The Metaphysical Aspects of Philosophy of Law

Dr. **Alan Xuereb**
M.Phil. (Jur.), LL.D.

Introduction

Philosophy of law deals also with juridical ontology. This study concerns the metaphysical aspect of the natural juridical order, with natural law and with the natural rights of the human person. However, there is another aspect which Dario Composta[495] calls *"diceologia"* which is a branch of ontology dealing essentially with the virtue of justice.

Composta puts forward two considerations:

Justice as *"iustum"* is not superior to natural law,[496] but it presupposes it;

Justice, being one of the cardinal virtues is connected to morality, but must be distinguished from the other virtues, namely prudence, fortitude and temperance, in that it renders morality, legal.

Justice is a form of *deontology* that may be called *diceologia*. Del Vecchio states that: *If the obligatoriness of justice, moralises the Law, this happens due to a process of legalisation of morality.*[497]

[495] Composta, Dario - Filosofia del Diritto II - I fondamenti ontologici del diritto, Pontificia Universita' Urbiniana, Roma 1994 Capitolo VIII "La Gustizia Nella Storia Del Pensiero" pp.217-224.
[496] Natural Law as intended in this thesis is a method not a code. Suffice it to say for now that in England the theory of natural law led to the Magna Carta, the Glorious Revolution, the declaration of right, and the English Enlightenment. It was the basis for the US revolution and the US bill of rights.
[497] Composta, op. cit. at p.218 para-phrasing Del Vecchio, La Giustizia, 3 ed. Roma 1946, p.46.

The word "justice" is itself a symbol as that term is understood in the psychological and philosophical system of one of the most influential thinkers of this century, Carl G. Jung. Jung states that:

"...a word or an image is symbolic when it implies something more than its obvious and immediate meaning. It has a wider 'unconscious' aspect that is never precisely defined or fully explained." [498]

Is this not what is meant when lawyers say that the law is presumed to be always speaking about? What is just and equitable in certain circumstances is within the discretion of a trial judge such that our concept of equity, or justice is neither precisely defined nor fully explained.

Law exists primarily to maintain order in society, and from this standpoint it appears quite conservative. When lawbreakers are dealt with under criminal law, the intention is to preserve and defend society and the way it is run more or less in a Hobbesian manner. Society has a working structure which depends on complying with the "rules". Persons who breach these rules are made liable to punishment in order to restore the social fabric:

NO LEGAL SANCTION = NO LEGAL RULE

The Contractarian Government

Lawyers are familiar with the necessity of voluntary compliance with laws of general application. Without such voluntary compliance chaos, or a state of revolution exists. We are familiar with the concept of this voluntary compliance as being of a contractual nature, of give and take, between the citizen and the state, between one citizen and another. Reiman describes the

[498] Jung, Carl G. ed. Man and His Symbols , New York, Bantam Doubleday Dell Publishing Group Inc., 1968, p. 4

Western experiences as being "the history of contractarian moral theory from Hobbes to Rawls."[499]

The notion of the social contract, of the necessity for voluntary compliance are not strictly Western ideas but are ancient and cross-cultural. (i) Taking unfair and unlawful advantage of one's fellows, and (ii) of the protections that the community provides (such as the Constitutional guarantees) are, one might say, universally condemned and found to be blameworthy, two elements said to attach to the notion of injustice.

It is common these days to hear criticism of procedural rights and privileges as being a shield for the guilty. The foregoing concerns, it is submitted, are of the rudiment of what it is to be human within the social context. They are specifically human, rather than specifically Western.

Justice should be done to those whom the institution would otherwise exclude.[500] Justice necessitates recognition of the *different*, but faces also the risk of incorporating or annexing difference in the name of a liberal consensus or some new and as yet indefinite universalising political doctrine.[501] Critical study of law supposes the injustice of modern legality and yet fails to make categorical its conception of justice and the criteria upon which the bias and intolerance of law are denounced. There is a profound scepticism of orthodox positivist philosophy of law towards morality which is shared by progressive lawyers and by the critical legal theory.

Their reservations probably stem historically from a rather muted approach to morality and justice adopted by Marx and Marxist theory. The majority of legal thinkers, however, concluded that Marx's frequent references to the unfair nature of capitalism were polemical and pragmatic and that he and Marxism had no true

[499] Jung, op.cit. p. 83.
[500] Williams (1991)
[501] Politics, Postmodernity And Critical Legal Studies-The Legality Of The Contingent - Costas Douzinas, Peter Goodrich And Yifat Hachamovitch -Routeledge 1994.

theory of justice. Moreover, this attitude was characteristic of radical lawyers, who denounced justice as 'class justice', while their struggle was aimed at achieving 'social justice'.

Strangely enough, progressive lawyers were both in favour and against justice, they were motivated by moral indignation but unable or uninterested in developing either a critical conception of justice, or else a programme for legal doctrine. On the other hand, a post-modern theory of justice allows otherness to survive and to become a theoretical space through which to criticise the campaign of the law's ceaseless repetitions. Justice in the post-modern era, however, cannot follow the protocols of a theory- it is thus, not a concept and does not apply a principle, value or code.

The post-modern judge is concerned with justice as applied to *id-Dritt* - he stands next to the litigant who comes before the court of justice[502] and hears his speech or request. Justice returns to ethics when it recognises the embedded voice of the litigant, when it gives the other person in his/her concrete materiality a *locus standi*. The law here is committed to the form of universality and abstract equality; but a just decision must also respect the requests of the contingent, incarnate and concrete other, it must pass through the ethics of alterity in order to respond to its own embeddedness in justice. In this unceasing conjunction, this commitment and detachment, this alternating current between the most general and calculating and the most concrete and incalculable, or between the legality of form and legal subjectivity, lays the ethics of a critical legal response to the material legal person, law's morality of the contingent.

Law is general and abstract. Law must necessarily be phrased in an impersonal way because it is addressed to hypothetical persons who may or may not fit the category of behaviour for which the law is framed. Furthermore, the law treats all persons in the same way when they come under its operation. Although under certain circumstances differences among people are taken into account, the

[502] Where there is a reference made to the Law intended as Dritt.

general character of law has the effect of treating all persons alike. This makes Law necessarily impersonal and abstract; and officers of Law must likewise think in terms of rules, not people; giving at times the impression that the preservation of a rule has a higher value than preservation of human dignity. Although a legal rule is, in fact, general, it nevertheless refers to concrete human beings whose behaviour it is designed to regulate. Whoever formulates a legal rule certainly has in mind the possibilities, tendencies, and dispositions of human beings, and he proceeds on the assumption that these conditions of behaviour are common to most men. It is hardly correct, therefore, to say that Law is abstract if this means that Law does not take into account the capacities of concrete persons.

The legal rule, just as the moral rule, is chiefly concerned with the behaviour of human beings, and for this reason, the category of Law is not fundamentally different from the moral category.

The conclusion one may now draw is that Law contains reasons for its enforcement, which go beyond the special concerns over the persons immediately involved. The importance of "generality" in law is not that it deflects law from personal concerns but rather that it seeks to be relevant to many persons and many times. In order to retain the relevance of law for a continuous period of time it is necessary to preserve its general character, not identifying the law with a particular event.

The stipulation of the law against homicide does not stipulate anything about the instruments used or the times at which the act may be committed, for it (the law) must be able to control all the great variety of ways in which the act is committed. However, even here the law shows considerable flexibility, for the specific result of killing a person has a variety of legal consequences. The law takes into consideration such factors as justifiable homicide in self-defence, excusable homicide, duress, insanity, accident, and mistake of fact.

Moreover, laws are binding in a particular place. A system of laws is effective and applicable in a limited geographical or cultural area. Only under special circumstances does a person in one state or nation have any legal liabilities under the laws of another state or nation. Laws apply for the most part only to the regular members of a community or to those outsiders who actually enter the community either physically or through such channels as trade and commerce.

Legal obligations thus have a limited scope of applicability; they apply to a specific group of people who have a certain formal relation to the lawgiver. Only when a law is mutually recognised, as between two or more nations, does it travel beyond its original boundaries. The European Convention on Human Rights, is an example of how a regional agreement can be incorporated into domestic law through parliamentary legislation. It is very much to the point here to recall that the legal philosopher Austin would not accord to international law the quality or character of "law". For him these rules governing matters between nations were called "positive morality" and not law.

Fourthly, as seen, law is concerned with external conduct. Thus there must be a standard of behaviour by which the law can measure an act - a standard on which reasonable men will agree. However, to get such agreement from reasonable men, they must be offered some evidence of external behaviour, which they can confidently analyse. The law is capable of making important distinctions between various types of behaviour, and it makes these distinctions chiefly based on external facts. However, the same act can transpire under different circumstances with correspondingly different legal consequences. For example, a man repairing a chimney throws or drops a brick down from the roof, thereby hitting another man and killing him. One may consider here three main sets of circumstances in which this might have taken place: a passer by climbed over a fence, was walking along the side of the house where there was no path and where no one was accustomed to walk, and was struck on the head when the brick-layer discarded a defective brick over the side; the brick-layer had carelessly piled

some bricks on the roof and one of them slid over the other side, striking a mailman who was approaching the side door where he always delivered the mail; the brick-layer recognised an old enemy and hurled the brick at his head. The differences between these three variations are obvious to a reasonable man analysing the specific details of the external act; there is no need to know any more about these acts for reasonable men to understand the different degrees of responsibility and culpability involved. Law, however accurate, cannot reach into the subtle wellsprings of benevolence; it cannot animate by force what by its very nature must be spontaneous and free. Nor can the law pursue people through all their waking moments, guiding and controlling them as they touch or intersect each others` lives in an indeterminate number of ways and in varying degrees of intimacy.[503]

Law then, must wait for a particular act; a single event lifted from an endless chain of human behaviour before its mechanism of control can operate. However, the event that triggers the mechanism of law enforcement is an external event, some mode of external behaviour. While the law can command the payment of taxes, it cannot require the additional element of cheerfulness, and while some aspects of marriage can be controlled by law, such as the registration and mode of the marriage, the community of acquests or the separation of property, etc.., there is no way for the law to guarantee true tenderness. The efficacy of law seems to end at the threshold of man's internal self, and at this point, there is nothing to judge the human act, except perhaps morality and God.

Upon closer inspection however, the distinction between external and internal behaviour is not so sharp or clear as it first appears. External behaviour is never unrelated to an internal act or to internal motivations. And we now that Man is not a dualistic entity, but a mono-existential entity. The same external act can, however, be produced by a variety of internal motivations. While the law is concerned chiefly with the external act and, indeed, will

[503] The gentle pliability of human existence with its constantly novel experiences, enlarging horizons, and delightful and tragic new turns and surprises cannot at any one moment be adequately anticipated nor fully captured in the form of a legal principle.

come into play only where there is such an act, the law nevertheless takes into account the factor of motivation, usually speaking of this element as "intent". To be sure, intent can be discovered only if there is some accompanying public act which is objective evidence of intent. The needs corroboration of the alleged facts through valid evidence.

Law is nevertheless profoundly concerned at appropriate times with the inner life of the actor as the decisive element in determining the fact and degree of guilt or responsibility. The law reflects the internal working of the moral self in still another way. Even though the legal rule applies ostensibly and in most instances to an external act, it is of utmost importance to bear in mind that the emergence or creation of the legal rule in the first place is an internal act.

Fifthly, law is concerned with minimum moral standards. In fact in most societies, the law limits itself to those requirements considered basic to the social order. This is particularly true in a society which exalts the value of human freedom. The scope of freedom is in inverse proportion to the scope of law, for as the coercive power of law is extended over human life, to that extent human freedom is diminished. However the freedom of individuals has to be in accordance and in relation to, (not to mention respective of) the rights and freedoms of others. As the American Supreme Court remarked:

"*The liberty of the individual to do as he pleases in even innocent matters is not absolute; it must frequently yield to the common good*".[504]

In a free and open society, therefore, the law is restrained and restricted to guaranteeing the minimal conditions for an orderly and peaceful community. The law provides the structure within which men can live with reasonable assurance that promises will be kept, property will be safe, and that people will not suffer intentional physical harm. Once these minimal guarantees are secured, the law

[504] Adkins vs Children's Hospital (1923) 261 US 525.

can refrain from prescribing man's conduct in more specific detail. The law has frequently been considered as playing the role of an umpire: it watches the contest only to insure that nobody is pushed off the track or tripped. It is not the function of the law to make sure that everybody wins the contest, but only that the lanes are kept clear. In this view, the law is limited to providing a race course within which various kinds of events can be performed, depending upon what the people find interesting and compelling.

This is to say that the law as such is not the agency for bringing to fruition the full possibilities latent in human nature or its destiny. There may also be a deep scepticism in this view over whether there is any particular fate or discernible structure in human nature, the possibilities of which should be persuaded into reality by the agency of law. Even if human nature did require special modes of behaviour, this view asks, is it by law that this behaviour should be ordered? The law simply liberates Man from daily concern over survival so that within this secure context he can turn his attention and energies to those more intricate and personal relations which his moral and social nature urges upon him.

In this context humans assemble to marry, do business, debate, study, and worship. They express ideas about goodness, justice, truth and about ultimate reality. Human beings communicate through speech, the printed word, and various forms of art. They form associations for the production of goods, education of children and adults, and for the worship of God. The way humans act in this broad sense cannot be fully prescribed by law because life in this sphere is too polymorphous. Large areas of life must be left untrammelled in order to preserve the possibility of free and creative new adaptation of human values.

Law is brought into the area of art, literature, education and religion, under great peril. For the law, before it can be the guide for the community, must itself be informed by the highest insights of the community. Can the Law, however, decisively control those

areas of behaviour which by their very nature are still in the process of discovery? Can the law define what is truth or how God is to be worshiped? If law is brought into this arena the result may be catastrophic. The injustice that may accrue is incalculable, ranging from ethnic cleansing to concentration camps. This reminds us of what Pontius Pilate had asked Christ during the latter's trial: "what is truth?". Implicitly asking "cannot there be more than one truth?". This was another way of inquiring "what is justice?", implying perhaps that justice is multifaceted, but that the law is inflexible and prescribes behaviour with a certain amount of certitude. Even if reasonably reliable "truth" is available to a community, is it within the scope of the law to regulate the broad area we have here been describing, or is this to be reserved for the more subtle control of morals? The breadth of the law's concern is in no wise way suggested by what the nature of law is. Whether the law will be used narrowly or widely is not a matter of the meaning or nature of law but a consequence of society's decision about its use.

Aristotle saw in law the instrument for habituating men to the morally good life; Soviet jurists saw in law the agency for the remaking of human nature; and in the United States the law has gradually absorbed many areas of behaviour which were previously considered the proper province of morality. The scope of law then changes from one era to the next, and in our era law has spread its control over a very wide span of human behaviour. It may be that the law never self-consciously or deliberately enforces an immoral mode of behaviour; those who fashion the law, for the most part, believe that the substance of the law is either required by moral considerations or at least by the general welfare of the community, which is itself a moral consideration.

The scope of law appears to increase as a society becomes more sensitive to how human beings "ought" to be living or how the social life of men can be improved. The simple guarantee that promises will be kept has expanded into a broader control over what kinds of promises or contracts will be permissible in the first place. Moreover, the guarantee of the safety of property has also

been accompanied by a radical re-conception of what private property means and what rights collective society has in this property.[505] The protection from injury has also been broadly reinterpreted so that today injury is no longer limited for the purposes of law to physical harm but now includes such forms as injury to reputation caused by slander and injury to personality caused by segregation - such as in the new consumers` tribunal arbitration, where moral damages can be awarded.

Sixthly, the law is made not discovered. Early jurists were fond of saying the opposite - that laws are not made, they are found. But by this they probably simply meant that the *obligatoriness* of a law was to be found in its moral defensibility. Certainly, laws are made in the sense that they emerge from a formal process of enactment. Certain modes of behaviour are neither just nor unjust, neither good nor bad, (they are value-neutral) until a formal rule is made to regulate them. Let us take an example: some of the traffic control transform otherwise neutral behaviour into contraventions as soon as they become official. It is an offence to travel at certain speeds or park in certain locations only after rules declaring these as offences are promulgated. Without such an applicable rule these acts are legally indifferent.

The positing or making of the rule is the only way law comes into being for these acts. Positive laws prescribe our behaviour not only in these areas which are morally indifferent before the law is made for we have already seen that the law as often enforces behaviour which is suggested or required by moral obligations. Even here, however, the law is made and has a positive character only because of an act of the official lawgiver, who has the authority to enact such law as provided by the Constitutional order of his system. Whether the substance of the law is morally neutral or morally freighted, the quality of law attaches to a rule only when it becomes part of an official system of rules, under the recognition of a Constitutional system, through an act of the political sovereign,

[505] Such as minimum wage and social security laws.

either through the legislative process as in Malta, or through the judicial process.

Why ask such questions before concretely investigating injustice and unconstitutionality? Though there are many ways in which the word "law" can be used, we can now limit this concept to those rules which are the official norms of behaviour within a society and which are made official in some positive way by the sovereign authority. To say that law is a rule of behaviour commanded by the sovereign means no more than that until a rule has this element of positive enactment or recognition it may be a customary rule, a moral rule, a religious precept, but not law. This does not mean that customary, religious or moral rules do not at any particular time have the *obligatoriness* of a legal rule.

When the common man in the street says "there ought to be a law against it" he is alleging that what at the moment may be only a moral obligation ought to be made a legal obligation. The moral rule and the legal rule may very well have the same substance, but what transforms the moral rule into a legal rule is its official recognition or promulgation by the political sovereign. The moral rule by itself is not a law. But the moral rule can be or become relevant to the process of law. However, one must understand that laws do not in every instance perceivingly have a moral basis. This means that, in the narrow view, the quality of law is conferred on a rule by the act of positive recognition or promulgation. This does not necessarily mean that a person has rights only if the law makes them or confers them upon him.

It is one thing to say that to make a legal rule is to create a right and that until the legal rule is made a person has no right at all; it is quite another thing to say that when the legal rule is made the conditions for dealing with human rights in a legal way have been established. Generally speaking, rights have their initial form in morality. When we speak of fundamental rights of the individual we are referring to moral human rights really. In this sense the legal rule is only the official recognition and the technical means of enforcement of rights. The law does not invest a human being with

the qualities of worth and dignity - these other values flow and are intrinsic to human nature when viewed from the standpoint of morality. The identification of rights is never complete, either in the fullness of their description or in their number, for specific rights come to light only as conditions focus upon them. The moral priority of rights, however, does not alter the fact that a right becomes legal only after a law has been made, either by legislation or a judicial decision. There are times when a moral right has not yet been legislated but becomes relevant for the first time in the course of a controversy in the judicial process. The making of law is, therefore, not in every instance the beginning of a right, but in critical areas of human behaviour it is the extension and transformation of the moral right into law. Law in the making often reflects the weakness, selfishness, and predatoriness of which men are capable. The existentialist view recognises that there is no guarantee that the law will always be made in accordance with Man`s moral insights or the requirements of his moral nature. Though human and political rights incorporated in most Constitutions guarantee such rights, there is no way to guarantee that loopholes in these Constitutions give way to unjust laws which nonetheless are not unconstitutional. However, a legal "safety-valve" exists in most jurisdictions - that is the fact that laws are promulgated, and enacted, but may be repealed.

Finally, legal obligations are not nearly so ultimate as are moral obligations. In spite, of the intimate relation between law and morality, the law is not the standard of morality, though it might be a standard of morality. Law and morality are bound together because the function of law as an agency for controlling human behaviour cannot proceed without reference to moral imperatives. Law here is seen as a flexible tool for regulating human conduct, and its flexibility is the outcome of man's ever new insights into what is morally right. To a large extent the direction in which the law will lead human behaviour is suggested by the moral tendencies of a community. A law which seeks to enforce fair trials for all people clearly has a different moral quality from a law which prohibits members of a minority race to own property. Every legal system is made up, on the one hand, of laws which reflect

clear moral imperatives and on the other hand of laws which clearly cannot be morally justified. If the law were to represent our only standard of right, we would lose the independent perspective which moral insight provides from which to evaluate the law. We constantly speak of good laws and bad laws, and we do this from whatever moral position we have taken. When our moral judgement condemns a law as bad, we are faced with the dilemma of obligations contradictory to the legal rule and to the moral rule. There are in other words two at least dimensions on the plane of obligation; there is allegiance to the fundamental and inalienable rights of the individual, and loyalty to the democratic legal order.

In a democratic system of law there is a double basis for legal obligation. The law is obeyed, for more than one reason: Firstly, because of its moral quality; secondly, it is obeyed because it is a proper and official part of the structure of law; and thirdly because generally there is a sanction of some kind attached to the non-compliance of the legal rule. It may be that not a single law can ever arouse complete or unanimous consent about its moral defensibility, yet it is generally obeyed by virtually the whole community.

There is then a kind of morality, or moral obligation, which compels one to obey the law for the sake of the community, even when one does not accept the moral substance of the law. The members of a democratic community will to varying degrees and extents, always have some criticism to make of the laws. Most of these moral criticisms have the effect of reducing or eliminating for such a person the moral obligation to obey the law - he may decide that the law simply violates elementary distributive justice, as in the case of an unjustly discriminatory tax; but the fact that a law is morally deficient does not immediately lead to disobedience of the law, for there is still the second basis of *obligatoriness* - that the system of law, which encompasses the remaining rules and procedures, must be upheld. This is particularly important when one considers that an individual's criticism of the law may not be shared by other members of the community who also presume to be expressing their moral judgements. Again, even the bad law is

obeyed under certain circumstances, because in this way the structure of the legal order is preserved.

In a democratic society there are specific remedies available for dealing with an unjust law which falls within the paradigm of what is generally held "unjust", without threatening anarchy or chaos. The main among these remedies are the legislative and judicial processes of declaring a law unconstitutional, and thus null and void. It is possible, therefore, to renounce one's obligation to the questionable morality or injustice of the law and at the same time to obey the law for the sake of the legal order upon which other important values continue to depend.

In such a case one affirms his higher obligation to the moral rule in whose light the law now becomes morally deficient. The degree of "injustice" in the law will vary from law to law, and thus the intensity of one's reaction to it will also vary. The unjust law can either be superseded by a new law or challenged through the judicial process. If neither of these procedures is available because either the mode of power or the predominant opinion is contrary to a person's moral sensitivity, he then must decide whether to continue to obey the law out of a desire to preserve the legal order or whether his moral obligation overrides even this second basis of the law's *obligatoriness*.

The life of the law involves a continuous process of protest. No formulation of positive laws can ever be taken as absolute or eternal. The basis of continuity in the law is provided by those accurate and fundamental insights into human nature and rights which history continues to affirm. Legislation and court decisions prevail only as they continue to fit the moral and existential expectations of society. Where these laws have lost their contact, either with the practical necessities or the moral sensitivities of the time, they either fall into desuetude or are altered or eliminated altogether. If they are neither abolished nor are they in disuse, then the result may be injustice.

There are times also when the whole structure of law, and not simply a specific law, is looked upon as of secondary importance by some in the solution of severe social problems. The overwhelming sense of moral obligation concerning human relations overrides the more deliberate processes of law. The feeling that the solutions to these problems are immediately mandatory and cannot wait for the inherently sluggish pace of the law nor take the risk of a technical diversion or obstruction has often led men to bypass the procedures of law by disobeying the law. This has resulted in civil disobedience, riot, revolt and in the most critical of cases in revolutions. The law, as will be seen, has learned to anticipate this problem and has made provisions for predictable protest. Contrary to the Marxist tradition, it is claimed that successful revolutions are social disasters. On the other hand contrary to the liberal-conservative tradition, it is claimed that reforms are not the [only][506] driving force of history either. Social progress is won by lost revolutions since they force the rulers to install reforms in order to avoid subsequent revolutions thus initiating the evolutionary process of breaking the foundations of unjust systems.[507] However, although there is some postponement of disobedience to law through the double basis of law`s *obligatoriness* and through the availability of regular procedures for challenging and altering the law, the time may very well come when a person feels that his obligation to law is not ultimate, that his moral obligations are of a higher order.

Laws are the tangible means of expressing the practical reasonableness of authority and its subjects towards the common good of a community.

LAW => JUSTICE => COMMON GOOD

[506] My qualification, not Novak's

[507]Nowak, Leszek Revolution is an Opaque Progress But a Progress Nonetheless in Social System, Rationality and Revolution, Nowak, Leszek (ed)Publisher: Rodopi, Amsterdam 1993

Laws must also abide by the theory of justice as fairness while respecting and preserving the absolute as well as contingent rights of all individuals.

The aim of law ought always to be justice. This does not mean that it is always going to be so; in reality positive laws are generally though not exclusively an attempt to enforce and achieve the principles of justice. According to Finnis 'there are human goods that can be secured only through the institutions of human law, and requirements of practical reasonableness that only those institutions can satisfy'.[508] Furthermore, the aim of justice is the common good, which may be described as the good or well-being of the community as a whole, without however, neglecting the individual good, which in a truly 'good community' should be compatible with the common aims and goals. In fact we may summarise the argument by saying that the aim of the common good is the good of all individuals.

Law as Practical Reasonableness

In discussing his account of law in the *Summa Theologiae*, Aquinas offers this definition of law:

"Law is the reasonable ordinance or prescription which is promulgated, is for the common good, and comes from the one who has charge of the community".[509]

The source of human behaviour is reason, but also within reasoning there is something which is a source of everything else, with which law must primarily be connected.

As Hart puts it 'law must have a minimum content of primary rules and sanctions in order to ensure the survival of the society or its

[508] Finnis, John – Natural Law and Natural Rights p.3
[509] ST I-II q. 90 a. 4

members and to give them practical reason for compliance with it'[510]

In practical reason, which is thus concerned with behaviour, that source is our ultimate goal in life, and that, is happiness or bliss?[511] Therefore, according to Aquinas, law must concern itself above all with our orderedness to well-being that may only be achieved through justice.

'The force of a law depends on the extent of its justice. In human affairs, a thing is said to be just because it is right, which means that it is according to the rule of reason.' [512]

Furthermore, since parts in their incompleteness are ordered to the completeness of their wholes, and each human being is a part of a complete self-contained community, law must properly be concerned with the general welfare of the community.

Since law is primarily an ordination for the general good, commands to do particular deeds are laws only when ordered to that general good - thus all law is somehow ordered to the general good. However, this does not mean that the common or general well-being is in opposition to the personal good.

The prescriptions of law apply the law to what it regulates. Moreover, orderedness to the general good, which is law's concern, is applicable to individual goals and so certain of its prescriptions concern individual acts.

However, a problem then arises as to who may and can legislate? Given that law is only so properly called, when it relates primarily to the general good who may plan for the common good? Planning for the general or common good of one's own community belongs

[510] Hart, pp 189-90

[511] Aristotle in his definition of matters of law makes mention of happiness and the city community. He asserts that we call those acts just in law that promote and conserve "happiness" and its components in the city state, for it is the city that is the complete self-contained community, as Aristotle says elsewhere.

[512] Aquinas, Summa Theologiae I-II q. 95 a.2.

either to the people as a whole (in a democracy) or to someone standing in for the whole people (which could be a parliament). Thus, legislating belongs either to the whole people, or else to some public, thus legitimised person[s] whose role and function it is to care for the whole- [a] representative [s] of the people.

Aquinas suggests that all positive laws necessarily have four characteristics:

1) The law must pertain to reason; (Practical Reasonableness)

2) It must always be directed towards the common good; (Justice)

3) Laws are only to be made by the whole community or a delegate; (Authority)

4) The law must be promulgated.

Human Law must also be enforceable and thus have legal obligatoriness.

Law thus, exists not only in the one doing the regulating, but also shared in the one regulated. In this way, everyone is a law unto himself, by sharing in the orderedness coming from the regulator.

Laws must be enforceable – Obligation

One must clearly distinguish between moral obligation and legal obligation. Moral obligations may be traced back to a more encompassing moral norm, for example the moral norm respecting the value of the human person whereas the legal obligation can be traced back to some democratic Constitution (or Act in the absence of a written Constitution).

It is important to keep in mind, that:

"*The equal obligation in law of each obligation-imposing law is to be clearly distinguished from the moral obligation to obey each law*"

Enforceability partakes to the legal obligation realm. A private person can admonish, but if his admonitions are not heeded, then he has no power of enforcement to foster *uprightness* effectively.

Nevertheless, law, to foster practical reasonableness and the well-being of citizens effectively, must have this power, as Aristotle says. This power resides in the people or the public authorities that can inflict penalties, so legislation is reserved to them.[513]

Moreover, just as the good of an individual is not the ultimate goal, but must serve the general good, so the good of a household must serve the good of the city, in turn the good of the city must serve the good of the whole nation and thus of the whole international community.

Furthermore, if law is to have the binding force proper to it as law, it must be applied to those who are to be subject to it by some promulgation that brings it to their notice. Promulgation then is required if law is to have force. Law is an ordinance of reason, made for the general good, laid down by whoever has the care of the community, and which is promulgated.

Laws Require Authority[514]

[513] On this point see Finnis (op. cit.), who discusses both authority and law (coercion) in quite some detail.

[514] There exist very enlightening relations between the concept of authority and that of law. It is perfectly appropriate to speak of the authority of the legislator, and it would be arbitrary to identify authority and executive power. Authority and law appear to evidence opposite intelligible tendencies, and this is intriguing. Also when authority serves to insure the united action of a community under certain circumstances which render unanimity precarious, authority is exercising an essential function. But after we have discounted all factors of a negative character, such as ignorance, short-sightedness, and selfishness, it is the contingency of our ways, the possibility of attaining our goal one way or the other, which renders unanimity precarious and causes authority to be the indispensable condition of steady unity in common action. Authority is perfectly at home in the management of contingency and in the uttering of practical conclusions. Law is more at home in the realm of necessity. If any law is so grounded in a necessary state of affairs as to be unqualifiedly

Authority is basically necessary to unite the political community towards the common good, while possessing the ability to solve its co-ordination problems. All forms of authority, and in this case political authority, must also respect the rights of all individuals according to their own practical reasonableness, and conform to the theory of justice as fairness.

The expression 'authoritarian government' then, may be considered redundant inasmuch as every government implies authority. Yet it is not by meaningless chance that this expression has come into existence, for in contrast to those governments which systematically proceed by law, as far as law can go, the governments which want their initiative to be, as far as possible, free from direction and restriction by law can be called authoritarian with some decency.

Accordingly, the principle of government by law is held in check by the inevitable and fully normal contingency of the situations that government has to deal with. The relevance of this principle is straightforward, for law admits of powerful and lasting guarantees against arbitrariness. Beyond the last settlement of law, Man is but precariously protected against the arbitrariness of his decisions. Government by law is a principle that must be asserted with special firmness and frequently recalled, precisely because it is inevitably restricted by opposite requirements.

The principle of government by law - which evokes an analogous term, namely the Rule of Law - is subject to such precarious conditions that, if it were not constantly reasserted, it soon would be destroyed by the opposite and complementary principle - that of adequacy to contingent, changing, and unique circumstances.

immutable, this is a law in the most excellent sense of the term, but only Eternal Law may be immutable. Let us not forget that anything man-made is relative, both in form and in content.

Law Must be Just

This point has been delved into in the chapter concerning justice.

Laws participate unequally in the character of law. Some are "morally charged" others are relatively speaking "morally neutral"; but the point is that there is nothing neutral in the true sense of the word.

It is argued that contemporary theories of justice focus exclusively on nearly just societies and ignore the issues in radically unjust societies. As a result of this focus, these theories have four important shortcomings when they are viewed from the perspective of someone living in a radically unjust society. The first deficiency is that contemporary theories of justice do not provide sufficient guidance on the way in which injustice should be identified. The second deficiency of these theories is that they have a lack of clarity on the issue whether theories of justice are universally applicable to all societies. The third deficiency is the relative neglect of clear guidelines on an appropriate method that could be used for designing, constructing and justifying a theory of justice. The fourth deficiency of contemporary theories of justice is an absence of thorough evaluation of forms of political action that could be considered to be acceptable strategies for the transformation of a radically unjust society into a nearly just society. These shortcomings imply that these theories of justice cannot be applied to the problems of radically unjust societies in a simplistic fashion. [515]

Concluding Notes on Law

Law ought to be a servant to the human being, and the human being should never be a servant to the Law. Law remains essentially a yardstick. It will always be a way of testing and

[515]LOTTER, H P P - Deficiencies in Contemporary Theories of Justice, S Afr J Phil, 172-185, N 90

crystallizing public opinion. No doubt that Law is willy-nilly, also organized public opinion, but it is not just that. Law is also a set of basic moral substantive and procedural values, that have been fashioned in accordance with higher "behavioural norms". However, there is nothing absolutely incorrect in saying that there is an element of organized popular ethos in every bit of legislation (even in the most unpopular law, such as the VAT legislation locally and the racial laws in Nazi Germany) passed through Parliament, it is wrong to state that Law is exclusively or mainly that. After all public opinion is the result of the prevailing values in that society. Again not just that, since public opinion takes into account not only the higher percentages of "ays" but also of "nays". The whole process is a comparative analysis, a juggling feat in an attempt to resolve conflict, tension, dispute, inconsistency and other niceties of the sort. It is also true however, that there is much more than that; laws are also a result of past societal processes and cultures, of past ideals, of past aspirations, of past necessities, of past discrimination (sometimes positive and sometimes negative) and so on. Besides being also a product of the present equivalent of all these and more!

Unjust laws, as will be seen, may therefore be described or defined diversely; perhaps in accordance with the prevalent values of one society or in those of another in many ways different or in conflict, but what appears to be common to most is that the importance of the human person remains paramount. The problem was that in some societies some were not considered persons.

Concluding Notes on the Common Good

The state of affairs appears to have become slightly more complicated in reality than in theory. The emergence of the phenomenon that has been termed as: *neuveaux riche* has changed the idea of low educational background equated with a low income (and thus poverty). This has also been experienced in Malta where people who traditionally come from a "working class" background have ascended the economic ladder and have now acquired a new purchasing power. They are economically wealthier. What still

remains uncertain is whether this new economic power has ameliorated their educational, cultural and artistic skills? Are they better persons? Do the *neuveaux riche* lead a more fulfilled life? Do they contribute more towards the common good of others and of humanity besides perhaps fuelling the economical engine of the society they live in? Does humanity and future generations gain anything at all from the fact that more persons gain more money but essentially these persons remain stuck in ignorance and muddled-headedness? The argument being submitted here is that going up the economic ladder is not always equivalent to going up the social ladder. This is an emerging millennium justice-related problem.

A sense of injustice is also heard in Jonah who on taking passage in a ship that would carry him away from Nineveh, he was caught in a great storm and swallowed by a fish, to be regurgitated alive three days later on dry land:

".... I cried by reason of my affliction to the LORD, and he heard me; out of the belly of hell cried I, [and] thou heardst my voice."[516]

A sense of injustice was also felt by Habbakuk:

"Why dost thou show me iniquity, and cause [me] to behold grievance? for devastation and violence [are] before me: and there are [that] raise strife and contention."[517]

He then exclaims, out of what we might at first classify as justified rebellion to what Habbakuk considered an injustice towards him:

"*Therefore the law is slackened, and judgment doth never go forth: for the wicked doth encompass the righteous; therefore wrong judgment proceedeth.*"[518]

[516] Jon 2:2
[517] Hab 1:3
[518] Hab 1:4

The sense of injustice here is *interpersonal*, since it is directed either towards God, or towards other humans. This kind of injustice is not attributed to misfortune.

"It is the betrayal that one experiences when others disappoint expectations that they have created in him.[519] *This sense of injustice has always been with us. We hear for example, the sense of injustice in the story of Job the Hebrew hero of the biblical Book of Job, which deals with the fundamental problem of undeserved suffering. Afflicted through Satan with the loss of family and possessions, and then with disease, the upright Job accepted all as the will of God.*[520]

"*So Satan went forth from the presence of the LORD, and smote Job with sore boils from the sole of his foot to his crown.*"[521]

Dickens is not alone. The hero of Heinrich von Kleist's Michael Kohlhaas and Coalhouse Walker, who is at the centre of E.L. Doctorow's rhythm, live in remote ages and circumstances which make all the difference in the meaning of their otherwise identical experiences of political injustice.[522] The first life in a society that is said to be generally just, and Kohlhaas is subjected to an exceptional outrage. Coalhouse lives in unjust, racist America at the turn of the century. Except for their time, place and colour, they are meant to be the same man.

The argument that no one is politically innocent is, however, interesting. For it is framed in the language of justice and appeals to its principles. It is by these that it must therefore be judged. Retaliation, it is claimed, is just punishment of those who deserve

[519] Shklar, Judith - The Faces Of Injustice - p83
[520] Only after friends had argued with him that suffering was the result of sin, did Job, sure of his faithfulness, lose patience and question God's omnipotence. In the epilogue, probably a later addition, he is restored to his former fortunes when he submits again to the will of God, which, however, remains mysterious and inscrutable. Ayyub (Job) and his sufferings are mentioned in the Koran.
[521] Job 2:7
[522] Ibid.

it, and everyone without exception in an oppressive society does deserve it.

If the charge of universal guilt could mean anything at all, it would have to refer to passive, not active, injustice. However, the crime that every inhabitant of an oppressive society is being charged with is not Ciceronian passive injustice, indeed, have paid more attention to the political issues presented by racism, taken active sides, and in general should have been better informed and more vocal.

Good citizens should, indeed, have paid more attention to the political issues presented by racism, taken active sides, and in general should have been better informed and more vocal. Being a good citizen is not the same thing as being wise, unbiased, humane, or unusually independent. No such claims can or should be made of citizenship. Rousseau was right when he remarked that the *best* citizens were xenophobic and bellicose. Passive injustice is a civic failing, not a sin or a crime. It refers to the demands of our political role in a Constitutional democracy, Shklar states that it does not refer '… to our duties as men and women in general'.[523]

The Republic of Malta – A Constitutional State

The Republic of Malta is a Constitutional unitary state. Its history predates Roman times, the largest island having been used as a trading outpost by the Phoenicians and then settled by Carthage. It was conquered by Rome in 218 B.C. and remained a part of the Roman Empire long past dissolution of the land-based power in Italy. In A.D. 533, the islands shifted to the control of the Eastern (Byzantine) Empire in Constantinople. From 870 to 1090, Malta was under Arab domination; then it became a vassalage of the Kingdom of Sicily, itself a part of the Spanish (and later Holy Roman) Empire. In 1530 the Emperor Charles V ceded the islands to the Order of St. John of Jerusalem.

[523] Shklar, J. op.cit. at p.98

The military/religious order ruled Malta until the islands were conquered by Napoleon in 1798; this was a brief conquest lasting only two years until the French were ejected by the inhabitants who eventually sought British protection. Malta was formally ceded to Great Britain in 1814 by the Treaty of Paris and became a British colony. In 1949 it became a dependency of the United Kingdom, and from 1964–1974 it was an independent constitutional monarchy within the British Commonwealth. With the Constitution of 1974, Malta was transformed into an independent republic within the British Commonwealth. A new constitution was promulgated on 21 September 1984, although the form of government remains the same: an independent republic within the Commonwealth.

The present governmental and administrative structure on Malta is typical of that left in place by Great Britain when granting independence to one of its colonies. The executive, formerly the governor general and now the more powerful president, shares authority with the prime minister and cabinet; legislation is made in a unicameral parliament and interpreted by an independent judiciary. The fundamental law is the constitution, which is subject to amendment in a complicated fashion. The president is the weakest party in the executive branch, with the prime minister and cabinet having real executive authority. The only exception to the unitary nature of the Maltese constitutional system is the limited self-government granted to the smaller island of Gozo in 1961.

Legal History

The basic, formative first period of Maltese legal development covers the twelve centuries from the period of Byzantine rule (which commenced about 533) until the Napoleonic conquest of 1798.[524] During this entire span, Roman law was established as the

[524] The 200 years of Arab rule (870–1090) left little or no impression on the Maltese legal system; even then, the territory was regarded as a trading and shipping outpost and Islamic legal traditions never took root. A strong Christian tradition, first Orthodox and then Roman Catholic, proved resistant to any Arab influence.

guiding force for the Maltese legal system. This was not the classical Roman law of the Empire, but rather the extensive and sophisticated medieval Roman law codified under Justinian in the *Corpus juris civilis.* This tradition was continued under the Norman and Spanish rulers who came from Sicily and, finally, for two centuries under the Knights of Malta. The further major influence was that of Roman Catholic canon law, which was especially strong in the development of family and personal law.

The modern era begins with the brief French occupation of 1798–1800. No immediate French legislation affected Malta, but the Napoleonic concept of, and approach to, codification found reception in a society based on the civilian Romanist tradition.

When Malta was ceded to Great Britain in 1814 by a formal treaty (the continuing rebellion against French domination never having achieved the status of successful independence) it carried with it—into British rule—its own legal system and traditions (since Malta was ceded or conquered, there was no long tradition and earlier date on which to base the application of common law). British rule lasted until 1949, but Maltese law developed within a wide framework of continental civil law mixed with common law influences and institutions. The "Civil code" was adopted in 1868 and 1872 and represents an amalgam of French legislation (the Code Napoléon of 1804) plus substantial borrowings from the long development of the Italian civil code of 1865 and was also combined with the inflexible and pervasive influence of Roman Catholic canon law.[525]

Commercial law also exhibits considerable French influence, even though there is no commercial code as such. The "Commercial code" which is Chapter 17 of the *Revised edition* is actually a series

[525] The populace is overwhelmingly Roman Catholic (about 98%), and canon law still plays a major role in domestic life. The Church's influence has been somewhat lessened since a 1983–85 dispute over expropriation of Church property and the position of the Church in the Maltese educational system. A marriage law of 1975 is something of a turn away from strict canon law.

of 1857–1858 ordinances on trade and maritime commerce based on the *French Code de commerce* of 1808. This has now been greatly reformed by subsequent British legislation or Maltese versions of English acts. Generally, English law has been more influential in commercial law and less so in civil law. Equally, the Maltese Code of organization and civil procedure (Chapter 15 of the *Revised edition),* which was enacted in 1854, is a combined version of the French *Code de procedure civil* of 1807 and local customary law. [526]

Legislation and the Judicial System

Modern Maltese law is now a thoroughly intertwined admixture of medieval Roman law, European continental codification (particularly the French and Italian traditions), latterly increasingly influenced by English common law since 1815.

The structure was superimposed on an English "compiled" codification and continues to be so controlled. Whenever the written or codified law is silent, recourse is permitted to custom—essentially Roman or canon law.

Public law (constitutional, administrative and criminal) has followed English examples and models, as one would expect of a nation that was a British colony for nearly a century and a half. [527]

The court system, established by the English and continued under the Republic, consists of Inferior or Magistrates' Courts, one for the island of Malta and one for the islands of Gozo and Comino. From these courts, appeals may be taken to larger panels of the same magistrates and then to either the Court of Criminal Appeal in Malta or the superior courts, all sitting at Valletta in Malta. The superior courts are divided into a Civil Court (First Hall), hearing

[526] E. Busuttil, "Malta," International encyclopaedia of comparative law. Vol. I, "National Reports," fascicle "M." Tübingen, Mohr, 1974.

[527] The legal system of Malta" by C.A. Charles. Vol. 4 (revised) Modern legal systems Encyclopaedia. Buffalo, N.Y., Hein [1988].

appeals, and the Civil Court (Second Hall), which has jurisdiction over non-contentious matters. There is a separate Commercial Court which also serves as the Admiralty Court. There is a Court of Criminal Appeals for cases beyond the Civil Court.

The judges have been for the most part Maltese and have included some eminent jurists. Occasionally, Chief Justices of the calibre of Sir Arturo Mercieca (who was later exiled) stood up to arbitrary and illegal British measures or enactments in the worst days of colonialism. Another bold judgement was that in the 1940s by Mr. Justice A. J. Montanaro Gauci, himself an Anglophile, on the illegality of deportation orders.

The Constitutional Court was established in 1972, when the right of appeal to the British Privy Council was abolished. While the concept of precedent is not so strongly followed in Malta as in most Commonwealth jurisdictions, judicial decisions are controlling in the absence of legislation or clearly identified custom.

Although appointed by the President, acting in accordance with the advice of the Prime Minister, judges and magistrates are independent of the Executive. A person must have practiced as an advocate in Malta for a period of not less than seven years to qualify for appointment as a magistrate, and twelve years to qualify for appointment as a judge. Judges and magistrates enjoy security of tenure and they can only be removed by the President in the event of proved inability to perform the functions of their office (whether arising from infirmity of body or mind or from any other cause) or proved misbehaviour upon an address by the House of Representatives supported by the votes of not less than two-thirds of all members thereof.

The influence of Roman Law and of the Napoleonic Codes is easily identified in present day Maltese Law, particularly civil law. English Law has, since the early part of the last century, had its fair share of influence in criminal procedure, certain areas of criminal law, public law and in particular the law relating to merchant

shipping. Maltese criminal law always adopted the maxim of English practice: guilt, not innocence, has to be proved.

It is very much to the point here to recall that the legal philosopher Austin would not accord to international law the quality or character of "law". For him these rules governing matters between nations were called "positive morality" and not law.

For example, a man repairing a chimney throws or drops a brick down from the roof, thereby hitting another man and killing him. One may consider here three main sets of circumstances in which this might have taken place: a passer by climbed over a fence, was walking along the side of the house where there was no path and where no one was accustomed to walk, and was struck on the head when the brick-layer discarded a defective brick over the side; the brick-layer had carelessly piled some bricks on the roof and one of them slid over the other side, striking a mailman who was approaching the side door where he always delivered the mail; the brick-layer recognised an old enemy and hurled the brick at his head.

The differences between these three variations are obvious to a reasonable man analysing the specific details of the external act; there is no need to know any more about these acts for reasonable men to understand the different degrees of responsibility and culpability involved. Unconstitutional Acts – The United States

Under the New York State Constitution, bench trials are not permitted in death penalty cases and under the state's capital punishment statute, the death penalty may not be entered upon a guilty plea.[528] Taken together, New York State law thus mandates two separate levels of penalty for the same offence, with only those who assert their innocence being eligible for the death penalty.

Trial courts in two first degree murder cases held these plea provisions to be facially unconstitutional under **United States v.**

[528] See, NY Constitution, art. I, § 2; CPL 220.10[5][e]; 220.30[3][b][vii].

Jackson.[529] Subsequently, in the separate declaratory judgment actions, the Appellate Divisions of the Second and Fourth Departments declared the plea provisions constitutional.[530]

In **Jackson**, relied upon by both trial courts and the New York Court of Appeals, the United States Supreme Court invalidated the death penalty provision of the Federal Kidnapping Act, 18 USC § 1201[a]. The federal act allowed a defendant to be sentenced to death only after a jury trial. The Jackson decision explained that the provisions at issue needlessly encouraged defendants to enter guilty pleas and jury waivers to avoid death sentences which impermissibly burdened the defendant's Fifth Amendment right against self-incrimination and Sixth Amendment right to a jury trial.

In this case, respondents argued that the New York statute is distinguishable from the Federal Kidnapping Act in at least three ways: (1) the defendant does not have unilateral control over the plea process because he can only plead guilty to first degree murder with an agreed upon sentence with the permission of both the court and the People,[531] (2) the challenged provisions simply codify permissible plea bargaining which was not at issue in the federal act and; (3) the New York statute requires a bifurcated trial whereas the Federal Kidnapping Act permitted a unitary trial.

The New York Court of Appeals concluded that respondents' attempts to distinguish this statute from the federal act at issue in **Jackson** fail and thus held the challenged provisions of the New York statute to be unconstitutional. However, because the constitutional provisions were severable, it declined to invalidate the entire statute.

[529] 390 U.S. 570 (1968) See also People v. Hale, 173 Misc. 2d 140; People v. Mateo, 175 Misc. 2d 192.

[530] Hynes v. Tomei, 237 A.D.2d 52; Relin v. Connell, AD2d , 674 NYS2d 192.

[531] See, CPL 220.10[5][e]; 220.30[3][b][vii];

The issue here was whether the New York capital punishment statute violates Fifth and Sixth Amendment rights by imposing death only on those who proclaim their innocence and are, subsequently, granted a jury trial.

The New York Court of Appeals in the cases **Hynes v. Tomei** and **Relin v. Mateo** held the new York capital Punishment Statute was unconstitutional.[532] Defendants should not have to make a choice between death and the exercise of their constitutional rights. The provisions endangering a defendant's constitutional rights should be excised and the resulting statute may remain standing.

Alan Xuereb
August 2006

[532] 1998 N.Y. Int. 0171 (Dec. 22, 1998).