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## THE IDEA OF JUSTICE.\*

### I. LAW AND JUSTICE.

The word justice has two meanings.

1. It denotes the true maintenance and confirmation of positive law. Whatever the law determines must be carried out. The law must be protected against arbitrary deviation therefrom.

2. Beyond this justice denotes the ultimate aim of law. In this sense the word expresses the thought that all legal volition without exception serves a single fundamental idea. All historic law must be judged by this fundamental idea. This idea is the standard by which we justify or condemn as a matter of principle a given legal volition. In the following discussion we are particularly concerned with the second meaning.

We must therefore analyze critically the concepts of law and of justice and distinguish between them.

The concept of law is partial in its nature. It denotes a peculiar species of human volition. This species of volition is in form always the same. A specific kind of volition is distinguished from other species of social order. The content of these various orders may be entirely the same. Formally, however, they are divided into different classes. This is what we do when we distinguish law from morals and external customs. The precept

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\*Translated from the German by Isaac Husik, the University of Pennsylvania.

may be precisely the same, for example that we should greet politely another person. But in the one case this precept bears the formal character of a juristic command, as in the case of a soldier; while in the other case it is a question of politeness and of the free resolution of the person addressed.

In the first place we have here a distinction between law and free choice. Law is inviolable so long as it remains law. This is the meaning of Psalm 94, 15: "For right shall return unto justice." From this is derived the first meaning of the word justice. It is emphasized in a wonderful manner in the Old Testament, and especially in Isaiah. But here too our observation holds good that the content of a legal command may be precisely the same as that of an arbitrary one. The difference is in the form in which they present themselves.

The formal characteristic of the concept of law consists, therefore, in this, that law is conceived of as being an order which is independent of the subjective pleasure of the individual. The conventional rule of decorum and of all other external manners is in its meaning dependent upon the recognition and assent of the persons addressed by it. The arbitrary command of force bears the implication that the despotic author thereof is not bound by it. The implication of law is that it stands as an objective entity above the individual. It commands in sovereign fashion, but at the same time it is inviolable, as we mentioned before.

The concept of law is therefore the logical quality of concrete volition. Whenever we speak of a legal volition we make use of this concept and exhaust its meaning. The same thing is true here as in the concept of cause. There may be any number of causes, but in every instance we have the same kind of formal arrangement of events. Similarly we may have before us any number of legal demands or refusals—in every instance there is present the determining idea of legal volition in its completeness.

The case is different with the question of justice in the second meaning of the word mentioned before. Here the problem is to think of a given desire which corresponds to the concept of

law, as being in complete harmony with all other legal desires. This is only an ideal. It consists in the conception of the absolute whole of all human endeavors. And this whole itself is naturally not again an object of concrete experience. But there is in this idea of complete harmony after all a problem that we must always pursue though we can never completely solve it—like the star (in the old picture) to which the helmsman of the ship looks up to guide himself, though he cannot, nor does he desire to reach it himself.

How, then, shall we describe this idea of justice more precisely, and what practical significance shall we ascribe to it?

## II. THE PRACTICAL SIGNIFICANCE OF THE THEORY OF JUSTICE.

Everyone who has to do with legal questions will always guide his thoughts in two directions. The first thing that meets his gaze are the paragraphs in the legal code, the positive determinations of the innumerable statutes and ordinances, the articles of the constitutions, the rigid forms of legal habits and customs. In ever-increasing numbers they grow on the soil of the law, and the first question in legal matters, as was said before, is, what is actually the law in such and such a question?

But behind and above this mass of technically formed statutes there is something else. Here the question is one of justice. In a matter of dispute the process must not be merely correct but just. Our desire is that the decision in question should be based not merely upon a positive statute, but also upon rightness as a principle.

There are many phrases expressing this idea: good faith, equity, moral duty, avoiding abuse, good morals, valid ground, and so on. This multiplicity of terms in the modern languages is borrowed from the wealth of expressions which the classical jurists of Rome likewise had at their disposal. But all the various expressions denote the one single thought, namely, that a matter in dispute should be decided in accordance with that principle which in the particular situation is fundamentally right.

This consideration appears first as a critique of particular

statutes. It is also made use of in political discussions. But it finds its immediate application also in the administration of justice.

All positive legislation endeavors, on the basis of historical experience, to determine in advance what would be a right decision in future cases. This is the origin of the numerous articles and paragraphs of which we have spoken. But the legislator can not anticipate all possibilities. Life is too complex for that. New questions always come up which could never have been considered before. The legislator therefore chooses a second way. He gives indications to the parties, to counsel, and to the judges that in future disputes they may search of their own accord and find what would in those circumstances be the right thing in principle. This raises the problem again of getting a clear notion of the meaning and idea of justice. The practical significance of the idea of justice lies in the fact that it is necessary not only in criticising political measures, but also in judicial administration itself.

### III. THE METHOD OF FINDING JUSTICE.

We must have a fixed method in order to understand what unitary conception we have in mind when we speak of justice. We can not evade this question by saying that the court should decide according to his "free" opinion. For the law addresses itself in the first place after all to those who are subject to it. The law can not say, "You shall conduct yourselves in such a manner as the court will afterward 'freely' indicate to you." Besides, it is not at all right that the court should decide according to his free subjective pleasure. The opinion of the court should be objectively right. The judge must be able to give reasons for his decision. How can he do this when the determining fundamental thought which we call justice is not clear to him?

In discussions of this sort appeal has often been made to the "feeling of right." Sometimes it is called also the "natural feeling of right." But this appeal can not solve the problem here presented. It presupposes the idea of a fundamentally just decision. For in referring to the so-called feeling of right what

one really says is this: Inside of me in some mysterious way an opinion is formed concerning what is *right in principle*. If, therefore, no question is asked, under what general and permanent conditions this idea of fundamental rightness in legal things stands, the above merely genetic consideration is no answer at all. But it is not at all true that every human being brings with him into the world a so-called natural feeling of right. The child in the cradle knows nothing of just and unjust laws of the State. The idea of justice must be gradually acquired by every one in the course of his life. That this is done by all persons in exactly the same way is an assumption that is quite unfounded. Every one is the subject of numberless impressions. He often acquires his fundamental opinions under the influence of immeasurable complications. One can never attain to unity of thought through the merely genetic method of thinking. There must be systematic consideration and critical reflection. The so-called feeling of right is therefore nothing else except a personal mode of knowing and judging the law. It has been scraped together by any given person in his conditioned circumstances and his particular development. For scientific study it denotes something that is the result of mere historical accident.

It is frequently customary in discussion to contrast *positive* law with *moral*. There is no inherent objection in referring to moral law, but we must consider more precisely what this moral law is and what determining ideas are connected with it. As everywhere else, so here also we must first realize that there is an unsolved problem. By merely using the catchword "moral" we have not yet gained any clearness on the question of the systematic method by which to direct our ideas.

Now, the word moral has two meanings, which are quite different from one another. This difference is clear when we consider the terms with which it is contrasted. "Moral" is sometimes opposed to "social." The social question is concerned with the life of men together. The moral question as thus contrasted denotes then the inner life of the particular person, his character, his desires. It is clear that morality as thus described has nothing to do with the idea of justice, for the latter pre-

supposes an external conflict of different persons, which has to be settled in right fashion according to a principle.

The second meaning of the word moral is the same as "right." Therefore, to refer to moral law is to repeat the problem and nothing more. We have merely the question before us which requires an answer. If we desire to test under what conditions a right decision of a conflict is possible, we must go into the question of the fundamental rightness of human volition in general. We will discuss this briefly first, and then apply the result to the question of social rightness.

#### IV. THE IDEA OF THE PURE WILL.

Law is a species of human volition. Justice, in the sense of legal demands which are right in principle, must therefore be derived from the possible justification of human desire in general. An act of striving and demanding is not justified in principle merely because it is there. It is necessary to show that its content is well grounded by reference to a fixed standard. What is this determining standard?

A particular purpose which is to be attained in a given situation can not be the highest law for all possible volition, because it is limited in its meaning. This applies to every limited purpose, even though it may appear at first glance as relatively better than other purposes. To erect beautiful edifices, to invent useful machines, to raise the level of external comfort—none of these is an absolute standard for all possible volition, none of them can demand that all other desire and volition should be sacrificed for it, none of them gives a complete answer to the question—what is a morally good volition?

In order to solve this question satisfactorily, we must get away from all desires which are merely subjective. The idea of a volition, good in principle, is determined by the quality of absolute and universal validity to which a specific volition must conform. We imagine, therefore, as our ideal standard a volitional content which is free from everything that is specific and that has to do with a given individual and his volitions.

There is no such thing in historical reality. All actual endeavors of man are conditioned. In actual experience we know only limited aims. But we judge these particular endeavors and their limited aims differently according to the fundamental direction in which they are taken up and guided. This is shown in ordinary life in our appreciation of unselfishness, selflessness and self-sacrifice. Here we see clearly that direction of an idea which does not regard mere subjective desire as the last and highest thing, for the attainment of which all means are permissible. We think rather of a specific volition as guided by absolute and universal validity, as directed by the infinitely extending straight line of pure volition. Both possibilities are given. The one is the maxim of subjectivism, the other expresses itself as an effort toward objectivity. In the first case, the limited desire is regarded not as material to be worked over, but as a principle of volition. In the second case only can we speak of the rightness of a given effort as a matter of principle. The idea of free volition means, therefore, simply an ideal process which may always be uniformly applied to judging efforts materially conditioned. It is not a question here of causal freedom, but of a volition that is free in its content. The idea of free will merely serves the purpose of giving us a sure standard by which a volitional content as it occurs in nature can be judged logically. This species of judging which we have described here as pure volition is the only kind that is appropriate as a standard of judgment to all human volition, and therein lies its firm justification.

#### V. THE SOCIAL IDEAL.

We must now apply the fundamental principle of human purposes to legal volition. This belongs to the social question. The latter is a combination of the purposes of men living together. The purposes of the one person are regarded as means for the other, and *vice versa*. According to the problem here presented, this combination must take place in the spirit of pure volition. This ideally guiding thought consists in the fact that all subjective endeavor must be regarded merely as conditional

material. Hence the idea of justice must also consist in this, namely, that in combining the purposes of different persons, the ultimate determining idea must not be a merely subjective desire of one of the two persons in the combination.

The idea of justice culminates, therefore, in the notion of absolutely mutual consideration. The guiding line is that of a pure community, which must be followed as an ideal guiding line. We may also say that the ideal problem of the law is—the community of men of pure volition. This formula is a definition of the fundamental idea which is at the basis of all legal volition and constitutes the ground thereof, if it is to be right in principle. Justice is therefore the agreement of a specific legal volition with the idea of a pure community.

If we imagine social conditions as corresponding to this idea, we may also call such an imaginary picture the social Ideal. But this will never be the case. The idea of a pure community always signifies only an unattainable goal. It does not contain the demand of establishing a utopia. It denotes only a methodical way by which historical relations may be judged properly. How this can be methodically carried out we will explain more precisely later. Here we will explain further the fundamental definition of justice just given by considering a few conceptions of this problem which are opposed to ours.

Here belongs in the first place the attempt made by the well-known Ihering. In his book entitled "Purpose in the Law,"\* he designates law as the "Politics of Force." He asks how law originated in the history of humanity, and tries to answer the question by assuming that a victorious warrior instead of killing the vanquished enemy made him his slave. We know nothing about this. Such an imaginary explanation is in any case worthless as an answer to the question concerning the ultimate objective meaning of historical law, which is found everywhere. Besides, there is no legal relation between the owner and the slave. Such a relation exists only between different owners of different slaves.

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\*Translated in part in the Modern Legal Philosophy Series under the title, "Law as a Means to an End."—I. H.

But when Ihering further on names as the fundamental idea of law the self-interest which every legal ruler must follow as a hard-hearted incorrigible egoist, he is without any doubt inconsistent. For he is surely endeavoring to find an expression for the objectively justified aim of all law. And the solution can not be that the subjective egoism of any particular person represents the objectively right procedure in legal matters.

#### VI. SOCIAL EUDÆMONISM.

This theory is widely prevalent, but is often held very uncritically. According to this theory the highest law of human volition is the attainment of personal pleasure and the avoidance of pain. The aim of social life and the problem of social order are then determined in accordance with this general purpose. This view finds its clearest expression in the ideas of those politicians of the present day who start from the basis of social materialism. These representatives of the so-called materialistic conception of history assume, in accordance with the basic idea of the materialistic philosophy generally, that the law of causality is the only one to be applied as the ultimate method of all scientific investigation. But no man can evade the problem of right volition. And this problem can clearly not be solved by a merely materialistic opinion. For the problem requires reflection upon the unitary and fundamental idea by the spirit of which the content of all imaginable human volition may be guided. Instead of this come those older materialists and dish up the hedonistic doctrines of Aristippus and Epicurus in their various shades of opinion.

But other philosophers also, who were not influenced by materialism, have tried to accept Eudæmonism as a fundamental principle. This was especially worked out in England, particularly by Bentham and the two Mills. But Eudæmonism prevailed in the eighteenth century generally on the continent also. Kant destroyed the theory of it absolutely in his "Critique of the Practical Reason." But in the practice of the individual as well as in political life the pleasure doctrine is still maintained in principle.

In the search for justice in the practical administration one can scarcely make use of happiness and pleasure as guides. In a dispute between two merchants or in an action between lessor and lessee, or in any other legal question, the decision will gain nothing from the idea of the happiness of all or of the greatest happiness of the greatest number.

But even in the case of a political policy, which takes as its aim the realization of right and justice, it is scarcely proper to take the happiness of the members of the State as the highest law.

In the first place, it is clear that the inner happiness of the individual can not be taken as the aim of a legal order. For this means calm of mind, peace with oneself, which everyone must give to oneself and cannot expect to get from the legislator. External fortune, comfort in external circumstances and goods, is subject to infinite variations. It varies everywhere with taste and personal desires, and therefore can not offer any proper point of view for a social order.

Very remarkable is the idea of many utilitarians that the greatest possible amount of the greatest possible happiness should be divided as far as possible equally among individuals. The efforts in question do not lend themselves to any quantitative division and distribution. But as a matter of principle there is a confusion here also of the idea of justice with a demand for external equality. It is always a mistake to take as the measure of consideration merely the *need* of the one who did the original service and not rather the manner and value of his service. And all these questions arise in the domain of historically conditioned inequalities, the conditioned character of which in its variations can never be gotten rid of. But to treat unequal things equally would be the greatest injustice possible. It has been proposed to avoid this by taking as a standard the idea of securing to the individual an existence "worthy of a human being." There is no great objection to this, provided we have a right understanding of the idea thus expressed. For the opposite of that which is worthy of a human being is precisely that which is fitting only for an animal and the animal desires. It must be worthy of a

human being as a rational creature. But then we come back again, if we think logically, to the idea of the pure will and as a corollary to it the pure community, exactly as we developed it above.

The same thing applies, finally, to the much used word "common weal." This expression dates from antiquity and has been often used since. But it merely expresses the desire to follow in social life an objectively grounded procedure and not to yield to merely subjective desires. The expression "common weal" is therefore not inappropriate, but it merely denotes the problem for the solution of which we have undertaken the above consideration.

One must not, however, conclude from all these considerations that our idea is to exclude from human endeavor all striving for happiness and comfort of living. We have no such idea. And it is above all a worthy aim of political legislation to think of the welfare of the citizens. All I wish to say is that this does not constitute the highest law of social volition. The efforts of the individuals to attain happiness is rather the material to be worked over by the one whose function it is to guide and protect the fortunes of the social community. This material must be worked over under the guidance of the *Idea of Justice*.

## VII. JUST LAW.

How is the ideal concept of justice to be applied and realized in practical life? We must, in the first place, guard against an error. We must bear in mind that an idea is not creative. It is always a mistake to think that one can, on the basis of ideal thinking and willing, freely produce the material for new conditions in social life. The material of human desire is given to us. It arises in the processes of nature. All that ideal reflection can do is to judge and guide this naturally given material. Ideal reflection is indeed necessary if the infinite mass of ever new and always changing desires of men is not to remain in chaos and confusion. For the idea denotes precisely the conception of an absolutely unitary method of procedure by which

every imaginable content of effort and volition is judged in a perfectly uniform manner.

From the above we get the following directions for adjudication and legislation:

In a dispute before the court, two different demands stand confronting each other. And even if they have not yet reached the threshold of the tribunal and have not yet found the opposing formulæ, it is still possible in every case mentally to set over against every legal demand its possible contrary. And then in our search for a decision right in principle, we must give the preference to that legal demand in which we best satisfy the idea of absolutely mutual consideration, the idea of the pure community.

It is not true therefore that a specific legal demand is subsumed under the idea of the pure community, but every concrete demand comes under a concrete proposition of law. It is only in choosing the right legal rule that the recognition just mentioned of the social ideal makes its appearance.

We can also see clearly now that the above-mentioned expressions, "good faith," "good morals," "fairness," and so on, really denote merely the quality of concrete legal rules. They do not signify any mystic, moral something, we know not what. In using and realizing these ideas, we are dealing exclusively with a *legal* consideration, though one of a peculiar formal character.

The same method must be followed in political questions. The difference is that we are not dealing in this case with a dispute between two single parties, but with the fortunes of a legal whole. On the other hand it is quite indifferent, if we are considering the proper methodical procedure, whether we are dealing with the so-called internal or external policy of a community. In neither case is it sufficient to designate the political activity merely as an art. To be sure, in politics, skill in practical psychology plays a great role. But we can not rely altogether upon mere personal accident. And if there is to be any progress, it can be found only if we strive to establish our politics upon a scientific basis.

The principles of the methodical reflection which we require are once more the following. As a result of historical conditions there arise uniform mass phenomena in the relations of the social order: wealth and poverty, good and bad services, particular modes of living, and all such other conditions as appear to the social observer. These mass phenomena give rise to efforts to change the traditional social order. These efforts will be more or less far-reaching, and will come in conflict with other efforts desiring to maintain things as they are. And here too preference should be given to those among the opposing efforts in whose essence we recognize as their ultimate aim a tendency toward the Idea of the Pure Community.

Can this be always exactly proved and carried out? This question, to be sure, can not be unconditionally answered in the affirmative. Both in adjudication and in political activity, many an instance will arise where no exact proof is possible. But this is a fate which our investigation shares in common with all scientific activity. The naturalist too must confess on many an occasion that he is not yet able to see and explain the exact causal connection of certain natural phenomena. The same thing will no doubt often happen in the scientific construction of the content of concrete human efforts. And in that case it behooves the lover of truth openly and freely to acknowledge the position thus arising of true scientific possibility.

Everything, in practical life, however, which may be correctly determined on the basis of the idea of the Pure Will and Justice, gives us in all cases merely an *objectively* just law. An *absolutely* just law, on the other hand, is not within the domain of possibility. The only things which are absolutely valid are the *pure methods* of ordering our intellectual life—in this connection they are the concept and the ideal of law. But the application of these pure forms of comprehension and judgment is always of relative significance only. For they have reference to a limited and changing and imperfectly given material, in perception as well as in volition. Accordingly, there is no single concrete legal order which is absolutely just in respect to its specific content.

## VIII. JUSTICE AND LOVE.

We can not conclude these discussions concerning the idea of justice without mentioning one idea which, especially in modern times, some have thought, leads to a different result from ours. I mean the attempt to show that the search after justice is not of such great importance, and that it would be superfluous if we followed the Scriptural precept to love our neighbor. What, then, is the relation between Justice and Love?

The well-known Russian writer Tolstoi, with more emphasis than anyone else, has given expression to the opinion that all law, nay, all social order, would be superfluous if we followed the command "to serve" one another. He is mistaken. Social order is nothing else than the use of the purposes of one person as means for those of another, and *vice versa*. We have already called attention to this above, when we differentiated between law and morals. Here we must emphasize the point that this idea of the social order is logically necessary. "Service," too, is only conceivable as the carrying out of an external rule among various individuals. But whether such service is really good and just, is still an open question. There is such a thing as doing another a service for a bad purpose. The difference between good and bad, and in social life between just and unjust, is thus tacitly presupposed in the words of Tolstoi. The reference, therefore, to the necessity of love can not render superfluous or replace the effort to get a clear idea of the conception of justice.

The correct relation between justice and love is stated definitely in the Epistle to the Romans (13:10): "Love is the fulfilling of the Law."

The idea of justice denotes the possibility as a matter of principle of right behavior in social things. But it gives only a *possibility*. This is indeed the case in all *scientific* activity. It gives possibilities of right knowledge and volition. That these possibilities should become realities is something that science as such can not bring about.

Here religious feeling is indispensable. What we call *love* in our theoretical discussion comes from religion. Love in this important meaning denotes devotion to the good, to right volition.

Justice and love therefore *must* supplement one another.  
The beautiful words of the German poet apply here:

“In the union of justice and love, and there alone,  
“Is expiation of human blame and atonement of earthly  
life.”

*Rudolf Stammier.*

*Berlin, Germany.*