Legalism and Justice

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INTRODUCTION

Law as a pivotal part of the sociopolitical structure of any society and culture, no matter how civilized or tribal, has been subject of diverse definitions by many social scientists, historians, and unfortunately politicians. All these definitions have a common feature, or assumption that any statement claimed to be law has to exercise social control, often institutionalized. As to their claim to express the true nature of law, this multitude can be grouped basically into three categories. Those regarding law as a form of an abstract generalization, contained in written statutes or imbedded in the memories of old and learned tribal intellectuals, or as a principle of the actual behavior of the people of a given group[1] or, finally, as a principle upheld in decisions of authorities (judges, headmen, chiefs, etc.) of the studied specific group.

Legalismus, with its explicit, abstract generalizations belongs to the first group.[2] It claims that all the law derives its validity from general rules (*leges*), that these rules are exclusive source of all the law. Various controls of behavior not included in these rules are simply not law.

In dealing with legal theory English language encounters a unique difficulty. The problem is that the English language does not distinguish between the category of legal phenomena contained in explicit general rules (statutes) — *leges*, and *ius*, law proper, enforced by the courts of law. All other languages that I know make this important distinction (as Latin: *lex* and *ius*, French: *loi* and *droit*, Spanish: *ley* and *derecho*, Czech: *zákon* and *právo*, Chinese: *fa* and *li*, and even the stone age Kapauku Papuans use the dichotomy of *daamana* and *boko duwata mana*). Thus *ius* is the law proper and *lex* is a rule. When law and rule are not linguistically separated it leads to intellectual problems.

1 EHRLICH, E. *Fundamental Principles of the Sociology of Law*, Cambridge 1936.

2 POSPISIL, L. *Anthropology of Law: A Comparative Theory*, New Haven 1971, pp. 117, 275.

HISTORY OF THE USE OF GENERALIZATIONS

Subjecting the history of law to comparative scrutiny we find that the use of general rules for human behavior, *leges*, has been used only in very few cultures, and when used at all, only as labels for principles influencing legal decisions of the authorities. Indeed, where we find the legal rules (*leges*) in use they never constitute orders to the judges, chiefs, or other types of authorities to be applied verbatim, excluding other considerations. They appear only as an advice to the person making a legal decision. Their assembly in codifications is likewise only advisory texts. So in the case of Chinese legal codices, issued almost by every Chinese dynasty, they function as an advisory text and there has been no compulsion to use them verbatim in court decisions. No order to the judges, as we in the Western civilization are used to, especially in the European administration of justice. Besides the European legalism and its place of origin in the Near East, only one case existed outside of Europe. This was a case of a short-lived legalism in China in the third century B.C., practiced by the short-lived dynasty of the Ch'in with its legalistic scholar Han-Fei — Zu and Lord Schan. After its short existence it has been replaced by the traditional Confucianism.

It was in Mesopotamia where in about 2,000 years B.C. we see the first departure from the use of precedents in individual legal decisions to the application of abstract rule. These first rules in general terms had probably religious origin. Accordingly we find an ancient reference to the sun god Marduk, issuing orders to the stars, animals, plants, earth, and, of course, to man, containing directives for behavior and morality. From these myths we proceed to lawgiver authority such as Emperor Chamurapi and his code of abstract rules of about 2,000 B.C. At the beginning these were probably only advice to judges rather than binding orders. In time these rules acquired power of their own, thus inducing the judges to regard them as being orders to be followed and observed, similarly as we do nowadays. In time these written rules tended to be regarded by scholars and authorities as being the only exclusive source of law (*ius*). They obliterated slowly the old sources of tradition, precedent and the consideration of justice of a case. Voila, we have here the birth of legalism, formerly a rare and unusual phenomenon. These happenings and people like Heraklitus (500 B.C.) had already made a claim that the divine law nourishes all human law. The idea that all of the nature and consequently man's behavior is also subject to a universal law became firmly imbedded in the Greek philosophy with the Stoic school about two centuries later. The conversion of Stoics to legalism seems to derive from scholars such as Berrossos (320 B.C), a Chaldean who settled on the island of Kos, wherefrom he influenced and converted the Stoics. Through the settlements in southern Italy and Sicily the Stoic teaching influenced Rome, as it is documented in Cicero's work *De Legibus*. Here he claims that human life is subject to the decrees of Supreme Law.[3]

Old Rome, true enough, has its lega base in the famous *Lex Duodecim Tabularum* (Law of Twelve Tables), which consisted of abstract principles. However, these principles did not mechanically bound the Roman iurisconcults (lawyers) or the magistrate. They were treated as a framework to be interpreted and adjusted to

3 CICERO, M. T. *De Legibus*, London 1928, p. 461.

the problems on hand. They were guides and not orders to be blindly applied and followed by the jurist, but to help him with his *responsa prudentium*, advise to parties or a specific dispute.[4] Because the Roman Magistrate, the *praetor urbanus* was often a political appointee in his adjudications of legal disputes he heavily relied on the writings of these jurisconsults. Thus these lawyers' opinions, written in response to particular cases, were actually the source of the Roman law, so that it became law of cases (casuistic) rather than a law based exclusively on abstract rules. So the originally casuistic law of Rome evolved into a legal system which relied on abstract rules (*leges*). The Roman law became formally legalistic when the emperor Alexander Severus proclaimed his abstract edicts and their *constitutiones* (statutes), containing descriptions of general principles of law, as the only and exclusively binding source of law. The Roman Law became legalistic, a domain of imperial *Constitutiones*. Finally, in the sixth century A.D., Emperor Justinian had it codified into the famous *Corpus Iuris Civilis*.

After the collapse of the Western Roman Empire it became forgotten for several centuries. This codified and already legalistic law became resurrected in Northern Italy, where it helped the various city states in their mutual contact and trade. It became increasingly studied by several legal schools (Glossators, Comentators, Pandekists), and acquired such a prestige that in the sixteenth century it "crossed" the Alps and extended its influence over the rest of Europe.

While studying history of transformation of the old Roman casuistic law into legalism, I became interested in the cause of the success of legalism in Europe and also in China (albeit there only for a short period of time) during the rule of the Ch'in Dynasty, and in the absence of legalism in almost all of the civilized and tribal societies. What was the feature in these two civilizations that gave rise to the acceptance of general rules over the traditional casuism? I saw that in both cases it became dominant when the empires extended their territories and included in them diverse cultures and people speaking different languages. Obviously this situation made it easier for their leaders to control a multitude of cultural and linguistic variety of the new subjects. While China expanded into its vast southern neighboring territories, European nations such as England, France, Spain, Portugal, and Germany created their colonies all over the world, and Russia slowly annexed, after having conquered the Mongols, the Asiatic central region and Siberia. They followed their expansion and legalistic change in the fashion of the Old Roman Empire. Viewing this history and having realized the almost necessary change in these empires, I predicted that since similar conditions prevailed in the Aztec and Inca empires, they must have experienced similar legalistic change. To my great satisfaction my past student, Professor Offner, identified in his work on the Aztecs of Texcoco, legalism prevailing in the control of their territory. Will the same discovery be made among the Quechua of the Inca Empire? Not to my surprise if it will.

Law conceived as a system of abstract rules, codified or remembered has been used by legalists and contemporary scholars as an analytical device intended to be applicable cross-culturally. The problem with studies that apply such an analytical

4 SOMMER, O. *Učebnice soukromého práva římského* I., Praha 1933, s. 15.

value to abstract rules lies in the fact that the concept has not been used objectively for its heuristic value but has been dogmatically applied to unsuitable cultures, being the writer's own cultural devise, a case of flagrant ethnocentrism.

Consequently I argue against the indiscriminant use of the legalist conception of law and in the following I shall demonstrate the inapplicability of legalistic conception of law in cross-cultural research.

First: If abstract rule were regarded as the exclusive form of law then many societies which do not have rules would have to be regarded as lawless.

Second: Most of the societies in their legal system contain "dead laws", that means never actually used in the administration of justice, a study of the rules only would not disclose which ones represent the true law exercising social control.

Third: Rules do not always give us the total picture of the legal field studied, because in high percentage of the decisions rules have been ignored and the cases have been decided on the basis of precedent and tradition. Among the Kapauku Papuans of New Guinea, of my recorded 176 legal cases, only 86 have been made use of. In the European civilized Tirol (province of Austria), my research revealed that about twenty five percent of the legal cases adjudicated in the District Court of Steinach have been decided on the basis of the old local tradition and not on the provisions of the Austrian Legal code of the year 1871.

Fourth: In some societies a legal rule is used only as an advice to the judge rather than as an order. In some cases, the judge may even disregard an existing pertinent rule (as in procommunist China; Mark Van der Valk, Escarra, etc.).

Fifth: Often only a few experts actually know the rule and some if their knowledge may be even questionable.

Sixth: Judges may differently interpret the language of the same rule.

Seventh: The words used in a codification may be deliberately ambiguous, leaving to the judge to legislate (e.g. "in due time", "in due course", "adequate care", "justified doubt", "reasonable action", etc.). All of these words allow the judges to pass radically different decisions, though referring to the same rule.

Eighth: We may also face the fact that the meaning of a word written in a code may have radically changed over time. Then, what is actually the law? For example, in California, the idea of a cruelty of a husband changed its meaning remarkably. While in the time of promulgation of the rule in the nineteenth century it meant a physical assault, nowadays it may mean a verbal insult. We even have a case when a woman obtained divorce on the fact that her husband kicked her dog. She charged him with causing her psychological harm.

Ninth: There exists also a legal lag, the written, petrified legal code of the rules is usually behind the ongoing social change.

Tenth: In non-English speaking countries we have two different words: for the concept of law *ius* (*Recht*, *právo*, *ley*, etc.) and for the concept of rule *lex* (*Gesetz*, *zákon*, *derecho*, etc.).

These critical remarks show how problematic it is to use legalism (exclusive reliance on rules) in adjudication of legal rases. The use of an insistence on "the letter of the law" does not bring exactitude and uniformity in application of law as it is supposed to convey.

IUSTITIA — JUSTICE

Legalism has been a blessing for administrators, bureaucrats, and especially autocratic regimes and, of course, to dictators. In these political systems legal decision can be adjusted to the requirements and desires of politicians, while pretending to be objective and unbiased. Here it is not the judge or the dictator who imposes oppression and perpetrate atrocities, but all is blamed on the rules, because the police, dictator, or the judges fulfills obediently the provisions of the rules. These, of course, can be twisted and their meaning misinterpreted. In the modern dictatorship and their quasi-democratic offspring in Eastern Europe, for example, the legalistic rules allow the dictators, their police, and their judges to be as oppressive as they deem to be necessary. If the legal persecution becomes intolerable the dictators and their associates present themselves to be kind and even on the side of the oppressed. To demonstrate this, they even "liquidate" (as the Communists say) the heads of their enforcement agencies and their supporting stormtroupers. For example, Adolf Hitler had his friend Rhöm killed and had his SA Storm Troupers "punished", some of them even executed. Josef Stalin (Jugashvilli) had during his rule the heads of his political police periodically executed Dzerzhinski (Jagoda, Jeszhov, Lavrenti Beria after Stalin's death) and their Storm Troupers purged, and the name of the secret police force renamed (e.g. Cheka, NKVD, MVD, Gpu, KGB). The tactic of Hitler and Stalin was simply to pass a rule (*lex*) and then to start with their cleansing activity. This technic was to fool and somehow to pacify the oppressed as well as the people and their governments abroad. The actions and propaganda of these dictators succeeded to confuse even heads of the Western democratic nations, so that we find Chamberlain of Great Britain refer politely to Hitler as Herr Hitler, and concluding with him peace, which lasted only a few months. President of the USA, Harry Truman, called Stalin endearingly Good Old Joe (the worst murderer in the human history), president George Bush told his audience in the USA that Putin (quasi-dictator, a past KGB man) is a good man that he could see it in his eyes. Joseph Kennedy, U.S. ambassador to Great Britain, Ezra Pound, and the U.S. aviation hero Lindberg, all were admirers of the mass murderers of the twentieth century. Klement Gottwald of Czechoslovakia did not stay much behind the "illustrious henchmen" and like them he had executed his close associates Rudolf Slánsky and Schling. So it is clear that legalism in some states was constructive and in other an instrument of oppression, and that it has nothing to do with justice. Justice is, and should be, superior to rules (*leges*) and law (*ius*), it never had anything to do with legalism. So goes also then the ages old request *fiat iusticia pereat mundus* (let there be justice even if the world should collapse). If legal systems relying on legalism do not institute some curbs to the administrative excesses, then another Latin statement becomes true: *summum ius summa iniuria* (supreme law becomes supreme injustice). Great Britain in the legal past tried to preclude this happening and constituted courts of equity (discontinued in 1873).

The popular Western conception of the main function of law has been to mete out justice. The generally accepted view, as Lloyd observes, is that law has to be assimilated to justice, and that law without justice is a mockery, if not

a contradiction.[5] In many societies law is considered so close to justice that the ministry supervising courts of law is called Ministry of Justice rather than Ministry of Law (e.g. France, Germany, Czechoslovakia, Zambia, etc.). And the courts themselves are regarded as institutions of justice. In modern states administration of justice is supposed to be realized through application of law, law being only a means to determine what is just. One has only to remember that Hitler himself was a "law abiding citizen", and most of his atrocities were legalistically strictly legal (first the rule and then the executions). It has to be realized that law can be immoral, or even inhuman. Justice should be applied without a regard for its consequences. To Aristotle justice is universal to all human cultures, while law is not; it changes in time and space. To Plato justice is also universal to all cultures. In its substantive form it has to reflect the structure of a particular society. Its substantive and culturally specific form shows that its requirement of equality pertains not to all people indiscriminately, but to persons classified by the particular society in the same category (e.g. adult, minor, sick, healthy, citizen, father, male, female, noble, commoner, etc.). Thus culturally specific form or justice does not have a single universal substantive denominator.

Justice is usually divided into factual justice (justice of facts) which attempts to determine objectively the empirical evidence (the universal truth) in evaluating a particular disputes and justice of law. This pertains mainly to the question whether the law (not a rule, *lex*), a principle incorporated in a judicial precedent, is just in itself and how far its provisions may be applicable to the factual background of a specific dispute to be adjudicated.

JUSTICE OF FACTS

In order to do justice to a legal case the authority has to make an effort to establish an objective factual basis of the dispute. He has to investigate the nature of the controversy and the claim of the plaintiff and of the defendant. It is usually difficult to establish the truth of the conflicting claims of the litigants. It requires ingenuity, experience, and especially judge's integrity and impartiality. He must make a serious attempt at objectivity in his evaluation of the evidence.

The integrity and impartiality of the judges in Eastern Europe is questionable. For forty years under the rule of Communism the judge had to be not only a good Communist, but he also had to take advice, an order, from the Communist party, usually from its secret police (in Czechoslovakia STB) how to decide the case. Upon the supposed reestablishment of democracy in Czechoslovakia (1990) these judges (often having had to issue a verdict of death or a long term in concentration camps of that country (eighty in number) during the dictatorship regime, were unbelievably kept in their office, thus precluding any impartiality in their decisions.

In establishing evidence in a given case statements of the parties to the dispute, of the defendant and plaintiff (in criminal cases the public prosecutor) had to be used. With this respect it has to be realized that both civilized and tribal societies

5 LLOYD, D. *The Idea of Law*, Guilford 1966, p. 104.

distinguish between direct evidence and hearsay. Also, of course, between firm and specific statement and a vague assertion. Statements of the parties in a dispute are usually supported or disapproved by witnesses. These may be of two kinds; voluntary or those who had to appear *sub poena*, people forced into the witness chair against their will. In the Communist Czechoslovakia the witnesses were usually twisting the facts to conform to the party line, or were even forced to recite statements prepared for them by the STB secret police. In the subsequent Czech Republic, the judges, retained from the previous Communist dictatorship era, generally tried to protect the Communist criminals letting them off without any penalty. In cases of plaintiffs asking for their property confiscated by the Communist regime, these judges facing the likelihood that the factual evidence will require verdicts for the return of the stolen property, resorted to a legalistic technique citing a plethora of old Communist (and even some Nazi time) rules of procedure and driving out any possibility of even presentation of factual evidence of the case. Thus legalistic rules of procedure helped to eliminate consideration of the factual justice in the adjudication of the cases not appealing to the Communist party (that remained in existence in the Czech Republic), but abolished in other states.

A special type of testimony is confession of the defendant. It can be volunteered, induced, or secured by physical force or psychological torture. The last method has been widely employed during the medieval inquisition and has been then developed into an art produced by well-trained specialists. The ancient inquisition and the modern Communist and Nazi dictatorships made wide use of physical torture so that some of the interrogated people did not survive the procedure. While the Nazi usually used very crude beating, forcing people into painful positions, induced sleeplessness, or fasting, modern communists made of the torturing of arrested people an art, like in the time of inquisition. Also some resorted to crude methods, like the notorious Grebeníček, who was crushing the prisoners' genitalia with tongs, others modernized the torture, like the STB agent Hlavačka, who gave the questioned prisoners electric shocks into their brain, killing some in the process, and driving others insane. Thanks to the Czech legalistic method described above, in contemporary courts none of the torturers were punished, and the mentioned Grebeníček, thanks to his defense lawyer, did not have to even appear in the court. None of the Communist torturers and murderers have been punished to my knowledge, while it is modern to punish only the Nazi.

In tribal societies, especially in Africa, to arrive at a truth of a case when empirical evidence was lacking, the headman or chiefs tried to arrive at a decision by turning to the method of reasoning, based on the standard of "reasonably acting man". They decided on the guilt of a man by comparing his claims with behavior of an imaginary man acting reasonably in the given situation. Also they might have turned to the supernatural by using ordeal, oracles, self curse, or oath. By observing the behavior of the accused man, his readiness to submit to the supernatural test or reluctance, fear, and sweating revealed to the judges the concealed truth. No evasive methods were used like legalistic flooding of the court procedure with rules resting on unrelated technical considerations.

To summarize, the discussion of the justice of the facts we may conclude that this type of justices mainly deal with the question of how adequate and objective the

fact finding of the case is, how far the facts, as they objectively existed, match those assumed to be true while entering into the jural decision.

JUSTICE OF THE LAW

Whereas justice of the facts inquires into the empirical background of the dispute in order to establish objective truth, justice of law deals with much more complex and subtle problems. Formally it tries to enforce the principle of impartiality of treating like cases the same way. In other words, it deals with the problems of adjudication. It also turns against principles of the positive law, whether they appear in the form of abstract rules or abstractions implicit in the precedents, and asks whether the principles themselves are just.

JUSTICE OF ADJUDICATION

Problems of this type centers around impartiality and a humane application of the law. It is the formal justice which deals with the first problem of the two. Impartiality in application of law presupposes existence of legal principles, derived from rules or precedents of a general abstract character, which are categorically applied by the judge to relevant, alike cases, the very idea of treating like as like.[6] If this type of justice is violated it results in the case being decided contrary to the pertinent legal provision, either because its relevancy is ignored on purpose (owing to the corruption of the authority) or because the factual base of the case was misinterpreted and the decision was based on a not pertinent principle, intended for another kind of situation. To do justice to a case in a formal way the judge must dispassionately and rationally scrutinize the evidence and use his judicial skill to apply to it the proper provision of law.

The second problem which is called justice of adjudication, deals with a consideration of the particular case per se. One may call it a humane consideration and interpretation of the law, tempered by the individual case. In the justice literature this type has been called equity. The laws should be interpreted in the spirit of equality rather than legalistically by insisting on their strict lettering. From this point of view many legalistically decided cases are deemed to be unjust. Rules of equity are applied directly to the particular cases and their sole function is propagation of human justice. As the famous Sir Henry Maine says: "Equity has been conceived as a set of principles invested with higher sacredness than the one of the original law, and demanding application independently of the consent of any external body". Also in the words of Latin scholars: *Fiat iustitia pereat mundus*, let us have justice without the regard for its consequences.

There is a long history of equity as it existed already in Old Rome. Roman equity has its ultimate origin in the opinions of the famous Roman *ius* consults.[7] Affected by Roman tradition, British legal system recognized the problems of justice and equity

6 LLOYD, D. *The Idea of Law*, Guilford 1966, pp. 108–109.

7 BUCKLAND, W. W. *Equity in Roman Law*, London 1911, p. 8.

as having paramount importance in the administration of law. Therefore legalism with its utter simplicity has been rejected in Great Britain and also in the United States of America. Most legalistic judges of the present Czech Republic and the rest of Eastern Europe are simply ignorant of the legal history.

All what has been said about justice and equity does not mean that the formal legal system and its provisions has been rejected by legal justice and equity. Equity and justice have always been regarded in theory and also in practice as complementary to or conflicting with common law. It has not been a legal system of its own. Rather equity was an addendum to the British law, a formalized vehicle of justice.[8]

In many modern civilizations as well as tribal societies it has been recognized that summum *ius* means *summa iniuria*. Therefore in most, but not all European legalistic judicial systems justice in individual cases (as distinguished from the rule — *lex*) has been made possible either through looseness of statements in the abstract rules, in which the judge is permitted to legislate (see above) or even by virtual absence of a pertinent rule. Of course if too much emphasis has been placed on individual justice law becomes unpredictable, creating an insecurity, as it happened in Korea.

JUSTICE OF THE PRINCIPLES OF LAW

Aside from the question of factual justice and that of justice of adjudication the question arises whether the principles of law themselves (as abstracted from rules and precedents) are just. Most philosophers and social scientists have inquired into the matter of justice of principles of law in two ways. Either they concentrated upon the content of the legal principles, thus having investigated what has been called "substantive law", or studied the legal process, thus creating a field of "procedural justice". The substantive justice has been defined as an endeavor to find universal principles according to which one could judge all the human rules as legal or non-legal, just or unjust. Prevailing principle which has been used as a measure of just or unjust rules has been provided by the doctrine of Natural Law. Using this measure, we can decide whether some rules are just and others unjust. While legalists have not been concerned with these inquiries, their rule, of course, can be subject to the judgment of the substantive justice. Both groups of these scholars tried to find universally valid principles of justice that would either serve as a measure of validity of positive law, or make justice into an analytical concept with cross-cultural applicability. That this might be possible was encouraged by the existence of same conceptual parallels in some tribal legal systems.[9]

Traditionally the thinking in the Western civilization, philosophizing, and writing on substantive justice, has been dominated for millennia by one simple theory, that of the Natural Law. Until the time of Bentham's writings no matter of what schools of philosophers and jurists who tackled this problem of just law and

8 MAITLAND, F. W. *Equity*, Cambridge 1936, pp. 17–19.

9 GLUCKMAN, M. *The Judicial Process Among the Barotse of Northern Rhodesia (Zambia)*, Manchester 1967, p. 305.

correct adjudication, their theories were influenced by the tenets of the doctrine of Natural Law, so that present day anthropologists may rightly regard the theory of Natural Law as constituting the folk theory of justice of the Western Civilization. The religiously inclined theoreticians regarded the precepts of Natural law universally valid, because given by God, while the secular scholars have regarded Natural Law as deriving its tenets from the common basic thought of mankind. The impact of the theory of Natural Law led many scholars to conceive of it as the basis of law of all the peoples, and a philosophical-theoretical formulation upon which judicial systems regulating interstate and even international legal problems could be built.

There was an important difference of sociological nature between the pure Roman tradition and modern jurisprudence. While interpretation and study of law in Ancient Rome had been conducted exclusively by lawyers, in modern Europe the protagonists of legal thought and argumentation were mainly academic people, university professors and philosophers such as Grotius, Puffendorf, Hobbs, Lock, Spinosa, Kant, Fichte and Rousseau, to name just a few.

The impact of the theory of Natural Law has not been limited to the local systems of the various nations. Since it was regarded as a basis of the law of all the peoples it became a philosophical-theoretical foundation upon which a juridical system regulating interstate and international relations could be built. Indeed in the Old Roman Empire, Praetor Peregrinus ordered relations of foreign merchants by a system of legal principles called *ius gentium*. This system presumed to reflect juridical thinking underlying legal systems of known tribal and state nations of the Mediterranean world. It was a skillful adaptation of the law of the city state (Rome) to that of a complex compound of peoples with different cultures.

This system became a predecessor to our modern international law. Thus, the theory of Natural law played a major role in the theory of justice in the Western Civilization. Although it is true that the modern legal philosophy has explicitly discarded the conception of a universally valid Natural Law, the lawyers in their actual thinking and actions do apply its principles, as we could notice in the well-publicized Nurnberg trials.

The generally accepted ideas of the absoluteness and universality of Natural Law, as well as of its source and the reasoning of man certainly made a profound impression upon Immanuel Kant's theory of etics. He embraced the *a priori* argument for identifying Natural Law and justice on the basis of pure reasoning, and ignored the later emphasis upon *a posteriori* empirical identification of Natural Law, which abstracted it from the various systems of different nations although to him pure reasoning and Natural Law had to emanate from something more determinate than speculation and philosophy. It is the pure reasoning common to all free thinking men. A prerequisite for arriving at and applying such a principle to human actions is the universal existence of free will, i.e. equality of all men. In Kant's words: "There is indeed an idea of equality belonging to every man, which consists in the right to be independent of being bound by others to anything more than that which he may also reciprocally bind them".[10]

10 KANT, I. *The Philosophy of Law: An Exposition of the Fundamental Principles of Jurisprudence as the Science of Right*, Edinburgh 1950, p. 243.

To Kant, Natural Law is merely a criterion of justice distinct from the positive law to which the criterion is to be applied. Consequently, positive law is only valid insofar as it conforms to Natural Law. To Kant, the Law is just only if it exercises minimal restraint to the freedom of individuals. How far is it from the legalistic thinking and practice of Czech lawyers and especially Czech judges!

No matter how influential the philosophies of Natural Law and Imanuel Kant were, it is obvious that both applied values that were relative in time and place. A cursory look at the values of Non-Western Cultures reveals that the notions of equity and individual's freedom, for example, were not universal and substantive justice absolutely conceived is a myth. It cannot pertain to some absolute and universal system of values and it cannot determine with universal validity whether freedom or slavery is just. In Lloyd's words:[11] "Justice is little more than the idea of rational order and coherence, and therefore operates as a principle of procedure rather than of substance".

Kant's formulation of theories produced a far more radical and basic reaction to that dominant legal doctrine of the West. It stressed utility and happiness as a measure of morality of an act, and became represented in philosophy by the writings of David Hume.[12] The scholars of this orientation based their theory of justice upon the idea of relativity of law and justice in time and place. Authors such as Bentham, Ihering, Stammler, Kohler, Roscoe Pound, and others presented us with a variety of theories of justice and measures of it. They all advance convincing theories, but their influence upon legal practice and empirical study of law and justice became minimal, unlike that of the doctrine of Natural Law.

To conclude the discussion of the subject of justice of law, I would say that the last part on justice of law consists of theories conceived mostly by philosophers who present their theories of justice subjectively. Only the theory of Immanuel Kant, and especially the theory of Natural Law, exercised a wise and significant influence upon the theory and practice of law. The rest of the theories are little more than mental exercise of the authors with paucity evidence of presenting us with an objective evidence of reality derived empirically from social facts.

In contrast to the field of justice of law the justice of facts presents us with facts based empirically upon evidence and thus achieving the quality of objectivity. It is this field of justice of facts that received a great attention of lawyers and scientifically oriented scholars and judges of the post-communist era of Europe, especially in countries that extricated themselves from the past dictatorships famous for their atrocities against mankind.

An excellent picture of this contemporary era, its problems of justice, empirical evidence, misuse of legalism and tolerance of past atrocities and present misuse of justice we find in the Czech Republic in which judges of the Communist era have been retained in their judicial positions, in spite of the fact that they presided over the illegality and atrocities of the dictatorship past. In order to defend themselves and especially their Communist allies of the past in the supposed new democratic

11 LLOYD, D. *The Idea of Law*, Guilford 1966, p. 160.

12 HUME, D. *Treatise of Human Nature*, Oxford 1958.

court decisions, they resorted to legalism in a very effective way. To cover up and obscure past well-documented crimes and atrocities perpetrated by themselves and the Communist police, they turned to legalistic claims that all there is to law is contained in the rules (*leges — statutes*) of the past. They could hardly afford to make subject of their plea and defend the factual justice. They substituted it by emphasis on the past rules of procedure. Thus they managed to drown all the empirical evidence of the adjudicated cases in constant reference to past Communist (and even to Nazi) procedural statutes, the notorious totalitarian rules. Their verdicts have not been based on objective facts, but politically "justified" by reference to the camouflage of the legalistically constructed rules of procedure.

In this way the past Communist judges and their new disciples managed to defend the criminal past. None of the past criminals and murderers have been brought to justice. Even the inhuman offenses of the STB (secret police) like crushing the genitalia of the prisoner with tongs (Grebeníček) and killing or driving the prisoner into insanity by electric shocks (Hlavačka) have been skillfully ignored by the post-velvet revolution, authorities and judges. Both of these inhuman killers have died of old age in their beds instead on the gallows.

The same legalistic technique has been used to defend the numerous holders of the past Communist era "confiscated" property. Some of it even kept by communities or museums in their publically inaccessible depositories. While legalismus, so effective in administration of heterogeneous populations of large empires and confederacies, it has also been used to impart legally flagrant injustice upon vast populations. How true then sounds the mentioned old Roman proverb *Summum ius — summa iniuria* (Supreme law, supreme injustice).

LEGALISMUS A JUSTICE

Studie se zabývá vztahy legalismu (zákona) a justice (práva) v teoretické i aplikativní rovině. Autor navazuje na text analyzující terminologickou disparátnost relace v anglojazyčné oblasti (viz POSPÍŠIL, L. "Law" equals "ius" and "lex": The Major Problem of Anglo-Saxon Theories of Law, *Studia Ethnologica Pragensia*, 2012, 1, pp. 21–28.) a pojednává o problematice v širších kulturních souvislostech. L. Pospíšil soudí, že právo reflektuje sociální strukturu každé společnosti, která prostřednictvím příslušných pravidel (zákonů) realizuje sociální kontrolu. Právní pravidla byla (jsou) v obecné rovině vnímána jako doporučení ovliňující právní rozhodování příslušných orgánů, vykonavatelů státní moci (viz právní systémy Číny, Mezopotamie, Egypta, Řecka, Atétů, Inků atd.). Ve společnostech budovaných na demokratických principech se zohledňovala (zohledňuje) zásada „rovnosti před zákonem", zatímco v autokratických (diktátorských) politických systémech byla (jsou) právní rozhodnutí činěna především v souladů se zájmy reprezentantů moci.

KEYWORDS
Legalismus — justice — lingvistika — historie — interpretace — 1.–21. století

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Education
1934–1942: Real-Gymnasium of Kosina; Olomouc, Czechoslovakia — Mat. Ex. — General.
1945–1945: Charles University; Prague, Czechoslovakia — J. U. C. — Law.
1947–1949: Masaryk's University; Ludwigsburg, Germany — Philosophy.
1949–1950: Willamette University; Salem, Oregon — B. A. — Sociology.
1950–1952: University of Oregon; Eugene, Oregon — M. A. — Anthropology.
1952–1956: Yale University — Ph. D. — Anthropology.
1969: Willamette University; Salem Oregon — Sc. D. — Science (honorary).
1991: Charles University; Prague, Czechoslovakia — J. U. Dr. — Law.
1994: Charles University; Prague, Czech Republic — Ph. DR. — Philosophy of Science (honorary).

Field Research
1952 (summer): Hopi Indians, Arizona. Invistigated subjects: political structures, social structure, law.
1954–1955 (13 months): Kapauku Papuans, Netherlands New Guinea. Investigated subjects: culture in its totality, special emphasis on social control, law, political structure, economy.
1957 (summer): Nunamiut Eskimo, Brooke Range, Alaska. Investigated subjects: economy, social and political structure, law.
1959 (summer): Kapauku Papuans of Netherlands New Guinea. Investigated subjects: economy, social and political structure, law.

1962 (summer): Kapauku Papuans of Netherlands New Guinea. Investigated subjects: economic and legal change; effects of acculturation on native law and political structure.
1962–1963: Tirolean peasants of Obernberg Valley, North Tirol. Investigated subjects: formal (legal) social control exercised by the various village associations; community study; quantitative analysis of social, political and economic structure.
1964–2009 (summers): Tirolean peasants of Obernberg Valley, North Tirol. Investigated subjects: culture and legal change through commercialization of the peasant community; quantitative analysis of legal, sociostructural, and economic changes caused by recent opening of the Valley to tourism.
1975 (summer, 1 month): Kapauku Papuans of West New Guinea. Investigated subjects: ecomomic and political change.
1979 (summer, 1½ month): Kapauku Papuans of West New Guinea. Investigated subjects: legal and political change.

Fellowships, Grants, and Honors

1949–1950: Five Downtown Portland Churches Fellowships.
1951–1952: Foreign Student Scholarship, University of Oregon.
1952–1953: Yale University Fellowship.
1953–1954: Junior Sterling Fellowship.
1954–1955: Ford Fundation Fellowship.
1955–1956: Senior Sterling Fellowship.
1957: Arctic Institute of America, Grant-in-Aid.
1959: Social Science Research Council, Grant-in-Aid.
1959: American Philosophical Society, Fellowship.
1962–1963: Yale Senior Faculty Fellowship.
1962: American Philosophical Society, Fellowship.
1962: Social Science Research Council, Grant-in-Aid.
1962: John Simon Guggenheim Fellowship (awarded but not funded).
1962: National Science Foundation Research.
1964: National Institute of Health Fellowship (awarded but not accepted).
1964–1965: National Science Foundation Research Grant.
1966: Social Science Research Council, Faculty Research Grant.
1966: Fulbright-Hays Fellowship.
1967–1971: National Science Foundation Research Grant.
1969: Sc. Degree (honorary), Williamette University, Salem, Oregon.
1972: Ford Faculty Research Grant.
1973–1979: National Institute of Mental Health Research Grant.
1975: Lord Simon Visiting Professor of Anthropology, University of Manchester, Great Britain.
1978: Robert Merton Professor of Law, University of Munich, West Germany.
1979: Ford Faculty Research Grant.
1980: President, S. V. U. (Czechoslovakia Society of Arts and Sciences)
1982: D. F. G. Professor of Law, Law School of University of Munich, West Germany.
1982: Reelected President of S. V. U. (Czechoslovakia Society of Arts and Sciences).
1983: Fellow of the New York Academy of Sciences.
1984: Member of the National Academy od Sciences.
1987–1989: President, Association for Political and Legal Anthropology.
1989–Present : President at Large, Association for Political and Legal Anthropology.
1989: Visiting Professor, Law School, Universities of Cape Town, Natal, Stellebosch, South Africa.
1991: Fellow of the American Association for the Advancement of Science.

1991–Present: Visiting Professor, Charles University of Prague, Czechoslovakia.
1994: Ph. Dr., Doctorate of Philosophy of Science (honorary), Charles University of Prague, Czechoslovakia.
1996–1998: Liaison of Section 51 of the National Academy of Sciences and the National Research Council.
1998: Member of the Honorable Committee for the 650th Aniversary of Charles University's Founding, Prague, Czech Republic.
2006: S. V. U. (Czechoslovak Society of Arts and Sciences).
2008: Koerner Center Grant for Spring 2009.

Professional Employment
1947–1948: Lawyer's Office, Olomouc, Czechoslovakia.
1950–1952: Teaching Assistant, Department of Anthropology, University of Oregon.
1953–1956: Research Assistant, Peabody Museum, Yale University.
1956–1957: Instructor of Anthropology and Assistant Curator, Yale University.
1957–1960: Assistant Professor and Assistant Curator, Department of Anthropology, Yale University.
1958: (summer) Visiting Professor, Department of Political Science, University of Oregon, Eugene, Oregon.
1960–1965: Associate Professor and Associate Curator, Department of Anthropology, Yale University.
1965–1993: Professor and Curator, Department of Anthropology, Yale University.
1966–1993: Director, Division of Anthropology, Peabody Museum, Yale University.
1973–1995: Editor of Yale University Publications in Anthropology.
1975: (spring) Lord Simon Visiting Professor od Anthropology, University of Manchester, Great Britain.
1978: (spring) Robert Merton Professor of Law, University of Munich, West Germany.
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1989: Visiting Professor, University of Cape Town, South Africa.
1991–Present: Visiting Professor of Anthropology, Charles University of Prague, Czech Republic.
1993–Present: Professor Emeritus, Yale University.

Professional Associations
American Anthropological Association (Fellow); Sigma Xi (Felow); Czechoslovak Society of Arts and Sciences; Washington D.C. (Past President); New York Academy of Sciences (Fellow); National Academy of Sciences (Member); American Association for the Advancement of Science (Fellow); Association for Political and Legal Anthropology (President at Large); Association for Social Anthropology in Oceania; Society for Economic Anthropology (Member).

Courses Taught
Peoples and Problems of the Pacific; Cultural Anthropology; Ethnology of Papua and Australia; Anthropology of Law; Introduction to Social Sciences; Race and Culture; Ethnology and Political Relations in Southeast Asia; History of Ethnological Theory; Ethnology of Oceania; Anthropology of Economy; Man and Culture; The Peasantry and Europe; Field Methods; Ethnology of Europe.

Taught and Graded at
1956–1993: Yale University, Graduate School, College, Law School.
1958: University of Oregon.
1999– Present: Charles University in Prague, Czech Republic (Annual).
1978, 1982: University of Munich, Germany.
1962–1970: Southern Connecticut State University.

Taught but Did Not Grade at
1975: University of Manchester, Great Britain, Lord Simon Visiting Professor
1989: University of Cape Town, Visiting Professorship; University of Lausanne, Switzerland.

Lecture at
University of Oregon; Willamette University, Oregon; Stanford University, California; University of California, Berkeley; Washington University at Seatle, Washington; University of Idaho (Moscow, Idaho); University of Chicago; University of South Illinois, Chicago Circle; University of South Illinois; Tulane University, Louisiana; University of South Carolina; Georgetown University; University of Pennsylvania; University of Pittsburgh; Seton Hall University; University of New York; University of Connecticut (Storrs); Southern Connecticut State University; Western Connecticut State University; Albertus Magnus College; Quinnipiac Colege; Hartford Seminary Foundation; Harvard University; University of New Hampshire; Columbia University; London School of Economics; University College (London); Warrick University (Coventry, U.K.); Oxford University; Manchester University; Utrecht University (Holland); Utrecht University (Holand); Leiden University (Holland); Niimeegen University (Holland); Erasmus University (Holland); Amsterdam University (Holland); Munich University (Germany); Freiburg University (Germany); Freie University, Berlin (Germany); Muenster University (Germany); Hunter's College, New York; Charles University, Prague (Czech Republic); Western Czech University, Pilsen; University of Pardubice (Czech Republic); Masaryk's University, Brno (Czech Republic); Palacky's University, Olomouc (Czech Republic); Jagellonian University, Cracow (Poland); University of Sydney (Australia); University of Cape Town (Anthropology Department, South Africa); Stellenbosh University (South Africa); Natal University (Durban, South Africa).

Main Theoretical Interests
Lav and social control; political structure; social structure; formal and quantitative analysis in anthropology, economic anthropology.

Books and Monographs: Selected Bibliography
Kapauku Papuans and their Law, New Haven 1958.
Kapauku Papuan Economy, New Haven 1963.
Kapauku Papuans of West New Guinea, New York 1963.
Anthropology of Law, New York 1971.
The Ethnology of Law, Reading 1972.
Anthropology des Rechts, Munich 1982.
Sprache, Symbole und Symbolverwendungen in Ethnologie, Kulturanthropologie, Politik, Religion und Recht, Berlin 1993.
Obernberg: A Quantitative Analysis of a Peasant Tirolean Economy, New Haven 1996.
Etnologie práva, Praha 1997; (Czech edition of *Anthropology of Law*, New York 1971).
Sociocultural Anthropology, Boston 2004.