JUSTICE AS A LAWYER'S CONCERN

The word " justice " plays a conspicuous role in political slogans and is bandied about in petty quarrels. In most contexts of its occurrence, it does little more than add emotional fuel to disputes; the intellectual value of its use appears to be frequently negligible. Thus there is no wonder that lawyers are reluctant to address themselves to the problem of justice and participate in its treatment only hesitantly, or not at all. Legal studies and actual experiences gained in legal practice tend to create the impression of the worthl lessness of the ideas in the name of which political passions, socia unrest, and personal animosities are kindled. The popular conceptions of justice, and politicians' high-sounding platitudes about it, are even despised by lawyers as being incompatible with the moral integrity of the legal profession. Moreover, lawyers seem to feel that preoccupation with the problems of justice shakes the basis of their vocation; for every scrutiny of the issues of justice sets in doubt the assumptions on which their work rests and subjects their way of reasoning, that is, the legal method, to challenge or to critique from which they can derive little benefit for their work. A special reason why most lawyers avoid entering into the problem of justice is that the here requisite theorising leads to the esoterics of moral and political philosophy, in which realm they feel incompetent[1].

Yet, in a certain kind or on a certain level of their activity' lawyers cannot stay aloof from dealing with issues of justice. Legal reforms, which require also lawyers' services, are often actuated by considerations of justice. The words " justice " and " just " occur in legal instruments and in courts' decisions and have a specific meaning in them which lawyers must ascertain. Expressions such as " administration of justice ", " natural justice ", " with just cause " and " without just excuse " are phrases of legal significance. They cannot be safely replaced with expressions in which " law "

occurs instead of " justice " and " legal " occurs instead of " just ". As terms of legal relevance, " justice " or " just " appear, for example, in the Fifth Amendment of the United States Constitution (" just compensation "), in Section 51 (xxxi) of the Constitution of the Commonwealth of Australia (" just terms ") and in Articles 1 (1) and 2 (3) in the Charter of the United Nations (" in conformity with the principles of justice ", " international...justice "). All these provisions impose on lawyers the task of their interpretation, and consequentially the problem of the meaning of their key terms. It stands to reason that this problem cannot be left to mere flair of the interpreter for the time being or simply to the skill of social engineering to be displayed in concrete situations. Thus lawyers have occasionally addressed themselves to the problem of justice as such trying to define justice and to formulate its principles.

As a notable sample, let us consider Lord Alfred Denning's relevant thoughts. In a book devoted to the matter[2], he points out that doing justice is implied as a lawyers' task in the judicial oath in England, the guiding words of which oath " I will do right " mean " I will do justice ", not simply " I will do law ". He believes that the duty of the judges to do *justice* can be derived also from the coronation oath of the Queen, whose delegates the judges are. The Archbishop asks : " Will your power cause Law and Justice, in Mercy, to be executed in your judgements ? "—to which the Queen answers : " I will ". Lord Denning contends that the task of lawyers is not performed by relying solely on the technical rules of law ; their objectives include also ensuring that the laws are just and are justly administered. With this emphasis on justice as a lawyers ' concern, Lord Denning has himself incurred the obligation to say what justice means. In discharging this duty he says that justice is not something which can be seen; it is not temporal but eternal; not the product of man's intellect but of his spirit. As its definition he offers : justice is " What the right-minded members of the

community – those who have the right spirit in them, believe to be fair.".

In face of this attempt to elucidate the notion of justice, one may feel somewhat perplexed. One may be amused about it, but under the surface of Lord Denning's beguilingly simplicistic definition of justice one can also glean a solid core. Thus it appears that he regards justice as a value, that is, something that is constituted not by what is *found* in the relevant states of affairs but rather in prevailing *attitudes*, especially in the attitudes of those who are endowed with competence, insight, and integrity. By his adorned reference to justice as something eternal, he appears to take the view that there are principles of justice transcending concrete and contingent situations. Lord Denning has obviously not provided an articulate and elaborate theory of justice. His "definition" relegates the problem to those who are experts in that kind of work, that is, to legal theorists or jurisprudents and to legal philosophers.

That lawyers have to resort to and rely on the assistance of these appears to emerge also from the net result of a book by a Harvard constitutional lawyer, Arthur E. Sutherland. Manifesting lawyers' concern with justice[3] in it, he arrives at statements such as "justice is due process and due process is justice", "last justice is hard to seek", and the duty of "calm judicial guardians" is "always to seek the just rule in our common lives". These utterances, whose tenour and spirit would touch the hearts of lawyers, call for their being placed into a broader frame of reference, which apparently only jurisprudence or philosophy can supply.

What assistance can the lawyer receive then from these qnarters? Let us consider jurisprudence first. Not much help can come from these legal theorists who entertain outspokenly skeptical or negativistic attitudes to the problem of justice, for example, Wilhelm Lundstedt. He asserts that the sayings according to which the

lawmaker should be guided by justice or to which the courts should administer justice are empty phrases; they are senseless because there is no justice nor is there any "objective ought"[4]. Another example of the same kind is Alf Ross' statement according to which "to invoke justice is the same....as banging on the table".[5] Unhelpful is also Hans Kelsen's relevant saying, who, claiming not to know what absolute justice is, declares to be able to spell out something about relative justice, which *for him* is that social order under whose protection the search for truth can propsper, and which is the justice of freedom, peace, democracy, and tolerance[6].

In contrast to the above writers, Roscoe Pound has made constructive contributions to the theory of justice. Thus he submits that "justice means a regime of social control to bring about and maintain an ideal relation among men". As a working idea in answer to the question, What is the ideal relation among men?, he offers that of maximum satisfaction of human wants and expectations[7]. Proceeding from a similar conception, Julius Stone says that justice is a relation between wants, resources, and outlets of dissatisfaction. This relation is dynamic since, for instance, men's wants vary with the external environment and often fortuitous experience. A complete rational apprehension of justice is not feasible, because of the emotive components in judgement as to its content. There is a multiplicity of ideas of justice and their great variability in time. However, the very relativity of the content of justice presupposes a constant base by reference to which this relativity can be asserted. In social intercourse particular principles become crystallized by recourse to which situations are considered as unjust. These principles are the criteria of justice[8].

The jurisprudential contributions to the determination and elaboration of the notion of justice contain a wealth of relevant ideas; however, they scarcely offer a fully elaborated theory of justice, for which the modern lawyer has a need. Since leading philosophers have addressed themselves to the problem of justice, one may hope

that in the area of philosophy that can be found which would satisfy this need. Some years ago, John Rawls, an eminent moral philosopher, published a book on a theory of justice, which book has excited much attention and has provoked a great deal of discussion all over the world. This book serves as a standard example of the contribution of modern philosophy to the problem of juctice as such.[9]

The gist of Rawls' theory of justice can be rendered as follows. Justice is the first virtue of social institutions. A distinction is to be made between the concept and the conception of justice. The former means a proper balance between competing claims; the latter means a set of related principles for identifying the considerations which determine this balance. The role of the concept of justice lies in assigning rights and duties and in determining the appropriate division of social advantages. The conception of justice provides an interpretation of this role. The first principle of justice stipulates : " Each person is to have an equal right to the most extensive total system of equal basic liberties compatible with a similar system of liberty for all ". The second principle of justice stipulates : " Social and economic inequalities are to be arranged so that they are both : (a) to the greatest benefit of the least advantaged, consistent with the just savings principle, and (b) attached to offices and positions open to all under conditions of fair equality and opportunity ". According to the just savings principle, " persons in different generations have duties ... to another just as contemporaries do. " The principles of justice are chosen behind a " veil of ignorance ", which means that they are to be chosen that no one knows his place in society, class position, social status, his fortune in the distribution of natural assets and abilities, his intelligence, and the like. According to what this author calls " the general conception of justice ", all primary goods are to be distributed equally, except when an unequal distribution is advantageous to the least favoured.

The theory of justice of John Rawls is interesting, but lawyers

who may have consulted it in the hope that they can gain something from it for the solution of their practical problems are likely to be disappointed with it. This theory does not offer much guidance to them, and contributes little to what they have known themselves all along. The thought that the principles of justice are to be chosen behind a veil of ignorance is intriguing, but all that it seems to convey is the common wisdom that when one is to make a choice in matters of fundamental importance, one should act in the spirit of emotional and intellectual detachment. This detachment ought not to result from ignorace–ignorance has no intellectual and also no ethical merit. A basic objection to Rawls' theory is that it amounts to a reductionism. Legal and political writers have insisted on the complexity of the phenomenon of justice and on the great variety of the ideas of justice actually entertained. It is clear that the answer to the question, what is justice ? in the form of a few principles, concepts, and conceptions cannot yield a theoretical model with which lawyers can work. Reductionist answers to this question is a trend manifest also in other philosophical contributions to the problem of justice. As a further example of this trend the theory of justice propounded by Chaim Perelman may be mentioned, which centers around the requirement for equal treatment of identical beings and the demands of regularity, security, and impartiality in the application of law. However, Perelman makes a most significant contribution to the treatment of the problem of justice by drawing attention to the theory of justification as a part of the theory of justice[10].

When a lawyer undertakes to survey the classical and contemporary learning relating to the problem of justice as such, he is likely to come to see that there is no theory on which he can fully rely in his concern with justice, even though he will encounter many stimulating and helpful thoughts. What remains is still the task of providing a workable theoretical model for dealing with the issues of justice which would satisfy his practical needs when the corres

ponding problems arise for him and perhaps also his intellectual curiosity. I am confident that this task can be performed, but cannot be done in the confines of a short essay. All that can be offered here is an outline of this model with a few requisite comments[11].

A theory of justice which should prove useful for lawyers and should be respectable as an intellectual effort in the contemporary learning has three main tasks. Its first task is to formulate a ***concept of justice***, which is done by a definition of justice. This concept supplies a frame of reference within which it would be possible to think intelligently and to talk intelligibly about justice. It would admit of different views about the ***contents*** of justice but operates as a communication device keeping discussions and disputes about these contents within reasonable bounds lessening, above all, the amount of talk at cross purposes. The common usage of the words " justice " and " just " and the relevant history of ideas provides material for the construction of the concept of justice, but this material has to be sorted out and organised by the definer. The concept of justice does not give answers to actual problems of justice but relegates such problems to a further field, in which the relevant ideas can be found.

The second task of the theory of justice is to stake this field and to collect and arrange what can be found in it. It is constituted by the *criteria of justice*, which are the basic principles of the law as it ought to be. In their totality, they make up the ***fundamental*** order of justice, which is similar to the constitution of legal order. What belongs to the fundamental order of justice is largely determined by the declared civilised standards relating to behaviour in inter-human and inter-group relations. This order is not a normatively closed or a static system but is expandable, modifiable, that is, capable of development depending on the prevalent and justified needs of the given time and place. The criteria of justice, just as the norms of the constitution of a legal order, do not form a deductive system and are not capable of mechanical application.

In every concrete issue of justice it is necessary to decide which is the applicable criterion, what is its precise meaning in the given situation, and whether it should prevail in the situation over other applicable competing criteria.

This poses the third task of justice, which is the furnishing of an *appropriate theory of justification.* Its principles and procedures can be drawn from common recognised standards of resonable discourse and from the experience of legal decision-making authorities. The methodology of science and the philosophy of practical reason, in particular the modern theory of argumentation, provide it with basic insights, with essential tools of thought, and with overall guidance.

To sum up in a few words : The lawyers' concern with justice calls above all upon lawyers themselves to work out a theory of justice adequate to their requirements. I am confident that this task can be carried out resulting in a theory of justice which would be plausible to all concerned and would prove solid as a basis for advance of ethical thought pertinent to law.

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Notes

1. Cf. E. Wolf, *Rechtsgedanke und biblische Weisung* (1948) 12 ff.
2. A. Denning, *The Road to Justice* (1955) viii, 4-6.
3. A, E. Sutherland, *The Law and One Man Among Many* (1956) 92 ff.
4. V. Lundsted, " Law and Justice " in P. Sayre (ed.), *Interpretations of Modern Legal Philosophies* (1947) 450–483.
5. A. Ross, *On Law and Justice* (1958) 174.

6. H. Kelsen, ***What Is Justice?*** (1957) 1–24.

7. R. Pound, ***Justice According to Law*** (1951) 1–35.

8. J. Stone, ***Human Law and Human Justice*** (1965) 287–321.

9. J. Rawls, ***A Theory of Justice*** (1971) esp. 3, 5, 10 ff., 293,3 02 ff.

10. Ch. Perelman, ***Justice*** (1967) esp. 21 ff., 35, 53 ff.

11. I have provided an exposition of this model in my German book *Theorie der Gerechtigkeit* (1977).