S makes a basic endeavour to F =Df S endeavours to be F; and there is nothing that S endeavours to do in order that he have the property of being F.

In making a basic endeavour, then, one adopts an end but no means to that end.

2. See Baker 1983, p. 363.

References

Baker, Lynne Rudder 1983 "*De Re* Belief in Action", *The Philosophical Review*, 91, 363-88.

Feldman, Richard 1978 "Actions and *De Re* Beliefs", *Canadian Journal of Philosophy*, 8, 577-82.

Heidelberger, Herbert 1979 "The Self-Presenting", *Grazer Philosophische Studien*, 7/8, 59-76.

Sosa, Ernest and Pastin, Mark 1981 "A Rejoinder on Actions and *De Re* Belief", *Canadian Journal of Philosophy*, 11, 735-39.

Practical Knowledge: Outlines of a Theory of Traditions and Skills, J. C. Nyíri and B. Smith (eds.), London/New York/Sydney: Croom Helm, 1988

Rechtsgefühl and the Rule of Law

Roger Scruton

Nicht das Rechtsgefühl [erzeugt] das Recht . . . sondern das Recht das Rechtsgefühl.
(R. von Jhering, *Der Zweck im Recht*).

1. Preamble

Erwin Riezler, writing in 1925, distinguished three ideas expressed by the word '*Rechtsgefühl*':

1. The feeling for what the law is (*Gefühl für das, was Recht ist*);

2. The feeling for what the law ought to be (*Gefühl für das, was Recht sein soll*);

3. The feeling that only what is in accordance with law (*das dem Recht Entsprechende*) should happen.[1]

In translating '*Recht*' as 'law' I have, of course, considerably narrowed Riezler's meaning. Even so, what I have said does not make clear sense to an English reader, who is likely to be puzzled, not only by the idea of law expressed in those three descriptions, but also by Riezler's insensitivity to the distinction between 'feeling for' and 'feeling that', the second of which, unlike the first, denotes a 'propositional attitude'. Nor does Riezler's subsequent discussion, couched in the discredited terms of introspectionist psychology, do anything to reassure the sceptical reader that something identifiable and important

is meant by *Rechtsgefühl* — that this is not just another of those ubiquitous *Gefühle* with which the German genius for legend has encumbered the world, a close cousin of *Genossensgefühl*, *Heimatsgefühl*, *Sprachgefühl* and the *Gefühl* that my academic status depends upon my drivelling on about *Gefühle*.

At various stages in his discussion, however, Riezler compares the German jurisprudent's *Rechtsgefühl* to the 'sense of justice' described by Aristotle in the *Nicomachean Ethics*, and also to the 'instinct' for 'natural justice', which Ulpian unphilosophically attributes to the entire animal kingdom.[2] He is helped in this by the well-known ambiguities of the word '*Recht*', which spans 'right', 'law' and 'justice' as these are known to English speakers. I do not blame Riezler for exploiting these ambiguities, any more than I blame him for linking *Rechtsgefühl* with the sense of justice. On the contrary, it seems to me that the German word '*Recht*' is not as misleading as it at first seems, and that if it refers to so many separable things, it is perhaps because these things are, in the last analysis, not truly separate. Riezler may also be right in his assumption, that a study of *Rechtsgefühl* will lead us to see a connection between the sense of justice and the operation of law.

Nevertheless, the sceptical flourish with which this paper begins must be completed. Let it be said, therefore, that to an English speaker the distinction between law and justice is not merely apparent: it is flagrant. Unless we are talking of 'natural law' (whose very existence is doubtful), it is clear that law is one thing, and justice another. Not only are there unjust laws; there is also lawless justice. The existence of law may generate a 'sense of justice', as Jhering's remark suggests; or laws and the sense of justice may be mutually dependent, as Riezler himself prefers to argue:[3] but these suggestions are far from obvious.

2. Defining Law

Definitions of law depend upon the purpose of the definer. The sociologist, wishing to explain social behaviour, sees law as a system of causes; the jurist, wishing to understand legal argument, sees it as a system of reasons. Part of the appeal of legal positivism — at least in the forms bequeathed to us by Bentham, Austin and Kelsen[4] — is that it presents us with a theory of law that is useful equally to the sociologist and to the jurist: a theory which shows how a reason might also be a cause. To describe 'command' as the fundamental ingredient in a legal system, is to suggest both an explanation of legal behaviour, and a theory of judicial argument. The judge, according to the positivist, is working out and applying the consequences of general commands. One question which troubles the philosopher is, who issues those commands, and for what purpose? For only if we know the purpose can we discuss the rationality of an act.

The purpose of an action must be sharply distinguished from the 'function' assigned to it by the sociologist. Many human activities have 'functions' in the sociologist's sense, even if they have no purpose (love, for example). Furthermore, the sociologist might assign a 'function' to an inherently purposeful activity without thereby *identifying* the purpose. For example, a sociologist might describe law as an instrument of 'social control' (such, for example, is Weber's theory). 'Social control' is not a purpose that a judge either has or ought to have. But that does not imply the falsehood of the sociologist's analysis, which concerns not individual intentions but social results.

As a matter of fact, the Weberian theory is most implausible. 'Social control' may sound like a description of the function of criminal law, but it seems hardly apt as a description of the law of contract or the law of tort. In these areas — and indeed throughout civil law — adjudication has the effect of resolving conflict — and if it also 'controls' people, it is only *because* it resolves the conflicts that would otherwise divide them. Again, 'resolution of conflict' does not describe the judge's intention: but it is an apt description of his long term effect. Indeed, it is

arguable that this resolution of conflict is a primary function of the law — at least, in those cases where sovereignty is not in doubt and where peace prevails. (And there is no reason to suppose that law retains its normal function in times of war, or in the aftermath of conquest.) In what follows, therefore, I shall consider the operation of law in the resolution of conflict, and I shall attempt to describe the precious artefact known as the 'rule of law' or *Rechtsstaat*. I shall then return to the subject of *Rechtsgefühl*, and offer certain tentative conclusions concerning its nature and importance.

Conflict may occur between individuals, between corporations, between individuals and corporations, or between either and the state. (I use the term 'corporation' loosely, to cover any body that performs collective actions which are subject to adjudication.) When a conflict is brought before the law it is resolved by the decision of a judge (who may again be an individual or a corporate body). This is the first important feature of law, and one which distinguishes it from war (the other most frequently used procedure for the resolution of conflict). In war the two parties marshall their forces, and contend by force for the outcome. Of course, there is also a law of war: but it is a law which operates only when law itself has failed. The dispute is then no longer before a judge, but solely between the parties.

Even when there is no trial of strength or violent confrontation, the procedure for settling a conflict may be nearer to war than to adjudication. Thus if one party is so strong that it would be foolish to resist him, he will dictate the outcome of any conflict. But this does not mean that his will is law: it means rather that law need have no place in his dealings.

The existence of a 'judge' is by no means distinctive of law. Various other procedures also involve the intervention of a third party: conciliation, for example, or 'good offices' in International Law. Moreover, the decision of the third party may be decisive — as in 'arbitration' — without the procedure thereby becoming part of law. It is, however, a principle of English law that, when a third party is in the sovereign position enjoyed by an arbitrator, his decision must satisfy the formal requirements of

'natural justice' (used here as a technical term of administrative law). Should these requirements not be satisfied, then the decision will be set aside by a court of law. (If arbitration sometimes is mistaken for adjudication, it is partly because of this possibility of appeal to law.) In order for a procedure to have the character of law, certain other conditions must be satisfied. First, there must be an application of general rules, specifying 'jural interests', in the sense made familiar by Hohfeld.[5] These rules must define the rights, liabilities, privileges, duties and immunities of those who are subject to the judge's jurisdiction.

Secondly, the decision of the judge must be binding. It must have the character not of a recommendation but of a command. Whether the command may also be *enforced* is a separate question, although it is reasonable to suppose that 'voluntary law' is an unusual kind of law, and one that depends upon very special circumstances for its application. In the normal case, the judge's authority is also a form of power, bestowed by the state which upholds his judgment.

3. Procedural Constraints

Here, then, is a first, minimal description of a legal process: the application to human conflict of rules defining 'jural interests', by a judge whose decision is binding on the parties and in the normal case enforceable against them. There are also certain procedural constraints which are widely understood to be intrinsic to the administration of justice, and which are certainly fundamental to the 'rule of law'. Three in particular should be mentioned:

(1) *Judicial independence.* The judge should be guided in his judgment only by the facts of the case and the law which he applies to them, and must therefore be independent of the parties. There are very few legal systems in the modern world which satisfy this condition. In most modern states the judge has ceased to provide an effect-

ive barrier between the individual citizen and the state. Often the citizen comes before him as the subject of a 'political trial', and the judge is instructed by the prosecution as to the verdict which he must, on pain of dismissal, deliver.

Some purists argue that a procedure in which the judge is controlled by one of the parties cannot be called law. However, we should be less concerned by the *word* 'law' than by the facts that it is used to denote. And there are clearly many distinctions to be made: within the limits laid down by the prosecution, the judge may still make real legal distinctions, even when the final outcome is largely predetermined. It is perhaps best to say that a trial in which the judge is not independent is a travesty of justice, although it may on occasion be a genuine application of the law.

Judicial independence may be diminished in a variety of ways, and is clearly never more than a matter of degree. Judges frequently have financial interests, and personal connections, which make it difficult for them to separate themselves from the outcome of a case. In English law the presence of such interests and connections is always a ground for appeal against a verdict, on grounds of 'natural justice' (again used in its technical sense, to denote a set of common law rules with a precise and long-established application in administrative law). Socialists sometimes argue that judicial independence, under 'capitalist' conditions, can never be achieved, since the judges will always have a *class* interest which aligns them with a certain party to politically decisive conflicts. To assess such a claim is extremely difficult: often it is presented as a tautology, which can be overthrown by no empirical evidence. If, however, what is meant is that judges will show a marked disposition to settle disputes in favour of the 'middle class' and against members of the 'working class', then, not only has this claim yet to be established,[6] but it is not at all clear what would follow from it, should it be true.

I place this 'rule of judicial independence' first, not only because of its crucial importance in the theory of government, but also because it is the decisive factor in

the genesis of *Rechtsgefühl*. Whether or not there can be systems of law without judicial independence, there certainly can be neither respect for the law, nor a guarantee of justice, if citizens have no prior assurance that their case will be judged on its merits.

(2) *Evidence.* Intimately connected with the idea of impartiality, and indeed not really separable from it, is the idea of truth. In many languages the words for truth and justice are etymologically connected: the adjectives '*juste*', 'right' and '*recht*' can be used to convey either notion, and in Slavonic languages the connection is even more explicit. ('*Pravda*' denotes truth, '*právo*' right or law, and some such abstraction as '*spravedlnost*' justice.) The instinct that led Kant towards truth telling as the primary example of the categorical imperative is by no means the least of his moral insights. The prime instance of injustice is a verdict based on a falsehood — as when a man is imprisoned for a crime that he did not commit, or a person loses his rights on grounds that do not apply to him. The second decisive feature of judicial procedure is therefore the disinterested search for the truth. We might call this the 'rule of evidence', although its implications range more widely than the concept of evidence employed in legal writings.

(3) *Legality.* Of equal importance to the rule of evidence is the rule that law should be properly formulated, and the citizen propoperly forewarned. H. L. A. Hart refers in this connection to certain principles of 'legality', which the legislator ought to follow or try to follow in the enunciation of laws.[7] Laws, he argues, should be i) general, with no arbitrarily defined exemptions; ii) free from ambiguities and obscurities; iii) publicly promulgated, so that those subject to their jurisdiction can be reasonably expected to know of their existence; and iv) not retrospective.

Each of those conditions raises difficulties of its own. i) clearly raises the problems encountered by Hare's theory of the 'universalisability' of moral judgments, and in particular the problem of triviality: how are we to prevent

ive barrier between the individual citizen and the state. Often the citizen comes before him as the subject of a 'political trial', and the judge is instructed by the prosecution as to the verdict which he must, on pain of dismissal, deliver.

Some purists argue that a procedure in which the judge is controlled by one of the parties cannot be called law. However, we should be less concerned by the *word* 'law' than by the facts that it is used to denote. And there are clearly many distinctions to be made: within the limits laid down by the prosecution, the judge may still make real legal distinctions, even when the final outcome is largely predetermined. It is perhaps best to say that a trial in which the judge is not independent is a travesty of justice, although it may on occasion be a genuine application of the law.

Judicial independence may be diminished in a variety of ways, and is clearly never more than a matter of degree. Judges frequently have financial interests, and personal connections, which make it difficult for them to separate themselves from the outcome of a case. In English law the presence of such interests and connections is always a ground for appeal against a verdict, on grounds of 'natural justice' (again used in its technical sense, to denote a set of common law rules with a precise and long-established application in administrative law). Socialists sometimes argue that judicial independence, under 'capitalist' conditions, can never be achieved, since the judges will always have a *class* interest which aligns them with a certain party to politically decisive conflicts. To assess such a claim is extremely difficult: often it is presented as a tautology, which can be overthrown by no empirical evidence. If, however, what is meant is that judges will show a marked disposition to settle disputes in favour of the 'middle class' and against members of the 'working class', then, not only has this claim yet to be established,[6] but it is not at all clear what would follow from it, should it be true.

I place this 'rule of judicial independence' first, not only because of its crucial importance in the theory of government, but also because it is the decisive factor in

the genesis of *Rechtsgefühl*. Whether or not there can be systems of law without judicial independence, there certainly can be neither respect for the law, nor a guarantee of justice, if citizens have no prior assurance that their case will be judged on its merits.

(2) *Evidence*. Intimately connected with the idea of impartiality, and indeed not really separable from it, is the idea of truth. In many languages the words for truth and justice are etymologically connected: the adjectives '*juste*', 'right' and '*recht*' can be used to convey either notion, and in Slavonic languages the connection is even more explicit. ('*Pravda*' denotes truth, '*právo*' right or law, and some such abstraction as '*spravedlnost*' justice.) The instinct that led Kant towards truth telling as the primary example of the categorical imperative is by no means the least of his moral insights. The prime instance of injustice is a verdict based on a falsehood — as when a man is imprisoned for a crime that he did not commit, or a person loses his rights on grounds that do not apply to him. The second decisive feature of judicial procedure is therefore the disinterested search for the truth. We might call this the 'rule of evidence', although its implications range more widely than the concept of evidence employed in legal writings.

(3) *Legality*. Of equal importance to the rule of evidence is the rule that law should be properly formulated, and the citizen propoperly forewarned. H. L. A. Hart refers in this connection to certain principles of 'legality', which the legislator ought to follow or try to follow in the enunciation of laws.[7] Laws, he argues, should be i) general, with no arbitrarily defined exemptions; ii) free from ambiguities and obscurities; iii) publicly promulgated, so that those subject to their jurisdiction can be reasonably expected to know of their existence; and iv) not retrospective.

Each of those conditions raises difficulties of its own. i) clearly raises the problems encountered by Hare's theory of the 'universalisability' of moral judgments, and in particular the problem of triviality: how are we to prevent

the condition being satisfied by any law whatsoever, however arbitrary its conception, provided only that it be suitably worded? ii) is no clearer, and no easier to apply, than the ideas of 'ambiguity' and 'obscurity' employed in its formulation. iii) (a favourite principle of John Locke's) may seem marginally more clear; and likewise iv). However, on one interpretation of judicial procedure, laws are not, and cannot be, determinately known in advance of their application, and every decision of a 'hard case' involves legislation which is inherently retrospective. (The second of those claims, if not the first, is hotly disputed by Ronald Dworkin.)[8] In which case, how are iii) and iv) to be satisfied? Even if we leave aside the 'hard cases', it is undeniable that, in almost every legal system, retrospective legislation occurs, and must occur if society is not to be undermined by disloyal litigation. (In Britain, for example, fiscal legislation acts retrospectively, from the time of the first presentation of the budget proposals, and before Parliamentary approval has made these proposals into law. It is obvious why this rule should be adopted.)[9] Moreover, common law, which remains the basis of our own (English) legal system, has the character, not of a public pronouncement, but of a slow judicial discovery.

Notwithstanding those and other difficulties, it seems difficult to deny the intuitive plausibility of Hart's conditions, or of conditions true to the spirit of those laid down by Hart. We feel that there is a norm of generality and precision to which law ought to conform, if it is not to become an instrument of arbitrary coercion. We feel that secret laws (of the kind that existed in Nazi Germany and in Stalin's Russia) are grossly defective, and that retrospective legislation (as opposed to retrospective interpretation) is acceptable only in special cases, which must be openly discussed, publicly justified, and properly announced. No doubt other conditions could be added to those offered by Hart,[10] and no doubt Hart is unduly influenced by a conception of legislation, and insufficiently sensitive to the workings of the common law. But the further question arises as to why we should expect law to conform to a 'rule of legality' in the first place? It seems to me that a very good answer is contained in

the sociological premise from which my discussion began. If law is really to have the effect of resolving, rather than creating, conflict, then it should be as certain and predictable as possible. Secret laws are evidently a *source* of social conflict, and could never be used in its cure: the same goes for retrospective laws, and for laws which arbitrarily divide the populace into those who must obey them and those who need not.

We may, then, enunciate three ground-rules of legal procedure: the rule of judicial independence, whose aim is impartiality; the rule of evidence, whose aim is truth; and the rule of legality, whose aim is to establish the existence of jural interests prior to the act which encroaches upon them.

Some wish to argue that 'representation' is a necessary part of adequate legal procedure. The pervasive existence of representation certainly changes the character of the law, in making every party to a conflict an expert in its adjudication; none the less, it is not a necessary feature of the adjudication itself. In some systems — the Shari'a, for example — representation is the exception rather than the rule, and in any case need not have the form of an intervention by experts. Exactly what role should be played by representation in the 'rule of law' is therefore a question that I shall leave unanswered.

4. Law and Rule

The three ground-rules do not suffice to characterise the nature of law. Something must also be said about the nature of the laws themselves, as these are applied in court. A first attempt at classification would distinguish custom, rule and principle. Custom is not a part of the law, although it may serve as a guideline interpreting ambiguous statutes and decisions. Rule is the essence of the law, while principle is an additional component — a reference beyond the prescribed rules, to a body of constitutional, political or even moral rights and duties,

which some (notably Dworkin) wish to make part of the law itself. (Dworkin wavers between saying that principle *is* part of the law, in England and the US say, and saying that it ought to be. He also wavers in his description of principle, and in particular in his interpretation of the word 'political': a political right tends to mean 'a representation of the law as it would be if it were entirely in the control of the *New York Review of Books*'. I shall not be able to discuss Dworkin in detail, but I shall have more to say in due course about principles.)[11]

Most people would agree that the third component principle is not an essential, even if it is a desirable, element in all judicial procedure. And the correct attitude to custom is surely to say that, whatever its final importance, it owes its life to the rules and takes its meaning from the fact that it arises in the application of the rules. (Thus there can be rules without customs, but not legal customs in the absence of legal rules.) The idea that principles are so important stems in part from the existence in Western systems of law of a procedure of appeal: in other words, they are a reflection in thought of the existence in fact of a 'higher court'. To cut a long story short, it is the rules alone that are essential.

A legal rule does not have to be written. Nor does it have to be fully known to the judge. In a British court, the judge is guided by the doctrine of precedent, according to which the rule is embodied in the precedents, but not necessarily explicitly stated there. (This is so, at least, if Parliament has not legislated on the issue.) The common law doctrine of precedent still applies, and when the barrister argues that the judge ought to *distinguish* the present case, he is arguing for a particular interpretation of the precedent, according to which the rule upon which it was decided does not apply to the present instance.

As I briefly remarked, there is a conflict in the offing between the common law doctrine of precedent and the third of our ground-rules: the rule of legality. For if the law is not known to the judge — if he too has to discover it in the course of adjudication — how could it have been known to the ignorant layman who stands before him? However, it should not be thought that this conflict is peculiar to common law. Every serious legal system has a similar problem — which will be called a problem of *interpretation*. Even if the law is all written down in statutes (or, if not written down, then recorded in some other way, as in the memorised verse-forms used by our Saxon ancestors and by the cities of ancient Greece), it still must be interpreted. And that too may require a great deliberation in the light of the particular facts of the particular case. The question 'Is this murder?', or 'Is this negligence?' will exercise the minds of judges under whatever legal system, and it is impossible to avoid the conclusion that the ideal of a publicly enunciated and publicly certain law is no more than an ideal.

The essential features of a legal rule are consistency, applicability, and relevance. A rule is *consistent* if it is always applied in the same way: i.e. so as to yield the same outcome on the same facts. Whatever difficulties that last sentence may contain (and all readers of Wittgenstein will be familiar with them)[12] are difficulties peculiar not to law, but to the idea of consistency. A rule is *applicable* if there are actual situations, occurring in the normal course of the given society, when it might be invoked. (A system of rules governing the breeding of chimeras and the navigation of the stars would not be a system of law.) A rule is *relevant* if the situation to which it applies is an actual or potential source of human conflict. Criminal law contains a paradigm of legal relevance, since its central core derives directly from the moral sense of man — the sense that murder, robbery, fraud, rape and violence cannot go unavenged. In other words, criminal law records a natural desire for retribution, and if the law does not provide that retribution, the offended party will. Civil law involves the resolution of more recondite difficulties: such as the division of property, and the recompense for injury. But again it provides a solution to a problem in which one party is in fundamental conflict with the other.

5. Law and the Sense of Justice

Hume argued that, if we could but abstract from all our interests, and look impartially, and with complete understanding, on the deeds of men, we should agree in our judgment as to what was right and what was wrong, since we should be guided only by that universal sentiment of benevolence which is common to all. Hume's thought is tantamount to the following: even in the absence of legal rules, we can put ourselves in the position of a judge, and attempt to obey the ground-rules of adjudication. And then we shall agree in our judgments as to what is right and wrong. I shall define the 'sense of justice' as the disposition to carry out this thought experiment, and to be guided by its result: the disposition to put oneself in an adjudicative position, whether or not the matter in question is governed by law. More metaphysical versions of Hume's thought are available — notably Kant's theory that the rational being is compelled by reason to put himself in an adjudicative position, and that when he does so his thought issues automatically in laws that are universally binding. It is not necessary to go so far as Kant in order to recognise that law is as much the product as the producer of the 'sense of justice'.

Modern social and political thinkers are frequently misled by a false image of the law — an image that has been prevalent since the eighteenth century but which is at variance with the historical experience of Europe. According to this image, the business of the judge is to *apply* law, not to make it, and law itself stems from the legislative decisions of a sovereign body. The rules are issued in the form of commands, which express the 'will of the sovereign' in explicit and generalised form. It is obvious from a first glance at the history of European law that this image totally misrepresents the way in which our laws have developed. Not only the Common Law of England, but Roman Law and the codified systems of Europe have their ultimate origins in judicial decisions, rather than in legislative chambers. The criminal law, and the root laws of the civil code, derive from long traditions of decision-making which took place without the

benefit (or, to be more accurate, without the curse) of sovereign legislation. At some point almost every code can be traced back to certain core conceptions which have judicial precedent as their sole and sufficient authority. And rules which are applied through courts that have no anchorage in historical precedent are open to marked defects, some of which I discuss below. But we should bear closely in mind the distinction — emphasised to great effect by Hayek[13] — between law and legislation, and should recognise, too, that legislation is not, and cannot be, the basis of a legal system, nor can it generate, of its own accord, a rule of law.

The above sketch is very inadequate, but it gives us some idea as to what a legal system is (even if it does not quite justify the word 'system'). It should be obvious that the sense of justice as I have defined it has nothing to do with the conception of distributive justice elaborately specified by Rawls,[14] (or rather, it has in common only the basic idea of impartiality). A sense of justice is manifest, not in some thought experiment designed to tell us how the total product of a society should be distributed among its members, but in the habit of looking upon individual transactions and conflicts impartially, and with an eye to the truth. I have tentatively suggested that there is a continuity between this disposition and judicial procedure under a rule of law.

6. Personality

There are two further important features of the rule of law, as this has developed in European civilisation, which I shall call 'personality' and 'concretion'. My discussion of these features will be directed in part against the tradition in sociological thought, represented most powerfully by Weber, which sees law as a paradigm of 'abstract and impersonal' relations between sovereign and subject.

The work of von Gierke in Germany and of Maitland in England made abundantly clear that the politics of

European nations cannot really be understood without reference to ideas of collective liability and collective right.[15] Collective agency is recognised by Roman Law (with its doctrine of the corporate *persona*[16]), by the *Genossenschaftsrecht* of medieval Germany, by Canon Law, and by the brilliant and baffling English law of trusts, which manages to give legal reality to collective agents without treating them as corporate 'persons' in the sense of Roman Law. All those legal systems acknowledge more or less explicitly that the features of individual human beings whereby we are moved to praise and blame them, to accord to them rights and liabilities, to oppose them and to ally ourselves with them, can be displayed by collective entities. A university, a trading company, a club, an institution, the state itself — all can be so structured as to possess legal rights and liabilities, and are so structured in many systems of law. (It should be noted that the term 'university' is borrowed from the '*universitas*' of Roman Law, which denotes the principal form of civil association bearing corporate personality.) A trading company, for example, can perform actions: these actions reflect decisions made on its behalf, which are themselves rationally based. People are affected by these actions, and their rights and privileges may be safeguarded or threatened by them. A company has rights in law — it can own things, buy things and sell them; it may possess rights of way and usufruct, rights of light, air, water, rights of representation, and so on. It also possesses liabilities. (It is a general principal that you don't have rights without having liabilities towards those who must respect them.) Indeed, all the categories of 'jural interest' seem to apply as readily to corporations as they apply to individual men and women.

A great amount of ink has been spilled over the question whether the corporate person is 'fiction' or 'reality'. Von Gierke endowed the *Genossenschaft* with dignity, value and moral identity beyond the reach of any individual. In reaction, jurists have tended to set corporations to one side, as derivative, artificial — even delusory. This attempt seems to me to be wholly misguided. Not only is it legal nonsense (the rights and liabilities of corporations being attributable, as a rule, to no individual person); it is

also moral nonsense. The idea of a corporation corresponds to an independent moral reality. Associations are the indispensable object of human allegiance, the archetype of all the wider loyalties from which society is generated and upon which the state and its jurisdiction depend. Even if there were no legal idea of collective identity, there would still be a moral idea. And until the moral idea is given legal reality it remains outside the deliberations through which our bonds are fortified and our conflicts resolved.

Collectives may act rightly or wrongly. Without a law that can hold them to account, and force upon them costs that are greater than the benefit of wrongdoing, we can have no protection against their power. And without a law that can establish and protect their interests, collective agents are at the mercy of fraud, theft and vandalism. A law of collective agency both protects association and at the same time limits its power. Through the operation of this law associations become institutions, and fleeting ambitions become sources of life, confidence and value.

The greatest of all collective agents — the state — is not only a person in International Law, but also a moral person, whose relations to us are of ever greater concern as its power increases. A legal system that lacks the conceptual apparatus whereby the personality of the state can be represented, cannot provide a rule of law. English law has a certain difficulty in this matter, and prefers to speak not of the 'state' but of the 'crown'. It describes the crown, in language of lamentable obscurity, as a 'corporation sole' — i.e. a corporation which at any one time has at most one member.[17] Nevertheless, however unsatisfactory this device, its intention is clear: to separate the collective agency of the state from the individual will of the monarch, and to subject the former to adjudication. In other words, the purpose is to subject the state to its own law, and to make it no better than an equal when it is challenged by the individual plaintiff.

If there is to be a rule of law, then legal personality (or its equivalent) must be assigned to the real sources of collective agency, and not to the facades through which they disguise their actions. The large powers and interests that operate in society must be made *directly* answerable

for their actions. If such powers remain unanswerable, while being the principal agents behind the state, then we might reasonably say that government has become 'impersonal'. The most important example of impersonal government is that of the one-party totalitarian state, under which the principal agent of change — the Party — possesses no answerability at all, and usually makes this quite clear by defining itself in terms of its 'leading' role. While totalitarian systems of law recognise corporations of a kind — such as universities and even trading companies — these are for the most part facades: crucial decisions are invariably made on their behalf by the ruling Party which, while acting through them, escapes any liability for the conflicts that they cause. In such circumstances, not only is the state above the law, but all major forms of collective action are likewise unjudiciable. This is a paradigm of what I mean by 'impersonal' government, and to the extent that government becomes impersonal, to that extent do the main social conflicts become irresoluble through law, and to that extent does the rule of law break down. What seems like law is really (to parody Clausewitz) war by other means.

A bureaucracy may be either personal or impersonal in the above sense. In both cases commands are carried out by officers appointed to specific functions. Yet in one case the officers can be controlled only from a point above them in the hierarchy of power: in the other case they can be controlled from a point below, through the intermediary of law. (Even in the hands of the underdog, law should be an instrument, not of influence, but of control, to use the sociologist's well-worn distinction.)

As I have indicated, English law has to a great extent stood aloof from the Roman law of corporations, tolerating the proliferation of unincorporated associations, whose actions, rights and liabilities it has nevertheless been able to adjudicate through the law of trusts. The device of the trust depends in its turn upon the dual nature of English law, with the system of 'equity' (close to the philosopher's 'natural justice') always taking precedence over the system of law. Legal systems that do not enjoy such sophisticated concepts may compel associations to incorporate, so that collective action will not escape

the net of adjudication. Or they may develop other conceptions — such as the Islamic *waqf* — through which to create rights and liabilities that are vested in no individual person. (Each method has its own drawbacks, that of the *waqf* being that it permits assets to endure perpetually without any individual having judiciable rights in them. This has been one of the major sources of disaster in the Islamic law of property, although there are also successful *awqaf* — such as the *aflaj* (water courses) of Oman — which could be easily administered in no other way.)

The importance of these devices is twofold. First, as I have indicated, they give legal enactment to an independent moral idea; secondly, they are an indispensable protection against conspiratorial power. The moral idea of the person is easy to grasp — although less easy to analyse. Clubs, societies, towns, guilds, unions, associations, churches, firms and nations — all have, in varying degrees, a moral personality in the eyes of those who deal with them. They have will, agency, responsibility, life and reason, and, as for their flesh and blood, we ourselves provide it. They are the objects of interpersonal attitudes — of love, hatred, admiration, contempt, affection, anger, gratitude, resentment, even of grief. To admit such facts is not to engage in outrageous metaphysics. It is simply to notice the world as it is. The *Genossenschaft* has a real existence, and a real moral presence, independently of the law which bestows upon it the status of a person or a trust. (If you doubt this, then you should turn again to the greatest of all dramatic representations of the *Genossenschaft* — Wagner's *Die Meistersinger*. You will then see how much the individual human personality is enhanced and enriched by its encounter with the moral personality of free association.)

By endowing associations with jural interests, the law extends its protection to an independently valued social organism, and one which already *has* those interests, or their moral equivalent, in the hearts and minds of those who encounter it. This process of protection is an essential part of the law's conflict-resolving function. It is a means whereby the state places itself at the disposal of spontaneous social order, so as to endorse and ratify it.[18]

Civil society, according to Hegel, owes its character to the corporations, and it is by the abundance of free association, according to Tocqueville, that the emerging society of America had limited the power of government.[19] Such views are immensely controversial. But we should surely not be surprised by the hostility that revolutionary governments — which gain power by conspiracy and maintain it by force — have shown towards the autonomous institutions of civil society, or by the seemingly inexorable logic whereby such governments have one by one destroyed the private clubs, schools, charities, guilds and autonomous trade unions which seemed to generate powers that they could not control. (Nor is the tendency new. The Revolutionary Government of France issued a declaration on August 18th 1792, announcing that 'a state that is truly free ought not to suffer within its heart any corporation, not even such as, being dedicated to public instruction, have merited well of the fatherland.' This was the prelude to one of the harshest acts of expropriation that had yet been conducted in the name of law.)

By the same token, we can see the value of personal law in eliminating conspiracy. In totalitarian states, where the Party, despite being principal collective agent, has only a defective legal personality, conspiracy remains an immovable component of public life. Even in states which abhor conspiratorial government, and which do their best to make every collective agent answerable before the law, large collectives will naturally try to bend the law in their own direction, and even to secure legislative immunities.[20] Under personal legality, all agents — the individual, the corporation, even the state itself — come before the law as equals, entitled to equal consideration and equal respect. The law of collective personality is therefore an indispensable part of the rule of law. If we wish to use the word 'personal' of a form of government, then we should do far better justice to the idea conveyed by it if we use it to describe, not the charismatic leadership of a warrior chieftain, but precisely that complex of jural interests that our own systems of law have established in response to the perceived realities of human association.

7. Concretion

The second important feature of our legal systems to which I should like to draw attention is the feature of 'concretion'. It is perhaps useful to explain this term by means of an example. Consider section 203 of the Czechoslovak criminal code. This tells us that those who 'consistently shirk honest employment and allow themselves to be kept by somebody, or acquire the means of existence in some other wicked manner are liable to punishment'. (All systems of 'socialist law' include such a provision, sometimes known as the 'anti-parasite' law.) Nowhere does the Czechoslovak law define what 'honest' employment is, what 'consistently' means, or what is a 'wicked' manner. Nor is there a tradition of recorded adjudication that could settle the matter, since judges have neither the power nor the independence to create binding precedents.[21] The law is crucially indeterminate — 'abstract' if you like — and can therefore serve (as is of course intended) as an instrument of arbitrary control in the hands of the state. It seems to me that much 'socialist law' is in that sense abstract, and that its abstractness arises partly because the judiciary has lost its independence. The 'concretion' of a law comes, not from the law itself, but from its application in the courts, in which the concrete circumstances of human conflict are allowed to determine the meaning of its terms (or, if you like, to determine the true nature of the law.)

This requirement of legal concretion was rightly emphasised, and interestingly described, by Hegel, in *The Philosophy of Right*:

> Amongst the rights of the subjective consciousness are not only the publication of the laws . . . but also the possibility of ascertaining the actualisation of the law in a particular case (the course of the proceedings, the legal argument, etc.) — i.e. the publicity of judicial proceedings. The reason for this is that a trial is implicitly an event of universal validity, and although

> the particular content of the action affects the interests of the parties alone, its content, i.e. the right at issue and the judgment thereon, affects the interests of everybody.[22]

Hegel was hostile to common law, partly on the ground already mentioned, that it gives legislative capacities of an unforeseeable kind to the judge.[23] Nevertheless, the fact remains that the prime example of concrete law is common law, founded in the doctrines of precedent and *stare decisis*. Its rules are precisely not abstract but *abstracted* from concrete decisions. The common law is an instance of a *tradition*, in which rational solutions emerge from the constant confrontation between human desire and recalcitrant reality. The principle governing such a law is no different from that which governs the law of a sovereign exercising a personal right of appeal. Indeed, it is understood in English law that the sovereign's personal adjudication is exercised precisely *through* the courts, and in particular through the Court of Chancery, which, although it has been a Weberian 'office' since at least the twelfth century, is bound in the last instance only by precedents of its own. (And it is from the peculiar adjudication of the Court of Chancery that our law of equity and trusts derives.)

An interesting corollary can now be drawn, concerning Weber's idea of 'legal-rational' legitimacy. It seems to me that a legal system that is impersonal, and which operates only through abstract laws, is precisely *not rational at all*. The prime feature of rational action is its subjection to correction in the light of the facts. In collective endeavours, rationality emerges by the resolution of contending interests, and the emergence of a common pursuit that will secure the agreement, in so far as possible, of interested parties. Collective rationality is a *process*, and law is one of its instances. (Some, for example Hayek, argue that the market is another instance: but there is no need to accept this appealing idea, in order to agree with my conclusions.) The process of rational conflict-solving is possible, however, only if the most powerful interests (those which are the greatest generators of injustice and conflict) are answerable to the law (i.e. only if there is

personal government); and only if the law itself is answerable to the facts — to the concrete circumstances of adjudication. In other words, where there is impersonality and abstraction, there is a failure of collective rationality. Nothing can then be corrected. Indeed, you will find that, in such circumstances, the person who attempts to voice an opposing view is invariably silenced, lest the smooth functioning of the mechanism be jeopardised by his protests. The failure of rationality consists in the liquidation of the dissenting voice.

8. Summary

Let us return now to our previous analysis of law. It can be seen, I hope, that impersonality and abstraction are corruptions of the legal process. They are corruptions precisely because they let the greater powers through the net of adjudication, while leaving unprotected the spontaneous associations in which our life and happiness reside. A central function of law — the resolution of conflict by adjudication — is then thwarted. Law cannot, in these circumstances, provide the preventative to war. (Martial law is appropriately called, in Polish as in French, a 'state of war'.) Our sketch of an analysis of law therefore implies that a legal record (in which concrete determinations are given to the interpretation of the rules), and a wide concept of corporate right and liability are essential to the true operation of law. We may therefore summarise our paradigm of law in the following terms. Law requires:

(1) The placing of conflicts before a judge.

(2) The application of rules defining jural interests.

(3) The acceptance of the judge's decision as binding, and (in the normal case) as enforceable by a sovereign power.

(4) Obedience to the three fundamental ground-rules of adjudication:
   i) the rule of judicial independence;
   ii) the rule of evidence;
   iii) the rule of legality.

(5) The use of rules which are
   i) consistent;
   ii) applicable;
   iii) relevant.

(6) The adoption of a system which is
   i) personal;
   ii) concrete.

The description is cumbersome; it is not a complete definition but an attempt to identify an institution in terms of one of its most important functions, and with a view to the explanation and evaluation of its effects. I hope I have given some grounds for thinking that the problem to which law, like war, addresses itself — the problem of human conflict — is better served by a legal system as I have defined it than by any of the more obvious alternatives.

9. Natural Law and Rechtsgefühl

It remains now to say something about the two problems which concerned me at the outset: first, the place of 'morality', 'principle', 'natural law', 'political rights' and so on, in the operation of a legal system; secondly, the nature, extent and meaning of *Rechtsgefühl*. These are, in fact, different aspects of a single problem.

There is a tendency in jurisprudence to think of natural law as Grotius thinks of it: a system of rules which are exactly like positive laws in form, and differ

from them only in this: that their content can be justified by appeal to reason, without reference to the sovereign power. Roughly, they are laws which are, in Kant's sense, *a priori* valid. It is a step forward to recognise that all actual appeals to natural law are not appeals to *law*, but to something else which overrides it. Dworkin talks in this context of 'principle', although he would probably not endorse the description 'natural law' to refer to his principles. He prefers, instead, to speak of 'political rights', secured perhaps by a constitution, or at any rate, widely accepted as structural features of the body politic, which can be invoked in court in order to say: *this* cannot be done. For Dworkin, these principles get invoked for the most part in 'hard cases', where the law is indeterminate or in conflict with itself. Presumably, however, they could be invoked elsewhere, in order to throw out a law which conflicted with them.

Both views — the traditional natural rights view, and the Dworkinian invocation of extra-systemic 'principles' — suppose that, in the course of adjudication, something else, beyond the rules, might be sensibly appealed to, and perhaps ought to be appealed to, if the resulting judgment is to have full title to our obedience. But why? What is it about a legal system, as I have so far described it, that requires completion in this way, and why is it a good thing so to complete it? If what is meant is that the law should conform to our moral sense, then that goes without saying. But the 'should' there is moral, not legal.

I propose instead another view of the 'natural laws' and 'principles' that seem to lie dormant within adjudication. I suggest that these are really shadows cast by the procedure of adjudication itself. They are not independently existing laws which may be applied like any other. They are, rather, the procedures themselves, transformed into principles. Thus, we may talk of the 'right to a fair trial'; but we do not mean by this some separate legally defined right that might be added to a system of adjudication so as to make a real difference to it. We simply refer to a consequence of the system itself. Without the 'right to a fair trial' there is no law. In the same way, we can speak of all the following as 'rights':

the right to impartial judgement (4, i);

the right to the truth, and all that is entailed in that (4, ii);

the right to do what no law forbids (4, iii);

the right to be treated equally for an equal offence (5, i);

the duty of corporations to answer for their acts (6, i).

It is possible in this way to denote a schema of formal rights, corresponding to many of the 'natural rights' that have been traditionally recognised.[24] The important point, however, is that these rights are secured *automatically* by any genuine rule of law, as a consequence of legal procedure. Conversely, they cannot be protected without the creation of such a procedure. Genuine law and natural law may be no more separable than are a man and his shadow.

If we now return to Hume's 'genealogy' of the sense of justice, we can begin to describe the fundamental contours of *Rechtsgefühl*. Someone for whom adjudication is the prime manner in which conflicts are resolved places himself when witnessing conflict in the position of the impartial judge. In doing so, he envisages, in his innermost sentiments, a procedure for resolving the conflict, which will conform to the demands of law. He will automatically think in terms of the 'rights' and 'liabilities' of the parties, and he will identify the parties according to an intuitive notion of personality which will be receptive to ideas of corporate right and corporate liability. He will be motivated to recognise certain 'formal' or 'natural rights', and above all the *right to truth*, as the basic principles from which his reasoning departs. And he will be constantly comparing cases, trying to reconcile his judgement in this case with his judgement in another. If Hume is right, then the disposition to adopt the judicial posture is essentially common to human beings, and constitutes a fundamental part of their ability to sympathise. And if the conditions of legal order, as I have described them, exist,

then *Rechtsgefühl* will develop spontaneously. One might go further, and say that, without this feeling, men would not be able to achieve what it is most important for them to achieve: a vision of the social world that is through and through personal, concrete, informed by a sense of right and liability. *Pace* Weber, it is precisely law, properly understood, that educates us to that perception, and through law we are presented with an idea of legitimacy that is personal, responsible and of immediate application to the self. It is true that we can easily lose sight of this 'personality'. For law can become cumbersome, overborne with written statutes and minute observances: like any human activity, it can be corrupted and turned against itself. But it is a virtue of law, that its faults are merely human.

Notes

1. Riezler 1969, pp. 7f.

2. Ulpian, fr. 1, section 3 D. *de iust. et iure 1*, 1. Austin rightly scorns the idea of a law of justice acknowledged even by animals as 'this most foolish conceit': Austin 1911, p. 210.

3. Riezler 1969, p. 42.

4. Bentham 1789; Austin 1911; Kelsen 1942.

5. Hohfeld 1923, ch. 1.

6. For evidence of judicial impartiality in the matter of 'workers' rights', see O'Higgins and Partington 1969.

7. See, for example, 'Problems of the Philosophy of Law', in Hart 1983, p. 114.

8. For example at several places in Dworkin 1978.

9. There are other far more dubious cases, however. Consider the case of *Burmah Oil Co. v. Lord Advocate*, (1965) A.C.75, in which a claim for war damage compensation was set aside by the courts, on the grounds that if it were upheld, many similar claims could also be made, and the public finances would be ruined.

10. See the eight conditions given by Fuller 1964, and identified (rather strangely) as the 'morality' implicit in law.

11. See Dworkin 1978 and 1986, and Scruton 1984, ch. 3, and 1987, in which I discuss Dworkin's views at greater length.

12. I refer to Wittgenstein's celebrated arguments concerning 'following a rule' in Wittgenstein 1953, part 1, and Wittgenstein 1954.

13. See Hayek 1973, ch. 4.

14. Rawls 1971.

15. O. von Gierke, *Deutsche Genossenschaftsrecht* (a fragment of this work has been translated and introduced by Maitland 1900). See also Maitland's 'Trust and Corporation' in Fisher ed. 1911, vol. 3.

16. The Roman Law doctrine is much more complicated than it is often represented to be. See Duff 1938, in which it is argued that Roman Law precisely does *not* make the philosophical distinction often attributed to it, between *person* and *human being*.

17. On the difficulties presented by this idea see Maitland, 'The Corporation Sole', in Fisher, op. cit.

18. For a sketch of the political significance of this, see Scruton 1984, ch. 8, 'The Autonomous Institution'.

19. Hegel 1942; Tocqueville 1835.

20. Such immunities, granted to trade unions by the British Parliament in 1906, have led to considerable doubt as to the nature and extent of trade union liabilities. It seems, nevertheless, that a trade union, though an 'unincorporated association', may be sued at common law in its own name: *Bonson v. Musicians' Union* (1956) A.C.104. On the issue of the legal identity of the trade union, see the excellent discussion in Ross M. Martin 1958.

21. This is made clear by Act 36 of 26 February 1964 — 'Concerning the Organisations and Election of the Judiciary' — as amended by Act 29 of 27 February 1968, Act 175 of 20 December 1968, Act 156 of 17 December 1969, and Act 29 of 5 April 1978, section 24 of which ('the basic duties of judges') includes the provision that judges shall interpret statutes and other legal regulations 'in the interest of the working people' — this interest being itself determined in practice by Party decree. Such legal records as there are, therefore, can have no binding authority, since no merely *legal* process can determine what is meant, from day to day, by 'the interests of the working people'. See also Daniš 1980, p. 165: 'Judicial independence does not mean that a judge may arbitrarily assert his own, subjective opinion. It is an independence which at the same time involves the judge's dependence on the socialist legal system which expresses the will of the ruling working class.' In other words the law is not determined by judicial reasoning, but by an extralegal, metaphysical entity — 'the will of the ruling working class' — whose concrete embodiment in the world of mortals is all too familiar under another name.

22. Hegel 1942, para. 224.

23. Ibid., para. 211, note.

24. This view approximates to that advanced by Hart 1955.

References

Austin, John 1911 *Lectures on Jurisprudence*, 5th ed., London.

Bentham, Jeremy 1789 *Introduction to Morals and Legislation*, London: T. Payne.

Daniš, Stefan 1980 "The Organisation and Role of the Courts in the Czechoslovak Socialist Republic", in *Bulletin of Czechoslovak Law* (Prague).

Duff, P. W. 1938 *Personality in Roman Private Law*, Cambridge: Cambridge University Press.

Dworkin, Ronald 1978 *Taking Rights Seriously*, London: Duckworth.

—— 1986 *Law's Empire*, Cambridge, Mass. and London: The Belknap Press.

Fisher, H. A. L., ed. 1911 *F. W. Maitland, Collected Papers*. Cambridge: Cambridge University Press.

Fuller, Lon 1964 *The Morality of Law*, New Haven: Yale University Press.

Hart, H. L. A. 1955 "Are There Any Natural Rights?" in *Philosophical Review*, 64, 175-91.

—— 1983 *Essays in Jurisprudence and Philosophy*, Oxford: Oxford University Press.

Hayek, F. A. von 1973 *Law, Legislation and Liberty*, London: Routledge and Kegan Paul.

Hegel, G. W. F. 1942 *The Philosophy of Right*, trans. T. M. Knox, Oxford: Oxford University Press.

Hohfeld, Wesley Newcomb 1923 *Fundamental Legal Conceptions*, New Haven: Yale University Press.

Kelsen, Hans 1942 *The General Theory of Law and State*, Chicago.

Maitland, F. W. 1900 *Political Theories of the Middle Ages*, Cambridge: Cambridge University Press.

Martin, Ross M. 1958 "Legal Personality and the Trade Union" in Leicester C. Webb, ed., *Legal Personality and Political Pluralism*, Melbourne.

O'Higgins, Paul and Partington, Martin 1969 "Industrial Conflict: Judicial Attitudes", in *Modern Law Review*, 32, 53-58.

Rawls, John 1971 *A Theory of Justice*, Oxford: Oxford University Press.

Riezler, Erwin 1969 *Das Rechtsgefühl: Rechtpsychologische Betrachtungen*, 3rd ed., Munich: C. H. Beck.

Scruton, Roger 1984 *The Meaning of Conservatism*, 2nd ed., London: Macmillan.

—— 1986 *Thinkers of the New Left*, London: Longman.

—— 1987 "Dworkin's Empire", in *Encounter*, July 1987, 66-9.

Tocqueville, Alexis de 1835 *De la Démocratie en Amérique*, Paris.

Wittgenstein, Ludwig 1953 *Philosophical Investigations*, Oxford: Blackwell.

—— 1954 *Remarks on the Foundations of Mathematics*, Oxford: Blackwell.