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ON THE PURPOSE OF LAW**

Problems. Four old aphorisms illustrate the highest principles of law and the strong tensions that exists between them. The first is as follows: *Salus populi suprema lex esto*. It contrasts with the second: *Iustitia fundamentum regnorurn*—not the common good, but justice is the supreme aim of the law. The third aphorism: *Fiat iustitia, pereat mundus* speaks not of suprapositive but of positive justice, of legality—the inviolability of the law stands above even the common good. To which the fourth aphorism responds: *summum jus, summa iniuria*—the strict application of law can often lead to the greatest injustice. Thus, the common good, justice, and legal certainty appear as the highest goals of the law, not in beautiful harmony, but in sharp contrast to each other.

Everyone agrees that law should serve the common good. However, the issue of what constitutes the common good has been disputed by various worldviews, theories of the state, and party programmes. The common good can be understood socially: as the good of all, or at least of as many individuals as possible; as the good of the majority, of the masses. The common good can also be explained organically: as the overall good of the state or nation, which is more than the sum of its individuals. Finally, the common good can be understood institutionally, that is, as the realization of objective values – not only

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in the interests of individuals or collectivities, but for 'the good' itself. Science and art, as values unto themselves, are the closest examples in this regard. However, all of these senses of the common good stand in contrast to the conception that del Vecchio formulates with the following words: 'The right of one man is as sacred as that of millions'.[1] The doctrine of liberalism asserts that the individual can, in a given field, defend himself against the majority, and against the totality of individuals, even with regard to subjective aims. This precept finds its expression in the two other purposes which the law serves alongside the common good: justice and legal certainty. Both of these objectives ensure that equality and freedom are taken into account in relation to the unilaterally conceived common good. Of course, there is no absolutely certain proof that law should serve these individual ends alongside its social, organic or institutional ends—for in the world of ought no absolutely certain proof can be expected. Nevertheless, it can be demonstrated that an order which seeks to serve only the common good, and which denies any legitimacy to an individual interest that can also hold its own against the common good, could have no claim to the name of law, that within the framework of such an order jurisprudence as hitherto understood would not be possible, and that here no generally recognized legal facts could be upheld, such as the independence of the judiciary, public subjective rights, the rule of law. This issue is the focus of my paper. The huge importance of the problems arising in our time needs no special presentation, since almost everywhere in the world there is a tendency to shape the order of society solely from the point of view of what is regarded as the common good, and to deny justice and legal certainty any independent significance. This tendency tends to destroy the idea of law itself.

The concept of justice. Let us begin with the concept of justice. We do not mean the concept which encompasses all the demands placed on law, and which therefore overlaps with the concept of the justness of law. The issue is rather a particular concept of justice, which is one of the many requirements of law. It was established for all times by Aristotle. It is an equal measure of treatment; the variety of treatment in accordance with the diversity of people and cases. It is not absolutely but relatively equal treatment: *suum cuique*. It is Aristotle's distributive justice, of which commutative justice is just a kind. Commutative justice is *iustitia distributiva* applied to people

[1] Individual, State and Corporation. Political Science Quarterly, Vol. 50, No. 4 (Dec., 1935), pp. 525–560, p. 541.

who are considered equal.[2] It is only from the treatment of the people involved in this process as equal that the demand for equality of reciprocal benefits flows, since one person would be exalted above the other if more were to be granted to him than he himself contributes. *Iustitia commutativa* means the application of justice to people between whom real differences are considered to be of no importance. Justness, on the other hand, means the justice that comes closest to the individual properties of the unique case. Yet even in this, its most external attribute, justice remains the application of a general measure. It therefore presupposes at least the comparability of individuals and cases, and thus the abstraction of their individuality. Hence it presupposes the equating of cases that are in fact different. Despite its relative properties, justice implies equality of legal treatment of narrower or broader sets of people and cases or, what is the same, the more or less great generality of the norms governing this treatment.

What is the source of this great importance of equality of legal treatment, this generality of the norm?[3] It has been sought in the attempt to quell universal feelings of jealousy, but this does not explain the sense of justice in disinterested third parties. It has been sought in an aesthetic sense of symmetry, but this does not shed light on the elementary and explosive power of the sense of justice. It has been seen as a demand for the common good: *fundamentum regnorum*, because injustice involves a disturbance in the social equilibrium and so increases the danger of violent upheavals. But this solution confuses cause and effect: something is unjust not because it upsets the social equilibrium, but quite the reverse: something upsets the social equilibrium because it is unjust. In truth, justice can be understood, psychologically speaking, only as a primordial and underivable feeling and, philosophically speaking, as an absolute value equal to other values, such as goodness, truth, beauty.

No conclusive legal statements can be derived from justice alone. This can be illustrated with the example of criminal law. Justice merely states that the more guilty should be punished more severely, the less guilty more leniently. Justice does not say why a murderer is more guilty than a thief; instead it presupposes a yardstick by which

[4] Cf. Ferdinand Tönnies, Thomas Hobbes, 3rd edn. 1925, p. 219. 'The justification of actions is usually divided into commutive and distributive justice. In reality, however, injustice does not lie in the inequality of the things that are exchanged or distributed, but in the inequality which man, contrary to nature and reason, attributes to himself in relation to his fellow men.'

[5] Cf. Ihering, Zweck im Recht. Vol. I, 4th edn., 1904, pp. 287 ff.

guilt can be measured, namely the greater or lesser threat to the general good. Nor does justice say how the guilty should be punished: whether the murderer should be broken on the wheel and the thief hanged, or whether the former should be given a life sentence; the latter temporary imprisonment. Justice can only determine the degree of punishment within the limits of a given system of penalties, but not the system of penalties itself—since penalty types are established from the point of view of their usefulness for the common good. Justice, therefore, only adjusts the penalty limit within a given penal system to the degree of guilt specified within the scope of a given concept of guilt. It defines punishment relatively, not absolutely. Both the content of the concept of guilt and the penal system are shaped by the idea of common good. The task of justice, however, is to determine relative punishment by means of the concept of guilt employed as a general measure, within the limits of specified types and measures of punishment, that is, within the limits of the penal system. Our example illustrates that justice has both a relative and a general nature.

The relative nature of justice means that, from conceptual necessity, it connects, compares and reconciles numerous persons, legal situations and interests. Hence justice necessarily involves the resolution of conflicts. 'The problem of justice,' says Georges Gurvitch, 'arises only if one accepts the possibility of conflict between equivalent moral values. Justice in fact presupposes the existence of conflicts. It is called upon to harmonize antinomies. In a harmonious order, justice is by definition inapplicable and superfluous'.[4] In particular, justice is unthinkable in the relationship between the collective and the individual if one considers conflict between the individual and the collective to be impossible and assigns the common good unconditional priority over every individual interest. Giorgio del Vecchio roundly rejected this position:[5] 'State and individual are two terms of reality which can and must be brought into agreement and tempered, but not suppressed, in that they exist. To declare, with even greater dogmatic arrogance, that one or the other of these terms does not merit consideration, because it is unreal, or because it is, *a priori*, identical with the other, may give the illusion of a scientific solution, but it is only a more or less lucky game of sophistic skill, and does not take us a step farther towards the real solution of the problem'. The idea of justice presupposes that it is possible for there

[4] Georges Gurvitch, L'expérience juridique et la philosophie pluraliste du droit. Paris, 1935, p. 99.

[5] Op. cit., pp. 526–27.

to be a state of tension between the collective and the individual precisely because the task of justice is to remove this tension. In this sense, justice is an individualist-liberal counterweight to the unilaterally supra-individualist idea of the common good.

Justice also imprints its relativity on the concept of law which it prevails over: all law is conflict resolution. Furthermore, generality, as a property of justice, is shared by the concept of law: law is the resolution of conflicts on the basis of general norms. One could prove this claim by subjecting the concept of law to deductive analysis.[6] Here, however, we can allow the indirect proof to suffice, namely that law would be indistinguishable from other systems of norms if it were not based on the resolution of conflicts and did not consist of general norms. A legal statement can only be distinguished from a mere clerical instruction if it is viewed as conflict resolution. Only if such an opinion is considered as general can it be distinguished from a judgment or an administrative act. Above all, it is the administration that functions solely in the service of the common good, but never law. These examples prove that those facts that must be denied the character of a legal opinion are not thereby denied the justification for their existence. An edict against a certain person may, as an emergency measure, be fully justified; it need not be mere arbitrariness. It does not, however, have the character of law. Thus, for such measures, not only does the name 'law' become inapplicable, but the hard-to-describe pathos that is associated with this name and the moral force that is supported by it also evaporates. This is why the victorious parties have always transformed their special interests into general legal opinions and have thereby produced very real effects. This can be illustrated by means of a historical example.

All-encompassing freedom was the need and aspiration of the developing bourgeoisie. This aspiration was justified by natural law and was therefore asserted as a legal claim. Therefore, the emerging bourgeoisie could not demand freedom only for itself, rather it had to demand it in general, that is, as freedom for all. The freedom demanded and obtained in the form of law, that is, in a general form, also carried in its bosom the freedom of association for the struggling working class, and thus provided a means of struggle against that very class whose interest in freedom was introduced in the form of law. Thanks to the legal form which political demands usually take, the rulers can generally only impose burdens on the ruled insofar as they also take them upon themselves. Conversely, they can claim benefits for themselves only if they are also willing to grant them to

[6] Cf. Radbruch, Rechtsphilosophie, 3rd edn., 1932, pp. 29 ff.

the ruled. This universality can remain a mere illusion if, for example, according to the mocking words of Anatole France, 'The law, in its majestic equality, forbids rich and poor alike to sleep under bridges, to beg in the streets, and to steal loaves of bread'. Yet this universality can actually acquire a very real meaning, as in the case of freedom of association. In this way, class law—because it already is law, that is, as it has taken the form of generality and equality—cannot fail to have at least a small degree of value also for the oppressed class and for minorities, for the weak and for individuals.

Let us summarize our considerations. Justice is an objective of law that is clearly distinct from, and in a state of tension with, the common good. It presupposes the existence of conflict, unlike the idea of the common good—which takes no account of conflicts or simply denies them. Thus, due to the fact that even the idea of the common good must allow for consideration of the legitimate interests of individuals, justice has an individualist-liberal quality, in contrast to the idea of the common good. Justice is characterized by equality and generality, which play no role in the field of the common good. Finally, the idea of justice also imprints its essential features on the concept of law, characterizing it as the resolution of conflict by means of general norms. But the concept of law cannot be derived solely from the idea of the common good. Without doubt, justice is also important for the common good, for it is the *fundamentum regnorum*. It does not, however, acquire its importance only as a result of its utility for the common good: justice is useful in itself, just as, for example, science and art are useful for the common good only if they conform to their own principles of truth and beauty, without any ulterior considerations. If, therefore, justice is to be included in the broader concept of the common good, then it must be distinguished in its intrinsic nature from the narrower concept of the common good.

Legal certainty. The outcome of our considerations on legal certainty, the topic to which we now turn, will be similar. First, however, we need to clarify this concept. Legal certainty can be understood in three ways.[7] Firstly, as security provided by law, thus as protection from deprivation of life, from robbery and theft, from traffic accidents, etc. Legal certainty in this sense is an element of the common good, so it does not occur in this kind of relationship. The common good is, of course, closely related to the legal certainty under consideration. For security provided through law presupposes that the

[7] Cf. Demogue, Les notions fondamentales du droit privé, 1911, pp. 63 ff., and Max Rümelin, Rechtssicherheit, 1924.

law itself is knowable. This knowability of law is the second meaning of legal certainty. In this sense, certainty requires knowability, knowledge of the legal sentence, a certain verifiability of the facts on which the application of law depends, the guarantee that the law will be enforced. It extends to the law valid at a give time, but not to its validity itself. This certainty of a temporarily valid law would only be apparent, however, if for some arbitrary reason the legislator could remove its validity. In this way, the certainty of any law in force requires, for its completeness, that the law be secured against change, to a certain extent; therefore the legislative apparatus is subject to resistance from the system of separation of powers and the difficulty entailed in amending the constitution. This, then, is the third understanding of legal certainty. In this conception, legal certainty does not usually refer to objective law, but rather to subjective law, and hence is equivalent to the protection of acquired rights. The protection of acquired rights, which is a conservative and in certain circumstances even reactionary principle, lies beyond the scope of the present work. This form of certainty only belongs to our topic insofar as the certainty of the existing law would be a sham if the law were not protected against change. That is, we are only concerned with such certainty that protects against changes in law which are arbitrary in relation to time and devoid of any restraint, or, as previously mentioned, that provides a way of securing the law against change.

Extensive proof is not required in order to conclude that legal certainty is something distinct from the common good, and that it often even contradicts it: because of legal certainty, *summum jus* is often that which is *summa injuria* from the viewpoint of the common good. It is precisely because of legal certainty that laws and rights are sometimes passed on to offspring like a perpetual illness. What is more, legal certainty and justice are closely related to each other, sometimes even partially overlapping. The same generality of norms that crowns the essence of justice is also a requirement of legal certainty: only a general norm can regulate future cases in advance, can create a law that enables the future to be predicted. On the other hand, a law that does not provide certainty is at the same time unjust, because it cannot guarantee equal treatment of similar cases in the future. Thus the idea of legal certainty can be formulated as 'equality before the law'. This is why Francis Bacon stated: 'Legis tantum interest ut certa sit ut absque hoc nec iusta esse possit.'[8]

[8] With a different justification, in Grundlagen der Gesellschaft, 1924, p. 443, Wilhelm Sauer call this 'narrow justice'.

Legal certainty also shares with justice an individualistic-liberal characteristic: it does not denote legal certainty for the law itself, but security of the law for the individual, protection against arbitrariness, in short—freedom of the individual.

Nevertheless, legal certainty is not, like justice, a non-decucible, absolute value. No matter how great is the tension between legal certainty and the common good in the narrow sense, legal certainty derives its value from its benefit to the common good in its broader sense. The utility of legal certainty for the common good was most clearly articulated by Jeremy Bentham—the greatest panegyrist of legal certainty after the highly original Louis Kapp, whom Louis Secco[9] recently snatched from the obscurity. Bentham identifies legal certainty as the decisive characteristic of civilization; in fact for him it is what distinguishes human beings from animals, because it is security that makes it possible to plan for the future and thus to work and save. Only this security can guarantee that life is not a series of unconnected moments, but a continuous course. It forges a chain of foresight and prudence that binds together our present and future lives and allows us to transmit them to the generations that come after us.[10]

Detailed elaboration is not required to show that today we have, throughout the world, moved a long way from Bentham's panegyric pathos. First of all, the direction of free interpretation[11] has shown that there is no quantifiable certainty in judicial decisions in the measure initially assumed, and that far more often than was previously thought, it is not the law but the judge's opinion that determines the verdict. This direction strengthened the judge's courage to make creative—that is, unpredictable—judgements. Later on, the legislature increasingly expanded the field of judicial discretion, and thereby also the field of unpredictable jurisprudence. This fact has only recently come to the attention of the general public, under the guise of the 'resort to general clauses'.[12] Under the most varied formulations, it falls to the value judgements of the judiciary to resolve legal questions in all fields of law, including the one where until now the most rigid legality had prevailed, namely the field of criminal law—where the prohibition on basing punishment on analogy, hitherto the strongest bastion of legal certainty, has now

[9] Luigi Secco, Luigi Kapp e la sua filosofia del diritto, 1936.

[10] Bentham, Works. Ed. John Bowring, 1859. vol. I, pp. 302 ff.

[11] On this issue, see A. Peretiatkowicz, Prąd nowy w prawoznawstwie, 3rd edn., 1921 and E. Waśkowski, Teoria wykładni, 1936 (footnote added by the translator to Polish).

[12] Cf. Justus Wilhelm Hedemann, Die Flucht in die Generalklauseln, 1933.

been abandoned. Nor is there any shortage of attempts to create ***contra legem*** legislation—where, following political upheaval, the legal position still in force is contrary to the spirit of the new social order. In states where the merger of the legislative and executive powers has neutralized previous legislative resistance, there is a danger that the law may be changed too quickly and easily, perhaps because of and for the sake of a particular case.[13]

How did this devaluation of the idea of legal certainty come about? In the four decades from 1871 to 1914 we lived through perhaps the longest period of security in social relations than had ever existed before in world history. The capitalist period created the legal certainty it needed. Max Weber insightfully demonstrated that capitalism created the rational state and rational law that it was in need of.[14] In this epoch Jacob Burckhardt could say that 'our entire present morality is, in fact, security-oriented, in other words that the individual has, at least as a rule, been spared the most vigorous decisions to defend the home'. 'As a first condition for all happiness, security requires the subordination of lawlessness to a police-protected law, treating all property issues according to an objectively certain law, securing property and trading – in the highest degree.' 'Security delivers what the state cannot provide'. But already in Burckhardt a sliver of doubt as to the value of this bourgeois security can be detected. After all, he says that 'this security was largely lacking in many epochs which spread around themselves perpetual splendour and which will occupy a high place in human history after the end of time'. 'The Athenians must have had a sense of being which no world security could rival'.

This sense of security in life had an even more stifling effect on young people before 1914. As evidence, I submit my youthful statements, which I made in 1910, in the first edition of my *Einfuhrung in die Rechtswissenschaft*: 'We may regard knowledge and the legal order, natural law and norms, as a wonderful institution that is, however, destined to banish the world of unpredictability and chance. But if it were really possible to enclose all of life in predictability—would it then be worth living? Coincidence, the incalculable and the unexpected, surprise and disappointment, the sweet agony of *ritardando* and the bewitching danger of *accelerando* compose the seductive music that make us love life'. '"By Chance"—that is the most ancient nobility of the world' (Nietzsche). What would life be if we were not waiting for 'something wonderful?' A man who is

[13] Jacob Burckhardt, Weltgeschichtliche Betrachtungen, 3rd edn., 1928, pp. 260 ff.

[14] Cf., e.g, Max Weber, Wirtschaftsgeschichte, 1923, pp. 289 ff.

not completely immersed in everyday life will always give priority to the 'happiness' of uncertainty over the certainty of happiness. Although the legal order is still quite far from being master of the unpredictable, an ever-increasing number of subtler natures are already suffering from the colourless regularity of bourgeois life. How many people are there today at whose cradle, or let us say more cautiously, on whose day of first communion, for whom it would be impossible to sketch a funeral eulogy? The thirst for adventure, successfully resisting danger with one's own strength, Faustian passion and drive, the desire to spread one's personality throughout the world, romantic delight in the non-standardized colourfulness and fullness of being—they rebel internally against the rule and order of law, they carry within themselves, consciously or unconsciously, the spirit of anarchism. These are but faint echoes of Nietzsche's praise of the 'dangerous life'.

In the meantime, such ideas have come to fruition in abundance. Since the World War and the upheavals that have continued unabated since 1914, we had more than our fill of the dangerous life. Perhaps it is our epoch, or rather our stage in life, that gives us today us a better understanding of Montesquieu's frivolous words: 'Happy the people whose annals are boring to read'. One does not need to be a prophet to foresee that the cry for certainty, especially for legal certainty, will become ever louder and more fervent in the future.

The increase in the value of legal certainty is also proven by the fact that legal thought that is exclusively focused on the common good takes this value into account. In authoritarian states this certainty was recognized as the basis of the national community. The law is supposed to be the will of the leader revealed in writing, so deviation from the law means a failure to fulfil the duty of obedience to the leader and therefore lawlessness and lack of legal certainty. Basing legal certainty on obedience to the state leadership is very closely connected with the exclusive orientation of law towards the common good: where many people are engaged in work for the common good, there the orders of the leader must apply, so that the actions of these people are not in conflict. This transformation of the notion of legal certainty into the influence of the idea of leadership and the common good contradicts certain legal elements which, however, one does not want to abandon. Where the law is nothing but the commands of a leader, the leader cannot be said to be bound by law, the rule of law and or subjective public rights. These concepts can only be formally explained by the positivist content of the idea of legal certainty, and materially by the individualist content of the idea of justice. The independence of the judiciary would still ultimately remain

incomprehensible if the law were no more than an order from the leader in the service of the common good, and if it did not have intrinsic existence independent of thinking in terms of purposiveness and of obedience to the order. The independence of the judiciary is nothing other than scientific freedom transferred to practising jurisprudence. Legal thinking, however, is not merely thinking through the category of purposiveness in the service of the common good—in that case it would not be possible to distinguish it from politics and from the science of administration. It is first and foremost thinking in terms of law, and thinking in terms of justice, that is, equality. There is no need to emphasize the great role played within these limits by thinking through the category of purposiveness, the development of which has taken place due to recent legal methodology. On the contrary, it should now be stressed that purposive thinking should remain within the framework of thinking in terms of statutory categories and category of justice. Like the rule of law and subjective public rights, the independence of the judiciary and the independence of jurisprudence, the concept of law is ultimately conditioned by the ideas of justice and legal certainty. If the idea of justice determines the essence of law as the resolution of conflicts by general norms, then legal certainty adds a further feature of positivism to the concept of law. In his beautiful book *In the Shadow of Tomorrow*, Huizinga says that everything that is called law results from the need for security;[15] we can adapt this statement as follows: everything that is called positive law results from the need for legal certainty.

The ideas of justice and legal certainty therefore stand alongside the supra-individualistic idea of the common good as individualistic components of the idea of law. While these ideas are admittedly not stronger than the notions of the rule of law, subjective public rights, the independence of the judiciary, the independence of jurisprudence and, finally, as the concept of law, they are equal to them. That authoritative states also do not want to abandon these values is strongly testified by del Vecchio: 'The sovereignty of the law – he says – and the equality of citizens before it remain the foundations of a fascist state, which therefore is and wants to be a state governed by the rule of law'. Also and above all, freedom belongs to its essence. Today it is understood better than in the past that the life of a nation and that of an individual are mutually interrelated.

The common good, justice, and legal certainty exercise joint rule over law, not in harmony but, on the contrary, in a state of living tension. The supremacy of one or another of these values over the

[15] Im Schatten von morgen, 1935, p. 32.

others cannot be deduced from a norm superior to all three—there is no such norm—instead, it comes from the responsible decision of each era. The police state gave priority to the common good, natural law to justice, and positivism to legal certainty. The authoritarian state begins a new round, putting the common good back into the foreground. History teaches us, however, that this dialectical struggle must continue, and that subsequent epochs will again give a higher value than our time has to justice and legal certainty, alongside the common good.