soul searching on topics such as birth-control, artificial insemination, euthanasia, etc.; the population explosion is, in India at least, causing legislation curbing the number of children a couple may have; pollution of rivers, of the sea and the air, by industrial and domestic waste; the disposal of effluents and of nuclear waste; all these are relatively new problems requiring solution by the organized community. They become problems when people become concerned about the various situations mentioned and when they feel that something has to be done. It is of course, notorious that many people are not worried by some or any of the problems mentioned above. For them, they are not problems and nothing need be done. The point it is wished to make here, is that a problem only arises when people decide that a situation is intolerable and should be altered. A problem is not 'just there' and accepted and found by all people. In this sense we are responsible for our problems.

When a situation is found intolerable, then regulations appear having as their object the alteration of that situation. And new regulations do appear very frequently. Today they are proliferating at an unprecedented rate which indicates the accelerated pace of complexity in human relationships and endeavours. Now upon what principles are such regulations founded? How can the legislator hope to draw up a law satisfying the needs of the moment, whatever they may be? How will he be able to

defend what he has done?

In the first case, it is no doubt possible for him merely to draw up such rules as would benefit him or his friends to the detriment of other interested parties. This he may, of course, do, but it is unlikely that his explanations for the law would simply state this – unless he were impervious to the effect of public disapproval. He would have to defend his work in terms of defensible principles/values/attitudes, in terms of arguments which can be tested for their validity by an impartial person, such as a judge. To me, at least, this implies that a law, in order to be defensible, must be rational, or is it perhaps possible, in the last analysis, to **defend** a radically irrational principle before someone who does not share the same view as that expressed by or in the principle? No matter how odd a law may look to a foreigner, it should make sense – at least to the people whom it is applied to. It should exhibit logical consistency to the extent that it does not break down under questioning; in short, it should be defensible in terms of a rational set of beliefs, or to put it in a rather Macchiavellian way, it should **appear** rational although it may, when examined critically, not be rationally founded at all. It cannot be doubted that many laws which are at present to be found on the law books of the world cannot be justified or defended in terms of reason, but find their 'justification' in custom, tradition and prejudice or because they are said to 'work'. The latter justification is a powerful one. Very often reforms work only on paper. This is not a plea that laws which do not immediately satisfy our logical queries should be disobeyed nor is it an admission that laws had better be left strictly alone. An attempt must be made to find out how one can go about, **ideally** to rectify existing rules and to draft new ones in a rationally satisfactory way.

It would seem that reason, or rationality will have to play an important rôle in a legal system which hopes to be defensible. The assumption has been made that it is out of the context of human relations, of human experience, that rules, whether rational or not, are drawn up. But rationality also, is not just found in the world. It has to be imposed, experience has to be organised and arranged, for 'reality', 'reason' are constructions of the human mind: 'tis a question of interpreting and re-interpreting the 'life-world', the experiences which we have in and of this world.

In other words, upon the welter of sometimes conflicting interests, and subjective experiences, a rule (or rules) has to be imposed, which will have to be satisfactory in that it can be defended rationally, will meet with sufficient approval to be obeyed, and will be practicable, workable, enforceable. To some extent – perhaps to a very great extent – such a rule will be arbitrary, in the sense that another rule could possibly have been devised for the same situation (e.g. driving on the left hand side of the road or the right hand side: either rule would do, as long as it is applied consistently). No rule can be regarded as final and perfect, and a completely different approach to the same situation might, in theory, quite frequently, if not always, be possible. Consider speed limits on roads. One approach may be to have every stretch of road littered with regulatory signs, another approach might be to leave every traffic situation where speed is concerned to the judgment of the individual road-user.

By their very nature, most legal rules are general, meant to apply indifferently to any instance covered by the descriptions given in the law or rule. And it is this I think, that gives rise to many problems concerning the understanding of the workings of the law, and perhaps some attention might briefly be given to this. The legal rule provides a 'framework' within which arguments concerning **particular** cases must take place. The particular facts, presented before a court of law, are relevant only in so far as they can be shewn to conform to the requirements of the rules covering cases of that kind. If the presentation of the particular facts fails to shew the applicability of a general legal rule, then the case must be dismissed. It is not so much a question of what is 'true' or 'false' as a question of 'Can the particular case be argued in terms of the existing legal rules?' For instance, can the facts be presented in accordance with the rules governing evidence? No matter how aggrieved someone may feel about a matter, or how real his complaint may be, unless a rule can be found which covers the facts of the matter (the complaint), no action can be taken. Like a tennis game a law case is, and must be, conducted according to its rules. And no doubt, as in tennis, luck, or the lack of it, expertness, or the lack of it, do sometimes and often play very important parts. In court, an opponent may make a slip, a judge may be off form, opinion in court may quite unjustly build up against a party in a dispute – in short we need not assume the practice of law is exempt from the

common fallibilities of human endeavour. The law and its administration is not perfect, infallible and omniscient. That is probably why e.g. South African Common Law tends to err on the side of mercy, giving the benefit of the doubt to the accused, and placing the burden of proof of guilt in criminal cases on the prosecution and not on the defence. (The question of proof is an interesting one and serves to illustrate the above statements about the rules which bind and limit the jurisdiction and competence of a court: it may well be common knowledge that someone has committed the crime of which he is accused, but it must be proved in terms of certain laid-down rules.)

Reviewing what has been said here, this legal layman comes to the conclusion that it may be easy, in the hurly-burly of the everyday execution of justice, to forget the relative bases of laws and the rôle played by opinions which may be very shallow-based and also perhaps to overlook the very great possibility of mountains being made of mole-hills in court; also the likelihood that luck and coincidence may play a part in law and its execution and the fact that what now seems a crime may later be condoned or even approved of, or, finally, that the accused's fitness to stand trial may become a question for dispute. It seems a pity, perhaps one may even say that it is tragic, that irreversible, final decisions are made which sometimes lead to the deaths of people by legal means, or their ruin even when they are not put to death. Such decisions, it should be borne in mind, are not taken from an Olympian perspective, but by other human beings, who may or may not be prejudiced but are certainly not perfect. The complicated systems which exist for the reviewing of legal decisions, by higher courts, serve as a reminder that all human action is susceptible to evaluation. And of course, the administration of justice and legal relationships between people do not exist merely within the walls of a courtroom. All these relationships and all the rules they are based upon are, in principle, evaluable.

In this section then, the relation between rules and reality was discussed. It is hoped that from the discussion it emerged that 'reality', i.e. our experience and our reflection on it, our interpretation of it, is a shifting, relative 'phenomenon' (for lack of a better term). It is not only the factual empirical world around us that changes, but also our views, interpretations

and acceptances that change: no direct correlation has been found between 'mental' changes and physical change (of the material world), but some adjustment in the one context to changes in the other context can usually be found. Just to add to the complication, it may be added that people have attitudes (views) about the attitudes of others (above paragraph) and here too, change is the rule rather than the exception. The 'conclusion' arrived at was that to justify a rule in this polyvalent and many-sided world of experience, one had to do so in terms of rational arguments – i.e. arguments acceptable to people of varied interests and views but capable of abstract thought.

The justification for a sanction to be attached to rules, would then appear to be found in the need for the members of a society to accept certain rules in order to make living together possible. The sanction would exist in order to compel those disinclined to obey these rules, not to disobey them, for the good of society. This matter goes beyond the definition of this section and we leave it to go on to a matter which arises out of it and at the same time forms the subject of the next section.

The relation between the rule and the sanction attached to it

The purpose of rules in a community seems clear. Ideally they serve to realize the desires of the community in question. Of course 'community' is a rather vague term and there are large differences between various communities in the world. In many communities, such as feudal ones, many people may be excluded from the processes of rule-making and the laws that are made may merely express the desires and serve the purposes of the dominant class or group. However, in so far as the 'excluded ones' do not resist, actively or passively, the implementation of such rules, they too serve to support the laws. But, once again ideally or strictly, the laws, rules and regulations, are the expression of the will of the members (all or some) of the community, and for safety it must be added again that (ideally) they must be rational. The rules of a community thus strive to bring into being or preserve a state of affairs regarded by the community as desirable; in short, they are regarded, at least by those that make them (in good faith and not cynically) as for the good of the community to which they are to apply.

A rule will be of little or no use unless it is obeyed. Unless the players in a game of tennis stick to the rules of the game, it will be impossible to record any scores and the game will come to an end, the players going their separate ways. In much the same way, community life will disintegrate if obedience to rules cannot be obtained. The ideal situation no doubt, would be that in which all the members of a particular community understand and recognize the need for the rules which obtain in that community and then accept approvingly that they are to obey them. But this situation of sweetness and light is seldom if ever to be found. After all, not only citizens but also the authorities are capable of unreasonableness; thus the laws themselves may fail to measure up to the standards of reason and reasonableness. But it is common cause, I think, that community life would collapse if large-scale contempt for and disregard of law prevailed. Therefore such a state of affairs is not tolerated to any great extent. And from the point of view of a law being broken by an individual, a sanction or punishment of some kind is usually attached to such an action i.e. if it is or can be shewn that the person breaking the law had the intention to break it, knew his action was wrong and was responsible for his action....

The question that must now be examined is thus: what kind of sanction can **justifiably** be attached to the breaking of a law? It seems that we must look again at the function of law or rules. If their function is basically to safeguard or establish values, or are the expression of values – that which the community regards as good and desirable – then perhaps from this it can be argued what the sanctions should be like. It would, I think, be inconsistent with the posited function of the law or rules, if the sanction were to be destructive of the values embodied in the laws, the disobeying of which leads to the sanction being applied. To be of beneficial effect, i.e. to be an expression of the values of the community, the sanction will thus apparently have to be consistent with the general values within the community. (*Caveat*: this is a logical requirement as people can psychologically cling to conflicting opinions simultaneously). In a rationally organized community, an inconsistency between the ideals of the community and the sanctions which are attached to laws would be seen as indefensible. Logical inconsistencies in an argument

destroy the value of the argument completely. (In this connection we may recall the following argument: The murderer has killed someone. It is wrong to kill. One must not kill. Let us therefore kill the murderer.)

Thus, while the sanction punishes or prevents actions which are disapproved of, it must not destroy the values of the community by its own negative quality. If, however, such is the case – that the punishments are negative or destructive of values posited by the community – then one wonders whether it is not correct to assume that this is indicative of the level of logical awareness or even of self-awareness achieved by the members of that community? It might be that the kind of punishments that are allowed/tolerated, tell us about the kind of society we are dealing with and not so much about the intractability, the brutality or the anti-social attitudes of the transgressor being punished. Let us take an example: In the early 19th century, certain crimes that are today regarded as offences, were in England punished very severely indeed: crimes such as the theft of small articles like a loaf of bread, and poaching. Now it can perhaps be said that in a capitalistic, semi-agrarian community such as existed in England at that time, 'economic' crimes were regarded as a direct threat or challenge to the principles upon which the community rules were based – hence the savage penalties. In contemporary Russia, we also hear from time to time of quite startling penalties attached to 'economic' crimes – such as making a private profit from some enterprise. But this again does not stand up to much investigation, and for the following reason: in a situation which is an immediate emergency, i.e. one that excludes to a large extent the possibility of calm choices, irrational, savage, or extravagant measures can be understood. But they do not make sense when the situation is not an emergency. (Note: People such as dictators always try to create an emergency in order to justify their draconian measures – the so-called emergency 'justifying' the 'choicelessness' of these measures. This tends to reinforce the argument that is now being constructed.) However, when the possibility of choice exists, then the person who is deciding, is responsible for his responses to the situation with which he is confronted: his attitude and the attitude he takes towards the situation will thus determine and explain his behaviour – not the facts of the situation themselves.

To return to the example of the severe penalties attached to the transgressions of law in nineteenth century England: they were not, although they were relevant to an extent, the **direct** result of factual social and economic factors. If we were to hold that they were directly deducible from such factors, then we would be reducing man himself to a mere immediate response-to-stimulus mechanism responding uniformly to the same stimuli, and this is the sterile mechanistic view of some Marxists and Freudians. Rather should we say that the penalties were the result of and evidence for the kind of attitude which prevailed among the people who made the laws at that time. We can see why so many explanations of such behaviour and of such laws, shy away from such a view as this, putting rather the blame on circumstances or on the criminal, because the picture of the law-makers that emerges, is not a flattering one. Sometimes the mask slips and then we may glimpse the grim visage of a Judge Jeffreys. However natural it is to blame the criminal for the kind of penalty he is made to endure, it is the other view which seems to follow from the reasoning adopted here. It can only be hoped that this argument itself does not conceal inner contradictions.

The sanction attached to a rule does not follow automatically from the existence of the rule but reflects the attitude held towards the rule concerned (its importance etc.) in the first place, and in the second place reflects the level, (if one may call it that) of punishment tolerated in a community: no other external 'facts' can be brought forward to support a particular punishment. The factors mentioned above are, I think, the only relevant ones. It is not so much a matter of facts as one of attitudes.

People can, for differing reasons, regard certain actions as wrong or dangerous and no one can doubt their right so to think. But the basic relativity of all behaviour even within a clearly defined human context (e.g. a game of some kind) must not be lost sight of and if it is the desire of a community to preserve its values by i.a. punishing the transgressors of its rules, then the punishments cannot be such as to be destructive of those values themselves. Hence the question again: how to remain civilized while punishing transgressors, how to behave rationally, defensibly and reasonably (as opposed to irrationally, inappropriately and absurdly) in dealing with those who break the rules of a society.

At this point let us recapitulate:

- i. The human situation is a relative one; different people have different values and experiences and interpretations of experiences.
- ii. Human beings are fallible; even within clearly defined sets of rules mistakes are possible.
- iii. Rationality, reasonableness, is an essential part of a rule or system of rules – would be indefensible otherwise.
- iv. Communities have values and it would be inconsistent when punishing those who transgress the rules, to act contrary to those values. It must be **decided**, when it is found that such an inconsistency exists, whether or not that inconsistency is to be tolerated.
- v. The citizens (the legislators) are responsible for the sanction which they tolerate – it is up to them and not to the criminals, what the punishment will be in the last analysis. Criminals are seldom allowed to sentence themselves.
- vi. Thus the law and its sanction depend on the 'tone' of the community and are an expression of that tone. Brutal people or indifferent people, make brutal, thoughtless or inconsistent laws. In so far – and it is very far – as we are to be defined in terms of our actions, we are defined by that which we allow to happen in our legal system as well as by what we allow and do in other contexts of our lives.

It is thus up to the individuals in a society to look into the mirror-image of themselves which is provided by the laws of their society and to decide whether they are satisfied with the picture they see. If the image is 'red in tooth and claw' and this satisfies the viewer, then no change will be made. If, on the other hand, something more elevated is **desired**, then no doubt efforts will be made to alter the situation. Whatever the changes, or lack of them, they will reflect the aspirations and ideals of the people who comprise the community.

From this discussion there has not emerged some ideal set of rules. This is impossible to construct. Only an awareness of what is involved in law-making has emerged, and perhaps that is of some help to those who, while trying to provide for the achievement of man's highest and noblest aspirations, yet have to take into account the basest motives of others and provide some protection against them.

OPSOMMING

Die artikel bied 'n kort filosofiese ondersoek aan i.v.m. die logiese funksies van die begrip 'reg' of 'geregtigheid' en bekyk ook aanverwante begrippe. Die hoofpunte is die volgende:

- i. Die ondervinding van die mens is relatief en so ook die reëls wat deur mense gemaak word. Die reëls vorm nie 'n geslote sisteem nie en die moontlikheid van ontoepaslikheid van sommige reëls bestaan. Die regverdiging van 'n reël moet geskied in terme van die werklikheid soos gesien vanaf 'n veranderende perspektief.
- ii. Menslike oordeel – selfs in die raamwerk van erkende waardes – is feilbaar.
- iii. Die regverdiging van die reëls wat gemaak word, verg logiese steekhoudendheid of redelikheid.
- iv. Bestaande gemeenskapswaardes se verhouding tot strafmaatreëls word ondersoek. Watter maatreëls word geduld en waarom word daar beperkings opgelê i.v.m. sulke maatreëls?
- v. Wetgewers self is verantwoordelik vir wette en hul sanksies en nie misdadigers nie.
- vi. Die wette en hul gevolge (sanksies) is afhanklik van die kwaliteit van menslike verhoudinge en die vlak van selfkennis in 'n gemeenskap.