Part I
Fundamental Relations

INTRODUCTION

THIS STUDY ATTEMPTS to present the basic impulses operative in man's drive for justice and in the formation of legal systems. It is a "psychoanalysis" of justice and law, because it analyzes the psychological elements of law and the function of justice in the formation and application of law. In doing so, the study uses some, but not all, results of psychoanalytical research. It does employ the concepts of identification, regression, introjection, and others. It does not employ, because it is not applicable to an investigation of social and legal phenomena, the psychoanalytic method of free association; Freud himself did not use this method, ingenious for the exploration of the unconscious, when he occasionally touched on legal concepts.

A. The Method

The study introduces, in Part II, a new method which, although I hesitate to add another term to the spreading psychological vocabulary, I propose to call "institutional psychology." This method is not contradictory but supplementary to psychoanalytical thought. The method, although "new" as employed here, is not entirely original. In anthropology Malinowski used a method which started from the description of institutions, and which had been employed before, though not as a matter of principle, by James Frazer and Henry Maine. The method used in this study consists in tracing back typical relations in such universal institutions as matrimony, family, and government to the primary childhood anxiety of being alone (*"Urangst"*), on which the union between mother and child after birth, the defense against and guidance by the father, and the initial aversion and later co-operation between siblings are based.

To psychoanalysis this method hopes to contribute evidence for the existence of certain childhood claims and impulses; to jurisprudence an explanation of the structure of legal systems, as based on these claims and impulses.

Matrimony, family, and government are legal institutions. The function of law is to provide the rules operating in those institutions; this function is fulfilled by the construction of legal systems, which consist of sections observable in primitive and advanced states alike. The universality of the various sections of legal systems is due to claims based on common infant impulses. For example, the legal section that concerns

itself with social law is based on the child's impulse to nurse; criminal law on the impulse to obey or disobey the father; the law of contract on the impulse to co-operate or compete; property law on the impulse for dependence or independence.

Even as anatomy describes the skeleton and its function, common to the human species despite individual differences, so this method describes the petrification of human relations in the structure of legal systems, despite vast differences over time and place. The differences have been investigated by others, particularly by A. Kardiner.

The entire body of laws, in any legal system, falls by its contents into branches and sections—not necessarily identical with those found in texts, or in doctrines based on the Roman *Corpus Juris*. Thus, and although I am aware that the following structuring has been contested, legal systems in this study are divided into three branches—public, private, and auxiliary law; and each of these substantively subdivides into sections: private law into law of property, contract, services, subsistence, and status; public law into military, social, criminal, educational, administrative, and revenue law; auxiliary law into procedural and execution law. All laws of all branches and sections receive their meaning and interpretation from constitutional law. These sections are universal. Even the Soviet Union today has a property law, and even the most chaotically ruled state must have some administrative law.

The study consists, apart from the epilogue, of a descriptive and an analytical part. The former describes the two sets of claims with which parents are presented by children: one set arising from the relations among the children themselves—for example, their insistence on equal treatment; the other set arising from relations between the child and the parents—such as the claim to be governed. These claims in the family are prototypes for claims found later in states, mirrored in the sections of the legal systems, and expressed in the form of obligations.

The nine claims discussed in the first chapter all are derived from basic impulses—thus the claims of the child against the parents (the claims for theocratic reverence, anarchic individualism, self-determination, and social co-operation are derived from the child's impulse to nurse, to disobey or obey, and the claims among brothers and sisters as presented to the parents (the claims of equality, reward, freedom, privilege, and preference over strangers) are derived from the basic impulse of competition or co-operation. All impulses, in turn, originate in the *"Urangst"*—the primary anxiety to be left alone; it is this anxiety which drives the child to seek the mother's breast, the father's approval, the companionship of his siblings, and mastery over objects.

This study deviates from Freudian psychoanalysis not only in the

inapplicability of the method of free association. Also, concepts of traditional psychoanalytic doctrines could not simply be taken over, for three reasons: first, because such orthodoxy is unfounded in view of the changing opinions and terminologies of Freud himself in his fifty years of heroic pioneering exploration of the unconscious. Some concepts described and formulated by him are not always consistent, and occasionally not precise; some of which are basic for the problem of the psychological origin of law and of the function of justice, for example, the superego, ego ideal, and conscience. Their meaning in psychoanalytic literature differs, despite or because of subtle explanations by Ernest Jones, Sylvia Payne, John Rickman, Gerhart Piers, and H. M. Lynd, which partly contradict each other. Therefore, where the terminology is unsteady, the meaning as employed in this study is defined at the appropriate place.

Secondly, concepts of traditional psychology were not wholly employed because the method used in this study led sometimes to conclusions not in full harmony with those of Freud and leading psychoanalysts. The method resulted, for example, in a differentiation of the Oedipus complex into an Oedipus "union" and an Oedipus "conflict," and thereby deviates partly from Freud's opinion on the origin of morality and law. A similar discrepancy with Freud (and Ernest Jones) occurred in investigating the problem of guilt which in Freud's or Jones's opinion is a never-absent element of morality and law, whereas this study attempts to demonstrate that fundamental obligations such as the marital obligations are not conditioned by guilt. Nor is the teaching of some leading British psychoanalysts accepted that "an impulse for reparation" on the part of the wrongdoer is a decisive force in the mental evolution of the individual; such an impulse cannot be traced in any section of the law. It was therefore unavoidable to discuss some problems of psychoanalysis in the pretentious expectation that thereby legal theory might contribute to psychoanalytic doctrine and not, as it has been claimed implicitly up to now, only vice versa.

The third reason why all deductions of traditional psychoanalysis were not taken over is the weight of the findings of other psychological schools. The acceptance of these findings here, however, seems in harmony with a trend in present psychoanalytic research. Piaget's work with infants and the schools of Gestalt psychology, functional psychology, and operationist psychology have left their mark on this study.

Piaget's thought and his original and illuminating method of experiment with, and direct observations of, the behavior of infants, will remain invaluable for any investigation into the early sources of morality, law, and justice. His conclusions, however, could not be accepted in one crucial point: His distinction between a heteronomous and an autonomous

morality of children—the one due to the father's commands, the other due to independent development as a result of social co-operation with fellows—might underrate the mother's early influence. Lenient judgments of older children on faulty activities of their fellows are passed in the course of maturation because of the revival of the infant's understanding of the lenient judgment of the mother. Those lenient judgments of older children are therefore based also on a heteronomous morality. Piaget's observations and experiments enlighten the process by which harsh judgments in criminal law and the commands of the father are modified and softened in the course of maturation by co-operation with fellows, but they hardly stress sufficiently the impact of the mother's morality of support which is already apparent when she helps the child to nurse.

Gestalt psychology, which demonstrated the necessity for the human mind to conceive isolated perceptive and emotional experiences as a whole within a structural organization, assisted the analysis of legal systems particularly in the chapter on the law of procedure. There the legal procedural method of finding and ascertaining the applicable rule and the relevant facts follows Gestalt psychology and the observations of Jerome Frank.

Functional psychology which emphasizes the biological significance of mental activities and in this respect is in full harmony with Freudian psychoanalysis has been conducive for parts of the last section* on the function of justice and has been complemented by following trains of thought in the study of the American biologist Theodosius Dobshansky, *The Biological Basis of Human Freedom.* The section repudiates the doctrines which see the purpose and function of justice in the striving for happiness. The real purpose and function of justice, however, is survival.

Finally, operationist psychology and its offsprings, instrumentalism and behaviorism, have been taken into account in the investigation of relations between brothers and sisters, and between child and parents in pursuing their claims for justice. For in making use of observations by Freud, the inquiry like any investigation by operationist, instrumentalist, and behaviorist research states actions and conflicts in the quest for justice and thus "explains" the meaning of the permanent structure of any legal system. However, the existence and effects of perceptive and moral phenomena as described by behaviorist psychology already presuppose valuation of events and activities by the observer. Their selection is influenced by what he considers to be relevant so that for instance in Arnold Gesell's interesting presentation of the maturation process of children beginning from birth, their libidinous activities and emotions are assigned to a

* The author did not live to write this section.—*Ed.*

rather inconspicuous place. Even the most carefully drafted questionnaires are necessarily based on a moral philosophy of their authors, who, in the collection of data and facts, express what they—in harmony with moral principles in a given society—believe to be advantageous for the well-being or the survival of the individual and the state. The investigation follows behaviorism in starting from observations of conduct. However, their selection, as it is frankly admitted, was directed to show reciprocal relations of individuals and of groups which up to now have not been fully explored.

B. Survey of Contents

The first (descriptive) part of this study intends to show the conflicts of claims in the quest for justice both in the family and in legal systems. The first section deals with the family. First, the five claims for justice submitted to the parental rulers by brothers and sisters: for equality, rewards for efforts, recognition of privileges, granting of and protection against freedom, and preference over strangers. These claims may be called in abbreviated (but I hope not misleading) form, the communist, socialist, conservative, liberal, and nationalistic demands. Those conflicting claims are not only displayed in controversies with others: They are operating in quick succession in the mind of every individual child in changing situations. Shonld one claim gain exclusive or nearly exclusive preponderance and tend to intolerance against the other claims, unrest or upheavals will result.

The claims which are operative in the family are also operative in the state despite the different structure of the two units. The aim of the authorities who govern both units is the same, the more so as both were identical at an early historical stage: They want to maintain internal peace which is continuously disturbed by divergent claims for justice. The order thereby created among the subjects is the model of private law which regulates the relations between brothers and sisters and later with other fellows.

Next, the relations between parents and children are described, following observations by Freud (and other psychoanalysts) and by Piaget, which are partly confirmed and partly complemented. In this domain four contradictory claims are at work at the same time: theocratic reverence, anarchic individualism and, later, self-determination and social co-operation, which together create the model for public law.

Theocratic reverence and anarchic individualism are present in the infant's mind at the same early phase. Together, though contradictory, they dominate the infant's psyche. They are both asocial insofar as relations with other family members and with strangers play a minor role at

the initial stage. When such relations are physically possible and emotionally more firmly established, self-determination and social co-operation weaken individualism and deified rulership.

The attitude of the ruling parents undergoes changes by the growing influence of the subjected children's claim for self-determination and produces a dilemma. The parents must promote self-determination at the expense of their own authority. While they therefore act mainly as arbitrators in the conflicting claims of the children among themselves, they are judges and simultaneously parties in the conflicts which concern their own authority. They there pursue at the same time the divergent aims of stability and progress—of the preservation of an immutable sacred order and of adaptation to changing mental and social evolution.

The parents' obligation and right to govern is rendered even more difficult by the ever-increasing strength of the subjected children's claim for social co-operation after social reciprocal relations between fellows have become spiritually and physically possible. Social co-operation provokes criticism by the child when he gets acquainted with conduct that deviates from the sanctified routine at home and increases doubts about the omnipotence and omniscience of the family rulers. Whatever the course of disparate evolution, the impact of the claims for self-determination and social co-operation will everywhere constitute decisive factors in establishing the legal system in families and states.

Another decisive factor in the family is the relation between the ruling parents, discussed in the section "Husband and Wife." They, partly in agreement with each other and partly in dissension, impress upon the children the legal rules which form the constitution of the family and decide upon the guiding methods of education, which transmits the culture and morality of one generation to the next. The harmony or disharmony of the spouses' views and methods in government and education are fundamental for the destiny of the family and for the history of states.

The legal systems are defended and their realization enforced by claims discussed in the section "Stability and Security." There a brief look is taken at the family's "criminal," "tort," "compensation," and "administrative" law, and its "civil, criminal, and administrative procedure," as well as its "law of execution."

The observation that the rules governing the relations between the family members vary throughout the ages and all over the earth leads to the theory of the "relativity of natural law" which maintains that in any phase of development in the family and in any historical period a specific natural law is valid.

All legal systems are apparently multiform not only by comparison with others, but even more so by comparison with those in the same state

at different periods. Nevertheless, they are uniform in that they all are the outcome of a typical universal evolutionary process.

The situations in which the infant, the toddler, the older child, or the adolescent find themselves are the same in all families everywhere and at all times. Rules of support, which aim at the infant's survival during the period of nursing when he is helpless, have been generally in force, though the *modus operandi* varies; in a similar way educational rules for the sake of adaptation and orientation are in force in the course of the different phases of maturation. In states a similar evolution is discernable though it can only be illustrated, not proved.

The second section, "The State," describes the peculiar technique generally employed in producing legal systems. They are divided into branches and sections as indicated earlier.

In every section of the legal system one of the claims is basic for its formation and direction and is restricted by all others. The claims lead to obligations and to law as a system of obligations which is therefore described. (The notion of "obligation" as employed in this study is defined because it deviates from American usage.)

Obligations are classified into relative obligations (obligations in personam) and absolute obligations (obligations in rem); and into unilateral and bilateral (or multilateral) obligations. They all have in common the biological functions of orientation, adaptation, and assimilation in the meaning of those terms proposed by Piaget, and are differentiated in that they are the outcome of relations between rulers and ruled, and between subjects and their fellows.

Hence the last part of the second section serves as an introduction to the analysis in Part II. This part, accordingly, deals with the psychological foundation first of relative, secondly of absolute obligations, and thirdly with the ascertainment of obligations. It shows—in harmony with results of psychoanalytic research and the experiments of Piaget—the uniformity of emotional sources from which the various obligations originate and which explain their universality.

Relative obligations are based on the typical relations between mother and child (social law); between father and child (criminal law); between husband and wife (educational and constitutional law); and finally between fellows (law on contract). Absolute obligations are imposed by the parental rulers on everybody to protect absolute rights (life, safety, property). By the law of procedure the judicial authorities ascertain, and thereby normally create, obligations. In doing so they employ the instrument of reason by a universal though always unprecise method of judging by analogy in fact finding as well as in rule finding as has been elucidated by Jerome Frank and E. H. Levi.

The choice and effects of sanctions are intimately interconnected with the psychological origin of law. Psychoanalytic research, since Freud, has made illuminating contributions to the psychological origin and the great impact of criminal law to an extent that law and criminal law are nearly identified in the writings of many psychoanalysts. The even more fundamental existence and validity of social law which institutionalizes the rules for survival by support are generally neglected. This led to one-sided opinions on the influence and origin of guilt in law and morality.

The earliest concept of law has its psychological source in the earliest experience of the mother's directions, guidance, and help in nursing. All elements of law are *in nuce* present in this earliest situation. The institutionalization of social law originates from the desire for support and its satisfaction by the mother.

Criminal law has its main source in the father's harsh prohibitions. Everybody is therefore subject to two concepts of law, the one in harmony with ego ideal concepts of support, the other with the superego's aggression. Whatever their differing strength in the various zones of culture they must arrive at some permanent or temporary compromise lest survival prove impossible.

I

THE FAMILY

A. Brothers and Sisters

An institution exists in which the office of giving judgment and passing sentence is entrusted to, and enforced by, a firmly established authority; in which the sense of justice is deeply rooted in the minds of all subjects and frequently finds loud expression; in which human beings are first submitted to rulership and joined in fellowship: the family. The sentiments encountered in the family environment have psychological elements which have persisted in every society throughout the ages. The desire of the children to please father and mother, and, at other times, the urge to antagonize them, the envy and aggressiveness displayed toward brothers and sisters, and at the same time the solidarity with, and the sympathy for, those who belong to the same circle—all these emotions and others may change in force and intensity but not in kind; their influence on life and the course of evolution is changeless and eternal. Human beings, compelled as they are to repeat in their prenatal state the evolutionary biological stages through which the human race itself has developed, are likewise forced to repeat, in the structure of their communities, the principles which govern the family. Consequently, since children exhibit funda-

mental desires of mankind much more positively than adults, it is not in the complicated structure of the state that the investigation into the eternal quest for justice must begin, but in that simplest of all communities, the family.

In the period of totemism and in matrilineal societies the family head was selected by principles different from those existing today. But even if the father was a stranger and the mother's brother the nearest relative, the same passion of love and hatred, the same spirit of obedience to and revolt against authority, and the same feelings of jealousy of and sympathy for fellows have survived the course of history. The family with its ruling parents and its subject children has always been the prototype of all governed communities in spite of difference in details in the various zones of culture.

Some significant demands for justice are regularly put forward by every child in every family on his own behalf, first with regard to his fellows in the nursery world, and secondly toward his parents.

Between brothers and sisters, the first demand is to receive no less. Every child is anxious to obtain the same share of food, of toys, of love, as the others; he is extremely envious of preferential treatment, and this jealousy is in no way proportional to his real needs. This demand for equality may be called the communistic principle of the nursery. In the families of the poor as well as of the rich, equality in the distribution of the common stock is for the child the symbol of the righteous and enduring affection of the parents; it is the psychological proof that he has not been neglected in favor of the others, a practical demonstration of his parents' love. Should scarcity arise, that sentiment of watchful jealousy becomes still keener, for now is added the fear of starvation if he fails to get his share. This, however, is never the main problem; however abundant the individual rations may be, and even if they are rather unattractive, strictly equal distribution is claimed by every child. My late wife told me that once, at the age of four, she and her twin brother had each been given equal portions of raspberries except that hers lacked the caterpillars present on her brother's plate. She complained and cried—her attitude was doubtless that of every normal child.

The crude demand for an equal share for everybody usually changes as soon as the child's judgment begins to be influenced by reason. The naïve and uncompromising theory of absolute equality may advance to a doctrine that resembles the dogma of "to each according to his needs." Reluctantly, the child recognizes that the older brother needs more, and thus has to receive more. This evolution is accompanied by increasing discontent and growing unrest because it is difficult to reconcile the innate desire for equality with the cruel inequality of nature. After the parents

have succeeded in getting the children over this first mental shock, a still greater task is placed upon the parents by the necessity of considering individual differences instead of dividing the common provisions into equal shares. In any case, the more carefully parents refrain from showing preference for one child, the happier the family atmosphere will be.

Nevertheless, ardently as every child clamors for equality of treatment, and later of status, he desires just as fiercely to be rewarded for his endeavors and achievements. As soon as he is burdened with the complicated tasks of cleanliness, walking, manners, and learning the language, he expects to be recompensed for his toil and for his sacrifices in no longer remaining dirty, dumb, and on all fours. Later, if entrusted with the supervision of his younger brothers and sisters, he has to be rewarded for his exertions and for his services for the household. He is dissatisfied if, in spite of his behavior as an adult, he should still be accorded the same rank as his inexperienced brothers. The socialist doctrine, "to each according to his achievements," burns in the child with the same fire as the demand for equality, although the two claims are strictly opposed one to the other. Special rewards will always be incompatible with equal shares. And yet, in spite of this discord, a system of rewards is indispensable in attaining the objects of education. It is only human that the child should on the one hand take offense at the preference shown to his fellows as a reward for their endeavors, and, on the other, be equally offended if some special success of his own remains unrewarded. The indifference of nature in the unequal distribution of talent intensifies the everlasting struggle between need and ability. Ambition, moreover, which as a driving force in the process of maturing is stimulated and fostered by nearly all parents, calls for recognition of obstacles overcome and objects achieved. The promise of a new toy, the granting of rewards commensurate with efforts—these gifts play the same role in the infant's world as titles, decorations, and fair wages in the world at large, and they succeed equally well in giving satisfaction to the recipients of honor and money, and breeding envy in the failures. Still, notwithstanding their obvious discrepancy, both demands are voiced with the same absolute conviction as to their justification.

Another fundamental desire is in conflict with both mentioned demands. Every child tenaciously wants his individual position to be respected, and watches jealously every attempt at encroachment. Its natural status, and especially that of the oldest, has to be carefully recognized. The oldest son, destined to become the future leader of the family, the oldest daughter, designated as the representative of the mother in her absence, are justified in claiming prerogatives even if their ability or their needs should be inferior to those of the others. They are the bearers of the

family tradition; on the oldest child as long as he remains the only one, is lavished the whole and undivided love of the parents; in return for his compulsory sacrifice in relinquishing his former unique position, he is entitled to expect special privileges. In a similar way the younger ones, in varying degrees, rightly claim to retain as much as possible of their material treasures and also the psychological benefits of their parents' attention which they receive according to the order of their birth. Even the youngest clings obstinately to the privilege of being spoiled as the baby. From such experiences has arisen the conservative theory, of great importance in history: the justification of privileges and the preservation of what one has received in accordance with the graded scale of the family. Privilege is linked neither with needs nor with efforts: it follows from the mere fact of having been born earlier, of having acquired one's share in advance, of being in possession and therefore being in the right. Esteem for privilege, rank, and property is deeply rooted in the unconscious of every child with all the power and status of a divine law. The younger children invited condescendingly to join in the games of the older ones, exhibit for the superior skill and knowledge of the latter a reverence and admiration nearly as great as that which they show for the parents. This attitude persists long after time has obliterated the differences. Early experience is unconsciously never forgotten, and thus, in spite of the obvious contradiction by success and social status, the protective behavior of the older children toward the younger ones will often endure as long as life itself. Sometimes the characteristics of the oldest brother permeate the minds of the others; for example, the ideal of the gentleman, expressing the mentality of the ruling class, attracted all classes of English society, or as the ways of the Prussian junkers were adopted by all Germany. This influential conservative dogma forms a strong antithesis to both the theory of equality and the recognition of achievements; it is accompanied as are the other demands, by an unshakable belief in its justice.

A fourth demand is inherent in every human being from his first day. It is the desire to do, without restriction, everything he wants to do. The efforts of authority to keep this passion in check evoke the crying protests of the suckling, the sudden outbreaks of fury in the infant, and the resistance to discipline at school; since parents, brothers, and sisters are powerful obstacles in the way of the achievement of unrestrained liberty, it is this impulse that gives rise to the first feelings of loneliness, and later to independent reflection. So vehemently does it function that its promotion, restraint, and regulation will always remain one of the foremost aims of education: The freedom of each must not encroach upon the liberty of all. Only by such means the intricate problem of mastering natural aggres-

sive and destructive impulses may be brought nearer to solution. Compulsion and discipline are necessary foundations for any peaceful community.

As long as children insist upon a degree of liberty which would render them unfit to be useful members of their community, even the imposition of blind obedience can prove an indispensable means for evolving morals and conscience. Compulsion, however, if carried beyond bounds, would violate the fourth demand of every child, the liberal belief in his innate right to be treated as an individual. The result would be revolt and disorder. Children would grow up either broken in spirit and unable to render the services necessary to the welfare of their small circle, or as revolutionaries contesting even the most reasonable orders. It is indeed an often unattainable end to grant every member of the family just that measure of freedom adequate to ensure his progress without retarding that of his fellows, and to avoid both the unrestricted application of force and the permission of a degree of liberty that would nullify the equally important tenets of equality, just reward, and privilege.

These principles of communism, socialism, conservatism, and liberalism, though each is accompanied by a strong sense of justice, are constantly at war in the mind of every child. According to varying conditions, one or the other directs the inclination of the moment: If in need, he leans toward communism; if efficient, to socialism; if attacked, to conservatism; and if attacking, to liberalism. Should, however, a strange child join the family circle for long, and be favored or only be treated on an equal footing by the parents, all the children at once become united, forgetting their own contradictory demands and ally themselves against the intruder. To play second fiddle to brothers and sisters is hard but tolerable, for though competitors, they are friends; but it is utterly intolerable to renounce even a fraction of one's parents' affection in favor of a stranger. It is the nationalist dogma of the nursery that is exhibited in the instinctive presentation of a united front against the outsider. When adopted by the parents themselves, or, in communities, by the ruler, it advances to one of the decisive factors in history. It owes its strength to the mixture of love and hatred that is its essence: It demands justice for members, and denies justice to strangers; it means love of one's fellows through a united abhorrence of the intruder; it creates a mental tie between brothers who, in spite of all quarrels and controversies, are one in their devotion to the same father and to the same fatherland, and in their contempt for, and fear of, the alien. Nationalism is the shining star of fraternal love which, imperceptible in peace, stands out in war.

Justice, according to the nationalist creed, is reserved for members of families and communities, and denied to strangers; it is a moral quality of

the ruler as demanded by and for his subordinates. Others, not recognized as fellows, may expect mercy, not justice.

In this unending conflict of brothers and sisters concerning equality, reward, prerogatives, liberty, and preference for members of the family, each of them backed by a sincere sense of its justification, the parents are in a difficult position. First, they are concerned with maintaining order. Without order, neither the small body of the family nor the state—its extension—could endure. Order can be maintained either by threats or by rewards. The method of governing does not consist only in the application of forceful measures: It tries also to maintain order by argument and persuasion; by discussion between the governor and the governed; by avoiding arbitrariness and prejudice; by appealing to reason rather than to emotion. It is the peculiar task of justice to reduce the exercise of power to the minimum; the social function of justice is economy in the application of force. Justice may be described as a method of a governor that enables him to reconcile the conflicting demands of the subjects, to uphold internal peace with a minimum of force, and to restrict those demands as much as and no more than is required by consideration for others. Justice therefore neither directs a superior system of ideal rules and immutable decrees as taught by the doctrine of a law of nature, nor is it inferior to positive law, serving the different ends of individual states, as the German Historical School claimed to have proved: It is an eternal method. It is the method of reasonable parents who, striving after peace, persuade the children to forgo the full satisfaction of desires, never completely realizable in a community, for the sake of more urgent needs of their fellows, and who make use of force as a last resort. Life means change, and to meet its fluctuating conditions they are compelled to vary their attitudes to further the communist demand for equality should a state of scarcity prevail; the socialist principle, should too meager rewards cause efforts to flag; the conservative dogma should stricter discipline be needed to preserve the *status quo;* the liberal concept in order that even apparently aimless pursuits be sanctioned as an outlet for surplus energies and as a means for discovering reality by independent thought; the nationalist principle should the security of the home or the family reputation be threatened by the enmity of neighbors. No one principle is suitable at all times; everything depends upon changes in the world outside the family and in social conditions, upon the mental and economic evolution of the subjects, and on their varying relations. The most urgent requirement of the moment therefore regulates—or should regulate if order is to be maintained—the gratification which, at a given moment, is allowed to each of the eternal social demands.

The five contradictory claims for justice, presented to parents in every

family, represent those of humanity in general. Instead of the parents, the state, embodied in the king, in parliament, or in a judge, has to dispense justice; the legislative and judicial authorities, besought by entreaties and sometimes shaken by revolts of the discontented, have to seek for the least dangerous path to order. The subjects aim at equality, just rewards, the preservation of privileges, freedom, and national superiority and are explicitly or implicitly, intentionally or unintentionally, divided into Communist, Socialist, Conservative, Liberal, and Nationalist parties. Long before parties in the modern sense came into being, the five basic demands inspired political movements and brought about revolutions or reforms in social relations.

The membership of each party changes since every human being strives after different goals at different times. The theory of "class war" which supposes that every member of a class adheres to the same basic demand at all times is psychologically untenable; it does not explain why a party in power is defeated in spite of the social structure of society remaining unaltered—why conservatism finds a majority today and is relinquished for socialism or liberalism tomorrow. In fact, no one adheres to a single principle throughout his life. Everyone's mind is shaped and directed by all five basic demands, and one of these, emphasised at a given time by particular experiences and events, dictates the momentary attitude of the individual. When a worker is in danger of being robbed of his coat, he wants his *status quo* protected and turns to conservatism by calling a policeman; when he needs a coat and cannot get one, he will support equality; when because of work done he feels he deserves a better one and cannot afford it, he will voice the tenets of socialism; when he sees no reason for wearing a coat at all, he is a liberal; and if foreign competition should prevent him from buying a new coat, his feeling will be expressed in a spirit of nationalism. After having changed his mind—as he will inevitably several times during his life without meriting the charge of apostasy—his sense of justice will urge him to fight the evil objects which he himself had previously desired. Everyone goes through experiences in his childhood—and repeats those experiences in later life—which awaken and strengthen the desires for communism, socialism, conservatism, liberalism, and nationalism, as the occasion demands. Everyone knows these contrasting experiences, is therefore disposed to every basic social desire, and is able to understand, though frequently not to approve, the feelings of his fellow men. This fact, and not Rousseau's fictitious *volonté générale*, is the psychological foundation of democracy and of peaceful social co-operation. Since everyone has in infancy been in turn communist, socialist, conservative, liberal, and nationalist, he understands the demands of his opponent though he may not at the time share them.

He knows in his heart, even if he does not consciously admit it, that any one demand carried to extremes will obliterate the others, and he remembers his despair as a child at losing privileges, freedom, or equality, however much he may be opposed to any of them in later life. "Democracy," in the words of John Buchan, "is an attitude of mind." It is based on an understanding of the opponent, on tolerance and compromise, made possible by the fact that the period of conflict between contradictory desires, through which all infants pass, is an experience common to all men.

These common experiences may, but need not, lead to understanding and therefore to order and a state of justice. It will depend on the attitude of the parents—and of all in authority—whether justice can be approximated, dangerous tension avoided, and order established; it will depend on whether parents and authorities rise above personal prejudices and concentrate on their task of maintaining peace by molding every basic demand in accordance with the needs of the moment. Impartiality, an essential feature of justice, can never be fully exercised, for fathers are not supermen, but have their own inclinations and prejudices. The degree of impartiality to quarreling children and their contradictory demands makes for peace or disharmony in the family. Accordingly, in communities cooperation is promoted by impartiality and impeded by discrimination.

The greatest obstacle to co-operation and order is fanaticism, which insists on the fulfillment of one demand alone as a panacea for all evils, although such overemphasis must lead to the suppression of other demands and finally to explosion. If parents suppress a basic demand it will secretly grow in strength and dominate the child's mind. A child deprived of freedom will frequently advocate anarchy in later life. Most boys who have been denied rewards by overzealous parents will, when grown up, disregard tradition and display a desire for just rewards, liberty, and equality. The boy who has felt his family humiliated by the behavior of his parents bids fair to become a stubborn nationalist. All suppressed basic desires will eventually come to the surface and tend to result in absolutism.

B. Parents and Child

The attitude of the child toward his parents, like that toward his brothers and sisters, is infused with a strong sense of justice, and the claims arising from it have an even greater influence on peace and order in the family and, later, in the state. The settlement of quarrels between the children requires the intervention of the parents, and it is therefore upon the authority of the parents that a satisfactory relationship between the children depends. In the child's attitude toward authority, four claims for justice are simultaneously present in his mind.

In the early years of his life every child reveres his parents as if they

were gods. This may be called the theocratic idea of justice. The parents are almighty, they miraculously provide the necessary and the desirable. Their orders, often incomprehensible, have to be obeyed without question and need no explanation. But for them there would be no food, no love. Their omnipotence renders useless all resistance to unwelcome commands; tears and outbreaks of impotent fury are the only means of expressing discontent and are sometimes rewarded by kisses and endearments, sometimes by scolding and punishment. Every infant in the first years of his life is submitted to an autocratic system of government, whether father, mother, or a representative of both holds the reins of power, protection, and custody; absolutism and autocracy on the part of the parents, met by subservience or resistance from the children, characterizes the early phase of mental and physical evolution.

Whatever is opposed to authority is wrong, and whatever accords with the commands of the godlike superiors is right. Fear as well as love forces the child into submission. The more intimately he is bound to the parents, the more does he learn to avoid the sin of disobedience which would betray doubt in the omnipotence of his parental protectors without whose support and guidance he would be alone, deserted, and abandoned in a world unexplored and full of threats and dangers. Moreover, he wants to please the power that rules him, and to receive its blessings. This faith in theocracy, the desire to be submissive and to rejoice in submission, the wish to maintain good relations with the superior power, has a powerful and lasting influence on every human being's attitude to life.

Autocratic theocracy remains unchallenged as long as the child is entirely helpless and his mental capacities in an embryonic state. Soon, however, the situation changes and the child expects the parents to support his adaptation by guiding rules and to satisfy his curiosity. When the child has learned to walk, his curiosity, usually after his third year, displayed in his ceaseless "why?" and "how?" reveals the strength of this natural impulse. This period of inquisitiveness, indeed, of interrogration mania, puts a strain on the patience and knowledge of the parents. Its effect is not only to strengthen the child's self and to widen his horizon but also to shake his faith in the omniscience and omnipotence of his rulers, since many of his questions could not be answered even by sages. Many questions may be regarded as unsuitable and indecent, and may be met with reproof instead of explanation. Thus the parents, in spite of the child's devotion and dependence, remain godlike no longer; for a deity without omniscience is no deity at all.

This does not mean that the theocratic conception disappears. Children are taught, and eagerly learn, to revere divine powers and to be afraid of evil spirits and ghosts. God watches their every step to see that they are

obeying the order imposed on them by the parents, his earthly representatives; evil spirits threaten the disobedient. The child becomes aware of the existence of the king both from his daily life and from his fairy tales, a being who has almost the same authority as God and will punish the recalcitrant and reward the righteous. The divine right of kings, as Filmer explained as late as 1600, is self-evident and derived from the natural position of the head of the family. Even when the parents cease to be respected as superhuman, they are seemingly in close touch with divine powers. Justice, in this view, is identical with yielding to their orders; all actions, even if undiscovered, which flout their decrees will ultimately be avenged by some superhuman agency.

Another trend of feeling with even deeper psychological roots than the veneration of authority and representing the very opposite attitude to the parents coexists in the mind of the child at the same period of infancy, and may be called the individualistic or anarchic conception of justice.

Although the human infant, unlike the offspring of other mammals, is entirely dependent on his parents for several years after birth, and although he would perish at once without their constant care, being unable to feed or to defend himself, his psychological attitude only partly corresponds with that fact. His mind is governed by what Freud called the belief in the omnipotence of thought. His feelings are imbued with a magic conception of the world of which he himself is the center. When he is hungry and cries, he usually gets his food; when he is tired nobody prevents him from sleeping, and care is taken not to disturb his rest; when he is wet and makes this known by his cries, he is made comfortable; everyone tries to please him, and is rewarded and delighted when he smiles. Obviously, he rules the roost, and by simply making his desires known gets immediate satisfaction. Helpless in reality, he is almighty in the realm of imagination. This is the source of daydreams of being an emperor and a magician who can dominate the world by thought alone, who can kill by purely mental effort, and can injure his enemy by sticking a pin into his image. Ambition, the strongest impulse in the course of maturing, owes its strength both to the child's desire to please the parents by carrying out their orders, and to his urge to impress them by his independent achievements.

The anarchic legal tenet, arising consistently from that state of mind, is a very crude one: Whatever I want is right and whatever I reject is wrong. Any obstacle to the child's demands is a crime and only that which is in harmony with his solitary vision of unlimited omnipotence is lawful. There is only one sentence for him who presents a momentary obstacle to the fulfillment of that vision: death. Fortunately, the child has neither

the power nor the means to execute, and he does not really know what death is. When his mood passes he will love the person he wished to exterminate a short time before, just as toy soldiers who died in obedience to his commands will soon come to life again. Owing to the weakness of conscience in early childhood, his feeling is natural, that all others and even his parents, are mere conveniences, to be tolerated when useful and destroyed when obstructive. Man is a social animal, but by no means from the very beginning. He does not discover until the second year of his life that other children are entitled to some consideration. In that early period of social isolation the child can form few social relations with fellows while talking and walking remain difficult. Dreams are real, and reality is but a dream. All is right that accords with the child's wishful thinking, and all is wrong that presents an obstacle to his realization. This anarchic conception of justice, the idea that rights and egocentric demands are identical, and indignation at the overwhelming resistance of the outer world, personified in the authority of the parents, leave an indelible mark on the child's character. In later life it will encourage the conviction that the state has to serve the individual, and that the individual has no duty toward the state. There, in early infancy, arises the conception of a stateless society as described best by the German thinker Max Stirner in *The Individual Man and His Property*: Liberty of thought, lack of discipline, and criticism, from this point of view, are heresies no longer. Resistance to unwarranted commands is justified, and the application of force by parents and rulers to break that resistance is unjust. This found expression in the doctrine of inalienable human rights of the individual, and long before, in that of the monarchomaches, the Jesuitical defenders of conscience, who regarded even the assassination of a monarch as a religious duty and a worthy end when he violated the primary and sacred right of the individual to defend his faith and to defy the despotic demands of authority.

Both conceptions, theocratic reverence and anarchic individualism, though coexistent and accompanied by the sense for justice, are contradictory. One moment a child may protest at being prevented from demonstrating his power over a big dog, and the next moment flee to the divine protection of his mother's skirts should barking shake his belief in his own omnipotence. His actions are dictated by his impulse toward independence; any exceptional situation, however, such as a thunderstorm or a mouse, will immediately evoke faith in superior powers. Hope to force the parents to do his will, and contrition for an escapade which may have offended the human gods, alternate in quick succession, together with the accompanying senses of gratitude and guilt.

Individualism and the belief in theocracy represent everyone's earliest

ideas on justice. Contradictory as they are, they yet have two points in common: They are asocial because of the social isolation of the child in early infancy, and they ignore the resistance offered by outside conditions. The awe for parental theocracy leaves care for the present and future in the hands of the rulers, whereas anarchic thought underrates the obstacles with which nature and the community bar the way to the realization of egocentric ideals. Therefore, as soon as the child is able to recognize reality and the existence of a social order, anarchic and theocratic thought decline in influence although they are never entirely superseded by other conceptions better adapted to the child's environment. They continue to operate, unconsciously and effectively, in the minds of adolescents and adults.

Every child after emerging from the period of complete helplessness seeks a place within the social and natural order where he can hold his ground, following his own impulses and the guidance of his parents. He tries to conquer space by learning to walk, to overcome his mental loneliness by endeavouring to talk, to become independent by learning to feed himself, and not to remain an outcast by persisting in unsanitary habits.

In the first four years of life the child acquires knowledge, ability, and other treasures of human experience to an extent never equalled in later life. This period is crammed with happiness and disappointment such as no later stage of development can offer. By ambition and imitation the child is driven to explore the complexities of his surroundings, and to stand firm among the shifting sands of inexplicable events. His trend of mind is disclosed in his assumption of the roles of father or mother, nurse or teacher, or—in Western societies—driver, engineer, bus conductor, or doctor in his games, for these occupations have in common that those practicing them seem, to the naïve mind, to master the forces of nature. They correspond to the child's desire to control events rather than to remain their impotent captive. The same desire is responsible for the child's inspiration to become as efficient as father and mother, to play the same important part as they, and even to replace them in the life of the family. He admires and envies and therefore imitates them, assuming their opinions, manners, and hobbies. He wants to gain a hold upon his surroundings and desires to demonstrate that he is a personality, determined to occupy his legitimate position, and no longer a mere puppet.

Everything that conflicts with his determination to make his own way is condemned as criminal, be it alive or inanimate. The legs of the table against which he bangs his head are in the wrong and have to suffer a beating for their impudence. The staircase is an adversary which triumphs over his defeat when he stumbles and falls. The grownups, it seems, have the key to all mysteries, the magic means to fight all dangers,

and hidden charms to conjure evils. The vital task is to become independent by imitation and later by learning: Then, the child feels, the time will come when everyone will admire him as he now admires his parents for their ability to make noises with their mouths and to get what they want in response, to overcome the resistance of spoons, forks, and knives, to capture things by drawing, and sounds by writing. Such desires lead to a third conception of justice which may be called that of self-determination. Everything that conflicts with the child's idea of mastering his fate is wrong, and everything that furthers this end is right. Though the importance of the parents is recognized, this third attitude differs in train of thought and trend of feeling from that of theocratic reverence. The parents are no longer gods, but are esteemed teachers and guides who will lead the child toward his aim of dominating the forces of nature, and of determining his own position in the maze of the community. Their instructions have still the significance of laws, but are no longer unassailable and self-evident. If they prove to be worthless or given without satisfactory explanation, they strengthen the child's resolve to go on alone, led by undisciplined imagination and driven by curiosity and ambition. Orders are appreciated which add to the child's understanding of another fragment of his universe, and rejected when their purpose proves to be the upholding of parental authority for authority's sake.

The impulse of, and the claim for, self-determination entitles the child to accept educational measures as a right and no longer as a sacred duty imposed upon him. He may demand reasons; he may discuss and contradict; if response is withheld he feels justified in showing anger; every order must work to his advantage and must accord with his aim of gaining independence within the structure of the family. At the same time, a further quality is attributed to the parents: they become examples and ideals; they change from gods to models, from unintelligible despots to bearers of tradition and knowledge. They become leaders in the enterprise of conquering the forces of nature and discovering the secrets of social organization. Both theocratic and anarchic thought decline in influence when devotion to an almighty authority or unbridled liberty are proved by reality to be inadequate instruments for holding one's own ground.

The complete or partial realization of self-determination takes longer to develop than any of the other basic drives. The child's desire to be independent of his parents and to occupy a position of his own, though an early impulse, can reach its goal only by protracted efforts, and is strengthened by the increasing power of sex. The free choice of one's profession, and also of one's permanent sexual partner, is the object of self-determination. Because children mature slowly and because of the complicated structure of human institutions, the period of education and

preparation occupies nearly a third or fourth of everyone's life. During maturing the desire for self-determination increases and a new conception of justice develops, namely, that all measures concerning the individual's relations with authority should promote the fullest opportunities for the acquisition and fostering of individual abilities. The drive for self-determination gradually becomes one of the strongest forces in the evolution of families and states.

Self-determination will fight theocratic tutelage and the licentious dreams of anarchic thought with ever-growing vigor, although the old conceptions will remain alive and active. Thus in every child's mind a battle rages between a new conception of justice, influenced by the wish for self-determination, and by the old ideas of theocracy and individualism. It is because of the persistent trend toward self-determination that most children are disinclined to submit to discipline and to a rigid time table. They would rather be Robinson Crusoes who achieve everything by independent effort, are submitted to no authority, and who succeed in forming an empire or even a civilization of their own design. On the other hand, laziness and carelessness in children and a distaste for mental effort are caused by unconscious memories of the happy state of infancy when they could leave everything to the parents and live without effort in the fool's paradise which was once a reality for everyone. Children, in spite of their wish to gain knowledge and to join the community under the guidance and by imitation of the parents, still hope to achieve independence by some miracle, demanding no effort, or in their individual way, unrestricted by discipline.

A fourth idea on the method of justice in the relations between parents and children—one that we might call the concept of social co-operation—springs from the fact that human beings are mammals with herd impulses that foster the aspiration to become members of the family and citizens of the state. These impulses are not apparent at once; in early infancy children show no inclination for comradeship. The newcomer is usually detested by his older brothers and sisters, especially when their is no big difference in age. The first reaction of the older children is a sense of injury at the sudden appearance of a competitor. After the birth of my late wife her older brother reproachfully asked his father: "Was this really necessary?" The baby often has to be protected from attack by the two-year-old. The situation is aggravated by the wild behavior of the youngest, due to his rudimentary social sense, and frequently by unreasonable requests of parents that the older child should give way to the baby's tyrannical demands. Traces of this early feeling of antipathy toward the brothers and sisters have been observed in adults by psychoanalysis. It will, however, cease to loom in the minds of the older

children because of their ambition to lead, to teach, and to protect like father and mother; and, as far as the youngest is concerned, the fear of remaining lonely and isolated and the desire to learn soon give rise to a more conciliatory attitude. The parental rulers, though perfect models, are often unapproachable; their manner of thinking and acting is distant and hard to understand, whereas brothers and sisters have had to face and overcome the same difficulties only a short time before.

The herd impulse, therefore, strengthened by ambition, causes the child to look for social relations, to take his place in the family with his brothers and sisters, to join in games, band together with the others in complaints of the injustice of the grownups, and to find out and share secrets which have been concealed by the parents. A sense of comradeship emerges which is strengthened by pride in having the same parents who assuredly are outstanding. The infant wants to remain neither an outcast nor a plaything to be petted and spoiled. He feels, though he is not yet on an equal footing with his brothers and sisters, that he is on the way to making his voice heard, sharing experiences with and filling his rightful place within the family.

The desire for co-operation produces another aspect of justice which creates an *esprit de corps*. The child discovers the meaning of loyalty and learns to refrain from denouncing the failures, mistakes, or misconduct of his associates to the parents; to elect a leader of games—usually the oldest—and to be faithful to him and abide by his decisions; to follow rules of play and interpret them in consultation with his playmates, and to adhere to those rules; to bring forward his claim to the parents if excluded or overlooked; to agree in principle to the social order into which he was born, and yet to demand a proper place in the scheme of things for himself; in short, to concede the right to live, to act, and to be happy to his fellows, and to claim the same rights for himself.

Self-assertion of the individual grows in intensity by collaboration with others in an organized group. By contact with fellows the child finds confirmation and mutual expression of what he has admitted to himself with misgiving and remorse: that the parents may frequently do wrong and be wrong. Mass feelings are, as a rule, stronger than the sum of the feelings of the individuals who make up the mass. There may arise a spirit of criticism and doubt which finds expression, rightly, or wrongly, in the oft-repeated saying that age does not understand youth. The world will have to be reformed by the common effort of the new generation in defiance of age and tradition. It is the sentiment once expressed in a provincial assembly in Germany during that country's liberal period by the words: "I do not know the intentions of the government, but I disapprove of them." It may lead to a conception closely related to that of

individualism, which would tend to despise tradition and the experience of earlier generations unless the same ideal of social co-operation could connect children with parents and new ideas with old traditions.

Every child, having acquired his social position within the family, is bound to observe that food and clothes, toys and candies, and all things necessary or desirable for his well-being, do not come as gifts from heaven and are not acquired by the divine power of his parents only. He realizes that there are such things as toil and trouble, and that even bread, the most common food, is no gift of nature. He becomes aware of the common efforts of his parents to maintain the household. His older brothers and sisters already assist the parents by taking over small duties or, if grown-up, by contributing to the common fund. In practice and in theory he will feel that, as a full member of his small circle, his rights and his duties are interdependent. Thus social co-operation leads to a new appreciation of the parents: They are no longer deities, but human beings with limited faculties who work hard for his welfare. Their efforts will be vital to him for a long period to come, and this leads to a sense of personal responsibility. When he is assigned some duty, both he and the family will suffer if he fails.

The child's desire to be recognized as a full member of the community, his conception of social co-operation, is based on two experiences: on the one hand that parents and brothers need his efforts just as he himself needs their care; and on the other that his desires will not generally influence the parents unless he himself takes into consideration the wants of his fellows, which, consequently, he will have to recognize. From that standpoint, anything which imposes duties on him without conferring rights and vice versa is wrong, and any obstacle that hampers collaboration and intercourse with his comrades upon an equal footing (allowing for differences of age, strength, and efficiency) must be removed.

The right to co-operation is emphasized in all religions by the solemn admission of the child to full membership of the community through the puberty rituals. He thereby advances to the status of a recognized individual entitled to collaborate with his comrades, to express his opinions, to determine to a certain extent his own future and to come nearer to the fulfillment of his desire to become the leader of a family himself. Puberty is a fact of the highest psychological and social significance for the child. His freedom, his self-determination, even his obedience toward authority are based on his right and on his duty to co-operate with his fellows.

While the theocratic and the anarchic conceptions are in contrast not only to each other but also to self-determination and social co-operation, it might be supposed that the two latter conceptions work in every child's

mind in full harmony. However, in many situations they conflict. Often the child wants to be left alone in his adventures to explore his surroundings, or to remain aloof from his fellows in order to indulge in his daydreams. When one is busy devising an original method of killing the dragon and mentally preparing to return as a triumphant hero admired by all, it is annoying to be called by an older brother to join in some common game. Evidence of the early idea of self-determination is seen in the endeavors of social reformers who attempt to devise new methods of solving problems of society, and that of social co-operation is seen in the enthusiasm of the rank and file of all great political movements.

All these different conceptions of justice in relation to the parental rulers are bound to provoke unrest, since children may demand recognition of the anarchic conception when discipline is needed, or will evoke the demand for self-determination when dangerous incidents call for co-operation. Here, as in the relations between brothers, it is for the parents to resolve the inevitable conflicts. Here again, their decisions are conditioned by the varying exigencies of the moment. They command obedience to superior knowledge in times of danger; they encourage individualism as a creative force; they teach social co-operation to prevent isolation of a child in the family; and they foster self-determination to be relieved of the necessity of watching the child's every step.

One fundamental difference, however, distinguishes the method of justice aud the function of law in the domain of fellowship from that in the domain of rulership. The position of the parents in relation to the claims of communism, socialism, conservatism, liberalism, and nationalism arising among the fellows in the family differs decisively from that in relation to theocracy, anarchy, self-determination, and social co-operation which govern the attitude of the children toward the parents.

The latter demands affect the very authority of the parental rulers themselves, either, as in the case of the theocratic idea, by increasing their responsibilities, or as in that of anarchic thought, by challenging their power, or lastly, by steadily diminishing their influence through self-determination and social co-operation.

Parents who act as judges are therefore also parties. As arbitrators over the claims of the children against each other, they are normally able to abstain, to a considerable extent from personal predilections and to display impartiality. In the domain of rulership where the same task is imposed upon them, their difficulties are immensely increased because their own position and authority are at stake. Here impartiality frequently amounts of self-sacrifice. The ruler is forced to consider whether he should relinquish part of his influence and power as soon as the subjects' desire for increased independence is justified according to his own judgment—a

formidable proposition, indeed, voluntarily to yield to an assault upon one's own authority, and to exchange a position of infallible leadership for one of an esteemed adviser. Frequently the dilemma leads to revolts within the family and to revolutions in states; often, however, parents and rulers succeed in solving this seemingly insoluble problem by holding fast to impartiality even at their own expense; such a decision is made possible because it conforms with one of the strangest and strongest impulses of every mammal: to sacrifice itself for the sake of its offspring.

In the domain of rulership, parents are forced by their own interests to promote self-determination and social co-operation at the expense of individualism and theocracy. Justice, in this domain of family life and in the domain of public law in states, does not serve merely as a method of obtaining a state of balance; it is also instrumental in promoting self-maintenance and independence in the children and in teaching them to adapt themselves to social collaboration.

All mammals instinctively strive to make their offspring independent at the earliest age possible, and all mammals living in herds try to force their young to join the ranks, in order to relieve themselves of the burden of providing nourishment and security for an indefinite period. Human parents are subject to the same impulses. The children must live by their own efforts when childhood has passed, and they must take their place in the scheme of the community. The parents aim to make themselves superfluous. Any education is directed to this end.

Thus a bewildering situation arises: The parents in accordance with their own interests are obliged to discourage belief in their omnipotence so that the children may on the one hand learn to be independent, and on the other integrate themselves into the community. Agreeable as it may appear to be elevated by theocratic thought to a position of infallibility, this outlook is averse to the final aim of the parents inasmuch as it prolongs in the children a happy but undesirable state of dependence and irresponsibility. Belief in the omnipotence and omniscience, though pleasant at first sight, is in the long run unendurable even for the adored ones who are subjected to the strain of living up to unrealizable expectations. This does not mean that claims for self-determination and social co-operation ought or could be satisfied at the expense of theocratic or individualistic thought on every occasion and in all circumstances. The stage of the child's mental development and the state of his environment decide whether the claims are to be supported or rejected. No reasonable father would grant a degree of self-determination to a four-year-old suitable for a youngster of sixteen, or would expect a strong social sense in the mind of a toddler. Even in the period of adolescence, theocratic authority can never be eliminated in favor of self-determination and social

co-operation. If it were, the younger generation might refuse the help of leaders in an emergency when their experience and advice would be indispensable to the well-being of the whole community. Evolution, moving in a certain direction, can be observed in families and states. It is not a consistent and logical evolution in a world where neither human mentality, nor nature, nor history follows a logical and uniform pattern. Contingencies arise to hamper or promote evolution; sunshine and clouds, prosperity and hardship, fortitude and despair alternate in sequences that defy logic. Typically, however, the path of evolution leads from theocracy toward self-determination and social co-operation.

Justice has, therefore, a different function in the relation between child and parents from that between equals. Its purpose there too is to maintain peace and order with the minimum of force; but while this is the principal aim in the domain of fellowship, it is only one of the two essential ends in the sphere of rulership. Justice, in the first part of legal systems (fellows), is in the interest of stability only; in the second part (parents), it has to be employed also in favor of promoting maturation. Here the ideal, never attainable, always desirable, is economic and spiritual independency of the individual within the structure of an organized community.

C. Husband and Wife

Marriage is a universal social institution which establishes lasting economic and sexual relations between (usually) two spouses. It consists in the obligation not to desert the partner, to satisfy mutual sexual needs, to produce a family, to educate the children, and to govern by common efforts.

The intention to form a permanent union has been a characteristic feature of all marriages everywhere and at any period even when divorce and separation is permitted. Once marriage is concluded, witnessed, and formally recognized before a traditional forum, the marital obligations last for life or can be terminated only with the consent of the community. Their inherent purpose of mutual support and loyalty cannot be changed even by the parties' consent, in contrast to most other contracts.

Parental government, thereby established, reveals the fundamental purpose of the marital obligations toward the offspring: to guarantee his security and survival and to promote maturation by education. By what means this end is achieved depends on whether the typical attitude of the father or that of the mother prevails at later phases of evolution in the primitive family and the state.

Earliest measures of support and early education are left to the mother everywhere. Her influence is therefore conspicuous in the first phase of

family life as well as in primitive states. This led to the doctrine of matriarchy being the original form of government, which was supported by the observation that rank, property, and assets of the family were frequently inherited matrilineally, and that the belief in the Great Mother—the White Goddess—probably preceded that in a divine male ruler. However, though the mother directs the internal family affairs in relation to the children at the initial stage, defense against and attack on enemies outside were probably left to the male in all herds of mammals. In many primitive families the father may not have been the decisive factor and may have frequently remained a member of his own clan, and not of the family created by marriage. In this case the oldest brother of the mother took on the obligations of governing. Though the existence of pure matriarchy is not proved, the mother's care for manners and appropriate social behavior are predominant at the earliest period of the family, and correspondingly of primitive states; regularly paternal authority, shaken by the infant's birth and by its union with the mother, is restored sooner or later. From then on the father's attitude and its emphasis on force and obedience regularly gain superiority by incorporating into the mind of the subjects severe moral rules prohibiting the wish for patricide and incest. Later he introduces also beneficial rules aiming at the offspring's survival for the sake of his own and the family's immortality. Education and measures of support remain no longer the exclusive domain of the mother. Not only the father's aggressiveness but also his love predominate in providing food, in teaching by his examples, and in maintaining security for the dependents. His authority in internal affairs normally soon surpasses that of the mother.

The yielding of the mother's influence to that of the father signifies a revolution in the history of every family and every state. It does not mean that the mother's influence disappears. The consciences of both partners united by the marital bond are directed at similar aims despite frequent diversity in means. Both parents are disciplinarians as well as supporters. Both exercise aggression and love in order to maintain internal security, stability, and peace. Both pursue in principle the same purpose of education by introducing and enforcing prohibitive and permissive rules. Co-government does not normally result in conflict between the father's and the mother's divergent principles, but usually leads to a compromise. When such compromise is not achieved, the child is deprived of his basic right to be governed. Dissolution of marriage and of the family severs vital bonds, promotes antisocial behavior, and increases isolation anxiety which cannot be removed even by good custody outside the home. The observations of Anna Freud on the emotional and mental state of homeless children have been confirmed by the research of John Bowlby for the

World Health Organization. Even a badly governed family is not replaceable by a well-organized institution: The worst government is still better than no government.

Nevertheless, in spite of similar aims of the two co-governors of the family, the means to uphold authority depend upon the development of the family. When the paternal ruler dominates, the maintenance of his authority and the coerced obedience of the children become a central aim of governing. On the one hand, the father's increased authority is the source of loyalty, admiration, and deification; on the other hand, it increases in the long run the resistance of the ruled children due to their inborn impulse of self-determination. In the course of maturation the paternal authority in families is weakened by the co-operation of the growing children.

D. Stability and Security

Peaceful defense of claims—the right to be heard by the parental authorities—leads in the state to the establishment of civil, criminal, and administrative procedure.

If the child is to be cured of the tendency to take what he wants without consideration for others, he must be given an opportunity to complain, to state his case, to express his feelings and opinions, and to make his claims known. Even if these explanations do not bear fruit, they provide the child with an emotional safety valve. He may still resent being deprived of material satisfaction, but by having found an alternative and authoritative listener, the aggressive force of his indignation will lose much of its destructive impetus.

Basic principles of civil procedure are apparent in the family; no judgment is normally given without hearing; the parental judge must pass judgment, when no settlement can be reached, unprejudiced by predilections. When the parents succeed in impressing upon the children that legitimate claims can be more easily satisfied by their intervention than by the law of the jungle, an important step has been taken in the direction of establishing civil procedure.

Criminal procedure presents a more difficult problem, for here the paternal ruler is prosecutor, judge, organ of the execution, and party at the same time. His authority, and not only the interests of the injured, are at stake, and his actions are therefore always in danger of being misinterpreted as arbitrarily serving his own ends. His assurance that the whole procedure and the penalty inflicted hurts him more than it hurts the sinner, is not of much avail. He may get a reply like that of a young friend of mine, seven years of age, who told his father not to worry and to try to forget the whole thing. As long as an autocratic system of

government prevails under which all life revolves around the ruler's authority, the rules of criminal procedure follow other lines than where the welfare of the subjects is the paramount interest. When the godlike, royal, ecclesiastical, or paternal ruler is regarded as almighty and omniscient, denial of any of his indictments is tantamount to disrespect, which is a crime in itself. Free defense in criminal affairs and the resultant safeguarding of impartiality come late in evolution; originally the presumption of guilt, not of innocence, constitutes the basic principle.

Impartiality, this essential element of justice, is still more difficult of attainment in administrative procedure. In every family it is the office and prerogative of the parents to determine the ordinary course of daily life: to set the time for meals; to decide on the hours for work and rest; to buy clothing, toys and food—in short, to lay down the principles and details of administration. In the early years interference by the children is seldom tolerated; appeals may, or may not, be taken into consideration. The arrangements made by the parents depend on reasons which are a mystery to the children: on the necessity for father to be early at his office, on his earnings which determine the family's social standard, on his cultural interests, faith, upbringing, and traditions. In primitive states the ruler determined the time for fishing and hunting expeditions and for work. At that early stage children and primitive subjects may object to commands; but they accept them as the norm and claim no right of interference.

It comes as a comparatively late and often shocking discovery that other families live according to other rules, that in some the grownups have their meals separately, or in others the children are not allowed to join in the conversation at table. As the child becomes better acquainted with the world around him some institutions of the accustomed order, particularly those which conflict with his own inclinations, will be criticized. He will ask why some things are forbidden at home yet permitted in a friend's house. He may object to being prevented from reading books which other children know. He may ask why he must wear the outgrown clothes of his elder brother. The moment he asks for reasons and wants to make his own views clear marks the point where the desire for administrative procedure, for the right to have a say in his own affairs, becomes apparent. Parents are reluctant to satisfy that desire for many reasons: The explanation that they are less well-off than other parents will shake the child's belief in their omnipotence; the complicated structure of the state or the strong influence of tradition which lies at the root of even insignificant habits cannot be explained to children satisfactorily; father may be reluctant to admit that some arrangements are the outcome of heated discussions with mother; he himself may often see the impracti-

cability of a rule but may be afraid to shake the belief in his infallibility. So long as the child's attempts at stating his point of view and changing the order of the houschold are met with reproof, no administrative procedure comes into being; as soon as reasons are given and defense allowed, whether the request is granted or refused, the first signs of that section of law appear.

Of the three procedural fields, administrative procedure is the last to be instituted. If not established, it may hamper mental evolution because the means toward an understanding of the social surroundings are lacking, and the bond between child and parents may be severed; if established it weakens the position of the ruler, who is not only, as in criminal procedure, party, judge, and organ of execution at the same time, but has so far been the only legislative power. By permitting the child to co-operate in his own affairs, the way is open to a sort of co-government. From then the constitution of the family changes; the children are entitled to expect their point of view to be taken into account. They may be ridiculed and shown to be in the wrong; yet the struggle for independence and collaboration goes on—in a more friendly or unfriendly spirit depending on the insight of the parents. Finally, when adolescence is reached, co-government is definitely established although the preponderance of the parents' influence may last as long as the family remains intact. At this point the single family and the state, though they were identical at the beginning, are no longer comparable, for single families find their natural end when the child grows up and establishes a family and a government of his own; in states, evolution continues even after the theocratic and traditional ruler has been deprived of his influence. The right of audience in the ruuning of the family is the first symptom of an inevitable trend of evolution, the aim of which is participation in the government by the subjects.

Security is the first condition experienced by the human being. He lives in his mother's womb, protected from dangers and attack from the outside world, free of trouble, and without effort of his own. This experience is repeated, though not to the same extent and with the same intensity, in the first year of his life. At this period he is already exposed to disturbing influences, aware of unpleasant changes in temperature, required to exert himself in feeding, interrupted in his rest when cleaned and dressed, and experiencing fear and anxiety. He reacts against the impact of the outer world by whining and crying. Yearning for a condition of lasting peace and irresponsibility accompanies humanity throughout life and history and finds expression in the legends of a Golden Age and a Paradise Lost. The infant's reaction against expulsion and his protests against the menace of the outside world lead to outbreaks of fury against

imagined attacks and to the desire for retaliation. The parents in their role of protectors while trying to avert the dangers of weather, infection, and accident, cannot satisfy the desire for full security and can only help to acclimatize the child to the atmosphere of insecurity which is the lot of all living creatures. As for social accommodation, they try to make the child realize the interests of others and resist his aggression; they defend him against attacks from his brothers and introduce measures to avoid the occurrence of future disturbances.

Thus the criminal law of the family, like the criminal law in general, is intended to defend the existing order: to give protection against breaches of the peace; to warn the sinner against repetition; to deter others from following his example and to render him harmless. Even the kind of punishment meted out in both communities does not differ greatly. General warnings are the first measure; a special warning for the future may suffice in the case of trifling offenses; fines correspond to deprivation of rewards, for example, favorite dishes; imprisonment to the order for the child to stay in his room; the pillory to standing a child in the corner. Curtailment of civil and political rights corresponds to barring a child from an outing or commanding his silence; the extreme measure of the death penalty could in earlier times, be taken by the *pater familias* as part of his *ius vitae necisque*—the authority of the parental ruler over life and death of all family members.

While criminal law is invoked by the children for reasons of security, it emphasizes the exercise of force as an essential component of justice from the viewpoint of the governors. Justice, though the antithesis of force, can never dispense with a minimum of force. That force be limited to an adequate minimum is a postulate in the family. Lifelong resentment may result if bed wetting by a two-year-old is punished by blows. Bad manners have to be corrected by different measures when a baby deliberately overturns his bottle and when an adolescent acts insolently. Inappropriate penalties may strengthen the belief in force instead of inculcating a sense of justice, with disastrous results for any community. The violence of a father will be imitated in the child's behavior toward brothers and later toward other citizens, and even against the aging parents and rulers themselves. One child of my acquaintance, a boy of five, was flogged, did not cry, and calmly stated: "When I am old and you are weak, you will pay for this." Passionate punishment is at once recognized as satisfying a lust for power in the master, and as being in contradiction to justice. It encourages an inclination not to take punishment seriously and to bear it stoically, and leads to bravado, disobedience, secrecy, and defiance. Another boy of six revealed his increasing doubt in the efficacy

of harsh measures and his declining belief in authority by the philosophical remark: "Is this the way to treat a child?"

This is the reason why, in the early stages of family life as in primitive states, criminal measures are usually confined to grave offenses against authority, and are not applied to other cases of wrongdoing. Trespasses against their equally primitive brothers and fellow subjects are made good not by criminal law, but by the law of restitution and the law of torts.

Respect for property and privileges of others is not inherent in human beings and only slowly evolves under the guidance of parental orders for restitution. When restitution is impossible, compensation takes its place. The toy may have been ruined beyond repair; a bump will not disappear by punishing the assailant and pain suffered cannot be undone. The parents who persuade or force the child to offer his own toy to replace the one he has spoiled, or give up his chocolate bar to pacify the playmate he has hurt, whether or not the child is guilty of deliberate wrongdoing, are laying the foundations for the law of torts.

The application of force which makes law a reality, though conspicuous in criminal law and in the law of torts and of restitution, is in general regulated by the law of execution of judgments. In many cases the threat of execution is sufficient to attain the result desired. A mother's warning to tell father means the same in the family as the judge's reminder that execution will follow further resistance means in the state.

The basic principle of execution, that an authority must enforce judgments and administrative measures, is the same in families and communities. Differences in important details are due to the difference between the complicated structure of the state and the simple situation in the family. In family life the father functions as both judge and executor, while in communities these offices are normally separated, though in primitive communities the royal judge was often obliged to act as the organ of execution. In the family the rule that execution cannot be carried out beyond judgment may not be so strictly observed and exemptions from execution arise from different causes and are granted for different reasons than in the state. But even the rules or exemptions frequently follow similar lines. Children must often renounce a legitimate claim for restitution out of consideration for the baby as in the state indigent debtors are often granted exemptions. The lawbreaker in a family may be allowed to keep a book snatched from his brother if he needs it for school work, even as in a state necessities of living must not be seized by execution; for in both communities the law of execution is not an end in itself, but a means toward maintaining peace and order.

E. Relativity of Natural Law

The rules of procedure offer one of the most convincing examples of the truth established by the German Historical School that no principle of law can be proved to be of lasting validity throughout history. What could be more in contrast to the present quest for justice in procedure than the ordeals which made defeat in a duel evidence of guilt, injuries suffered in passing through holy fire evidence of treachery, and sinking in a river an irrefutable token of innocence? Formerly it was the duty of the prosecutor to extract confessions by torture and ordeals whereas today in democratic countries even voluntary confessions are not admitted as sufficient evidence. The presence of moles was once considered to betray the crime of witchcraft; today the evidence and the crime itself have lost legal significance.

The law of property among primitive tribes shows no resemblance to the complicated rules governing property rights in present-day capitalist and even communist states. In the realm of public law the constitutions of primitive states, feudal states, and parliamentary states have hardly any material rules in common.

Nevertheless, the rejection of "natural law" by many distinguished writers is erroneous. They are right only to the extent that indeed one natural law valid at all times and all places does not exist; however, there does exist a series of natural laws, every one of which is valid in specific periods and regions. In every era basic principles, best suited to the stage of evolution reached, are commonly believed to be, and really are, self-evident. The law of reason or nature is not the same in all the phases through which humanity has passed, but it is valid in each particular phase. In every stage of evolution and history, distinct rules of natural law are acknowledged as self-evident; legal systems must adapt themselves to these rules if order and security are to be maintained.

Rules are in force in every family for the treatment of babies, others for toddlers, others again for older children, and yet others for adolescents. Rules which are self-evident for babies constitute "natural law" for that age: They must have milk and carefully selected food, should be regularly fed and kept in close contact with the mother or her deputy, and sleep two-thirds of the day. Any infringment of these rules will harm and bring disorder to the life of the whole family. These rules are of unchanging significance for a certain age and a certain state in family life and are bound to be superseded by other natural laws.

If the parents are ignorant or superstitious and think a baby should drink beer or sleep only eight hours a day, their views conflict with experience, are contrary to natural rules, and will probably lead to the death of

the child. Such rules forever valid and self-evident for early infancy are clearly less valid for later periods of childhood. It would be foolish to force a toddler to sleep the greater part of the day. On the other hand, certain rules again are self-evident for toddlers: They may be allowed some liberty, but under control, so that dangers arising from their curiosity may be averted. They must be taught to obey without always being told the reasons which at any rate they would not understand. They must learn to exercise the small amount of independence granted to them in a way that makes it possible for them to be left alone for short periods without risk. These rules—and many others—constitute natural law for toddlers; they are not natural law for any later stage of evolution. Older children cannot, and ought not, be forced to unquestioning obedience; they should be able to walk unaccompanied, clean and dress themselves; keep discipline; gain elementary knowledge; and perform the small household tasks.

Natural laws, therefore, are in force in each period of mental and physical development. They cover equality, rewards, privileges, liberty, and status of strangers in relation to fellows and fellowmen; and theocratic reverence, anarchic individualism, self-determination, and social co-operation in relation to the rulers of family and state. Ideal rules of permanent value exist for every stage of evolution and serve as a criterion to judge the rules in force. A law of reason or nature for every such stage is not only conceivable, but a reality. It may differ in the various states and spheres of culture. But everywhere it epitomizes the experience of generations and is considered to be self-evident because it is in harmony with the moral belief of the state and confirmed by experience as the best means of maintaining order.

The law of reason or nature as recognized at a particular period is neither complete nor beyond criticism. The fact that it may be more thoroughly established in the course of time does not invalidate its reality. When Einstein demonstrated his theory of relativity, Newton's conception proved to be merely incomplete, not false.

Primitive community was a large family—a clan governed by a father-king or a mother-queen. The same forces must therefore have contributed to the emergence of law and order since family and state were originally indistinguishable. The intricate forces of communism, socialism, conservatism, liberalism, and nationalism have always dominated the relations between the subjects in both communities, while theocratic thought, anarchic individualism, self-determination, and social co-operation have determined the attitude toward authority.

What is true of the family is also true of states. The family is not taken merely as a model which exhibits some of the characteristics of

larger and more complex communities nor is the deduction of the function of justice from the social relations in the family and their application to those prevalent in a state a purely poetic simile. The psychological forces which operate here and there persist. The same permanent demands are discernible in the unwritten code of behavior in families and in legal systems. The relations between children do not differ essentially from those between citizens, and the attitude of children toward the parental ruler is basically identical with that of the subjects toward their governors.

The mentality of children and its evolution differ from that of adults in many respects. Their capacity for reasoning is undeveloped, their outlook more subject to emotional influences, their emotions more inconsistent and liable to quick change, and their behavior more unpredictable. Developments which take decades and centuries in states take but a few years in the family. There are, moreover, in advanced societies, many families with only one or two children, whereas in the state there are various groups of subjects. In the family, finally, social relations, especially in the case of infants, are limited. Puberty, signifying the ability to enter into sexual relations with a stranger of the other sex and into social relations with fellow men, loosens the bonds of family life and deflects a great part of all human passions—jealousy, ambition, aggressiveness, love, and the yearning for liberty and authority outside the small circle of childhood. The initiation rites in all societies and religions, in solemnly recognizing sexual maturity, emphasize the deep-rooted wish of early childhood, then so far from realization, for a permanent helpmate of the opposite sex, and the long standing ambition to occupy the position of family head, is now legitimized and will be focused upon new objectives.

In spite of these differences, fundamental desires do not essentially change. No new psychological quality will abruptly emerge and alter the configuration of the mind. The character is molded and fixed at the end of the fourth year of life; from then on reaction to new experiences is consistent. The moods of the spirit are transient and dependent on outer events and mental evolution, while the framework in which they operate is permanent. The relation to superiors and fellow citizens is preordained by the past: the chief may take the place of the father, colleagues and competitors that of brothers. The choice of a wife is not determined by mere chance; the similarity of the chosen partner with the beloved mother or a favorite sister will be a deciding factor, or negative feelings against those early models will result in a preference for a mate with opposite qualities. The attitude toward parents and fellows will change in the course of time because of advancing maturity and the individual's increased desire to become independent, to co-operate, and to determine

his own future; in states the same changes take place by cultural, economic, and social evolution in the relations with governor and co-citizens.

To illustrate what is meant by the "theory of relativity of natural law," the evolution of everyone's recognition as a person before the law is taken as an example. Reverence for the deified rulers, voluntary or enforced, is inevitably natural law for early infancy and for subjects in primitive states. As long as a baby cannot feed himself, cannot walk, is haunted by vague fears, is afraid of any stranger, and cannot make himself understood by language, his natural condition is one of uncritical obedience and slavery. It is not slavery in the sense that the commands given serve the sole advantage of the parents and not his own welfare; it is slavery nevertheless in that his own will is not yet recognized; he has to give way against his desires, and he cannot order his own movements nor determine his time of feeding, sleeping, and playing. His life depends on his parents; their right over his life and death, the *ius vitae necisque*, is the natural outcome of that state of slavery, and it corresponds to the position of the ancient ruler. Usually in primitive communities only the ruler is supposed to know the divine commandments which must regulate the behavior of every single subject lest the wrath of the gods deny success in the hunt or deliver the community into the hands of a hostile tribe. The subjects themselves, frightened by thunderstorms and menaced by enemies and wild beasts, ascribe all evils to merciless deities, whom the king, or the queen, with their magic knowledge and superhuman gifts can appease. They alone know how to avert disaster, and their divinity is revealed in their effective treatment of good and evil spirits. Good or bad harvests, victories and defeats, health and disease are attributed to their conduct or to disobedience of the commands of the spirits. The ruler is the born master of the fate of his subjects and must be slavishly obeyed even if he demands the sacrifice of lives. At that early stage of evolution the question of human rights does not arise. All conceptions other than awe, fear, and venerating love operate to an only rudimentary extent. Individualism may find expression in the crying of infants and the grumbling protests of primitive subjects, which may or may not influence authority, but no recognition is as yet accorded to a human right to make one's sentiments known. Likewise, the conception of social co-operation can unfold effectively neither in infants who have not yet evolved social impulses, nor in primitive man who, in co-operating with his fellows, does not follow free resolutions but ancient tradition, whose preserver and interpreter is the king-priest. Finally, the urge for self-determination, the desire to control one's own life, though it may be

present at an early stage, is still impotent and restrained. No infant can go where he likes or determine his activities and no primitive man can choose his own occupation or change his social position.

Autocratic rule in the early stages of family and social evolution, though the fundamental and self-evident principle of government, does not mean arbitrary dictatorship. The governor neither creates new rules nor desires to do so. He, the mouthpiece of a supreme authority, has to uphold a stable order. At that stage natural law, divine law, and the law of reason cannot be differentiated. Transgression of the sacred law deprives the governor of authority if he is the culprit, and places the subject, when he is the guilty one, beyond the pale until readmission is secured by a purifying ordeal.

The disappearance of the taboo system, and the accompanying decline in belief in magic, marks the point where the absolute power of the monarch ceases to be a question of undisputed tradition. This event corresponds to the growing doubt of infants regarding the numerous rules for everyday routine which were previously accepted without question. The growing strength of individualism drives children and subjects to express opinions, first in their own affairs, and later in those of their younger brothers and sisters. Rulers and parents may regret such interference; they must however take account of open or silent criticism. Older children in the family and advanced classes in states imperceptibly gain in independence and begin to exercise some influence over the treatment of their fellows. Absolutism, instituted by the gods, is natural law no longer although it will be emotionally operative and theoretically defended for long periods. Parents must seek the support of the older children, and rulers that of their more advanced subjects, if the steady continuance of their government is to be assured. The king's right over the life and death of the subjects, though still dogmatically maintained at this second stage of evolution, cannot be put into effect except in flagrant cases of disloyalty. The *ius vitae necisque* may still be law, but any attempt to exercise it will be strongly resented.

Between the period when the unrestricted authority of a divine ruler is reflected in a rigid taboo system in states, and in unchallenged traditional rules of behavior in the family, and that in which measures of the government are controlled by public opinion and where, in a family comprising adolescents, the parents have to justify their commands, there exist many intermediary stages, each having its particular natural law.

The tenet that every human being is a person before the law is the fundament of the natural law of our era, but in the early stage of the family and in primitive states slavery was the natural condition of children and subjects, and in the following periods at least some classes

of subjects were not recognized as legal entities. It is explicitly stated in the international conventions on the outlawry of slavery.

The movement for the abolition of slavery, which was initiated by Wilberforce at about the time of the general decline of the faith in the divine right of kingship, culminated in the condemnation of slavery in Britain and in the United States, in the latter after a civil war in which the vigor of both sides demonstrated the vital importance of the problem involved. The prohibition of the slave trade in Africa by the Brussels Conference in 1890 was a further milestone. There seventeen governments signed the act which was called "the Magna Carta of the African Slave." Slavery itself, and not only the slave trade, was the subject of the Convention of St. Germain in 1919 by which all members of the Leagne of Nations pledged themselves "to endeavour to secure the complete suppression of Slavery in all its forms." Abyssinia was admitted to membership only after declaring illegal the purchase of slaves within her territory and after joining in the convention of 1919 because, in the words of the British Empire delegate, "It was the opinion of all members of the League that in order to be admitted to it a country should clearly show its desire to abolish slavery within its territory." This development culminated in the Geneva Convention of 1936 by which all signatories were bound to secure the complete suppression of slavery in all its forms and of the slave trade by land or sea.

By those treaties slavery has been condemned by international law and is abolished everywhere with the sole exception of backward Saudi Arabia. Those international resolutions solemnly establish that, in our period, every human being is a person in law possessing inalienable human rights which cannot be repealed by the national laws of any sovereign state.

States which still live under theocratic rule cannot subscribe to that doctrine and for that reason are not entitled to be included in the term "civilized nations" in the meaning of Article 38 of the Statute of the International Court of Justice. Their refusal to accept a basic rule agreed to by all other nations bears witness to the correctness of the theory of the relativity of natural law, for those states, in their cultural and social condition, are still primitive communities for which slavery is a natural institution.

Any legal system which reintroduces slavery infringes the natural law of the period. The Nazi laws were declared void in international law for this reason: for Hitler reintroduced slavery in Europe including Germany itself though he avoided that term. This is especially apparent in the laws and decrees against the Jews which were later applied to members of other nations in a modified form. Slaves have no right to live

and may be killed without reason and procedure; hence the mass murders of Jews and others in gas chambers, their suffocation in trains, and their starvation. Slaves have no right to freedom; millions of not even suspected people were "legally" imprisoned in concentration camps. Slaves have no property rights; hence the "aryanization" laws and the measures of confiscation throughout Europe. Slaves have no legal successors; the property of deceased Jews fell to the German state. Slaves cannot be nationals or citizens, neither could Jews according to the Nuremberg laws. Slaves do not determine their own fate and, therefore, under Nazi law millions were deported for compulsory labor. Whether or not Nazi rules were instituted in accordance with German constitutional law, they were invalid because they contradicted natural law and the laws of humanity which were stated to be in force by international treaties signed by nearly all nations including Germany.

Such "laws of humanity" are referred to as a source of law in international treaties. In the preamble to the Hague Convention of 1906 "the High Contracting Powers deem it expedient nntil a more complete code of laws can be drawn up to declare that in cases not covered by the rules adopted by them the inhabitants and the belligerents remain under the protection and governance of the Law of Nations derived from the usages established among civilized peoples, from the Laws of Humanity and from the dictates of public conscience." Forty years later the charter on the procedure against major war criminals went further and determined that grave assaults against those laws of humanity are punishable crimes. The term "General principles of law recognized by civilized nations" which is used in Article 38 of the Statute of the International Court of Justice is only another term for the law of nature in our era.

A common law of nature, valid in our period, has positive significance. It implies a minimum satisfaction of the moral claims which together create the legal status of a human being, unless the individual is reduced to a position of slavery. For everyone who is not free to some extent, who cannot determine his own future, who is forbidden voluntary co-operation, or who is deprived of the protection of authority, loses his legal status as a person in public and private law. The limitations of every human right differ in the various countries; the complete suppression of any of the fundamental claims, however, must lead everywhere either to permanent unrest or to explosions.

The law of nature in a certain period does not need rational explanations. It represents the moral foundation and religious belief of the era. On the threshold of our period are inscribed the solemn words of the Declaration of Independence: "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator

with certain unalienable rights, that among these are Life, Liberty, and the pursuit of Happiness—That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed . . . ."

II

THE STATE

In every society law serves the settlement of conflicts between contradictory demands. While the details of law are continually changing, every legal system is framed in the same manner. It is divided into two permanent parts, public and private law, the one dealing with the relations of the subjects toward the rulers, the other with the relations between the subjects themselves. Private and public law consist of permanent sections for each of which one demand is always basic while its contents and limitations are fluctuating in the course of history.

The division of legal systems into public and private law is thought to be erroneous by Kelsen because norms exist and are valid only in relation to the state and therefore any law could be only public law. But the universal differentiation between those two parts of the legal systems which led commonly to different rules on procedure and judicial competence is a historical fact whose general appearance is not clarified by its negation. If it is contradicting the theory because the state cannot be the subject of obligations toward the individual, so much the worse for the theory, since states and governments, their historical representatives, have always been the subject of such obligations. The differentiation has never and nowhere been irrelevant, as shown lucidly by Lord Holland. Its psychological source directs public law to regulating the relations between rulers and ruled, and private law those between fellows. The frontiers between both parts may change in the course of the process of maturation in the family as well as in the state so that some section of the legal system may belong at different periods to the one or to the other part. In principle, however, public law is the law of subordination—of the rules stating the obligations of the ruled toward the ruler—and private law that of co-ordination stating the obligations between the subjects.

The contents and relevance of both parts of the legal system are very different in primitive states from those in later periods. Private law was of small importance in primitive states so that it needed the observations of Malinowski, Ruth Benedict, Margaret Mead, and others to demonstrate that it existed at all. But also in advanced communities, as for instance in Communist countries today, private law receded in favor of public law. Even where private law was firmly established some of its

sections belonged to public law in previous periods; for instance, the rules concerning services were part of public law in the era of feudalism.

Any attempt to describe in detail material rules in both parts of the legal systems would be futile in view of their diversity in the various zones of culture, and even in one and the same community in the course of a frequently inconsistent evolution. Nevertheless, it may be instructive to indicate how and by what general technique peculiar to legal construction, fundamental and universal impulses are operative in law. The examples in the following pages, taken mainly from the laws of present-day Western communities, serve therefore only as illustrations of such general technique, though the different sections of legal schemes appear also in Eastern and Communist systems, and in every legal system of primitive or advanced communities. Laws on property or on contracts in private law have been in force everywhere though their importance was limited in primitive states or in present Communist states. Laws on administration and social laws of support have never been absent in any legal system. The following description is therefore concerned with the demonstration of universal psychological impulses and their relations to each other, which are responsible for the general identity of the *framework* of legal systems.

A. Private Law

Private law regulates the domain of fellowship, public law that of rulership. The whole system of public and private law is defended by criminal law and the law of execution, and it secures the right of the subjects to express their claims by the laws of procedure. Its contents are interpreted, and their meaning thereby found and stated, by the constitution and the constitutional law of the community.

The technique used in every legal system in framing private law and public law is of a quality peculiar to legal thought. Each part is divided into sections, every one of which is devoted to the representation, defense, and limitation of one particular basic demand.

Private law psychologically falls into five main parts: the laws of property and possession; the law of contracts, except those relating to personal services; the latter together with all precepts concerning trade unions, collective agreements between employers and employees, and social insurance, are dealt with by a third section which may be called social service law; the fourth part which forms at present a section of public law comprises all laws granting rights of subsistence such as those procuring unemployment benefits, old-age pensions, and public assistance; the personal status and particularly the nationality of every citizen is covered by the fifth section.

Each of these parts is based on one of the fundamental social demands; the law of property and possession on that of conservatism by granting and securing the prerogative of ownership and possession; the law of contracts on liberty; social-service law on the safeguard of fair rewards; the rules for securing the bare necessities of life for the poor, the sick, and the unemployed on equality; and the regulations covering personal status on the preference of members to strangers.

It is more convenient here to follow the order conservatism, liberalism, socialism, communism, and nationalism, although our earlier order placed communism first. The reason is that the sections of the legal systems which are based on prerogatives, liberty, and preference of members to strangers lend themselves better to the technique operative in private law, whereas claims for equality and rewards have, at different periods of history, been parts of public law.

The first part of private law, the law of property, is designed to grant a sphere of influence to the individual and to defend it against any change that has not been approved by the owner. Presents given to a child offer the first significant examples of the granting of that privilege; they mean that the child, in principle, is entitled to do what he likes with a certain object; he may use it exclusively, he may prohibit all others from participating in its enjoyment, he may even destroy it. In the family as well as in communities, the privilege of ownership and possession is the first indication that children and subjects have reached a stage of evolution in which they are acknowledged as personalities. Property rights and the rights of possession are, though not the only privileges granted, the most significant ones. They are the first and most outstanding symptoms of a psychological tendency to achieve order by assigning an exclusive domain of his own to every member of the community.

The second part of private law, the law of contracts, is a later product in the evolution of the family and of the state. It is founded on the liberal idea that one may change existing situations by co-operation in freely giving promises and accepting obligations. Whereas the conservative principle embodies the recognition of children and subjects as persons, the liberal tenet signifies the acceptance of their individuality by parents and rulers. It recognizes the adventurous desire to alter conditions which had previously appeared unalterable, and to find the means for doing so by independent consideration and voluntary co-operation.

The demand for fair reward and decent compensation for effort constitutes the basis for the third part of private law, which comprises contracts for services and the rules of indemnification for professional accidents. This section originally belonged to the domain of public law; for in the family and in primitive states the rulers grant rewards by grace

and discretion. Slavery, a natural condition of subjects in early life and primitive societies, does not allow the right of fair reward. When the stage of slavery has passed, it still remains the care of parents and governors to keep to rules that satisfy the desire for fair rewards. These rules are decreed from above, and thus, though the subjects may exert some influence in the course of time, they are a part of public and not of private law. In Western states, in the periods of feudalism and the guilds, free contracts among the subjects as to wages, pensions, and compensation were exceptional.

Free contracts governing services are a product of an advanced stage of the community in a similar evolution as in the family the claim to rewards for services rendered may become an obligation of the parents toward the adolescent, though not toward the infant. In an even later stage, and after a hard struggle, the right of the subject to associate for the purpose of securing proper rewards is assured. At this point laws covering collective agreements and trade unions come into force and in close connection with them the laws providing compensation for occupational accidents.

The fourth basic demand of equality was originally cared for, and to a considerable extent still is, by public law. The principle that the social status of plaintiff and defendant should be disregarded in a court of law was not always "natural law" and as self-evident as it is today. Older children must be treated according to substantive and procedural rules different from those which are applied to the yonnger ones since the latter's ability to make themselves heard is still undeveloped. In Western states, clergymen, knights, or freemen were treated differently according to special procedure and special substantive rules, while now equality before the court is generally recognized. Formal equality in procedure foreshadowed material equality as to the bare necessities of life; poor and aged people in need were cared for in all periods of history, but in some of them they were not entitled to insist upon their claims as of right.

The nationalist principle dominates the fifth part of private law relating to the personal status of the subject so far as the position of foreigners is concerned. Its rules are at present frequently covered in a general part of codes of law or in maxims of so-called international private law. They reflect the restriction imposed upon strangers and the preference of the ruler toward his indigenous subjects. Judging from the small number of restrictions imposed upon the foreigner in private law at present, it may appear that the nationalist principle—the fear and distrust of this stranger —has declined in importance in the course of history, since in the domain of private law equal rights are granted to all residents regardless of nationality. In war, however, it becomes obvious that foreigners are only

tolerated. Their position in the community does not rest upon individual rights conferred on them by the constitution. Under conditions of war the nationalist principle regains full power and does not respect the rights of foreigners. It does not grant them permission to hold property, to conclude agreements or, frequently, to share in the benefits of social services. Even in peace it shows its influence in the exclusion of foreigners from certain professions and, particularly, from the civil service.

The assignment of a distinct section of private law to each of the five basic demands does not mean that only one principle is taken into consideration in the respective section. All social desires tend to absolutism and to the suppression of all others. Should law satisfy this antisocial despotic impulse, then all its sections would be separated from each other by an impassable gulf; immovable stability would dominate the law of property, license that of contracts; the granting of deserved rewards carried to extremes would make equality impossible, and unrestricted equality would stultify initiative. The various sections of law would no longer be interdependent, and the legal system would be split into a number of incoherent fragments. Disorder, not order, would be the result; justice and law could not fulfill their function of settling conflicts between contradictory demands, preventing the tyranny of one demand from suppressing the legitimate expression of all others, and thereby resolving unrest and avoiding revolutionary explosions.

The specific technique applied in every legal system, therefore, assigns one special domain to each of the basic demands and simultaneously restricts its absolute application within that domain by consideration of all others. In every section one principle is always basic and never exclusive.

In the law of property the principle of conservatism and of safeguarding privileges grants, in theory, unrestricted power over possessions; in reality it is checked by all other basic demands. The owner of a gun, though protected against any attempt to rob him of that property, cannot use it indiscriminately and has to respect the freedom of movement of his fellow citizens. A citizen may be forced, in the interests of the community, to sow potatoes in a period of emergency, or to sell his goods impartially to all. A businessman may be compelled to insure his enterprise against occupational accidents, in addition to paying fair rewards for past efforts, so that his workers may not be deprived of the opportunity of earning. His property may be expropriated for public needs. The nationalist principle may forbid foreigners to own certain kinds of property, for example, cars, or binoculars in time of war—and it may also prevent citizens from exporting goods which may be useful to the enemy, or prohibit the citizen from disposing of his own funds.

Sometimes liberty, equality, fair rewards, and nationalism restrict

privilege and conservatism in their own domain to such an extent that some property rights, reduced to *nuda proprietas*, are but an empty shell, a mere title without any material backing. But even if restrictions do not go as far as this, they considerably curtail the rights of the owner, and not only in Communist countries. Their ever-increasing scope depends on a trend of evolution which is opposed to the belief in the sanctity of property. Nevertheless the law on property will always be based on the theoretical recognition of a recognized sphere of influence of the owner, no matter how much that privilege may be limited by the other demands.

Even as stability is the essence of the law of property, evolution is the essence of the law of contracts. A contract in the formulation of Savigny which is accepted by many other jurists, is "the union of several in an accordant expression of will with the object of creating an obligation between them"; it is the freedom to create obligation that is unique and peculiar for this domain. To give and to accept promises in freedom constitutes the basic principle. Again it does not rule unrestrictedly. The conservative principle of privileges is taken into consideration in many respects. When an agreement has been made, each of the corresponding obligations is recognized by law as being a privilege resembling that of property. In some cases, for the sake of stability and security, contracts, like that of marriage, cannot be concluded conditionally or on certain prohibited terms. Equality likewise checks unlimited liberty; usurious contracts are, in most countries, voidable on grounds of gross inequality in the economic status of the parties and its exploitation by one of them; for similar reasons contracts made with imbeciles or under mental compulsion are invalid. Out of the same consideration public undertakings must conclude contracts on equal terms for all and are thus prevented from abusing their monopolistic superiority. The claim for just rewards also frequently restricts liberty of contract by forbidding payments of wages in goods instead of cash or by determining minimum salaries or wages in general or for certain occupations. Finally, the nationalist principle deprives merchants and industrialists of the liberty of uncontrolled buying and selling of vital commodities during war or economic crisis, or even in peacetime.

This characteristic of legal systems, that in each section one principle is always basic while others restrict its validity, is not strongly marked in contemporary social-service law, which should be dominated by the demand for just rewards. Up to the end of the eighteenth century, the guild system with its subtle rules for securing just wages and just prices, though not entirely successful in attaining its end, assigned a legitimate section of law to the socialist principle of fair reward. At the beginning of the nineteenth century the industrial revolution and liberal-

ism destroyed all former safeguards for just wages, and caused a state of social insecurity and internal unrest, which lasted for more than a century. The reacknowledgment of the legitimate claim for just rewards and its elevation to a legal sphere of its own came about only slowly. Similarly, a system of just prices had been the focus of the law covering economics for many centuries; although this had not given the consumer complete protection against exorbitant charges, it had in some degree succeeded. In Western countries, after the downfall of the guild system and the victory of liberalism in economics, the idea of price regulation by governmental decree was ridiculed, and enterprises which enjoyed almost monopolistic power could make extravagant charges in the name of liberty. To check this, price regulations made their appearance once more even in capitalist states, and will probably nowhere disappear again entirely. Measures against the big corporations are also directed toward regaining legal recognition for the principles of fair reward by securing the right of the consumer to receive value in goods commensurate with the effort he has made in gaining his livelihood. Nevertheless, the principle of fair reward in its legitimate domain is so hedged about with exceptions that they are almost the rule. The right of the socialist demand to govern a special section of law is not yet recognized as fully as those of conservatism and liberalism.

The demand for the guarantee of material equality in at least the necessities of life, is still far from ruling in that section of law which should constitute its legitimate sphere. Its right to govern a special section was successfully contested and denied in Western civilization by the triumph of the principle of *laissez faire, laissez aller*, and by the belief in the blessings of untrammeled freedom which emerged after the breakdown of the medieval economy. Whereas Christianity in the Middle Ages and the continuing belief of rulers in their divine mission had made care for the poor and the sick (and thus equality in the bare needs of existence) a religious duty, the overbearing confidence of the nineteenth-century governments in the automatic settlement of all social problems kept equality in the background. The suppressed communist idea forced its way to the surface either by explosion in revolts or by creation of a perpetual atmosphere of imminent crisis which eventually reassigned a special section of legal systems to equality in man's primary needs—a section which, since it was superimposed from above, is now in the domain of public law. At present, however, in many countries, the restrictions imposed upon that basic principle in its proper domain by the other demands are far-reaching. Unemployment benefits and old age pensions frequently depend on previous efforts and are available only to people who have been employed before, which is an outcome of the socialist demand. In some coun-

tries, foreigners are not entitled to claim social benefits, in accordance with the nationalist principle. Liberalism makes its influence perceptible by frequently exempting some classes of the population, such as farm laborers, from social benefits and still leaving the responsibility for their welfare with their employers. Moreover, the scope of the domain of equality is narrow. The primitive right to live—which became "natural law" after the abolition of the right of the superior over the life and death of the subject, except in grave criminal cases—should include not only the right to unemployment benefits and old age pensions, but also the right of all to be housed for a reasonable rent, to receive inexpensive medical treatment, and to get free education in elementary schools and for gifted children in secondary schools and universities. Such rights, despite promises in constitutions, are not practiced in many countries.

The demand of nationalism, which is the basic principle in the laws of personal status, is likewise held in check by all other demands. In private law, equality grants foreigners the same protection as citizens; liberalism allows them to indulge in nearly all activities; with few exceptions they have an equal right to fair reward, and they participate in the benefits of the laws of social insurance; they are endowed with the same privileges of acquiring and keeping property. As for their personal status in public law, their self-determination is seriously hampered by the possibility of expulsion without reasons in many countries; their full social co-operation is impossible because they are usually without political rights—and theocratic loyalty cannot develop because of their existing obligations to foreign rulers and their exclusion from military service. Thus the nationalistic principle which is, or at least was before the World Wars, in retreat in the laws of personal status belonging to private law, operates still vigorously in the domain of public law.

Frequently the legal technique does not properly operate. Sometimes a principle will usurp a domain as a mere pretender, as in the conquest of the economic sphere by individualism and unrestricted liberty after the industrial revolution; such revolutions frequently follow a period when the basic principle in question has ruled too exclusively in its particular domain. When the guilds became too predominant and impeded the driving force of individualism, individualism conquered economics. When the privileges of property were practically confined to a small circle in tsarist Russia the whole idea of property was shaken by the revolutionary spirit of equality. A long period is always needed to re-establish an equilibrium which will secure internal peace by assigning to every demand its legitimate sphere of influence and simultaneously counteracting its trend toward absolutism.

Nevertheless the technique by which legal systems of private law are

formed testifies that equality, fair reward, liberty, privilege, and national pride express permanent claims of mankind in the relations between children in the family and fellows in a state, and may be called the natural rights of every human being in this sphere. Such a proposition is not new: It was taught by one of the most notable legal documents of modern times.

The Declaration of the Rights of Man, published in Virginia on June 12, 1776, stated in its first paragraph, in words of lasting importance, "that all men are by nature equally free and independent, and have certain inherent rights, of which, when they enter into a state of society they cannot, by any compact, deprive or divest their posterity; namely, the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety." Here four of the five basic social postulates of private law are summed up: the liberal claim that all men are by nature free; the conservative dogma of safety, and thereby the protection of property and possession; the socialist demand, to acquire the means for happiness; the communist creed, foreshadowed by the expression "enjoyment of life" for all men—a term that found interpretation in the American Declaration of Independence of a few weeks later "that all men are created equal." All these rights were proclaimed to be eternal and inalienable, "self-evident truths" as the Declaration emphasized. Thus, four of the permanent psychological demands of the individual for justice in the domain of private law were installed as the rights of man. The nationalistic claim alone was omitted, presumably because of its conflict with the idea of equality. This omission of a principle which has been a powerful living force caused internal unrest for decades until the Civil War led to the victory of equality over nationalism—a result by no means permanent; for the impetus of the theoretically condemned nationalist claim impeded the realization of practical equality. The suppression of such an essential trend as nationalism or racialism was bound to cause explosions and was evidenced in the practice of lynching members of the community who, though regarded as strangers and unequal, were legally recognized as equals, and by the continuing desire for segregation and discrimination in the defeated South.

In practice and in theory, the constitution of Virginia and the Declaration of Independence exercised a lasting influence upon the Americas and Europe. Their spirit imbued the Bills of Rights of Pennsylvania, Massachusetts, Maryland, New Hampshire, Vermont, and of many South and Central American constitutions. The *Déclarations des Droits de l'Homme*, proposed in France by Lafayette, differed only slightly from their American model. The new conception spread from France all over Europe throughout the nineteenth and twentieth centuries; almost everywhere

a similar catalogue of human rights became the basis or a part of the constitution. Progressive statesmen apparently were convinced that the recognition of these human rights would suffice to maintain order, peace, and justice. Schemes on similar lines were contemplated after the Second World War by the Draft International Convention on Human Rights which intended to bind all civilized nations to pronounce a full list of all human rights and to defend them fully.

The principles summarized in the Bill of Rights are the pillars of all systems of private law; but they contradict each other. Full liberty would destroy tradition and security, full equality is incompatible with just rewards and with the preference of citizens over strangers. It is the demarcation line between the basic demands that is the vital question and not the recognition in principle of every demand. Liberty, protection of property, equality, the pursuit of happiness, and national pride cannot be treated as separate items; trouble is bound to arise when the liberty of the one conflicts with the security of others, or when compulsory distribution for the sake of equality impairs freedom of competition. Unfortunately, the struggle for the rights of man consists of a struggle between the rights of man. It is usually not the blunt denial of liberty, equality, or privilege which lies at the root of national or universal unrest, but the fact that freedom conflicts with privileges, and fair reward with equality. The question whether the New Deal in the United States was in harmony with the Constitution can by no means be answered in the negative by stating that it encroached upon the basic human right of liberty; for the New Deal was founded on the power of Congress to guarantee the pursuit of happiness by fighting want and unemployment. One constitutional right inevitably restricts other constitutional rights.

Any government that strives for full realization of one of the basic human rights will be defeated by the impetus of all others. While attempting to be unconditionally righteous it would destroy justice.

The history of France, since the French Revolution proclaimed the Rights of Man, confirms that the crucial problem of justice cannot be solved by the radical realization of all the rights of man, but only by restricting each of them in favor of all others to a varying extent under varying conditions. Since the end of the eighteenth century, France has never been able to maintain stability, probably because of the sudden abdication of reverence to deified absolute kings while the nation was still unready for peaceful co-operation of the classes. Every one of her governments aimed at the fullest attainment and domination of a single one of the rights of man, and fell by revolutions arising from the neglect of others. Each of these rights was concentrated upon in later periods without regard to the others.

The assemblies of the French Revolution, well-intentioned as they were, started this disastrous development. At one and the same time the absolute application of one principle was guaranteed, and was rejected with the same vigor in favor of the absolute validity of another one. The inviolability of property, the sum and substance of conservatism and privilege, was guaranteed by the new Constitution, and a special article was dedicated to the assurance that no expropriation would take place without satisfactory compensation; however, in defending opposite human rights, the same assembly ordered wholesale confiscation of property first of the emigrants, then of the dissenting clergy, and lastly of all defeated opponents. The tenet of equality suffered the same fate: Slavery was abolished in 1794 on the grounds that all human beings are born equal; in 1802, it was installed anew as indispensable for upholding the prerogatives of the white races. Natural children were put on a par with their legitimate brothers in 1793 in the interest of restoring the equality of nature in the face of the unjust inequality of law; a few years later their status fell lower than before by the prohibition of any research into paternity in the interest of liberty. Liberty itself was proclaimed as an inviolable right of humanity in granting full freedom of conscience, press, assembly, and speech; everybody, however, who tried to exercise these rights in a manner opposed to the revolutionary government in power was brought to trial. While the very core of all human rights, the right to life, was recognized as inalienable by the abolition of the death penalty after a stirring speech by Robespierre, the same Robespierre incited the same convention to the murder of tens of thousands of innocent or slightly suspected citizens in an attempt to strengthen the conservative stability of a very unstable order a short time afterwards. The socialist principle of adequate reward for efforts was protected by strict price regulation maintained by threat of severe penalties, which in its turn was rendered farcical by decrees which created inflation.

The same deleterious enthusiasm for the absolutism of each of the rights of man dominated the history of France in later periods, though in a different manner. In the revolutionary period abrupt changes took place almost daily, and each of the demands gained ascendancy in quick succession; later periods were characterized by the tyranny of one single demand which disqualified all others. It was always the hegemony of one principle and the tendency to regard the exclusive application of this principle as justice that made stability impossible and caused unrest and revolutions. After the downfall of the First Republic, the nationalistic principle, embodied in Napoleon, won in France: National glory reigned and *égalité, liberté, fraternité* had had their day. Then the returned Bourbons replaced nationalism by unfettered conservatism in their at-

tempt to revive the dead institutions of the eighteenth century: No longer was there any regard for liberty, national pride, and equality. After only fifteen years of conservative autocracy, a period of unrestricted liberty was ushered in by the July Revolution. The device of Louis Philippe, the bourgeois king, *"enrichissez vous,"* made freedom, especially in the economic sphere, the sole aim of the state, smothering the socialist, communist, conservative, and even the nationalist demands.

The suppressed passion for equality and just reward was given vent in the explosion of 1848; the First Commune elevated equality to the essence of justice and despised liberty and stability. After its sanguinary overthrow by the combined forces of liberalism and conservatism, a new nationalism gained predominance, not as genuine as the previous one, victorious rather through the decline of the other principles than through its own impetus. Again it was national glory, masked as justice, that sought to compensate for lost civil liberties and to veil social inequality. Then, typically, equality, the antithesis of national superiority, forced its way to the top in the government of the Second Commune after the catastrophe of Sedan. The Third Republic followed with a period of incipient anarchy, reserving for each of the principles a certain domain of the state where it reigned isolated from, and without regard for, all others. Conservatism governed the army, liberty and license ruled the sphere of economics, socialism was the creed of the professional classes, communism that of the workers, and nationalism dominated colonial politics. A symptom of this anarchic state of the public mind appeared in the growing influence of syndicalism—that is, atomization—in the rank and file of the intelligentsia and of the workers. At the end of the Third Republic, nationalism, forced upon France from outside, united the nation during the First World War. Immediately afterwards the heroic efforts of Clemenceau and Barthou were doomed to failure. France, the first propagator of the Rights of Man in Europe, was exhausted; the achievement of justice had been attempted by the relentless pursuit of each of the eternal demands: Consequently, the governments dominated by each of these principles, and concentrating on their own absolute ends to the exclusion of all others, were not conducive to justice and peace. The neglect of the real method of justice to deal impartially with the contradictory rights of man had led to chaos, and the failure to reconcile them according to varying conditions had resulted in disaster, and to the re-emergence of a more or less personal regime based on reverence.

Great Britain was spared revolutions in the ninteenth and twentieth centuries for the opposite reasons. All parties, Liberal, Conservative, and later, Labor, did not identify themselves with the obstinate representation of only one special demand as did the Continental parties. They

always gave way, sooner or later, to political claims which were in conflict with their declared principles, when circumstances and public opinion proved irresistible. A Conservative government under Peel repealed the Corn Laws, which served the prerogatives of the great landowners, and introduced free trade for the sake of economic liberty. Another Conservative government, under Disraeli, granted universal franchise, thus supporting a socialist demand; the same government revived the nationalist idea by its movement toward a new imperialism, later brought to maturity by another Conservative, Joseph Chamberlain. Liberals, under Campbell-Bannerman, fought nationalism during the Boer War, and shortly afterwards, handed over the government of the conquered countries and the whole of South Africa to the defeated Dutch, in strong contrast to the attitude of Continental liberals, who always sided with nationalism. Liberals again, on the proposition of Lloyd George, advanced the claims of equality in his budget and the Old-Age-Pensions Bill. Frequently it was difficult to distinguish the parties by their attitudes to the various social demands; each of them, though representing certain claims in principle, has been careful not to disregard others especially when the latter seemed to stir public opinion. Progress, though sometimes slow, was swift enough to avoid revolutions. To the extent that each demand was considered with regard to all others justice was operative.

The condition of private law is the crucial test of whether feelings of tolerance have triumphed over those of aggression. Private law presupposes that all members of the society have a common background of experience, and have all recognized, at different times, the value and vigor of each of the basic desires for liberty, equality, stability, fair rewards, and preference over strangers. These common experiences build a bridge of understanding between all, notwithstanding their varying momentary needs and desires. Everybody emotionally realizes, in spite of all differences, that he and his fellows sail in the same boat and are equally exposed to wind and weather. Where this realization is superseded by aggression and envy and by the desire for complete fulfillment of one demand at the cost of all others, no stable system of private law can be established. The human rights are brought into conflict, and the attainment of social order through peaceful settlement becomes impossible.

All systems of private law throughout the ages have represented a persistent attempt to strike a balance between the contradictory rights of man by assigning its proper domain to each of those rights and simultaneously restricting its power within that domain by consideration for all others. The lasting value of the American Bill of Rights and the Declaration of Independence does not rest in their enumeration of basic human rights in the relations between the citizens, for those rights had

been operative in all legal systems long before they were formulated. Mankind is indebted to the Declaration for another reason: From then on the basic human rights in private law were derived from the legitimate and irrepressible impulses of the individual and no longer from the grace of divine rulers. After the decline of theocracy men had to establish private law on the basis of tolerance, understanding, and mutual agreement. Where they exercised tolerance and where no group insisted on the full realization of one specific desire, internal order and peace between citizens could be maintained. Where they insisted on the exclusive domination of one of the basic demands, unrest ensued.

B. Public Law

Public law regulates the relations between ruler and subjects and is governed by the psychologically coexisting concepts of autocratic theocracy, anarchic individualism, self-determination, and social co-operation. In following the technique of legal thought, public law allots to each concept its proper domain. Like private law, it is divided into parts, each of which, though dominated by one basic principle, gives consideration to all others. The parts are: military law, founded on the respect for theocracy; freedom of speech, conscience, science, art, and the press on individualism; education on self-determination; law of revenue and taxation on social co-operation.

Military law has always been characterized by compulsion, prohibition of criticism, and strict discipline, and has preserved the elementary rule of obedience to authorities. In its domain, no resistance is permitted to any command from a superior, however nonsensical it may appear. Everything which is in accordance with his will is right, and disobedience is an unpardonable crime. The soldier must assume, in principle, the outlook of the infant. The commanding officer decides when the day shall commence and when it shall end; he imposes duties and confers rights without offering explanations or reasons; he demands sacrifices and he apportions praise; his mistakes must be tacitly endured; directed to run, to halt, to march, to look to the right and to look to the left, the soldier must not ask why. Autocracy is the only possible system of government as long as inexperienced children and subjects are threatened by dangers which they cannot avert. It continues therefore to be the ruling force in that domain of law which is dedicated to the bare survival of the state against attacks from outside and upheavals within. Unlimited confidence in the ruler, whether merited or not, is the unconditional premise of existence when the destiny of the whole state is at stake in a period of war or preparation for war. Submission is the supreme law, and no criticism is tolerated from the rank and file of the armed forces.

This does not mean, however, that autocracy tyrannically governs military law. A military law which entirely suppressed individualism and independent thought in the ranks would produce a poor army indeed. Situations arise in which any private may be forced to act on his own initiative and at his own risk though following the presumed intention of his leader. The strictest discipline must leave an outlet for quick decisions and bold individual action should the occasion demand them. Self-determination also plays its important part: In an efficient military organization, every private must be taught to understand the purpose of commands, and be master of the weapons he handles. Continuation of education, acquisition of some special technical knowledge or skill, and the general widening of the soldier's mental horizon are outstanding features of any efficient military system. Finally, social co-operation can never be ignored: An *esprit de corps*, a feeling of fellowship among the members of a company and among the armed forces in general, forms ties without which an organized army would be but an incoherent mass of slaves. Thus individualism, self-determination, and social co-operation recognize theocracy as the basic principle of military law and simultaneously restrict its absolute application to a varying extent in different periods of history and zones of culture.

Originally the faith in the omnipotence of divine powers lay at the root of all parts of public law. In primitive families and states the deified parental rulers cannot allow inexperienced children and uneducated subjects to control their own lives and take part in the task of governing. Nor can independent criticism and activities be permitted to children and primitive men without disastrous results. Individualism, self-determination, and social co-operation only slowly develop and take over appropriate parts of public law.

Individualism, in principle, governs the part of public law devoted to freedom of worship, art and science, speech and the press; its function is to preserve the individual's spiritual sphere and to protect his creative artistic endeavors from oppression by the government or attacks from other citizens. Sure as it is that individualism if allowed to dominate all sections of public law would lead to anarchy and the dissolution of the state, it is equally true that stagnation can only be avoided by allotting a special part of public law to the safeguarding of individual thought, independence, and criticism. All legal institutions, like life itself, are progressive and conservative at the same time; while the permanent frame of law assures stability, individualism is expressed in its changing contents. Originality, sometimes fruitful, sometimes damaging, is instrumental in spreading new ideas and preaching new ethics, in making discoveries and inventions, in seeking future utopias through the criticism of existing in-

stitutions. Where individualism is not accommodated by a domain of its own, the legal system loses its balance. Justice, therefore, in order to maintain peace and order, and to promote evolution, has assigned in principle the domain of science, art, religion, and freedom of communication to the fundamental principle of individualism in the course of a slow evolutionary process which found expression and revealed resistance in all primitive and advanced societies at all periods in East and West.

As in all other parts of legal systems, individualism never unrestrictedly governs its legitimate domain. Censorship may be introduced in the interest of authority when in the view of the ruler anarchic thought might endanger order and security, especially in war. Regard for social co-operation likewise frequently restricts individualism; churches of varying denominations, while claiming freedom of conscience for themselves, may not always be inclined to grant it to their competitors; universities and research institutes which in some respects legitimize individual endeavors are not always fertile soil for the development of outstanding individuals. Individualism nonetheless always remains the fundamental idea and driving impetus in the part of law which is dedicated to the recognition and permission of creative efforts of artists, inventors, explorers, and prophets, and it is always restricted in its own domain by consideration of other fundamental claims.

The law of revenue emphasizes the obligation for co-operation. All members of the community ought to share in the sacrifices indispensable to the maintenance of government and to the safeguarding of the state against dangers. Taxes must therefore be paid by all, and service in the armed forces must be rendered by those able. The stronger the citizens' faith in the units of the state, the more sternly are evasion of taxes or desertion from the army condemned. A low standard of public morals, an increase in defrauding of revenue, or widespread reluctance to serve in the armed forces are symptomatic of growing anarchic individualism.

The impulses for freedom, self-determination, and privilege restrict the basic principle of social co-operation in its legitimate spheres. Individual circumstances such as the maintenance of children and the source of income are taken into account. Occasionally the spirit of enterprise is encouraged by exonerating new undertakings from taxation. For the sake of self-determination, taxation laws often do not lower the standard of living drastically so that smaller incomes are exempted from taxation or subject to proportionally smaller payments. Theocratic privileges are rare today; the revenue of the king (in some countries the income of his family) and of the elected president, however, are normally not subject to taxation.

Self-determination was described as the next fundamental driving

force in the evolution of the relations between child and parents in the family. It appears to be the basic principle in the rules on education although the influence of the other basic impulses which limit its force and impetus is strong. Education is a universal phenomenon which usually in our present era is unjustifiably restricted to mean education in schools. Schools, however, are of comparatively recent origin and by no means universal institutions. Only slight traces of what we call schools—general means for the education of the bulk of the population—are found in primitive or feudal communities, and even in the most advanced communities universal education in schools was introduced only during the nineteenth century in the West and even more recently in the East. In fact, education has a much more universal meaning: Education by example or teaching of the parental rulers passes on to the infants and subjects the experiences of previous generations in all fields of activities in the shape of rules for conduct. They thereby make orientation within, and adaptation to, physical and social environment possible; for though the impulse to discovery and thereby to orientation and adaptation is discernible very early in the mind of the infant—as confirmed by the illuminating experiments and observations of Piaget—it can approach its goal only by parental education. The unconscious aim of all activities is self-maintenance within a given, supposedly immutable, in fact continuously changing, social and physical environment. The aim is in harmony with that of the parents in families and rulers in states. For they both want to be relieved as much as feasible of their obligations of perpetual care for their dependents who are taught to maintain themselves within an organized society.

However, self-determination can be given free rein only reluctantly after many years of careful preparation because of the slow maturation process of the human race. Discipline and obedience, and thereby theocratic reverence, must be kept effective up to the period of maturity—usually to a decreasing extent—in order to impress upon the ruled the sanctity of the ruler's ego ideal and superego concepts for the sake of moral orientation and adaptation. It remains an indispensable condition for self-maintenance and thereby partly promotes and partly reduces the impetus for self-determination. It creates a universal psychological dilemma for the rulers as well as for the ruled. For the support of self-determination demands on the side of the ruler sacrifices of deified authority, and burdens the ruled with the obligation to care for their own survival. Co-operation with fellows in the course of maturation is an indispensable condition of self-maintenance because it facilitates its achievement by common effort and relieves the children and subjects from isolation which would make adaptation and orientation impossible.

The impulse inherent in individualism too is generally recognized in education by rules designed to discover specific preferences and talents. In their creative activities children in the family and artists in the state must learn and are taught more or less intensely in different zones and periods of culture to master its material, because individualism, regardless of how anarchic and opposed to self-determination under the guidance of rulers and in co-operation with fellows, remains inarticulate without some traditional means of mental communication. The influence of all other principles observable in public law—theocratic reverence, social co-operation, and individualism—restrict that for self-determination in its legitimate sphere.

The law on education reveals more than any other part of public law the function of law and justice in any state in restricting or promoting the basic principle of self-determination by the stronger or weaker influence of the other principles. The educational system directs the individual's endeavors in all parts of private and public law, and they decide in the last instance upon the constitution of the state. The content of the whole legal, economic, and religious system in any state is based on early education.

The task of education imposes basic obligations upon the parental rulers in families and states. They are called upon to promote self-determination to a varying extent at the expense of their own authority. Governors not infrequently ignore those obligations. In that case the whole system of law no longer fulfills its function of adaptation to changing conditions with the help of independent efforts of succeeding generations, and becomes an impediment in the evolution of culture. History has confirmed by many examples—among them as the most conspicuous is the destiny of Sparta—that the strict adherence to paternal authority may create an efficient army but cannot offer contributions to art, science, and philosophy by disregarding the individual's demand for self-determination. The governments in the Communist area are well aware of such danger and are therefore wavering between strengthening the concept of infallible leadership and persuading the masses that their voluntary determination remains the decisive factor in the state.

C. Constitutional Law

"Constitution" in its original meaning means the bodily and spiritual character which an individual has in common with all other human beings, and which, at the same time, distinguishes him from them. The parents orient themselves in treating the infant and guide its orientation by starting from the self-evident assumption that it is possessed with physical and spiritual qualities and predispositions common to the

human race, and is, simultaneously a unique individual with specific abilities and peculiar predilections. The children are taught (partly on the basis of reflexes of the mother) rules of behavior which in the parents' opinion are indispensable for the survival of the infants, and on the other hand, take into regard peculiarities.

The constitution of a state means basically the same. It contains the essential features the state has in common with all other states and, simultaneously, its peculiarities. The constitution's ascertainment is the result of a process of orientation whether it is laid down in a written document or stated by traditional practice. In both cases it authoritatively summarizes the fundamental legal principles which are, or ought to be, prevalent and practiced in the state.

The constitution is not permanent, nor is the constitutional procedure for finding and thereby creating its rules. The mental and sometimes also the bodily constitution of the individual subject undergoes changes in the course of the process of evolution and maturation. The conceptions of the rulers in guiding adaptation and accommodation change accordingly, the more so as natural conditions of the environment also change, partly under and partly without human influence.

Constitutional law has its source in the marital obligations in the same way as social law is based on the mother's attitude and criminal law on the father's attitude. It is the nucleus of the legal systems in families and their extensions (herd, clan, or state) and determines the interpretation and application of legal tenets in any section of law. Its indispensability proves the existence of a universal drive of the parental rulers to govern and of the ruled to be governed. It contains rules which are apparently proved by experience to influence the deities in favor of survival and in mitigation of persecution. The rulers themselves are not the law-givers: In their own belief they only preserve and apply the law which is unchangeable, permanent, and sacrosanct. Marriage and the family are ritual institutions directed to the teaching and transmission to the subjects of traditional and often inscrutable rules aiming at the expulsion of the wrongdoer from the state and at the admission of the righteous to membership. The initiation rites which have been universal in all primitive and in most advanced communities throughout the ages serve the purpose to impress upon the candidates obedience to, and knowledge of, traditional morality and law by enduring severe tests as a condition of joining the herd.

The many profound and learned explanations of the mysterious rules which influence the conclusion of marriage in primitive and, to a smaller degree, in advanced communities (exogamy, endogamy, totems, taboos) are relevant for our theme only so far as marriage creates the

universal obligation not to desert the partner and to educate the offspring. Other marital obligations, important as they are in the evolution of legal rules, vary more in their emphasis in different spheres of culture; adultery for example is easily condoned in some primitive and in many advanced communities, while in others it constitutes a major crime, which, if committed by the wife, was punishable by death. Jealousy remains a powerful force in creating prohibitive rules and has its source in the father's hostile attitude to the new child who deprives him of the monopoly over his spouse's affections, and challenges even his authority by the temporary priority of the newcomer's demands; nevertheless, in spite of its relevance for the evolution of law, it is not so basic as the marital obligation to govern together and to educate.

Yet marriage means more than a lasting economic, sexual, and legal union: It is a religious and ritual partnership to secure survival by invocations to superior powers* and by insisting on keeping rules of conduct.

The judicial function of the parents, their approval or disapproval, is vital in their relations toward the subjected children. The parents are joint custodians of apparently immutable rules which are thought indispensable for the existence of the family and of any family member. They know the difference between good and evil, between virtue and crime as earthly deputies of the powers who govern the destinies of all.

D. Auxiliary Law

Artists have personified justice in two ways: The Greeks presented Themis weighing deeds and events and observing their equilibrium; the Romans showed Justitia blindfolded and drawing a sword. Both symbolize the methods in ascertaining and in realizing justice: The one in collecting facts and in poising praise and censure—in the method that leads universally to the formation of the section in legal systems concerning procedure; the other exercising force for the sake of peace without regard to the status of the parties—which leads to the section on execution.

* For primitive man, as Kelsen demonstrated, natural events are not the result of mere physical causality. They are the outcome of purposeful actions of deified authorities (or of heroes and medicine men endowed with superhuman gifts). Deaths, famines, droughts, diseases are due to their persecution and indicate the violation of regulations, or even of whims of aggressive deities, and may perhaps be averted by magical means, such as prayers or sacrifices. However, their attitude is not always hostile; many events which are also ascribed to the purposeful actions of the deities are not frightening and make life enjoyable and tolerable: The sun reappears every day, rain falls frequently when needed. The processions and prayers of gratitude after successful harvests or hunting or fishing expeditions, demonstrate the belief in friendly tendencies of deities which goes side by side with the fear of their hostility. Life consists of reward and punishment: One assures survival, the other condemns to death.

Procedural law serves the purpose of enabling the judicial authority to state the relevant facts in the case submitted to his judgment on the basis of information provided by the parties. His creative activities—as a judge or a public servant with judicial functions—intend and achieve more than merely to state what the law is: He produces legal rules by subsuming the individual case—which is always unique—under a rule arrived at by the method of analogy with previous decisions in other cases, in the course of a mental judicial process illuminated particularly by Jerome Frank and Edward Levi. The judge finds the applicable rule and, inseparably connected, the relevant facts—guided, but never tightly bound, by precedents in case law systems as well as in statutory law. The ascertainment of the rule and of the relevant facts serves the purpose of realizing or of denying the realization of a situation requested by one or both parties according to whether it would, in his judgment, be in harmony with the legal system. The parties assist in supplying facts and rules by insisting on his obligation to listen, which produces their right of audience in the different branches of procedure.

Laws on procedure form the bridge between what is or what ought to be: between perception and valuation, reality and morality.

The fundamental significance of procedure in the domain of law will be discussed in detail in the second part of this study; here it will be pointed out only that the guiding principle of procedure, of finding rules and facts with the help and on the request of the subjects, does not dominate its legitimate territory unrestrictedly. It is restricted by principles of material law.

Though the aim of all procedure is the same, the three sections of procedural law—civil, criminal, and administrative procedure—follow different methods to meet the needs of their different ends.

Civil procedure comes into action to settle disputes between the subjects themselves; in such cases the authority of the ruler is not at stake and his interests are only indirectly affected. He acts as arbitrator between contradictory demands, neither of which concern his authority.

Consequently the rules governing civil procedure in Western states usually grant free play to the parties. They alone offer evidence; they may come to a settlement outside the court and drop the matter; though they must follow rules of pleading and procedure, these rules are more flexible than in criminal or administrative affairs. The right of the judge's interference in the proceedings is restricted, and no other representative of the government is employed in the task of discovering the facts.

In criminal procedure—a main purpose of which is to uphold the authority of the ruler impaired by the action of the accused—the rules are different. In this section the government has normally not one, but

two representatives: the judge, who embodies its impartiality, and the prosecutor, who is the bearer of its authority.

Still more complex is administrative procedure; for here the very authority which issues an order normally decides whether the objections raised should be upheld. The power of the government is vested in a representative who has to combine authority and impartiality. The subject in this perplexing situation is entitled to be heard beforehand: If his objections are not upheld, he may demand an explanation which frequently cannot be given. The government regularly retains far-reaching discretionary powers and is thus relieved of the duty of giving reasons or even adhering to precedents. The judicial and the administrative functions of the government are entrusted to the same office, which acts as judge and party at the same time. As a remedy, in several European countries a supreme court of administration has been instituted whose members act in a judicial capacity. In other countries, as in Great Britain, the same result is achieved by the jurisdiction of high courts. However, in the numerous cases where the administration is invested with discretionary powers, neither the Continental supreme courts of administration, nor the high courts can give judgment. Only in the United States the interpretation of the constitutional "due process of law" clause by the Supreme Court led to effective control of administrative measures, though it too has not always been successful.

The seemingly unorthodox situation in administrative procedure results from the necessity of avoiding a cumbersome procedure which would impede efficient administration by discussions with the affected subjects. The obvious reason frequently conceals a more subtle one, which involves a matter of principle. Administration and its execution has been a privilege of the ruler from time immemorial. That section of law is still to a considerable extent dominated by theocratic thought—by the idea of the individual's tutelage under a ruler who knows best and should not be bothered by amateurs who pursue their own aims. The needs of the state must be the first consideration even at the expense of impartiality by the exclusion or restriction of the basic and primitive right to be heard. The necessity which thus emerges, of adjudicating over one's own decisions, is a superhuman task, and even ministers of state are not always supermen. However, because of the need for quick decisions, especially in times of national emergency, resistance to improved safeguards of impartiality increases, and the subjects' protection against arbitrariness is inadequate as compared with the prescriptions of civil and criminal procedure.

Though one principle of all laws of procedure is impartiality, the

technique apparent in all sections of law again operates there. Impartiality is restricted in its application by all other basic demands. In the criminal procedure of present European non-Communist states individualism frequently impedes impartiality by the rule that in some cases prosecution can take place only at the request of the injured—a stipulation which often gives criminals a considerable degree of immunity—and that in other cases individual initiative is required to institute prosecution, as in matters of adultery and of personal honor. Equality in prosecuting lawbreakers is thus considered less important than individualism by preserving the injured party's sphere of influence. Social co-operation also plays its part in criminal procedure, in the institution of the jury, which, in some countries, has the effect of restricting impartiality in crimes of passion or politics, although it originated as a safeguard against tyranny. Self-determination entitles the accused freely to choose his line of defense, to refuse to answer questions, to give evidence and to call witnesses, although the exercise of this right is frequently damaging to impartiality. The effects of a foolish defense presented by inefficient lawyers often cannot be corrected by an impartial judge, and the indicted may be sentenced on account of his inadequate defense and not because of his guilt. Finally, the influence of authoritative theocracy in criminal procedure is often contrary to impartiality, not so much by the provisions of the law as by its practice. Presentation of evidence for the defense is largely left to the accused, who is not helped, as is the prosecutor, by the police organized to assist him in fact finding.

Whereas in criminal procedure the substantive principles of public law—authority, individualism, social co-operation, and self-determination—restrict impartiality, in civil procedure, which serves private law, privilege, liberty, equality, fair rewards, and nationalism are operative to the same effect. Prerogatives often prohibit proceedings against the king, the government and, in many countries, against civil servants for neglect of duty, because the king and his servants can do no wrong. The favorable position of the wealthy is, in practice, another obstacle to impartiality. They can hire clever lawyers; the poor must rely on their own resources. Even when a chamber or society of lawyers is obliged to nominate on application one of its members to take a power of attorney, the man of small means has no choice, is subject to a prior examination, and thus has to face two judgments, the ordinary one of the court and the preceding one of the chamber. Moreover, important legal questions often cannot be settled by supreme courts because these courts seldom deal with matters of small financial import. They do not

discriminate against the poor; they have not even the opportunity to do so. Expense makes civil procedure in many countries an exclusive affair of the wealthy.

In civil procedure it is left to the parties to decide how the case shall be presented. "Where there is no plaintiff there is no judge." The principle of liberty is directed toward impartial and equal treatment, and the judge cannot go beyond the petition and cannot investigate facts without a request. Any party has full liberty to withhold evidence or refrain from invoking the appropriate law; the judge, in spite of his impartiality, can exercise no initiative.

The influence of the socialist principle in civil procedure is discerned in the introduction in most Continental countries of a special procedure for claims arising from contracts for services and professional contracts by courts composed of expert judges and laymen, which are frequently inclined to favor workers and employees, and to sacrifice strict impartiality to social considerations.

Nationalism sometimes deprives foreigners of the benefit of appealing to the courts, or makes such appeals difficult. In many European countries nonresident foreigners have to deposit estimated expenses of litigation with the court unless a reciprocal treaty of nondiscrimination has been concluded. Moreover, injunctions straining the assets of foreigners are facilitated in order to secure efficient execution of a later judgment. In times of war their right to sue is usually abrogated in all countries.

Even more far-reaching are the restrictions imposed upon impartiality by other principles in administrative procedure. In cases of emergency, insistence on impartiality by granting the owner the right to be heard is impracticable. Delegated legislation and the extended discretion of the government go far beyond this understandable limitation in all countries today, because of the necessity for authoritarian measures during the war and during the subsequent period of reconstruction. The tendency to lower the status of the citizen in emergencies and reduce his right to impartial treatment in administrative affairs to a matter of mere grace is strong. The conflict between authoritarian bureaucracy required in an emergency, and the preservation of the citizens' right to impartial treatment, presents one of the most complex problems of our time in domestic politics. Though efficiency and not impartiality is the order of the day in an emergency, adults demand the right to be heard in their own affairs, and protest against the abrogation or curtailment of this right.

Self-determination, which finds expression in the liberty of the individual to determine his own future by choosing his job, is likewise not

maintained in administrative procedure in a national emergency. A system of licenses, previously required only for a few professionals, such as lawyers, doctors, and accountants, is extended to numerous other spheres. Even unskilled workers may be deprived of the right to change their jobs and may be directed into employment against their will. Administrative procedure today (not only in the East, but partly also in the West) means compulsory direction rather than consideration of the interest of the individual.

The last basic demand of public law, social co-operation, can be discerned in administrative procedure in the right of local bodies or professional associations, such as industrial syndicates or trade unions, to be consulted before the introduction of new measures concerning their field of activity, and to submit opinions or raise objections. The intervention by autonomous bodies of private associations supports impartiality in its struggle against veiled autocracy by forcing bureaucracy to take into account the desires of the governed. On the other hand their influence restricts impartiality, because of their tendency to defend their members, employers and employees alike, against any competition from outside and especially against newcomers, as the bitter struggle in the United States and Britain for and against the closed shop principle indicates. Local tradesmen often induce local autonomous bodies to prevent the formation of competitive enterprises by witholding licenses. The resistance of associations of industrialists to newcomers serves the same purpose as does that of medical associations to foreign practitioners—a resistance which may reveal partiality toward individuals, and may be against the public interest.

In administrative procedure impartiality has to fight harder for recognition as a fundamental principle than anywhere else. Nevertheless, there too legal technique adheres to the method of assigning a legitimate sphere of influence to a basic demand and restricting its operation by consideration for the other principles.

E. Law as a System of Obligations

Any legal system may be described as a coherent whole consisting of permissions (rights) and duties (obligations), which are complementary since what is one's right constitutes another's obligation. Alf Ross in his *On Law and Justice* makes the concept of rights his main "tool in the technique of presentation" of the structure of law, though he does not deny that it is quite possible to give an account of valid law without using the concept of rights at all. The present study, on the other hand, takes law as a system of obligations although the admissibility of Ross's technique is recognized. The necessity to regard the legal systems as

based on obligations was brought about by considerations derived from legal theory and psychoanalytical doctrine.

For Ross feels that the starting point of any analysis must be that the concept of rights is used to designate that side of a legal situation which is advantageous for a person. However, obligations can be just as "advantageous" as rights—for example the marital obligation (*"eheliche Pflicht"* in German) to have intercourse with the partner; or the obligations—normally felt satisfactory—to take care of the children during maturation and of the parents during old age. A second, even more important reason, not to make rights the basic concept of legal systems is the fact that the systems consist of norms as Kelsen's *Pure Theory of Law* irrefutably demonstrated. Any norm contains an "ought" of how to behave, and so does any obligation, while this element is absent in the concept of rights.

The term "obligation" needs some clarification because it is used sparingly in American legal practice and theory, and is employed in European legal systems with various meanings: in a narrow sense of an instrument under seal which contains a promise to pay ("bond"); in a wider sense in the "law of obligations" comprising contracts and torts; in the widest sense it means "any moral or legal tie binding to some performance" (Lord Holland); and has been advanced to a fundamental concept in European legal theory and practice—and under their influence in the legal codes of Japan and Turkey—by the teaching of the Roman classical jurists who described it as *vinculum juris*.

In this widest sense any obligation is composed of at least three essential components which are closely knitted together: an "ought"; a performance (in German *"Leistung"*)—an action or forbearance required by the "ought"; and, a realization not by physical force, but by the volition of the subjects to the obligation through the direction of a moral agency within themselves.

The first component—"ought"—represents the normative element in that it creates a legal or moral bond between rulers and ruled, or, with the ruler's consent, between subjects. Linguistically it finds expression in the term itself; in Latin as well as English it has the same root as "ligation" or "ligature" which is now used only in surgery to describe the process of binding. The prefix *ob*—meaning "by way of"—underlines the tendency to produce the tie. *Vinculum juris* emphasizes the spiritual and moral character of the bond, and places the notion of obligation into the realm of values where the imposed "ought" affirms and demands its validity.

The second component—the performance—states the aim at which the action (or forbearance) should be directed. Without such statement

any norm and any ought would be meaningless and incomprehensible. Norms, no matter how disparate in content universally impose on the individual an obligation to behave in a certain manner and to reach a certain goal. It may well be called a command in spite of possible objections that then law would cease to be a reality for infants and for people asleep. For the discoveries of Freud and the investigations of Piaget have shown that commands imposing obligations are well understood by infants at the earliest stage and that censorship which is working in dreams demonstrates the continuing influence of moral prescriptions during sleep. Neither is the argument against the "command doctrine" convincing that norms ought to be followed even when the subject is iguorant of their existence. For ignorance and negligence lead to breaches of obligations created by ego ideal concepts, which are effective very soon after birth.

Obligations, because of their moral element ought to be followed and kept, and *are* normally followed and kept. But when they are disobeyed and broken, their breach is of the same relevance for the understanding of legal and moral systems as is their fulfillment and its reasons and effects: For it is inherent in the concept of "ought" that a required situation *should* be realized by the performance but it is not implied that it *will* be realized. Human beings have the choice between obeying and disobeying, complying and resisting from earliest infancy. The unconscious motives for keeping obligations imposed by law and the unconscious countermotives which militate against it will be investigated in the second part of this study.

The third component of any obligation—that the performance is to be realized by the volition of the parties involved—is closely connected with those motives. The conscience of any human being—its superego and ego ideal concepts—finally decide whether the performance will be accomplished. This does not mean that the decision of the individual is not influenced by the rulers. Their ego ideals and superegos are incorporated into the infants' and subjects' minds in every state from the earliest phase and they induce the formation of morality and the emotional acceptance of, and consent to, moral and legal rules which are learned and taught by education. But it means that the concept of good and evil, of right and wrong, is inherent in the mental equipment of the human race and that it leads to an everlasting conflict between refusal and acceptance of obligations which are unpleasant though vital for survival. Historical evolution in states and the results of the maturation process in families depend on the choice between good and evil—notwithstanding their differing contents in the various zones of culture —on judgments of rulers and ruled of what is right or wrong, on the

grudging or enthusiastic consent to traditional moral concepts of the community as transmitted by the parental authorities, and finally on the unconscious choice between the frequently divergent ego ideal and superego concepts of either parent. The complex situation thereby produced calls for some comment.

Actions and forbearances which lead either to the realization or to the refusal of the performance are judged as justified or unjustified according to whether the obligation itself is considered bad or good, moral or immoral. Already the infant displays a behavior (as shown by Piaget and by observations of psychoanalysts) that reveals its emotional judgments on the advantageous or disadvantageous character of the performance required. Normally he will follow up demands either because they are in harmony with his own inclinations or because of isolation anxiety, and sometimes he will not. This implies that the obligation itself is emotionally felt moral or immoral by the character of the performance. If the performance is realized—as it normally is—obedience may be accompanied by feelings of gratitude and satisfaction in case it coincides with the desire of the subject. Should it be realized by emotional constraint against resistance this may be of lasting influence on the attitude toward the moral concepts of the rulers, may lead to permanent explicit or implicit protests against obligations imposed by them, and may strengthen the trend toward independence—toward anarchic individualism as opposed to reverence for theocracy. No common pattern has been discovered as the reason for the prevalence of one or the other attitude of children and subjects to the traditional moral rules of governing which show a multitude of varieties in individual families and, even more so, in states. Voluntary reverence may continue to form the fundament of legal and moral systems as it did in Chinese society for many centuries before the recent Communist revolution which, however, seems to adhere to the impulse of reverence for a deified ruler and only to replace that of the emperor with that for the party leader. On the other hand, the impulse for disobedience and independence may be strengthened in the course of evolution and may lead to participation of the rules in the business of government in families as well as in states as it did in the Western zones of culture.

The whole problem of observing or breaking obligations is made even more intricate by the coexistence of impulses for obedience toward (or independence from) two authorities. The infant is exposed to the moral concepts of the superegos and ego ideals of the father and of the mother. Their moral orientation may often, or even regularly, not be in full accord. Both may aim at the same goal of the child's survival, and at his adaptation to changing moral and natural conditions. But their

means and methods in achieving this end may differ. The mother may prefer persuasion and rewards, the father coercion and punishment. The mother may insist on peace and stability, the father on conquest and progress, or vice versa. Rarely will the aims and methods of their ego-ideals and superegos—of their consciences—fully coincide. The child is thereby faced unconsciously with the moral conflict of whom to follow, and his choice, which is motivated by inborn inclinations, will be instrumental for the prevalence of one or the other moral principle in his moral orientation.

Nevertheless, in spite of all differences in the performances required, in spite of the varying and sometimes incomprehensible contents of the rulers' and the ruled superego and ego ideal concepts, the law of any state is the permanent systematization of fundamental obligations. All sections of the law deal with specific obligations and assign to them their place within a whole. Those fundamental obligations neither make their appearance at the same phase of mental or social development, nor are they construed in the same way, nor is their purpose identical. The obligation to pay taxes, to render military or public services, to respect ownership, to refrain from committing murder, fraud, or theft, to keep contracts, or to compensate for damages inflicted by faulty actions differ in their character and aims. Their classification, as any classification, is—and has always been considered by legal theory—the necessary means to clarify their contents, origin, and function.

A fundamental division of obligations is that between obligations in rem (or absolute obligations) and obligations in personam (or relative obligations).

Absolute obligations defend the personality of legal subjects from attacks or infringements of any other person against his life, security, freedom, honor, ownership, or possession. They are obligations imposed on an indefinite number of persons who need neither to have known the protected individual, nor to have had any relations with him before the infringement has taken place.

Relative obligations come into being by specific relations between two or more parties. They characterize obligations as those produced by contracts, marriage, social, or educational law.

Relative obligations are either unilateral or bilateral (or multilateral). Unilateral obligations bind only one party while the other party may enforce them. Payment of taxes and public or military services, are based on one-sided obligations of the subject, and the authorities may determine their realization. This does not imply that unilateral obligations only *burden* the party under obligation: Payment of taxes, though not pleasant, serves, or is intended to serve, the tax-

payers' vital interests. In bilateral (or multilateral) obligations the parties are regularly equal in status, at least in theory. Both sides are giving and simultaneously accepting reciprocal promises voluntarily, though they are normally determined by pressing needs.

To be concluded