The presidente--or one of the directors--may inspect the locale under different circumstances and for different purposes, as will be seen later. Before forwarding the request to the SSS the association may have an interest in inspecting the locale where the improvement will take place. The inspection may take place later on when the presidente (or one of the directors) will accompany and assist the SSS's engineer when he comes to inspect the locale and to decide the type and degree of improvement or repair to be authorized. The presidente may inspect the locale in order to decide autonomously about the authorization (without forwarding the request to the SSS). The presidente may inspect the locale when the association has come to know that a construction is taking place without any authorization having been requested. Finally, the presidente may inspect the locale when the resident is violating the terms of the authorization in such a way that the association's intervention seems necessary.[13]

[13]Symmetry would require that the analysis of associational life in Pasargada be immediately followed by the analysis of the socio-cultural structure. However, the preceding presentation of Pasargada makes self-evident how this community fits into the observations on the socio-cultural structure advanced in Chapter I with reference to the universe of Rio's favelas. Only through sophisticated repetition could I create the illusion of adding here something to the previous discussion.

Part Two

THEORETICAL FRAMEWORK

or

TOWARD A SOCIAL THEORY OF LEGAL REASONING

CHAPTER III

A Concept of Law

The level at which the search for a unifying concept can be successful often contradicts the level of analysis at which the concept is supposed to be serviceable. This has always been the basic difficulty confronting the search for a concept of law. In this chapter I will argue (1) that this difficulty should not deter us from searching for a concept of law and (2) that in such search the serviceability of the concept should take precedence over its universality. I will begin by a methodological introduction. Then I will stipulate my concept of law and explain each one of its elements separately.

III-1. Introduction

Ever since the Greeks, Western thought has centered around the search for universal concepts which will reveal, in their unifying structure, the absolute truth underlying phenomenological reality and manifesting itself in it only in a partial, self-obscuring, and clumsy way. In this vein, Socrates keeps asking for a concept of courage which will embrace (and will be truth of) all forms of courage, for a concept of virtue which will reveal the ultimate truth of all particular virtues known in Athens, without being identical with any of them. This speculative tradition has passed over to the legal philosophy and legal science and, more recently, to the social sciences having law as their object of inquiry.

Thus, the basic question is: what is law? This question embodies a theoretical program whose goal is the elaboration of a concept of law through which it becomes possible to identify and to integrate all possible manifestations of law stuff across space and time. Such concept fits into what we may call a zero-infinite frame of reality.

The nature of this question and of the concept that one arrives at vary according to whether one accepts a realistic or a nominatistic epistemology. For the realists the essence of the concept lies in its relation with a truth content existing in the object of the concept itself. Consequently, concepts are true or false and can be proved or disproved. For the nominalists, the essence of the concept lies in its relation to a realm of arbitrary meaning. As a result concepts are neither true nor false and cannot be either proved or disproved. They are arbitrary and only suffer the test of logical consistency within the realm of meaning from which they derive. A hard form of nominalism can be seen in J.S. Mill when he says:

> Assertions respecting the meaning of words, among which definitions are the most important, hold a place, and an indispensable one in philosophy; but, as the meaning of words is essentially arbitrary, this class of assertions is not susceptible of truth or falsity nor, therefore, of proof or disproof.[1]

One can argue that such hard nominalism is logically im-

[1] John Stuart Mill, A System of Logic, London, 1843, II, Chap. 1, 103.

is[2] or that, at least, it is absurd within the framework
heory whose point of reference is the real world rather
closed system of formal logic. In any event, we may
with Perelman in contending that Mill himself does not
through in his work such extremist position.[3]

identify myself with a position which may be called
ominalism and which was eloquently adopted by Hermann
owicz. After saying that the question of "what is law"
uestion "upon which whole libraries have been written,
itten, as their very existence shows, without definite
being attained",[4] Kantorowicz dismisses the realist
on on the ground that this position is based on a lin-
c trap--the *is* in "what *is* law?"--which creates the
on of a natural or metaphysical connection between the
nd the thing named. This illusion, which Kantorowicz
"verbal realism", induces the scientists into a search
definition of law such that will reveal in full the
te essence of the law. "[T]he sense indicating this

Chaim Perelman and L. Olbrechts-Tyteca, in The New
ic, Notre Dame, 1971, 211, ask rethorically: "If it
rect that definitions are arbitrary in the sense that
es not have to accept them, must we consider them as
arbitrary in a much stronger sense, which would claim
here was no reason to select one definition rather
nother and that there is hence no possibility of argu-
their favor?

Perelman, The New Rhetoric, loc. cit.

2 Hermann Kantorowicz, The Definition of Law, (ed. by
mpbell) Cambridge, 1958, 1.

essence and the definition covering this sense, and only this sense and this definition, would be 'true'".[5] Since nobody has ever been able to give a clear idea of what is meant by "essence", there is a fundamental mistake involved in this strategy,[6] and one which can only be cured through a deeper understanding of "the meaning of meaning".[7] The right method, which Kantorowicz calls "conceptual pragmatism", starts from the assumption that:

> Any question posed by any science as to the meaning of a term can be answered only if the intention is to ask what in this particular science ought to be understood by this particular term (or other symbol).[8]

Consequently, the question of "what is law?" is transformed into the question of "what ought to be understood by law?" within the framework of a particular scientific task. "The definition chosen, though it can never be true or false in itself, must be fruitful for the purpose of the particular science".[9] Such definition is presented as a proposal and

Espacio y Tiempo
Para quién y bajo qué contexto.

5 Kantorowicz, 2.

6 Max Gluckman, The Judicial Process Among The Barotse of Northern Rhodesia (Manchester, 1955), 220: "For each definition put forward as the true meaning of "law" can be countered by an antagonist with another definition."

7 Reference to C.K. Ogden and I.A. Richards, The Meaning of Meaning, London, 2nd ed. 1927.

8 Kantorowicz, 5.

9 Kantorowicz, 7. Consequently, any definition of law is a mere proposal without any other legitimate ground than its usefulness in the selection and the structuring of the relevant data and their analyses. When it is said that law is, a metaphor is meant which best expresses the structure-aspect of the convention upon which the analysis is based.

always involves a decision. However, this decision is not an arbitrary one. The choice of a definition of law is conditioned by two kinds of limitations: the formal limitation dictated by linguistic and technical rules; and the substantive limitation dictated by the criterion of usefulness and fruitfulness for a particular science. Such a criterion is summarized in the following way:

> It must above all be useful in that, by connecting what ought to be connected and separating what ought to be separated, it delimits a subject-matter about which true and important statements can be made, and affords an instrument for the production of exhaustive classifications.[10]

Hence, it is at this level that it can be argued about a specific definition.

One of the assumptions hidden in Kantorowicz's methodology is that, in ultimate analysis, one, and only one, specific definition will fit one specific science, in this case, the legal science. To this extent, Kantorowicz may be included in the Western tradition of the search for universal concepts that I have been referring to. However, if it is true that the definition of a given subject-matter can only be found by reference to a given science, it is not less true that the boundaries of a given science can only be found by reference to a proposed definition of its object. In order to supersede this apparent circularity it is necessary to resort to a phenomenological understanding that will

[10] Kantorowicz, 7.

create a common ground upon which a given [illegible] object may enter in reciprocal reference and feedback. Such a reciprocity, though, is full of tensions, at least whenever the science in question aims at an object in the real world, since there are conflicting loyalties to be considered. To begin with, the object of a definition for a given science does not cease to be the definition of an object for the real world. Consequently, the constant flux and innovation in the real world definitions will keep introducing new elements and eliminating old ones in the scientific object so that the aim of exhaustive and correct classification will be frustrated at any moment. On the other hand, the fact that one science remains one does not depend so much on the real world definitions of its object as on the state of division of labor within the scientific community at a given point in time. As a result it is, at least, conceivable that in a given moment one science has an object which will in fact no longer bear one and only one definition or, conversely, that one scientific object is being in fact dealt with by more than one science. To admit this implies to renounce the easy solution of postulating a priori the logically necessary coincidence of a science with its object. To solve the problem this way is to solve it away. It is to resort to extreme nominalism when its solutions are more appealing than the problems it cannot solve. Instead of an easy solution it is preferable to live with the problem in full conscience of its existence. This is important because, as I suspect, the trouble that the

different social sciences have had in defining "law" may be due, in part at least, to the failure to recognize that, irrespective of the unified structure of the scientific perspective, the object of study is so diverse and so multifaceted that one scientific definition of it may be either incorrect or useless. It is incorrect whenever, to attain it, it is necessary to rise to such a level of abstraction that it does not fit the level of abstraction at which the scientific discourse under consideration runs. It is useless whenever, to use a metaphor paraphrasing Hegel, the truth content of such definition is almost null not only because the definiendum has many properties other than those indicated by the definiens but also because the definiens applies to many objects other than the definiendum.

The question then is not whether or not a unifying concept of law can be obtained but rather whether or not the purpose of a given scientific enterprise can be better served by such a concept rather than by a pool of concepts.[11]

III-2. A Concept of Law

The discussion of the concept of law in the more recent literature,[12] has been more fruitful in the view of the issues raised than in the view of the concepts advanced. This may be due to a built-in tension in the whole discussion.

[11] On further reflection, it can even be concluded that the same scientific enterprise may be better served differently at different stages.

[12] Cf. Sally F. Moore, "Law and Anthropology", Biennial Review of Anthropology, 1969, 252 ff.

On the one hand, the need to avoid Radcliffe-Brown's [illegible] of those concepts of law in terms of which law includes "most if not all processes of social control";[13] such need calls for a more specific and less inclusive concept of law. On the other hand, the need to account for the most diverse legal phenomena, that is, phenomena which in spite of their diversity have something in common--either in terms of processes, or of structures, or of functions--with other phenomena in other societies ordinarily classified as law, and in such terms that the educated intuition of the anthropologist leads him to assimilate both types of phenomena under the unifying concept of law; such need calls for more general and inclusive concepts.

This tension has been dealt with in different ways by different social scientists but in each one of the proposed strategies a residual insufficiency can be detected. This is illustrated in the works of the founders of the modern discussion on the concept of law. Malinowski, for instance, starts from the assumption that all people, however primitive they may be, must have a law, and, consequently, he proposes a strategy in which the generality of the concept takes precedence over its specificity. From his study of the Trobriand Island society he concludes in a generalizing fashion:

[13] Radcliffe-Brown, "Primitive Law," Encyclopedia of the Social Sciences, New York, 1933, Vol. IX, 202 [illegible] in Radcliffe-Brown, Structure and Function in Primitive Society New York, 1965, 212. Quoted from here in the [illegible]

> There must be in all societies a class of rules too practical to be backed up by religious sanctions, too burdensome to be left to mere goodwill, too personally vital to individuals to be enforced by any abstract agency. This is the domain of legal rules, and I venture to foretell that reciprocity, systematic incidence, publicity and ambition will be found to be the main factors in the binding machinery of primitive law.[14]

This famous statement, however rich in insights on the sociology of law, is very poor as a definition. It can even be said that it is a non-definition: its first part is ostensible negative; the second part limits itself to an enumeration of grounding factors ("the main factors in the binding machinery of primitive law") and, unless one is an orthodox Hegelian, one cannot purport to have captured the nature of a thing by having exhaustively determined its conditions. Besides, as Abel has contended, Malinowski's concept may be tainted by false generalizations.[15]

Radcliffe-Brown takes a different approach. In his strategy the specificity of the concept takes precedence over its inclusiveness. Following Pound, he defines law as "social control through the systematic application of the force of politically organized society."[16] He is then led to conclude that "in this sense, some simple societies have no law." What is most disturbing about Radcliffe-Brown's definition is that he defends it on the basis of its being "more convenient for purposes of sociological analysis and classification."[17] What is implied here is that those "simple societies" do indeed have law but that, for some pragmatic reasons, it is better to proceed as if they did not. This conceptual manipulation is even more evident in the work of his disciple, Evans-Pritchard. In his study of the Nuer of Sudan, Evans-Pritchard comes to the conclusion that "in the strict sense, Nuer have no law".[18] But, as Epstein rightly points out, this statement would have important scientific meaning if its implication were that, for Evans-Pritchard, the Nuer of Sudan were a lawless people. "Yet it is also clear from the whole of Evans-Pritchard's account that he intended to say no such thing".[19] Indeed, in a subsequent article Evans-Pritchard admits that: "within a tribe there is law; there is machinery for settling disputes and a moral delegation to conclude them

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14 Bronislaw Malinowski, Crime and Custom in Savage Society, London, 1926 (8th printing 1966), 67-68.

15 Richard Abel, Toward a Comparative Theory of Dispute Process, Yale Law School, xeroxed draft, May 1, 1972, 9: "For a concept modelled upon Trobriand ethnography fails to identify as legal many phenomena commonly categorized as such in other societies: for instance, that vast body of rules relating to torts in Anglo-American common law, which are not obeyed out of ambition nor primarily maintained by the forces of reciprocity or publicity."

16 Radcliffe-Brown, Structure and Function, 212.

17 Radcliffe-Brown, Structure and Function, 212.

18 Evans-Pritchard, The Nuer, New York, 1971 (first published 1940), 162.

19 A.L. Epstein, "The Case Method in the Field of Law", A.L. Epstein (ed.), The Craft of Social Anthropology, London, 1967 (reprinted 1969), 205.

sooner or later.[20]

The recognition of this tension between the specificity and the inclusiveness of the concept of law--a tension which has been recently compounded with the Bohannan-Gluckman controversy and with the whole question of ethnocentrism[21]--has originated two lines of development. One is represented by Fallers and consists in assuming the provisional and tentative character of any definitional enterprise, acknowledging the

20 M. Fortes and Evans-Pritchard (ed.) African Political Systems, London, 1940, 278. This expansion of Evans-Pritchard's concept of law was brought to my attention by R. Abel, Toward a Comparative Theory.

21 This is the controversy on whether it is legitimate (Gluckman) or illegitimate (Bohannan) to use in the analysis of other societies and cultures concepts, such as the concept of law, that are originally folk concepts of the anthropologist's native society and culture. Cf. Gluckman, Judicial Process; Gluckman, The Ideas in Barotse Jurisprudence, New Haven, 1965; Gluckman, Politics, Law and Ritual in Tribal Society, New York, 1965; Gluckman, "Concepts in the Comparative Study of Tribal Law", Laura Nader (ed.) Law in Culture and Society, Chicago, 1969, 349 et ss.; Bohannan, Justice and Judgment among the Tiv, London, 1957; Bohannan, "The Differing Realms of the Law," Bohannan (ed.) Law and Warfare, Garden City, 1967, 43; Bohannan, "Ethnography and Comparison in Legal Anthropology", Laura Nader, ed., Law in Culture, 401 ff. The Bohannan-Gluckman controversy extends beyond the concept of law and reaches in fact the "law of the concept", that is, the scientific rules that should govern the elaboration of analytical concepts. Reflexions on this controversy are to be found in the work of other anthropologists. Gulliver, for instance, speaks of the "not unreasonable view" according to which "law" being a Western term and concept should be defined by Western criteria with the consequence that "law", thus defined, is absent in many non-Western societies while one can find in these societies institutions that from a structural-functional perspective "have their comparable counterparts in Western societies, both within and without the legal system". Cf. P.H. Gulliver, "Introduction" (to Part I, "Case Studies of Law in Non-Western Societies"), Law in Culture, 12.
According to Laura Nader the controversy has already been settled by an epistemological manipulation consisting in the substitution of a three-level analysis (folk system, folk analytical system, comparative analytical system) for the traditional two-level analysis (folk system, analytical system). Cf. Laura Nader "Introduction", Law in Culture, 4.

ethnocentricity

the empirical analysis at hand. Fallers starts from the [illegible] that "it is difficult, perhaps impossible, to spin off from our own imaginations a fully developed set of culturally neutral concepts for analysing societies comparatively".[22] To recognize this does not lead us to abandon the comparative enterprise but rather to proceed in full consciousness of the culture bound character of the concepts used since such "culture-boundness" is only dangerous and misleading "if it remains unrecognized and intellectually undisciplined". In other words, it is the consciousness of necessity that creates the realm of freedom within which the scientific analysis can unfold. It is in this spirit that a given concept of law is picked up and then tentatively applied to analogous phenomena in other societies and modified in the very process of application in order to embrace new data. It is in this spirit that Fallers follows H.L.A. Hart's concept of law.

The other line of development is represented, among

22 L.A. Fallers, Law Without Precedent, Chicago, 1969, 5. I would put it even more strongly and say that any social-scientific tool is ethnocentric, even the concept of ethnocentricity itself. The attempts to eradicate ethnocentricity, be it through a meta-language (Bohannan) or through a "chain of phenomenological reductions" (Mühlmann, entry "Ethnologie und Völkerpsychologie", Handwörterbuch der Sozialwissenschaften, Vol. 3, Stuttgart, 1961, 350) seem to be doomed to failure.

others, by Laura Nader,[23] Gulliver,[24] Abel[25] and Felstiner.[26] Given the basic ethnocentric character of the concept of law and the fruitlessness of the discussions about the concept, an alternative strategy should be followed to define the general area of interest within legal-anthropological studies. And this shift should also command some methodological preferences. The alternative strategy was found in the study of dispute settlement and the methodological preferences in the focusing on processes rather than on norms or institutions. These two choices are linked together by an emphasis on the universals. As Epstein has pointed out, not only processes are to be found everywhere but also "disputes are a universal feature of human social life".[27]

As long as this strategy aims at a general theory of dispute processing or dispute settlement there is nothing

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[23] L. Nader, "An Analysis of Zapotec Law Cases", Ethnology 3:404-419; "The Anthropological Study of Law", American Anthropologist 67 (6):3-32; "Styles of Court Procedures: To Make the Balance", L. Nader (ed.) Law in Culture, 69 ff; L. Nader and B. Yngvesson, "On Studying the Ethnography of Law and its Consequences", to be published in I.I. Honigmann (ed.) Handbook of Social and Cultural Anthropology.

[24] P.H. Gulliver, Introduction; Social Control in an African Society, Boston 1963; "Dispute Settlement Without Courts: The Ndendeuli of Southern Tanzania", L. Nader (ed.) Law in Culture, 24-68.

[25] R. Abel, Toward a Comparative Theory.

[26] W.L.F. Felstiner, The Influence of Social Setting on the Form of Dispute Processing, Yale Law School, xeroxed draft, May 1, 1972.

[27] A.L. Epstein, The Case Method, 206; W.L.F. Felstiner, The Influence, 12: "Disputing is a fundamental element of human life in society."

that can be said against it. Felstiner's work must be understood in this perspective. This, however, cannot be said of Nader's, Gulliver's, and Abel's approach. Even if these authors claim to focus on a universal phenomenon they don't deal with it in its universal capacity. They are interested only in certain kinds of disputes. And the criterion they use to select the relevant kinds of disputes leads us to wonder about the extent to which the concept of dispute is an alternative conceptual focus in relation to the concept of law. According to Abel:

> A dispute, as I use the term, is the assertion of conflicting claims by two or more persons. A claim is a demand for a scarce resource. It is made as of right, i.e., it is normatively justified, at least implicitly.[28]

Once a normative content is introduced in the concept of dispute, two legitimate questions force their way to the discussion. On the one hand, the question of the danger of ethnocentrism which seemed exorcised through the denial of the concept of law; on the other hand, the question of the criterion according to which such a normative content can be defined and delimited. And here again it seems that the concept of law which had been thrown out through the front door quietly enters the house through the back door. In view of this, the concept of dispute, rather than being an alternative concept in relation to the concept of law, necessitates it. This applies even more crucially to Abel since his ulti-

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[28] R. Abel, Toward a Comparative Theory, 12 (my italics).

mate goal is not a theory of dispute settlement but rather a social theory of law [29] On pragmatic grounds, one can choose to suspend the concept of law, that is, choose to present it in its absence-form. But then the approach and the strategies followed are directed to bring the concept of law to its presence-form (explicit, articulated, and operationalized), and not to do away with it.

My ultimate goal being the same as Abel's, I am thus confronted with the questions outlined in the preceding discussion. Instead of postponing the formulation of the concept of law I prefer to stipulate it at the outset of the inquiry. For the purpose of the discussions and analyses in the present study, law will be conceived of as a body of regularized procedures and normative standards, considered justiciable in a given group, which contributes to the creation and prevention of disputes and to their settlement through an argumentative discourse, coupled or not with force.[30] In this definition, what law is and what law does are seen as the two sides of the same coin. They can only be seen together and, for that purpose, they have to remain distinct. What law is is actualized (presence-form) in what law does as much as what law does is implied (absence-form) in what law is. These two forms are not forms in the sense of being purely abstract.

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[29] R. Abel, Toward a Comparative Theory, 32.

[30] I am fully aware that this definition is less than adequate (or even completely wrong) when applied to State regulatory laws (leis administrativas; Massnahmegesetze).

They carry with them nexus of meanings and reciprocal (and limited) freedoms between the two sides.[31] I will now proceed to the analysis of the different elements of the definition.

In my definition law is process and normativity actualized in a context of disputes. Such "actualization" is further specified through the specific structures of the process, the normativity, and the disputes. Traditional definitions of law tend to present its so-called substantive normativity aspect and to neglect (or fully omit) its procedural aspect. This is particularly true within the civil law systems. In the common law system we may find the opposite emphasis. To explain this is the task of the legal historian. From a structural point of view, however, such emphases don't seem to be correct. Any norm becomes through a process as much as any process becomes through a norm. Again we are in the presence of two sides of the same coin. There may be all kinds of reasons why the legal profession, the legal experts, or the legal caretakers of a given group concentrate their practice and/or their scientific elaborations on one of the sides. This, however, has nothing to do with the fact that the other side is also there. Accordingly, our definition speaks of a "body of regularized procedures and normative

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[31] These nexus and freedoms are crucial. It is through them that one may speak, for instance, of the "crisis" or of the "development" of the legal system. Moreover, this theoretical posture is the pre-condition of any attempt to supercede the old and fruitless discussion about "law as a fact" and "law as pure normativity" as well as, to a certain extent, the discussion about "law in books" and "law in action".

standards". Following Kantorowicz,[32] such procedures and standards may be said to constitute a "body" when they all possess some common characteristic which renders them coherent and interdependent. The characteristic here is that they are applied in a given group through an institutional framework of some sort.

The expression "regularized procedure" is borrowed from Gulliver.[33] By it I don't mean much more than what is already implied in the idea of process. Basically I have in mind the notion of a patterned recurrence, within a more or less wide range of variation, in a step-by-step event creation.

The expression "normative standards" is purposefully vague. It is intended to be the minimal (most encompassing) reference to the normativity aspect of the law. It is also intended to avoid detailed conceptual distinctions between rules, norms, precepts, dogmas, principles, standards, policies, jural postulates, etc. By normative standards I mean norms, in the broadest sense, which can be lined up along three continua which, though intimately related, must be kept distinct. Firstly, the continuum that runs between the two extreme poles: on the one hand, technical or ritual legal rules, that is, rules which appear, at least at the level of their routinized operationalization, as instrumental or efficiency oriented and about which it can be reasonably stated that, if they are not ethically indifferent, they do not, at least, embody major ethical decisions; on the other hand, basic principles which belong as much to the legal order as to the ethical foundations of group life and which, consequently, make the distinction between law and ethics an impossible, if not even nonsensical, task. Secondly, the continuum between: on the one hand, what may be called closed norms, norms with a fairly well delimited realm of application, precisely stated and relatively unproblematic as to their actualization in particular instances; on the other hand, open norms, with characteristics opposite to the closed norms. Thirdly, the continuum between: on the one hand, dichotomic imperative norms, norms which, within the boundaries of any of their reasonable interpretations, seem to evaluate the outcome of their actualizations either as violation or as conformity, and which establish specific sanctions for the violations; on the other hand, infinite-guiding norms, norms which, given their specific contexture, seem to allow for different "amounts" of conformity and of violation and in such a way that it becomes impossible or, at least, rare to evaluate actualizations as outright violation or complete conformity, norms in relation to which the outcome of "less than conformity", whenever ascertainable, is sanctioned, in most cases, only when it is mediated by the concurrent violation of a dichotomic-imperative norm.

For the purposes of a social theory of law it seems useful to add that the normative standards must be considered justiciable within the group. The element of justiciability

[32] Kantorowicz, 21.

[33] P.H. Gulliver, Introduction, 14.

is introduced by Kantorowicz to distinguish law from social custom and it is defined as the characteristic of those rules "which are considered fit to be applied by a judicial organ in some definite procedure".[34] By "judicial organ" Kantorowicz means "a definite authority concerned with a kind of 'casuistry', to wit, the application of principles to individual cases of conflict between parties".[35] As we can see, Kantorowicz uses the concept of judicial organ in a very broad sense or, as he puts it, in a very "modest and untechnical sense"[36] since it includes State judges, jurors, headmen, chieftains, human gods, magicians, priests, sages, doomsmen, councils of tribal elders, kinship tribunals, military societies, parliaments, areopagus, sports umpires, arbitrators, church courts, censores, courts of love, courts of honor, Bierrichter, and, eventually, gang-leaders. It is precisely this broadness and flexibility that makes this concept fit in our own scheme even though we are not concerned with a distinction between law and social custom, but simply with emphasizing that the normative standards we are talking about are applicable by a third party--to use a concept with wide currency in the most recent legal-anthropological literature--within a dispute context and according to certain regularized procedures.

[34] Kantorowicz, 79.

[35] Kantorowicz, 69.

[36] Kantorowicz, 80.

In introducing the concept of a third party one is aware of the criticism, first advanced by Malinowski, that the actualization of normative standards or, from another perspective, the dispute context may run its full course without the intervention of a third party. Kantorowicz confronts Malinowski in much the same way as Felstiner confronts Gulliver: the contention that their utterances about the absence of third parties may not be fully substantiated by the data they analyse.[37] Other studies by Richard Schwartz,[38] B. Yngvesson[39] and J. Starr[40] have posed the problem anew, suggesting that in certain situations we have to abandon the element of a third party or else to see it, in a diffuse form, in the community as a whole. The discussion on the third party may in fact have been poisoned by two different biases. Since the parties in disputes are specific individuals or such groups of individuals within the community group one may, either, tend to think that the third party should also be a rigidly defined entity (the individualistic bias); or, that the third party should also be a person or

[37] Kantorowicz, pp. 79 ff; W.L.F. Felstiner, The Influence, 11.

[38] Richard Schwartz, "Social Factors in the Development of Legal Control: a Case Study of Two Israeli Settlements," 63 Yale Law Journal (1954) 471 et ss.

[39] Barbara Yngvesson, Decision-Making and Dispute Settlement in a Swedish Fishing Village: an Ethnography of Law, Diss. Univ. of California, Berkeley, 1970.

[40] June Starr, Mandalinci Koy: Law and Social Control in a Turkish Village, Diss. Univ. of California, Berkeley, 1969.

a sub-group of persons (the anthropocentric bias). As a matter of fact, the third party may be a cloud, a coin, a dog barking in the dark, a flood, a thunderstorm, etc., etc. On the other hand, there is no reason to dismiss the idea of the community, as an undifferentiated whole, functioning as a kind of diffuse, "structureless" third party. The authors that take the neo-evolutionary perspective of the progressive rationalization of the law (Max Weber, Kantorowicz) or of the progressive role differentiation in dispute processing (Fallers, Abel) initiate their inquiries at the level of an incipient division of labor--where for instance the same individual or group performs political, religious, and legal functions--and then proceed to analyse the process (and/or its consequences) through which such different functions become to be performed by different individuals or groups. However, there is no reason why the analysis should not be pushed back to the point where not even such incipient division of labor is present. I would argue then that the community as a whole can be conceived as a third party where two cumulative conditions are met: (1) there is no individualized dispute settler performing this role in a patterned and recurrent way; (2) every member of the community has, in general, an equal opportunity to become a situational (ad hoc) third party in a dispute. It can be objected that, when the third party becomes to be identified with the whole, it collapses as a separate category. However, given the restricted limits within which I conceptualize the community as a third party,

I do not think that this objection is very relevant. Besides, the objection would be more definitive if it were useful for the purpose of a theory of dispute processing to brush aside the category of the community as a third party. But on the contrary, I think that the purposes of such theory are better served by the inclusion of this category because such an inclusion makes it possible to raise two interesting questions at least.

The first question concerns the topic of dispute processing and opportunity.[41] The fact that in more differentiated societies the task of dispute processing and settlement is left to specialized third parties has a positive and a negative effect. The positive one is that it concentrates in such functionaries a great deal of opportunity, power, and expertise to fulfill such a task. The negative one is that it tends to neutralize whatever opportunities, power, and expertise the common member of the society would have to

[41] This topic represents a reelaboration of the category of the ad hoc third party and is innovatively borrowed from some recent criminological studies in which control and situational theories of deviance are proposed. Cf. David Matza, Delinquency and Drift (New York, 1964); Travis Hirschi, Causes of Delinquency, Berkeley, 1969; Scott Briar and Irving Piliavin, "Delinquency, Situational Inducements, and Commitment to Conformity", Social Problems 13 (1965), 35-45. According to these theories some amount or types of deviance cannot be explained in terms of factors with deep roots either in society or in the personality of the offender, and can best be attributed to the "unpredictable" creation of an opportunity for delinquent behavior, a chance event, the unique configuration of an existential situation which functions as the triggering mechanism for deviance. The use of this idea in a context of dispute creation is at hand. But it can also be investigated in a context of dispute processing and particularly in situations of the community as whole functioning as the third party. It is only a question of converting the opportunity for delinquent behavior into the opportunity for dispute settlement.

process and settle disputes among other members of the society. On the contrary, in societies like the Swedish island (Yngvesson) or the Turkish village (Starr)--which also tend to be small and dominated by face-to-face relations--where such differentiation has not taken place, every common member--in general, but different members for different types or situations of dispute--may have enhanced opportunities, power, and expertise to process and settle disputes that occur in situations in which he happens to be (without being one of the disputing parties). Under these circumstances it can be said that each of the community members has a general capacity of becoming a situational third party, and admittedly in such cases the conventional distinctions between creation, prevention, and settlement of disputes may become fairly blurred.

The second question concerns the issue of partisanship and impartiality in dispute processing. Whenever an individualized and permanent role of dispute settler cannot be identified in a given society, one may be led to conclude that such society is run by a generalized self-help system. The correctness of this conclusion, however, may be cast in doubt if one considers the society as a third party. On this basis it can be speculated that in more differentiated societies--where third parties or dispute settlers are individualized--the parties in a dispute are encouraged to (or put in such a position that they have to) behave and evaluate as parties, that is, partially. It can be even hypothecized that the emphasis on the impartiality of third parties is an increasing function of the recognition of partisanship in disputing behavior. This partisanship may be even protected (the defendant will not be penalized for not having told the truth; the judge will disqualify when there is a conflict of interest). On the contrary, in societies in which such specialized third parties are not present, the parties in a dispute may be encouraged to (or put in such a position as to have to) behave in such a way that elements of partisanship intermingle with elements of detached impartiality. Each party will assume, as it were, a double personality (as a party in a dispute and as a third party). It is as if the value of impartiality, which in more differentiated societies seems to be concentrated on specific entities, were disseminated throughout the community (including the parties in a dispute). In any event, even if this is very difficult to verify, it should be kept in mind as a warning: that other factors remaining constant, the structure of dispute creation and dispute prevention in a society where there is an individualized third party for the settlement of disputes must be significantly different from the one in a society where such third party is not present or effective.

Once the category of the third party is conceived in the broad terms presented here, whatever further qualifications and limitations are introduced in the category are to be explained in terms of the analytical needs of the empirical material at hand. My research, for instance, focuses on a

third party that intervenes in a patterned and recurrent way.

With this I conclude the analysis of the first part of my concept of law (law is "a body of regularized procedures and normative standards, considered justiciable in a given group"). Most of the traditional definition of law, particularly those given by legal scholars, end here. Law "is" normativity and whatever else can be said about what law "does" falls outside its "essence". The antithesis of this tradition is represented by the extreme realistic school according to which any definition of law should begin here. Law is facticity, and a fact is the "doer" and the "done" of experience. Clearly I do not want to get involved in the fruitless discussion about the distinction (possible?) between norm and fact or about the relative truth (?) of the different schools of legal thought. I think that both schools are reductionist, trivial and self-contradictory. If a norm exhausts within itself all the conditions of its existence it does not make any difference whether we consider it as a norm or as a fact. A similar reasoning can be applied to the extreme realism. It is my view that law is practical normativity and consequently can only be actualized (be real as praxis) through non-normativity. That is why my definition has to proceed; that is why a dispute theory merges, at this stage, with a theory of law. Through this merging the elements of the definition become operationalizable as social variables to be correlated with other factors in the dispute context and in the social system at large. The sociological

approach to law is given full recognition without forcing us into extreme sociologism. Not because sociologism is inherently wrong but rather because both extreme sociologism and extreme normativism appear to me as sophisticated legitimizers of status quo conditions. The social theory of law aimed at here involves the possibility of a critique of present social conditions on the basis of careful groundwork of analytical nature.[42]

I will now proceed to the analysis of the second part of the definition ("which contributes to the creation and prevention of disputes and to their settlement through an argumentative discourse, coupled or not with force"). It has been re-

[42] The extreme normativism conceives norms and the value judgments they embody as self-centered realities. The prevalent social conditions, which norms confront in the real world, cease to be an adequate scientific basis for the evaluation of the operation of norms (norms "operate" among themselves). As a result of the absence of "external" challenge, the study of norms tends to focus on questions of "internal" consistency. The value judgments which norms embody tend to recede as judgments and to be analysed sub species aeternitatis. Consequently, norms are transformed into a given (indeed, a fact: this is the point at which extreme normativism merges with extreme sociologism).

The extreme sociologism conceives norms as facts that are an integrant part of prevalent social conditions. The value judgments which such conditions either support or challenge in the real world lose distance from those conditions and cease to be an adequate scientific basis for their evaluation. Devoid of a normative reference the prevalent social conditions tend to be analysed in "value-free" terms as if they inherently belonged to the nature of things (the normal become normative: this is the point at which extreme sociologism merges with extreme normativism).

Both the extreme normativism and the extreme sociologism are positivistic in the sense that they eliminate from the realm of science, though in different ways, the dialectics between values and facts. I argue then that, however preposterous this may appear, a critical theory of law in society has a "natural law" foundation conceived not in scholastic terms but in terms of a vision of the future in which a better state of affairs will prevail.

cently said that the focus on disputes tends to portray law in a distorted manner since it has a built-in bias in favor of social conflict and the role of law in it, leaving in the dark the facilitative aspect of law, its functioning in non-conflicting behavior as a guarantee of smooth and peaceful social life.[43] The temptation is strong to jump from this objection into a high level discussion about the two opposing ultimate conceptions of society: the conflict theory and the integration theory. This, however, is not in my bag of worries (and temptations) at this point. Aside from the fact that any scientific approach has a "built-in bias", one can only say that up until now the sociological and anthropological studies on conflict resolution and dispute settlement may suffer from an integration bias rather than from a conflict bias. The research has been directed to the processes through which conflicts are resolved and disputes are settled. To the extent that law is involved in such processes, it is seen as an instrument to eradicate conflict and to bring the parties back into smooth and peaceful interaction. Not only the Berkeley Village Law Project but any other (theoretical or empirical) study, including the present one, that follows the perspective of dispute takes the case as the unit of analysis, that is, a dispute already existent, brought to the public arena and bound to be settled under the scientific eye of the field researcher. When Nader and Gulliver insist on the need

[43] Cf. lastly, Merryman's and Lon Fuller's interventions in the Conference on Legal Anthropology held at Yale Law School in the fall of 1971 (see the transcript of the conference).

to study the pre-history of a case they have simply in mind previous facts of social life which help to understand the workings of the dispute processing and settlement mechanisms. Similarly when one distinguishes between a dispute perspective and a social control perspective in terms of a retrospective versus a prospective approach, law is seen either as an instrument to settle disputes already created or as an instrument to prevent disputes likely to occur in the future. Very little attention has been given to the view of law as an instrument to create disputes.

I follow the concept of dispute advanced by Abel and Felstiner and already mentioned. In much the same way, but in more detail, Gulliver defines dispute as follows:

> A dispute arises out of disagreement between persons (individuals or sub-groups) in which the alleged rights of one party are claimed to be infringed, interfered with, or denied by the other party. The second party may deny the infringement, or justify it by reference to some alternative or overriding right, or acknowledge the accusation; but he does not meet the claim. The right-claimant may, for whatever reason, accede to this, in which case no dispute arises. If he is unwilling to accede, he then takes steps to attempt to rectify the situation by some regularized procedure in the public arena.[44]

The general form of norm actualization in a dispute context is the form of "contribution" (ex: law contributes to settle disputes). This form acknowledges what I regard to be the nuclear truth (converted into untruth only when pushed to an extremist formulation) of legal realism: the idea of

[44] P.H. Gulliver, Introduction, 14.

the necessary implication of non-normativity in any practical normative process. In our scheme the dispute context is precisely the platform where normativity and non-normativity work together and contribute to a certain outcome. Their relative contributions vary enormously (according to culture, social system, type of dispute, type of settlement mechanisms, etc.) In spite of all possible variations it will later become clear that I, unlike some legal rationalists (like Max Weber), do not envisage a system in which legal disputes are exclusively governed by law.

Aside from this type of variation, the general form of "contribution" may assume three different modes which correspond to the three different ways in which law can be actualized in the dispute context: dispute creation, dispute prevention and dispute settlement. There is a structural relationship among these three different phenomena and, consequently, the full understanding of one of them requires the analysis of the other two. To say this amounts to acknowledge one of the limitations of the present study which is mainly concerned with dispute settlement and, to a certain extent, with dispute prevention. At the time of my field research I was not aware of this deep relationship. If we take for instance the dyad dispute creation/dispute settlement, the use of the case of dispute as the unit of analysis leads us necessarily to conceive of the creation of a dispute as logically and chronologically preceding its settlement. The situation is not changed if we extend the analysis to the pre-history and the post-settlement of the case. But if instead of isolated cases of dispute we take, as unit of analysis, the constant flow of disputing behavior in a given society, the logical and chronological relationship just mentioned breaks down. Creation, settlement (and also prevention) of disputes are stones in a fast creek coming down from the mountains in early summer: they keep together in the current but they change their relative positions all the time. Creation of disputes precedes settlement of disputes as much as the latter precedes the former. They are subjected to the same social conditions and their processes are intertwined. That is why the settlement of a dispute will create other disputes and prevent still others. Similarly, the ways in which one dispute is settled are affected by the ways in which this and other disputes were created and also by the ways in which other disputes of this type were prevented and this was not.

It may be argued that when we establish that the disputes are normatively justified we are already recognizing the contribution of law to the creation of disputes. Gluckman has also demonstrated how custom can create and exacerbate conflict in a tribal society at the same time that it prevents the conflict from going beyond an intolerable level.[45] To say this is not to go far enough. Postulating the normative justification in disputing behavior makes it unproblematic, unsusceptible of being operationalized and correlated with

[45] Gluckman, Custom and Conflict in Africa, London 1956; rpt. New York, 1969; Cf. also E. Colson, "Social Control and Vengeance in Plateau Tonga Society", 23 Africa (1953) 199 et s

other social factors. It becomes impossible to ask questions like this: under what conditions and in which types of disputes (according to the resource in dispute or the status of the parties, for instance) does the dispute creation process--always normatively justified--follow one of these patterns: (1) the disagreement tends to focus on facts rather than on norms; (2) the disagreement tends to focus on concurrent norms rather than on facts; (3) in the latter case, the opposing norms tend to occupy the same positions within the continua above mentioned; (4) the opposing norms tend to occupy opposite positions in the same continua (one party basing his claim on a closed or precise norm of a code while the other bases his claim on general principles of justice, charity, or equality); (5) the opposing norms have different sources or belong to different legal systems. In sum, the effort of Felstiner and others to study the social factors that account for the different structures and processes of dispute settlement in different groups or societies has to be directed also to the study of similar factors that account for the different structures and processes of dispute creation and dispute prevention in those groups or societies. The fact that settlement of disputes in one society is dominated by adjudication and in another by mediation will not be fully explained before we analyse the differences (if any) between the two societies as to structures and processes of dispute creation and prevention. Similarly, the study of dispute settlement by a legal profession should be done in conjunction with the study of the creation and prevention of disputes by the same profession in the same society. My basic assumption is that people advance settlements before they dispute. In other words, the basic premises upon which disputes are created and framed are structurally related to settlement in two opposing ways: (1) in anticipating and accepting the established settlement norms, procedures, and structures; (2) in consciously refusing such norms, procedures, and structures and striving for alternative ones. In the first case the dispute creation is an inverted form (like in a mirror) of the established dispute settlement. In the second case the dispute creation is an inverted form of a superseded dispute settlement (replaced then by an alternative one).

The same dispute creation/dispute settlement relationship will account for the fact that the regularized procedures (and not only the normative standards), which we are used to analyse only in the settlement context, may be present, in different forms, in the creation context. Questions like these may then be asked: whether in some societies (or certain types of disputes) the social energy and the social drama are concentrated in the creation and exacerbation of disputes, their settlement being an obscure and little regarded moment of social life, while in other societies the opposite may be true; whether in certain societies (and/or in certain types of disputes) third parties intervene, not to settle the disputes, but rather to help create and exacerbate them while in others the dispute is maintained in dyadic structure until

settlement begins; whether there is a relationship, in the societies of the first type, between the different third parties (as dispute creators and dispute settlers), or whether the triadic structure of the dispute in the creation context is converted into a dyadic structure when settlement becomes necessary or desired; whether the differences between creation context and settlement context in terms of time density, population density, publicity density vary according to societies and/or according to types of disputes; whether in some societies (and/or some types of disputes) the creation context of disputes may be allowed to reach high levels (in terms of intensified manifestations or formulations of disagreement or in terms of social involvement) before the settlement context is initiated while in others the opposite may occur; whether in some societies (and/or some types of disputes) the settlement of disputes is seen as a passive moment of social life, a moment that in itself counts for nothing (as settlement) and is only valued in terms of the future creation or prevention of disputes to which it can contribute, while in others settlement is perceived and valued as a self-subsistent entity (as the recovery, the vindication, the closing up of past social life).[46]

Dispute prevention occupies a peculiar structural position. It is half-way between the non-dispute context and the dispute creation context. This may seem wrong not only because dispute prevention appears as the "incarnation" of non-dispute context but also because whenever the movement away from this context starts we are already in the field of dispute creation and it does not make sense to speak then of dispute prevention. The fact, however, is that it is as absurd to speak of dispute prevention after the dispute has been created as to speak of dispute prevention before the conditions for the creation of the dispute are present. A dispute may be prevented when the conditions for its creation are present in an inchoate, latent or potential form. From another perspective, a dispute will be prevented when through a kind of short-circuit its settlement is present before its creation has been actualized in the real world. Dispute prevention, thus conceived, is, for instance, what people do when, after having decided to enter a contractual relationship, work together to make explicit the clauses agreed upon and for that purpose follow certain established procedures. More generally, dispute prevention encompasses all the strategies aimed at avoiding disputing behavior that are used by people involved in specific social relations. By specific social relations I mean relations in which individualized persons or groups participate for the purpose of (1) exchanging goods and services mutually needed, (2) avoiding such exchanges when they would occur if a specific counter-act did not take place, (3) making or dropping claims to specific rights. The dispute prevention context of these relations will be detected in the substance of the relation itself and

[46] Similarly, in the field of criminal law two models have been discussed and opposed: the deterrence model (future oriented) and the retribution model (past oriented).

in the steps taken to cut off lines of probably friction in the future.

We already know that preventing one dispute may lead to the creation of others and to settlement of still others. My assertions are based not only on a perspective but also on the dominant outlook of social phenomena--in terms of structural-functional design and practice and in terms of interaction strategies of participants--at the moment in which the constant flow of social life has to be sliced for purposes of analysis and its movement consequently distorted. There are at least two ways through which law can be actualized in this context. On the one hand, it proposes not only procedures but also normative standards--which, among other uses, inform participants about the consequences of the presence and the absence of such procedures and other remedies--which are directly oriented to apply in the context of dispute prevention; on the other hand, the norms and procedures which apply to the settlement of the disputes and their actualization (costs, anticipated outcomes, etc.) in such a context may affect not only the degree of desirability of dispute prevention but also the ways in which such prevention actually takes place. One or more individualized third parties may be identified as dispute preventers and one of them (or the only one) may be the third party that would intervene as dispute settler were the dispute not effectively prevented. The relevance of this fact will become clear when we analyse, in the empirical part of this study, the feedback mechanisms between the dispute settlement function and the dispute prevention function of the third party. Under certain social conditions it may become particularly crucial to analyse the ways in which the norms that "govern" the smooth and non-disputing behavior between parties in a given relationship (the dispute prevention context) relate to the norms that "govern" the settlement context when a dispute between the same parties arises out of the same relationship.[47]

In view of the preceding discussion little has to be added with reference to the relationships between dispute prevention, dispute creation and dispute settlement. Some of the most important questions may be spelled out: whether the small amount (however determined) or absence of certain kinds of disputing behavior (over certain types of scarce resources, for instance) is due to non-dispute contexts in the broad sense here advanced (situations in which the conditions for the creation of disputes are totally absent) or to the successful triggering and working of dispute prevention mechanisms (intervention when dispute creation conditions are already present); whether the goal of dispute settlement mechanism is to recover for the parties the same situation (or a very similar one) in which they would be had the dispute prevention mechanisms been activated effectively, or whether

[47] This echoes the well-known suggestion made by Eugen Ehrlich that Verhaltensnormen (the norms that regulate the everyday legal dealings between agreeing parties) and the Entscheidungsnormen (the norms that the "official" courts will apply to settle disputes arising from those dealings) may at times be very different. Cf. Eugen Ehrlich, Fundamental Principles of the Sociology of Law, Cambridge, Mass., 1936.

such goal is deemed impossible or undesirable and something else is aimed at; what forms or degrees (if any) of division of labor can be identified in reference to these different mechanisms and what the impact of that on the involvement of norms and procedures in the same mechanisms; whether in some societies, in which certain kinds of legal pluralism are present, the steps taken to prevent the dispute in one of the legal systems will be considered by the other legal systems as steps taken to create the dispute and what impact (if any) this may exert upon settlement mechanisms.

In the preceding discussion I have been suggesting that when the acting and the being of the law are analysed in a convergent and broad setting and the dispute is taken as the basic category of such setting, the actualization of the law has to be considered in the triple context of dispute prevention, creation and settlement. Thus I acknowledge the inherent limitations and even biases of most of the studies, including my own, using disputes as a perspective. As a consequence, very little is known today about the structure of legal actualization in dispute creation and dispute prevention contexts. This is why my proposed definition is left, in relation to these contexts, in the vacuum or, more optimistically, in the residual positivity of pointing to a problem without solving it. On the contrary, the actualization of law in a dispute settlement context has been discussed for thousands of years even though, at times, such context may have been merely implied. This wealth of discussion puts us, paradoxically enough, in a difficult position, similar to the

one created by the absence of discussion. It is as if ignorance and too much knowledge would create the same existential conditions for scientific theorizing. Hopefully however, ignorance cannot be sliced or distorted, while kn ledge can. This is the assumption upon which I base my th that argumentative discourse is the basic or structural mo of actualization of law in the dispute settlement context. This mode embodies the dominant outlook which, obviously, does not preclude the involvement of other modes and categories that must be made explicit whenever possible and ne sary. To elaborate on the nature of the argumentative dis course is to explain my theory of legal reasoning. This w be my task in Chapter IV.

The last element of my definition--"coupled or not wi force"--raises many problems. On its face, it violates a basic rule of definitional discourse: if one element may may not be present it should not be included for, if it we an infinite number of others should also be included, and this procedure would destroy the definition. There are, h ever, some more compelling reasons not to be too strict ab logical reasons. For instance, the intellectual tradition a given concept. The discussions on the concept of law ha traditionally centered around the category of force or co ercion, particularly so when the purpose has been to disti law from other normative structures such as custom or ethi This alone may warrant a reference to the category. But there are still more compelling reasons. When I propose t the basic mode of law in dispute settlement is argumentati

discourse" I am referring, as already said, to a predominant outlook. When it is added that such discourse may or may not be coupled with force it is meant that whatever else it may be, besides argumentative discourse, law is also and most likely force. The disjunctive expresses the idea that force in its presence-form (as actually exercised) is not a necessary element of the definition of law. It is then necessary to distinguish between two modes of force: the actual exercise of force, or what I call the presence-form of force, and the threat, the rhetoric of force, or what I call the absence-form of force. The last element of my definition is merely aimed at suggesting that the structures and processes of dispute processing vary with the prevalent modes of force[48] and that such variation is due to a dialectical relationship between argumentative discourse and force.[49]

[48] It is in this context that factors such as the authority of the dispute settler and the sanctioning powers at his disposal have to be discussed.

[49] I hope to find in this dialectical relationship the explanation for the fact that even when law is conceived as an instrument of power (as in Marx) it assumes a very specific and complex character in that capacity (as it was fully recognized by Marx even though not so by the Vulgarizers that followed him).

I find myself in the same intellectual tradition out of which the concept of le serment (the oath) in Sartre's Critique de la Raison Dialectique, Paris, 1960, emerges as a duality of fraternity and terror.

CHAPTER IV

Toward a Social Theory of Legal Reasoning

IV-1 Introduction

Traditionally the studies in legal anthropology have been of a monographic kind, devoid, explicity at least, of comparative purposes. Implicitly, however, a comparison has always been in the back of the researcher's mind, namely, the one between the characteristics of the law-ways of the exotic or primitive society he set out to study and the characteristics--as he assumes them to be--of the legal system of his own country. This can be verified not only in the criteria for the selection of relevant data but also in the categories used to analyse them. Sometimes, as in Malinowski, the analysis of the "primitive law" involves a critique of the "developed law" of the researcher's native country. In other studies, as in Gluckman's study of the Lozi courts, the comparative perspective is made explicit but remains uncontrolled and the dangers of false comparison, so well indicated by Van Velsen,[1] are at hand.

In more recent times the comparative approach has been considerably stressed, the assumption being that only through comparison can the scientific status and development of the discipline be guaranteed. Thus, comparisons must not only be made explicit but actually become the central focus of research

[1] J. Van Velsen, "Procedural Informality, Reconciliation and False Comparisons", M. Gluckman (ed.) Ideas and Procedures in African Customary Law, London, 1969, 137ff.

Moreover, the imprecise, casual, and intuitive comparisons, as they have been in the past, must be abandoned in favor of more sophisticated and precise comparisons, that is, controlled comparisons. Only in this way can we compare comparable entities, test hypotheses and make predictive statements. This approach in legal anthropology comes to a convergence with the approach that, for many years already, has been followed in legal sociology. We have only to mention that Richard Schwartz published his remarkable study on two Israeli settlements almost twenty years ago.[2]

The fruits of this new approach in legal anthropology begin now to appear. The Berkeley Village Law Project has been initiated under the preoccupation of establishing a set of common categories which would provide the ground and the criterion for the selection and gathering of comparable data. The empirical studies within this project are now coming up.[3] Laura Nader has also presented us with a comparative study of the dispute settlement in a Mexican and a Lebanese village.[4] The next step will be to compare the actual results of each study and to elaborate the conclusions within a unitarian framework. The construction of such a framework requires further and complex theorizing. Signs of this can already be perceived and at least two different and complementary

[2] R. Schwartz, "Social-Factors".

[3] Cf. among others, the Ph.D. theses of J. Starr and B. Yngvesson mentioned in Chapter III.

[4] L. Nader, "Choices in Legal Procedure: Shia Moslem and Mexican Zapotec" American Anthropologist 67 (2) (1965) 394-399.

theoretical orientations can be distinguished. One, followed by Felstiner, aims at a carefully organized set of correlations between social factors and dispute processing mechanisms characterized and distinguished through certain categories. The purpose is to account for the variations in profile among such mechanisms as they differ from society to society and even within the same society. Variations will be traced back to specific social conditions. Another orientation, followed by Abel, consists in selecting one of the categories or perspectives used to characterize dispute processing mechanisms, in this case, role differentiation of the third party, correlating variations in this characteristic with variations in other structure and process characteristics of the same mechanisms. The difference between these two orientations is that, while Felstiner's orientation is legal-sociological in that he sees the dispute processing as one social phenomenon among (and related to) other social phenomena, Abel's orientation is "legal-dogmatic" in that he conceives of the dispute processing as a closed system and is mainly concerned with variation within this system. The complementariness between the two orientations lies in the fact that while Abel, in not placing dispute processing in the social context, runs the risk of substituting a new kind of legal dogmatics (an empirical legal dogmatics, as it were) for the traditional legal dogmatics, Felstiner cannot go very far in discriminating the impact of the social context without the sophisticated and complex elaboration of categories of dispute processing as

it has been done by Abel.

This new orientation prompts us to a few comments that seem particularly pertinent in view of the discussion to follow in this Chapter. Whenever a comparative perspective is selected, however controlled it may appear, there lies at its basis an intuitive view, often not even consciously realized, of the "things" that should be "interesting" to compare and of the results which could be reasonably and preferably anticipated. This intuitive view is conditioned by the preferences of the researcher which may take him in one of two directions: (1) to stress differences and evolution across time and/or space; (2) to stress similarities and constancy across time and/or space. The evolutionist and neo-evolutionist theories are based on direction (1), as are also the theories drawing upon what we may call a technical view of social reality. On the contrary, direction (2) provides the foundation for theories drawing upon what we may call a mystical view of social reality.[5] In order to carry through these two directions two different strategies must be followed. Direction (1) requires that narrowly defined identities be ascribed to "things" in social life so that things appear as separate, distinct and thus different--strategy (1). Direction (2) requires the opposite strategy--strategy (2). From another perspective one can say that strategy (1) is particularly adequate to capture the surface-phenomenal level of

[5] There is no derogatory connotation in my use of the word "mystical" since I believe in the rationality of mysticism.

social reality, while strategy (2) is adequate to capture a deeper level of social reality which we may call, without any precision, more essential or more structural. This is not to say that at this level changes do not take place but simply that they are less striking or less easily measurable, even though they may be of more fundamental importance for the understanding of social life.

The two different directions and strategies appear reflected in anthropology and sociology of law in that two different focuses are discernible: what we may call the legal instrumentarium focus (l.i.f.)--following direction (1) and strategy (1)--originated in Max Weber and including among many others, Fallers and Abel; and the legal reasoning focus (l.r.f.), as we may call it--following direction (2) and strategy (2)--which in spite of having been very neglected still finds a major advocate in Gluckman.

There is nothing wrong in following one or the other focus once it is made explicit that two levels of legal social experience are involved and that one of them will be necessarily neglected. It is also possible to follow a more or less eclectic focus. However, the l.i.f. often suffers--and this may be related to its predominance--from two different biases: the exclusiveness bias, which consists in assuming that what can be known through this focus is the universe of what can be known (scientifically, at least); the rationality bias, which consists in portraying one given legal system--usually the one in force in the researcher's

native country--as the most developed one, in terms of the formal rationality of its functioning and of the role differentiation of its functionaires, deriving from it a set of categories against which the less developed legal systems are compared. The danger of the latter bias is that it is often based on the misrepresentation of the "most developed" legal system and when this occurs the set of proposed correlations may be poisoned by false comparisons in the framing of the categories. The danger of the former bias is that it may very well reveal a deep truth, that is, that the logic of the science and its major conventions are such that, to know something else, one has to jump out of the accepted boundaries--a risky enterprise in any case.

As far as my own option is concerned I try to be eclectic even though the l.r.f. is my major focus. The categories developed by the l.i.f. will be used whenever necessary.

IV-2 Legal reasoning, argumentative discourse, and rhetoric.

Rhetoric is here conceived as the art of persuasion. Argumentative discourse is a discourse modeled according to a form of reasoning aimed at seeking adherence on the basis of persuasion. The backbone of such discourse is language used both as a means of argumentation and as a magical means of action. Language-discourse, however, includes in itself non-language moments, such as silences, implicit language,

examples, and even deeds.[6]

Ever since the Greeks, Western thought has distinguished between two modes of reasoning (and of knowledge): the apodictic reasoning, aimed at necessary truth and resorting, for that purpose, to analytical proofs (demonstration oriented) through either logic deduction and/or empirical experimentation; the dialectical and rhetorical reasoning, aimed at adherence to what is credible, reasonable, plausible, probable, and resorting, for that purpose, to dialectical/rhetorical proofs (deliberation/argumentation oriented) through reasoning from generally accepted opinions and arguments (topoi).

Obviously it is beyond the scope of this study to summarize the intellectual history of the West. It suffices to say that with Descartes the concept of reason begins to be narrowly identified with apodictic reasoning, the dialectical/rhetorical reasoning being debased to a kind of sensualist irrationality, and that, since then, this unbalance has not been changed (for a sustained period of time, at least). This movement, however, was never completed and has been counter-attacked by prominent philosophers. We have only to remember Gian Battista Vico, professor of eloquence, who published in 1708 a dissertation titled De nostri temporis studiorum ratione. In it he analyses two different types of

[6] Consequently, the theory of argumentation from which I start is significantly broader than the one advanced by Perelman, even though I draw upon it at length in the following. Cf. Chaim Perelman and L. Olbrechts-Tyteca, The New Rhetoric, A Treatise on Argumentation, Notre Dame, 1969.

scientific method which he calls the critical and the rhetorical. The critical is the new one (Descartes, Arnauld), and it is characterized by starting from an absolute truth (a primum verum) and then proceeding deductively and systematically until it reaches a necessary conclusion. On the contrary, the old rhetorical method is based on common sense and starts from points of view (topoi) proceeding syllogistically towards probable conclusions. This revival of the old method suffered many vicissitudes in the following years. In our time we find it systematically reorganized (and also recreated) through the remarkable efforts of Perelman and his disciples.

Where does the legal reasoning fit in this dichotomy and its history? We have known for a while that legal reasoning in Greece and Rome was of the dialectical/rhetorical kind. So much so that general rhetoric was taught using the model of forensic rhetoric. Vico emphasizes that the old rhetorical method had been highly developed in judicial reasoning, and Curtius has shown how students of rhetoric were trained in the Middle Ages through the discussion of fictitious legal cases.[7] In modern times, however, a whole set of circumstances (territorial unification; centralization of power; general discredit of rhetoric; growing legal profession; economic development, etc.) led to a new scientific consciousness about the ideal functioning of the law with the substitution of the

[7] E.R. Curtius, European Literature and the Latin Middle Ages (Bern, 1948), trans. Willord R. Trask, New York, 1953.

categories of rationality and generality for the categories of reasonableness and concreteness of the "old method". From then on the emphasis was on the elaboration of general principles of axiomatic nature from which necessary legal solutions could be logically deduced within the premises of a closed system. The manifestations of this movement are infinite; the codification epidemic and Kelsen's pure theory of law are some of the most recent ones. The Anglo-American law resisted this movement and has been praised or blamed for that, according to the evaluator's ideology. In U.S.A., however, two different (and opposite to a great extent) currents may have stayed in the way of the recognition of dialectical/rhetorical elements in legal reasoning: on the one hand, Langdell's analytical jurisprudence seeking after general principles of axiomatic nature; on the other hand, the legal realism which, in light of its reductionist tendencies, may have identified rhetoric with sheer manipulation, refusing to see in it a deeper principle of justification and structure.[8]

Against this background we are able to understand the impact produced in the mid 50's by Viehweg's provocative essay, Topik und Jurisprudenz[9] and also by Esser's, Grundsatz

[8] But the Realists often used rhetoric manipulatively with or without humorous apology. I owe this note to a personal observation of Professor Leon Lipson.

[9] Theodor Viehweg, Topik und Jurisprudenz, Munich, 1954.

und Norm in der richterlichen Fortbildung des Privatrechts.[10] Viehweg is directly inspired by Vico and by his identification of the judicial reasoning with the "old rhetorical method". Viehweg shows, both at the historical and at the structural level, that legal reasoning has always been and still is dominated by rhetorical elements. Beyond the most precisely written norm and the best defined legal concept there is always a background of uncertainty and probability which cannot be removed by any deductive or apodictic method. The only way out is the inventive art (ars inveniendi or ars combinatoria--Leibniz) of finding points of view or "common places" (loci communes, topoi), which, being widely accepted, will help to fill the gaps, thus making the reasoning convincing and the conclusion acceptable. Viehweg provides us with many examples of such points of view originally conceived as topoi but which in the course of legal history were adulterated into general principles from which necessary conclusions could be deductively drawn: Nemini casum sed culpam imputari (guilt and not accident is what makes people liable); publicam utilitatem privatorum commodis praeferandam (public utility is always to be preferred to private interests); plus cautionis in re est quam in persona (there is more security in things than in people); Nemo plus juris ad alium transferre potest, quam ipse haberet (nobody can transfer to others more rights than he has), etc. etc.

10 Josef Esser, Grundsatz und Norm in der richterlichen Fortbildung des Privatrechts, Tübingen, 1956.

These topoi,[11] in their original form, are endowed with conviction power, not with truth power. They refer to what is evident, to public policies or to communis consensus and, as Esser points out,[12] these references substitute, in an open system, for the necessity of axiomatic deductions. The same is true of the concepts of classic Roman jurisprudence. For instance the concept of causa (as in justa causa) is not a technical expression but rather an "unburdened general concept of forensic rhetoric", as Esser puts it.[13] It is with this rhetorical foundation in mind that Perelman, after contrasting demonstrative reasoning with commensensical argumentative (legal) reasoning, concludes: "Unlike demonstrative reasoning, arguments are never correct or incorrect; they are either strong or weak".[14]

We must also emphasize that topoi are characterized by their close connection with problem thinking. They belong inherently to the discussion of problems and in a sense are recreated from problem to problem. They are never the same in the discussion of different problems and allow for infinite nuances. That is why they cannot be systematized.

11 I prefer the Greek expression since expressions like "topics", "points of view", or "common places" have gone through complex semantic evolution.

12 Esser, Grundsatz, 46.

13 Esser, Grundsatz, 45.

14 Ch. Perelman, "Justice and Justification", Natural Law Forum 10 (1965) 1 et ss.

They are fragmentary insights, points of view, that orient the discussion of the problem and open a set of probabilities as to its resolution. By pointing out what is not controversial in the discussion, they provide guidelines for the processing and conclusions of the dispute. Described in general, the topoi appear as very vague ideas, almost devoid of content. As a matter of fact, to describe them in general is, in a way, to adulterate them. Their specific content emerges only in the discussion of specific problems. In the Anglo-American law, which has always consciously remained an open system, this problem orientation appears congenial. Edward Levi speaks of "reasoning from case to case".[15] This formulation has often been criticized on the ground that this kind of reasoning is actually deductive, and presupposes an idea of system. Its appearance as an inductive reasoning is an illusion created by its major premise remaining undisclosed. As a matter of fact this criticism appears to be fundamental only as long as its major premise remains undisclosed; otherwise it is trivial. Its premise is that the two types of reasoning are antithetical and mutually exclusive. This, however, is not true. To use Stoljar's formulation, "deduction and induction, far from being antithetical, are in effect complementary procedures".[16] The dichotomy upon which my conceptualization of topic-rhetorical thinking

[15] Edward H. Levi, An Introduction to Legal Reasoning, Chicago, 1949.

[16] Stoljar, "The Logical Status of a Legal Principle", 20 University of Chicago Law Review (1953), 186.

is based is not system/chaos but rather closed system/open system. It begins to be known that the selection and the formulation of problems presupposes an idea and a choice of system as much as the selection and the formulation of a system presupposes the idea and the choice of problems. The question, therefore, is not a logical one but one founded in the dominant praxis of the field of inquiry itself. And, on this ground, it becomes crucial. The question is: in terms of the particular praxis, which of these two elements (system and problem) is the stronger one, the more permanent, the one which constitutes the moving force of the praxis? Now, both Viehweg and Levi have shown that in legal praxis such an element is the problem and not the system.[17]

The theory of dispute processing, because of its focus on problems (cases) rather than on normative systems, is particularly adequate to bring out the topic-rhetoric structure of legal reasoning. The characterization of this structure in the literature so far, however, does not provide us with more than a general orientation and a framework within which a whole set of categories and issues must be introduced

[17] This shows the need for a reorientation of the comparative law studies. The problem, or clusters of problems, should be the starting point of comparison because they are, unlike systems, structurally international.

and discussed.[18]

In light of this it is my intention to further the discussion of those issues and categories that seem to be most relevant for the analysis of my empirical data. The topic-rhetorical theory of legal reasoning I propose, in spite of drawing upon the legal theory and the legal praxis of some of the "most developed" legal systems in the world, is here developed with reference to Pasargada law-ways, to the law-ways of a squatter settlement in an urban metropolis. My perspective is an anthropological-sociological one. I am aware of the fact that my data substantiate some points better than others. And still others are not substantiated at all. In these cases questions will be asked that cannot be answered in the limits of this study, propositions will be advanced that cannot be tested. Hopefully, some other social scientists will do the job--if my ignorance and deficiencies are challenging at all.

IV-2.1 Topoi, general principles, and judicial policies.

Judicial policies are organizational principles, princi-

[18] Viehweg does not go very far in this respect. He is content in settling the question of method and in identifying some general features of its practical relevance. Esser goes beyond this but only to a certain extent. On the other hand, both Viehweg and Esser are mainly concerned with unveiling the legal reasoning structure of the official (state), legal system of Germany. Moreover, these authors follow a legal theoretical perspective. Legal reasoning and legal praxis are analysed in isolation from other social phenomena (even though they are not conceived of as insulated from the rest of social life) and there is no account of reciprocal influences and co-variations. In sum, they lack a sociological perspective even though, particularly in Esser, the constant reference to the "social valorations of the community" leaves the door wide open for it.

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ples of action, or rules of thumb on the basis of which some strategical decisions about the ways to proceed are made. These policies are derived from the interests, needs, limitations, and potentialities of the dispute processing mechanism itself as they are perceived by the social groups that control it or by the dispute settler. Whenever a given dispute processing mechanism is involved in an institutional framework some judicial policies will merge with organizational or classificatory principles governing the division of labor within the overall structure of dispute processing. Judicial policies are then distinct from topoi in that they are not an integrant part of the argumentative discourse though they condition it.

General principles were among the normative standards discussed in the previous Chapter. However, within the context of dispute settlement and given the specific actualization in this context, I prefer to speak of topoi rather than of general principles. Principles express truth contents of a given legal order; topoi are recognized by the persuasion and manipulation power they carry with them. Principles seem to exist per se, the social particulars being irrelevant both for their (the principles') validity and their truth content; topoi are problem born and problem oriented; their validity and their "truth" seem nonsensical outside this context. Principles are autonomous, they are applied as a "question of principle"; topoi are useful and their usefulness lies on the impact they produce. Principles exist in general;

% Dif sustancial con Viehweg pues señala la ≠ y especifica los límites del topoi

topoi are general only through the recurrence of the type of problems which they fit. Principles, given their generality, tend to be regarded as major premises from which lesser norms and particular decisions can be deduced; topoi express the mutual and gradual approximation of facts and valorations.

Topoi are based on common sense, on "the logic of the reasonable", to use Recasens Siches' expression,[19] or on public policies.[20] Following Aristotle,[21] I distinguish between two different kinds of topoi: general topoi and special topoi. General topoi can be used in any domain of rhetoric without belonging to any of them specifically as, for instance, the topos of quantity or even the topos of the exemplary figure. Special topoi belong to a specific domain of rhetoric and, since in our case such domain is legal rhetoric, they will be called legal topoi. This distinction should not be taken too strictly. It can be even conceived, rather than as a dichotomy, as a continuum along which different topoi can be differently located. On the other hand, the special topoi used in legal rhetoric may at times be very similar to topoi used in political rhetoric or in moral rhetoric. In the context of some problems they may be so much intertwined that it becomes impossible to distinguish them. Actually, this is often the case with legal and ethical topoi; many topoi used in legal discourse have a mixed legal-ethical outlook.

There are hierarchies among the topoi not in the sense that one can be deduced from the other but rather in the sense that one can be applied to a given problem only within the boundaries previously set up by another or that one is only considered when another does not fit the particular problem. Topoi may also be antithetical and they may clash in the discussion of a particular problem.[22]

Given that topoi are not only the windows by which the legal system remains open to (and integrant part of) the whole of social life but also the wind of social valorations that blows across them, the importance of the sociological

[19] Luis Recasens-Siches, "The Logic of the Reasonable as Differentiated from the Logic of the Rational (Human Reason in the Making and the Interpretation of the Law)", R.A. Newman (ed.) Essays in Jurisprudence in Honor of Roscoe Pound, Indianapolis, 1962, 192-221 (204 ff.)

[20] The distinction between common sense and public policies, as made by the Anglo-American jurisprudence (among others O.W. Holmes, The Common Law, Boston, 1881, 36.), is necessary and useful in dealing with a complex legal system of a complex society. In a smaller and simpler society, as in Pasargada, the public policies either are so self-evident and urgent that they merge with common sense or they are so particularized and so split among the different (and sometimes, opposing) leaders' groups that their "public" and "policy" character is cast in doubt. In the latter case such policies are what I call private interest postulates and may be used both by the parties and by the dispute settler. As long as they remain in the realm of motivation without any traceable translation (even in an implicit form) into the logical connections of the discourse, they remain outside my research field.

[21] The Rhetoric of Aristotle (a translation by Sir R.C. Jebb) Cambridge 1909, I, 2, 1356a; Aristoteles, Topik (edited by P. Gohlke), Paderborn, 1952, II, 109a.

[22] This is actually frequent in general rhetoric. Perelman (New Rhetoric, 65) gives the example of the classical topos of the superiority of the lasting which may be opposed, in the course of the argument, by the romantic topos of the superiority of that which is precarious and fleeting. Similarly, in legal rhetoric the topos of equity very often clashes with the topos of certainty, or the topos of equality with the topos of responsibility and merit.

study of topoi lies at hand. They can be correlated with other features of the dispute processing or they can be analysed as indicators of the ways in which dispute processing is related to other aspects of social life. Along the present section some hypotheses and correlations will be advanced. At this point only a few general suggestions and considerations seem adequate.

Even though topoi refer to zones of agreement, the latter can be wider or narrower and the agreement more or less intensive. The possibility is not even precluded that the normativity which the topoi embody unfairly favors the interests of certain groups against the interests of others. This aspect can be related to many others within and without the dispute processing. Here I try to relate it to the explicitness with which topoi are used in dispute processing. Topoi can remain implicit (absence-form) in which case their use can only be detected through careful analysis of the logical connections of the explicit discourse. And short of full explicitness of use, topoi can be used in what I may call semi-formulations.[23] Semi-formulations are ideal instruments to manipulate positions in such a way that tactical agreements can be reached. They can also genuinely further agreement in those areas in which penumbra is preferable both to light and

[23] Semi-formulations have a mixed structure of explicitness and implicitness. They are formulations which finish before the reasonable and logical implications of what is said are disclosed but in such a way that the openness and ambiguity of what remains implicit feeds back upon what is actually said, thus investing the speech with an overall duplicity of meaning.

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to darkness. Having this in mind, I suggest that the wider and more intensive the agreement upon which topoi are based the greater the tendency for them to remain implicit in the legal argumentation; and that the narrower and the less intensive the agreement the greater the tendency for the topoi to be made explicit or, at least, to be semi-formulated. I recognize, however, that, given the high generality of these hypotheses, there is wide room for intervening variables. The major question then is under what conditions these hypotheses are likely to be proved or disproved. I suspect that the second hypothesis, for instance, can only be true when one group tries effectively to impose its interests and ideologies upon another group.

Similar problems confront us when we try to analyse the hierarchies and antitheses between topoi at a high level of generality. Perelman points out that it is possible "to characterize societies not only by the particular values they prize most but by the intensity with which they adhere to one or the other of a pair of antithetical loci".[24] But given the problem orientation so congenial to topoi such characterization will remain abstract and very misleading as long as it is not narrowed down to specified clusters of problems and circumstances.

IV. 2.2 Topoi, clichés, maxims, proverbs and slogans.

In the nineteenth century legal historians (particularly

[24] Perelman, New Rhetoric, 85 (loci is the Latin translation of topoi).

the Germanists) dedicated a great deal of attention to the study of legal proverbs and maxims (Rechtssprichwörter).[25] These were considered as popular renditions of dominant normative standards or as suggestive formulations of legal ideas by legal practitioners. In both cases, their study was deemed very important in order to understand the real law-ways of society. However, with the increasing predominance of the narrow rationalism of the codification movement and of the legal positivism (in its various forms), this area of study was condemned to the deepest neglect. From then on the emphasis was on the systematic study of norms conceived of as the general precepts emanated from the State and usually included in codes according to definite principles of organization. This continues to be the emphasis of our days as far as legal science and legal philosophy are concerned, and particularly so in the countries of which many a legal anthropologist or legal sociologist is native. Consequently, whenever this social scientist sets out to study a given legal system and uses for that purpose the set of categories and concepts developed by the legal science and philosophy of his native country, he may be running the risk of being systematically biased or, at least, of defining his field of research too narrowly. He will concentrate on general norms, losing sight not only of topoi but also of cliches, slogans, maxims, and proverbs which, in my judgment, are important lubricants of dispute processing.

[25] Johann Friedrich Eisenhart, Grundsätze der Deutschen Rechte in Sprüchwörtern, Helmstadt, 1759 (I consulted the new edition prepared by Waldmann and published in Berlin in 1935 under the title: Deutsches Recht in Sprichwörtern); Jakob Grimm, "Von der Poesie im Recht", Zeitschrift für Geschichtliche Rechtswissenschaft Vol. II (1816) 1, 25-99 (I consulted the reprint Darmstadt, 1957); Otto Gierke, Der Humor im Deutschen Recht, 2nd ed. Berlin, 1886 esp.. 29 ff. A recent analysis of specific issues in Ferdinand Elsener, "Keine Regel ohne Ausnahme", Festschrift für dem 45. Deutschen Juristentag, Karlsruhe, 1964, 23-40.

Topoi are distinguished from clichés in that the latter may or may not involve a normative standard and when they do the element of normativity appears in a recessive form, hidden behind over-used, stereotyped formulas. Perelman characterizes clichés in the following way:

> The cliché is the result of an agreement as to the way of expressing a fact, a value, a connection between phenomena or a relationship between people. . . . The cliché is both form and content. It is an object of agreement regularly expressed in a certain way, a repeated formula of a stereotyped character.[26]

In the context of dispute settlement we find clichés, for instance, in the ways in which the parties and their representatives address each other or the third party ("Your Honor"; "Senor Presidente"; "Comrade"; "Senhor Doctor Juiz"; his personal--first or last--name). The importance of cliches like these lies in that they are integrant part and effective reinforcers of the ritualistic character of dispute processing. They help to create the ambiance of interaction and the atmosphere of evaluation. Compliance with them follows so mechanically that it becomes almost unnoticed. This is

[26] Perelman, New Rhetoric, 165. It seems to me that it is necessary to go beyond Perelman's definition and include, besides verbal clichés, non-verbal ones such as gestures, postures, special dresses, special modes (positions and movements) of fitting in the space structure of the site of the dispute processing.

why non-compliance may at times be very upsetting for the smooth progression of the dispute processing. Reaction against it may take many forms and degrees of intensity. It may consist in overt and delimited punishment (more or less intense) or in more or less covert and diffuse disapproval (for instance the creation of a mood of hostility against the transgressor on the part of the audience or the third party) from which the subsequent processing of the dispute is not insulated. Whenever no functional equivalent expression is substituted for the cliché the reaction, when taking place, may be directly attributed to the non-compliance. Whenever one such expression is substituted for the cliché, the reaction may have a much more ambiguous character as to its cause. It may be the result of a subtle weighing operation between the value of what the cliché represents in itself (the cliché is form and content; the medium is the message) and the value affirmed (more or less adequately) or denied in the substituting expression. At times, the reaction may be more directed at the latter expression than at the non-compliance with the cliché.

From a sociological perspective some specific hypotheses may be advanced. In the first place I suggest that the frequency and the seriousness (measured through the existence and intensity of reaction against non-compliance) with which clichés are applied are positively correlated with formalism and ritualism--characterized through factors other than the use of clichés--in dispute processing. However, when ritualism reaches such a high degree that all other characterizing

factors tend to merge in stereotyped language/non-language, the ordinary legal reasoning will be transformed into magical legal reasoning. When this transformation takes place another follows at the level of meanings and functions of language. As a consequence, the clichés themselves, as conceived in ordinary legal reasoning, will be superseded, and the distinction between verbal and non-verbal clichés will also break down.

As to the correlation between sanctions for non-compliance with the cliché and the main outcome of dispute processing (the settlement of the dispute) I suggest that the organized and delimited sanction tends to exhaust its effects in the process of its enforcement (its outcome) without affecting, beyond that, the settlement of the dispute, while the unorganized and diffuse disapproval tends to create a self-enforced mood of victimization which may affect the settlement of the dispute.[27]

The preceding hypotheses take the clichés as in fact they present themselves in discourse, that is, as both form and content. However, for purposes of sociological analysis, it is most profitable to separate form from content. Clichés are stereotyped formulas and consequently they bring with them an element of dissonance with present social and cultural conditions. Thus most clichés are what we may call

[27] The assumption is that, while the organized sanction has an explicit outcome, thus, a controlled outcome, the unorganized sanction has in fact no outcome but rather is in a constant process of "outcoming", a process which can only be actualized along with (and interwoven with) the dispute processing itself.

congealed past in that they refer to conditions (for instance, forms of social or cultural stratification or differentiations) that are not real anymore or that are real in an attenuated and diluted way. It is known that social symbols may survive as clichés or ideologies after having exhausted the existential possibility of consonance with economic, political, legal, and ethical conditions out of which they emerged.[28] In this case, clichés can be analysed, according to the historical method, as witnesses and reflections of social and cultural change. From a functional perspective, the process of stereotypification can be analysed as a reflection of social inertia or as a conscious effort, by the operators of the social and legal system, to absorb (or to minimize) the impact of change or even to minimize change itself. I suggest that, other factors remaining constant, when a conscious effort is involved, the reaction against non-compliance tends to be organized and delimited while, when social inertia is involved, the reaction tends to be unorganized and diffuse.

The dissonance of clichés with present conditions may stem from anticipation. In this case, the stereotype is created, as it were, instantly, and what follows (when it follows) is a gradual process of de-stereotypification as the social conditions gradually catch up (when they do) with the symbol that the cliché embodies. Then the cliché is congealed future and is usually introduced and promoted by moral or political entrepreneurs for purposes of education or propaganda. This type of clichés can be seen and analysed as social experiments through which conflicts and tensions between ideologies and between groups are manifested and conditioned. Whenever sactions for violation exist they tend to be organized and delimited and they also tend to be unaccompanied by the diffuse disapproval of the audience.

The content of a cliché may still be analysed as to its specificity or generality. I suggest that the higher the specificity the greater the role differentiation and professionalization in dispute processing. But in this respect the problem of borrowing becomes very relevant. Clichés may travel from one mechanism of dispute processing to another. They may be originated in one and remain "officially" limited to it but perceptions of functional equivalence among the audience and/or the active participants may lead to their transplantation to other mechanisms.

Very important is also the study of maxims and proverbs. Although I am aware of the possible distinctions between maxims and proverbs[29] they are treated here as synonyms. They are brief and suggestive formulas which express, illustrate or simply suggest accepted values. There is an element of tradition and of wide acceptance in them even though their popular character may vary. According to the normative

[28] In periods of sweeping revolutionary change the ideological foundations of verbal and non-verbal clichés may become aparent as is illustrated in the changes in the insignia of magistrates after the French Revolution. Cf. Jean Mazard, "Les insignes des magistrats et des auxiliaires de justice sous la Revolution", Festschrift Guido Kisch, Stuttgart, 1955, 311-319.

[29] Maxims can be conceived as a broader category than proverbs. Proverbs are then popular maxims.

standards to which they refer we can distinguish between legally oriented maxims and morally oriented maxims. The former are of the type of regulae, sententiae or brocarda which were "invented" by jurists in Rome and throughout the Middle Ages to facilitate the processing and settlement of disputes in court. The latter have a more popular character and refer to dominant valorations in the community; the dispute processing is only one of the contexts in which they can be meaningfully invoked. But this distinction, even in this mild formulation, cannot be taken too seriously because most maxims have a mixed (legal and moral) character. Take, for instance, the old and famous maxim Summum ius summa iniuria (Too much of law is wrong; Zuviel Recht ist Unrecht). Is it a legal or a moral maxim? The two aspects are so interwoven that the question is almost nonsensical.

Topoi are intimately related with maxims and proverbs. Elsener and others suggest that not only the regulae and brocarda of Roman jurists but also the maxims of medieval jurists were nothing else but topoi.[30] They were starting points of legal argument and were used in close connection with specific types of problems. In view of this, I can only add that topoi are a broader category within which maxims and proverbs may be included. Topoi are not so dependent on the formula through which the content is expressed as maxims are. On the other hand, even though most topoi embody an element

[30] Elsener, "Keine Regel", 34.

of wide acceptance, they may be related to transient notions of common sense or public policy and consequently are not necessarily endowed with the patine of tradition as is the case with maxims and proverbs.

From a sociological point of view the importance of the study of maxims can be illustrated in connection with the following topics. In the first place, maxims refer to widely accepted value judgments and, consequently, give a moral character to the speech, as Aristotle says.[31] Thus I suggest that the more frequent the use of maxims in dispute processing the greater the tendency for the atmosphere of evaluation to assume a moral tone. Consequently, the use of maxims appears negatively correlated with the "autonomy" of the legal system and with the presence of a distinct legal sub-culture.

Maxims and proverbs represent a special kind of thinking which I will call, following Brecht and Walter Benjamin, "crude thinking" (das plumpe Denken).[32] Crude thinking is thinking free from logical subtleties and speculative manipulations. It is so close to social conditions that it can be said to be the discursive consciousness of social reality itself. It is also an action-oriented thinking. "Crude thoughts", said W. Benjamin, ". . . are nothing but the referral of theory to practice. . . . A thought must be crude to come into its own in action". And he concluded that

[31] The Rhetoric, II, 21, 1394 b.

[32] Walter Benjamin, Illuminations (edited and with an introduction by Hamah Arendt), New York 1969, 15.

"proverbs are a school of crude thinking".[33] Hence I suggest that the greater the use of maxims in the context of dispute processing the greater the likelihood that the gap, pointed out by Ehrlich, between Entscheidungsnormen and Verhaltensnormen will be minimal or null.

We come finally to a brief reference to slogans. Perelman characterizes them in the following way:

> Slogans and catchwords are maxims developed to meet the requirements of a specific action. They are designed to secure attention through their rhythm and their concise and easily remembered form but they are adapted to particular circumstances, require constant renewals, and are too recent to enjoy the wide traditional agreement accorded to proverbs. They may be able to stimulate action, but they are much less effective in inducing beliefs; their function is essentially that of compelling our attention to certain ideas, by means of the form in which they are expressed.[34]

Slogans differ from topoi because they don't necessarily refer to points of agreement, and also because they are not so much problem oriented as they are circumstance oriented. They also differ from maxims and proverbs because they lack the backing of tradition. Slogans do not emerge out of common sense but rather out of interests and policies of specific groups in society. Consequently, they are introduced and promoted by political, economic and religious entrepreneurs. And they die out, either when the specific action is accomplished, or its accomplishment is no longer desired, or when a different group--with different interests and different

[33] Ibid, loc. cit.

[34] Perelman, New Rhetoric, 167.

slogans--takes over the position from where the production and promotion of slogans can be controlled.

Slogans can be distinguished according to the areas in which they are to produce impact most directly. Legal slogans, such as, for instance, "law and order", are mainly directed to the operations of the legal system. All other types of slogans may have an impact on the legal system even though their specific targets lie elsewhere.

From a sociological perspective the importance of slogans lies in that they are, in the short run, powerful lubricants of dispute processing because of their adequateness to be used by public officials and mass media. They act upon the collective subconscious of the audience and active participants and are, at times, decisive conditioners of the interpretation of norms and of the standards through which specific degrees of moral indignation are attached to certain forms of social conduct. I have already mentioned the categories: the atmosphere of legal evaluation and the atmosphere of moral evaluation. A third one should be here introduced: the atmosphere of formal (or label oriented) evaluation. This category refers to situations in which facts and normative standards are manipulated in such a way that they appear so intimately interwoven, so oross-fertilized and -neutralized that the very cognitive categories by which the facts are spelled out exhaust most of the relevant normative density, little room being left for further inquiry. An atmosphere of this type can be created by many different

factors and can occur in most different circumstances but I dare to suggest that the more sloganized the dispute processing the greater the tendency for the atmosphere of evaluation to assume a formal (label oriented) character.[35]

It is also important to trace the functional relations between slogans on the one hand and maxims and proverbs on the other. It seems to me that a sloganized society is a society that ran out of maxims and proverbs either because the low historical depth of traditional wisdom is coupled with a process of fast social change (U.S.A.) or because the traditional wisdom is identified with a renegated ancient régime, a pre-revolutionary past (USSR). There is also the possibility for a complex mixture of slogans and maxims and proverbs both when contents of traditional wisdom find their way through new (adequate to social change) formulations and when traditional formulations and contents are more or less juxtaposed with new contents (Japan and People's Republic of China). Within the context of dispute processing the point to retain is that maxims and proverbs guarantee (however precariously) the possibility of an unbiased processing, given the wide acceptance and the density of common sense with which they are invested. This guarantee cannot be expected from slogans and I even suggest that the more sloganized the dispute processing the greater its tendency to be dependent on the interests and ideologies of specific groups in society.

[35] The underlying assumption is that a sloganized dispute processing tends to process itself rather than the dispute.

IV.2-3 Topoi and norms. The creation of normativity in dispute processing.

Norms are here conceived as legal rules in stricto sensu (Gesetze, lois, legges, leis). In the above mentioned continua of normative standards they tend to occupy the positions of precise, closed and technical norms (see III-2). In more developed and complex societies they tend to assume a written form and be collected in codes or in other modes of collection. As said earlier these norms have almost monopolized the attention and the energies of jurists in recent years. The dogmatic study of legal norms has been considered the nuclear task because the norms have been conceived as the major premises from which particular legal decisions can be deduced through a process of subsumption, this process becoming then the nucleus of the "application" of law. On these grounds, the autonomy and the rationality of the legal system have been built.

This basic perspective has even gone beyond the practical purposes of legal dogmatics and been used in legal sociological research. One of the most recent illustrations can be found in Luhmann's Legimitation durch Verfahren (Legitimation through Process).[36] Luhmann analyses the legal process through a system theory based on a Parsonian functionalist model. According to him, the legal process is a closed system whose major function lies in the absorption of complexity (in social conflict) through an autonomous programming of

[36] Niklas Luhmann, Legitimation durch Verfahren, Neuwied 1969.

legitimate and relevant alternatives. Functional efficiency--of which the internal consistency of the system is an important factor--is what legitimizes process and not any appeal to truth or justice. Truth is a result of system performance and the rationality of the law is limited to the system.[37] It is not here the place to take issue with Luhmann. Actually I find myself in agreement with some aspects of his theory. What is wrong in his approach is that his theory is in fact a meta-theory, a theory of a theory rather than a theory of praxis. His theory cannot be taken as being based on a real description of the functioning of the legal system in Germany or in any other part of the world. He pushes the Weberian theory to its logical consequences and does the same with the tradition of legal positivism and of legal dogmatics. Consequently there is a complete lack of understanding for the aspects of legal life which, from the point of view of his narrow rationalism, can be labelled as "logical inconsistencies","irrational and emotional moments", "moral ideologies", etc. Within the horizon of issues to be discussed in the present section it is particularly important to emphasize Luhamnn's complete insensitivity to the complexity of the process that goes under the name of application of "law", the "application" of legal rules to particular social situations and problems. The assumption underlying his system theory is that legal rules are applied through a simple process of subsumption. This apparent simplicity, however, constitutes, in my opinion, a gross misrepresentation of the actual process, and is only to be expected from a legal instrumentarium approach, as I have called it, which is not coupled by a legal reasoning approach. This simple vision of the application of law--which is very far from being an immediate vision--will be dismissed in the present section.[38]

The basic assumption of my theory is that, even in complex and "developed" societies and legal systems, norms (legal rules) play a relatively secondary role in the actualization of law (Recht, droit, diritto, derecho, direito) in the dispute processing context. Legal rules are models of regulation which never necessitate particular decisions. The normativity charge which they embody is a mere proposal that comes only into being (as actualization) in the context of a specific legal case and its circumstantial complexity. Consequently the formal logical or juridical subsumption ("this case falls under this law")--which assumes

[37] Luhmann is heavily influenced by the American legal sociology and anthropolcgy. It is, therefore, not surprising that we can find striking parallels. As to the complexity absorption function, for instance--and only to mention one of the most recent studies--we find a similar formulation in Fallers when he says that "legal thought involves a simplification and rationalization of everyday morality" (Law Without Precedent, 85). Even though Fallers is very careful in maintaining within sight the close interrelation between law and the social system, he gives great relevance to the narrowing of issues in the legal process.

[38] My critique of Luhmann runs parallel to Esser's in Vorverständnis und Methodenwahl in der Rechtsfindung, Frankfort am Main, 1970. My departures from him are in most cases neccssitated by the sociological perspective followed here and absent in his analysis.

that the normativity of the legal rule is a ready-made formula or that normativity "lives" in the rule in very much the same way as the walls and doors of a house live in it--only expresses the external process and, at its best, may perform an argumentative task: but never the task that it is supposed to perform, that is, the cognitive task of guaranteeing the *if* and the *when* of a *correct* application of the law. The internal process is dominated by material logic and valoration and consists in the gradual and mutual approximation of the *adequate* legal rule and the *relevant* facts of the case ("this law falls under this case", or better, "this case and this law fall into each other"). Specifically what comes together is the normative content and direction proposed in the rule and the regulation needs (that is, the normativity needs) of the case. Their fusion, in its success and in its failure, is the ground upon which the cognitive task of correctness is performed, not in the light of the positive or systematic self-assertion of the law but rather in the light of the horizon of social expectations built around the case and its processing and embracing the parties, the judge, and the relevant audiences. Thus, law application is also law creation.

Two questions come to the foreground: (1) How does the approximation of norms and facts proceed? (2) What are the rational guarantees of the process? As to the first question it is important to distinguish different steps in the process of approximation. The first step consists in what I call the

pre-understanding of the case and norms.[39] Pre-understanding is a pre-valoration of the conflict content of the case and of the norm or set of norms which seems to fit the regulation needs of such content. This valoration, therefore, does not cover the dispute in an indiscriminate way. What it considers in the case is derivative from the direction in which the case must be considered in terms of its regulation needs and purposes. These needs and purposes are detected and evaluated in the light of common sense postulates and public policies mandates to which the third party has access either as a common citizen or as holder of a dispute settlement role.[40] In the latter case the valoration stems from a more specific learning process derived from standing praxis coupled or not with formal professional education. It is the sense of direction in the pre-understanding of the case which accounts for the pre-selection of the relevant issues. And it also accounts for the pre-selection of the norm or pool of norms because these do not appear as *a priori* necessitators

[39] In using this concept I follow Esser but, while in Esser's view--perhaps because he works with an adjudication model in a complex society--the pre-understanding appears as a monopoly of the third party, in my view, the parties and their advocates bring also pre-understandings and valorations into the dispute processing and these compete not only with each other but also with the pre-understanding of the third party. This interaction can eventually be more visible in a mediation setting but is still present in an adjudication setting. The recognition of this, however, does not prevent me from concentrating, at this point, on the third party's pre-understanding.

[40] Consequently, the regulations needs of the case do not constitute a law inhering in the case, the "immanent law" of which Llewellyn speaks. Cf. Karl Llewellyn, *The Common Law Tradition: Deciding Appeals*, Boston, 1960.

of decisions for the cases that fall under the legal type (Tatbestand) they express but rather are selected, according to the above-mentioned postulates and mandates, for the usefulness within the context of needs and purposes of regulation that the dispute brings into being.

The reference to common sense postulates and legal policies mandates already suggests that legal topoi preside over the pre-understanding. They are also instrumental in carrying through the gradual approximation of norms and facts. Through them alternative solutions are further excluded and factual relevance and normative adequacy are re-defined again and again. A complex operation of weighing out of interests, purposes and needs is set in motion under the orientation of topoi which, by expressing and reinforcing fields of consensus, invest the valorations with an objective outlook. And they act not only upon the selection of norms but also upon the interpretation to be given to concepts and categories used in these norms. As a consequence, decision or outcome, instead of coming at the end, has in fact to be anticipated and evaluated before a given interpretation is relied upon. Thus, the external process reflects in an inverted form the internal process.

In order to perform their task, topoi draw upon the full complexity of the dispute as a social phenomenon and it is on this basis that the gradual process of selection takes place. Consequently, when Luhmann speaks of the absorption of conflict complexity as the characteristic of the legal process,

or when Fallers speaks of the simplification and narrowing of issues as the characteristic of the legal thought, their statements are, at least, misleading, since they seem to imply that social complexity and situational holism are pre-legal or extra-legal while, in fact, they are as legal as the selection, absorption, or simplification that takes place subsequently. They belong to the legal field as much as the foundations of a house belong to the house, since without them the visible structure would not subsist. To argue against this view on the ground that then the social is reduced to the legal amounts to propose that "law in society" is commendable but "society in law" is anathema. Within the scheme sponsored here it becomes also clear that even though the learning process involved in professional specialization may enrich the pre-understanding of the third party, the latter has to transcend the premises of his professional attire in order to be able to grasp the full complexity of the situation. Here as elsewhere it is true that a profession is best exercised in the form of self-supersession.

As to the second question, the question of the rational guarantees of the process, it is important to bear in mind that the rationality looked for here has nothing to do with dogmatic-systemic necessities which impose the selection and the interpretation of a given norm as the only ones possible ab initio in the case sub-judice and which, therefore, make the legal process appear as value-free (= objective = rational). Rationality as conceived here is the mere ability

to give reasons that are intelligible and acceptable within the relevant range of inter-subjectivity.

I distinguish two types of guarantees: the justness constraint and the harmony constraint.[41] The justness constraint consists in the need for the third party to reach (or contribute to) a plausible and reasonable decision, that is, a decision about which consensus can be built. The topoi which preside over the pre-understanding and the gradual approximation of norms and facts are also instrumental in creating an opinion of consensus around the decision. This, however, is only possible because the decision falls within the horizon of expectations which emerges out of the relevant audiences.[42]

Since consensus is actualized within the horizon of ex-

[41] Esser, Vorverständnis, speaks of Richtigkeitskontrolle and Stimmigkeitskontrolle.

[42] The element of consensus introduced here does not contradict the premises of the conflict theory which underlies the theoretical framework advanced in the present chapter and in Chapter III. Consensus is, in fact, a residual and very important element since no situation of conflict can be fully explained in terms of its conflict content alone. Consensus does not carry with it either the utilitarian idea of happiness of the whole or the utopian vision of community living. Consensus is here conceived as the minimum of social reciprocal understanding which must exist so that conflict may be possible, carried out, prevented or terminated. This minimum of consensus varies according to the different stages (or modes) of conflict and, within the same stage, according to the structures and processes prevailing in the stage and the social conditions acting upon them. When the stage under consideration is dispute settlement I venture to predict that such minimum must reach a high level so that the stage can fulfill itself. However, whenever the parties and/or the third party use this stage not to settle dispute but rather to prolong it, to exacerbate it or to achieve some other goal independent of (or dependent on the non-occurring of) settlement, a separate analysis is required as to their agreement, density, and direction.

pectations as proposed by the relevant audiences and since these, as will be seen below, transcend the parties in the dispute, it is possible that sub-conflicts may co-exist with the overarching consensus. When the parties engage in a dispute their conduct is most probably governed by private interest postulates even though the consequences of the conflicting behavior may reach far beyond them. These postulates establish, thus, the horizon of expectations. However, when the dispute is brought to the third party for processing and settlement, such horizon is somewhat superseded or, at least, complemented (as a counter-factor or as a reinforcer) by another one: the horizon of the expectations that, according to the parties, can be reasonably entertained both in view of the style and judgment of this particular third party and in view of the normative and professional environment and the rational controls in which he operates. Consequently, when it is said that in most dispute settlement contexts one party, at least, is frustrated with the outcome, this does not necessarily mean that the outcome has gone beyond (for the worse) the latter horizon of expectations and the consensus it expresses. On the contrary, in most cases, the frustration can be reasonably explained in terms of private interest postulates. Similarly, within the relevant audiences, different and conflicting groups are often created which, on the basis of the common horizon of expectations, organize different priority and prediction tables according to their different interests and ideologies. In many cases,

their frustration with a specific outcome reaches such tables but not the overarching horizon of expectations.

It may appear that the assumptions underlying the justness constraint and the pre-understanding are in contradiction with each other, since the guarantee of plausibility finds its ultimate foundation in the just application of the norms that fit the case, while the pre-understanding calls for a valoration that goes beyond the norms. The contradiction would be real if such valoration were to be governed solely by the individual ethos of the third party, as would necessarily be the case if the legal positivistic position were accepted here with its refusal to recognize the existence of any non-illusory intermediate region between the objective, that is, "value free" application of legal rules and the uncontrolled irrationality of the third party's sentiments, motives, and prejudices. This position, however, and its aprioristic stance must be dismissed. It is my (professional, educated) belief that such intermediate region exists--which actually does not lie so much between the two extremes as it supersedes them at a higher level--and consists in the professional, educated ethos of the third party in his quality of holder of a social role or function (even when this does not transcend the situational or ad hoc setting).[43]

The constraint of justness is based on the need of the third party to reach a plausible and reasonable decision. In mediation such need appears in the foreground since the principle of "getting a little, giving a little", in order to lead to an acceptable decision, has to be actualized through a process of weighing out of interests and in a way considered reasonable by the parties. In adjudication this process may be not so evident but it is still there. Besides, the need has to be waged against the retaliation that both the parties and the relevant audiences can possibly mobilize against the dispute settler for his unreasonable decisions through appeal and overturn, deserting of jurisdiction, dismissal from dispute settling function, loss of power and prestige.[44]

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[43] Even when the third party phrases his argument or his justification in personal terms, such as "It is my belief . . .", this does not necessarily mean that the valorations involved draw upon his individual ethos. Truly this is a matter for sociological inquiry. The use of personalistic arguments and justifications--as much as the use of impersonalistic ones such as "It is believed by the court", "the court finds" or "the evidence shows"--has to be analysed in terms of the rhetorical needs of the discourse. Besides, the surface meaning of such expressions is further conditioned by cultural postulates, social conditions and structural consistencies of the dispute processing itself.

My argument is restricted to the recognition of the "intermediate region". I am very far from denying the role played by the personal subjectivity of the judge. On the contrary, I think that such subjectivity should be acknowledged in the overall scheme of the judge's "creation of law", and here I agree with Charles E. Clark and David M. Trubek, "The Creative Role of the Judge: Restraint and Freedom in the Common Law Tradition", 71 Yale Law Journal (1961) 255-276.

[44] The effectiveness of the constraint of justness is negatively correlated with the sanctioning power of the dispute settler.

The harmony constraint refers to the need on the part of the third party to reach a decision that is in tune with past decisions on related dispute contents. The raison d'être of this constraint lies in the horizon of expectations and, at this level, it is impossible to distinguish it from the constraint of justness. The distinction has to be sought at the level of the orientations and tasks proposed by such horizon because the latter is so complex and diversified and reflects so closely the social and cultural beams as they focus the dispute settlement context that it can support and propose different and, at times, conflicting orientations and tasks.[45] And the two constraints are differently assigned to them. The constraint of justness focuses on the particular dispute sub-judice, on its regulation needs, on the reasonable weighing out of interests involved and on the plausibility of the outcome, leaving in shadowy background the constitutive, but somehow, subordinate consideration of the systemic and institutional needs of the dispute processing setting itself. The constraint of harmony, on the contrary, focuses on the particular setting where the processing of the dispute is going to take place, on the constant flow of decisions which constitutes its past, on its bureaucratic or functional integration with other settings, and on restrictions, styles or

[45] I even tend to believe that such differences and conflicts are necessary and that there is a dialectical relationship between them.

ambiances created by its more or less developed institutional framework, leaving in a subordinate position the consideration of the specific demands of the dispute sub-judice. This constraint is most effectively exercised through the comparison of the present dispute with similar disputes decided in the past. A complex process of weighing out of interests takes place, not between the conflicting interests of the dispute sub-judice, but rather between the interest conflicts and prevalences of this dispute and the ones of past disputes with similar content. This link between the past and the present is what I mean by systemic need, the need for a minimum of continuity, uniformity, and coherence so that a sense of identity may emerge. The need of identity has been traditionally justified by the need of predictability, the ability of the parties to outline in advance the range of processes and outcomes within which the third party will operate. In fact, identity and predictability are also needed by the third party in order to be able to outline in advance the range of processes and outcomes which the parties expect from him and within which they will cooperate with him. The past in dispute processing, as elsewhere, tends to be ambiguous and to support different and conflicting predictions. Under certain conditions the dispute content of the case sub-judice can be translated, for purposes of legal argument, into competing readings of the past.

While the justness constraint has a topic-rhetoric outlook the harmony constraint has a somewhat systemic outlook,

but both cooperate in the exclusion of alternative decisions which take place along the processing of the dispute. This shows that these constraints do not become operative only at the end, when the time for decision has come. On the contrary, in order to be effective they have to inform the whole process which is nothing but a myriad of sub-decisions gradually evolving into a composite structure, the macro-decision or settlement. This fact is of crucial importance both for the parties and for society at large. For the parties, because they do not have to wait until the end of the process in order to retaliate against what they perceive as improper exercise (or complete lack) of the constraint. The residual consensus, the structural bargain which lies at the basis of any dispute processing form, even the fiercest form of adjudication, can be disrupted by the aggrieved party with consequences that feedback upon the overall performance of the third party and the rewards he gets from it. For the society the validity of the constraints along the process is also very important, because whenever a decision is reached the relevant group carries with it not only this decision but also the processes through which it was reached.

It may be objected that, in the scheme presented here, there is no guarantee that the two constraints will be effective. They are both based on some kind of residual consensus which can be disrupted by any of the participants or any of the relevant audiences without incurring, in most cases, the violation of any formal legal rule and consequently

without being formally sanctioned. The bargaining positions, from which some effectiveness is expected, are very unstable and easily circumvented. This lack of control is particularly dangerous in a scheme of legal praxis that instead of striving for a dogmatic, scientific or formal rational application of legal rules, openly resorts to socio-ethico-political valorations beyond the controls provided by such rules and by the system itself. In order to meet this objection a few notes are in point. Firstly, none of the constraints advanced here is conceived of as absolute, that is, as absolutely effective. Only the legal philosophers of the Enlightenment[46] thought that the strict application of the law would provide such absolute insurance against perversion. On the contrary, control is here conceived of as controlled risk, a risk that does not lead to fatal outcomes in most cases. This conception is commanded by the praxis-near theory followed here since the everyday legal praxis does not suffer any other kind of control. Secondly, the idea of a dogmatic application of the law has probably never corresponded--and, surely, does not correspond today, particularly in Germany[47] to a real description of the praxis of the legal process. Extra-systematic valorations have always been re-

[46] Montesquieu, De l'Esprit des Lois, 1748; Cesare Beccaria, Dei Delitti e delle Pene, 1764.

[47] The works of Esser and Viehweg have already been mentioned. Among others: Karl Engisch, Einführung in das Juristische Denken 3rd ed. Stuttgart, 1964; Erich Fechner, Rechtsphilosophie, Soziologie und Metaphysik des Rechts 2nd ed. Tübingen 1962.

sorted to, and in an uncontrolled way because never acknowledged. In my opinion, legal dogmatics provides us with a symbolic description of legal praxis. It is a style of argument, a rhetorical device, a specific way of phrasing legal arguments, of intensifying persuasion and of reaching reasonable decisions used in countries and legal cultures which were influenced, directly or indirectly, by the prevalent trends of the German legal science in the XIX and XX centuries.[48] The third and last note is that even at its peak the legal dogmatics of the Begriffsjurisprudenz, with all its controls and its legal positivistic outlook, could do nothing

[48] Many illustrations could be provided: two will suffice: First illustration: the different legal scientific theories and dogmatic discussions about the mistake of law and mistake of fact are based upon different socio-ethical valorations of certain kinds of conduct. Example: the underlying valoration: is it unjust or just to convict of the crime of abortion a Swedish girl who came to Lisbon to spend her vacation and while there provoked an abortion in the belief that abortion was as "legal in Portugal as it is in Sweden"? The legal-dogmatic argument is phrased as follows: Is the consciousness of illegality (Rechtswidrigkeit) a constitutive element of intent (dolus, Vorsatz) so that when such consciousness is missing the subjective legal type is not fulfilled and consequently there is no crime (when the crime is a crime of intent, like abortion) even though the lack of consciousness may be blameworthy (Mezger's theory)?; or is the consciousness of illegality not an element of intent but rather an element of guilt (Schuld; culpa) so that when such consciousness is missing the subjective legal type is not affected and consequently all the elements of the crime are present, unless the lack of consciousness is not blameworthy because in such case there is a general exclusion of guilt (Welzel's theory)? (a detailed analysis of this argument in J. Figueiredo Dias, O Problema da Consciência da Ilicitude em Direito Penal, Coimbra, 1969.) Second illustration: the interpretation of a norm is considered clear from a dogmatic point of view only when such interpretation does not lead to unjust or unreasonable decisions.

to stop the invasion of the Nazi terror and the complete perversion of the legal order that followed. Actually the positivistic idea of formal legality suited perfectly the purposes of the power holders and was used by them accordingly ("die legale Revolution"), as it has been recently demonstrated by B. Rüthers.[49]

Before proceeding it is necessary to consider briefly another possible objection against the overall theory outlined in this section. It may be said that this theory does not reflect the legal praxis in two cases at least: the mass decisions and the jury trial. In mass decisions, such as the mass processing of minor offenses (public drunkenness, for instance) in lower criminal courts, the topic-rhetoric model is not at all applicable. Instead, there is a more or less mechanical application of precise legal rules according to a deductive model. In jury trials, the fact that the judge cannot reach a decision undermines the whole process of the gradual approximation of facts and norms since one of its fundamental moments, the anticipation of possible outcomes and

[49] Bernd Rüthers, Die Unbegrenste Auslegung: Zum Wandel der Privatrechtsordnung im Nationalsozialismus, Tübingen, 1968. However, neither Rüthers nor I would make positivism as such, as a legal theory, the scapegoat for the surrender of the law before wholesale terror. Perhaps as important was the conservative ideology and the class consciousness of the legal profession throughout the Weimar Republik. (Cf. Franz Neuman, The Democratic and the Authoritarian State, Glencoe, Ill., 1957) Actually, after 1933 the courts were led to act in such a way that contradicted some basic tenets of legal positivism. (Cf. Rüthers, 111 f., and 137 ff.) What this shows is that all possible legal controls are too weak before totalitarian domination because the emergence of such domination in itself is already proof of the major failure of major controls.

the progressive exclusion of the least reasonable ones, cannot be actualized.

As to mass decisions the objection raises, in fact, the much broader issue of the computerization of dispute process, a topic whose discussion lies beyond the scope of the present study. The following, however, must be said. Firstly, it will be seen below that my sociological (as opposed to legal-philosophical) treatment of topoi allows for variation and consequently for situations in which the topoi are less useful or in which they appear in a recessive form. Secondly, this variation, however, cannot include situations in which topoi are totally absent because the praxis of the deductive model contradicts the theory of the deductive model and we are here concerned with praxis rather than with theory. That is, the major premises upon which deduction is based cannot be reached by the same process through which they are applied. They are obtained through extra-systemic pre-understanding, through socio-ethical valorations in which topoi play an important role. Consequently, the mechanical character of certain forms of legal process is often the mere surface appearance of a deeper reality of congealed rhetoric. This also explains why whenever the automation of the legal process has been tried, it tends to center around areas in which socio-ethical valorations are widely accepted and thus persuasion can be taken for granted.

The jury trial is based on a fiction, the fiction that the judge has not reached a decision for the case when he gives the instructions to the jurors. In reality, however, the judge has oftentimes decided the case for himself before the instructions. His decision, which he has reached through the same topic-rhetorical process of gradual approximation of norms and facts along the dispute processing, he has now to suspend in order to instruct the jury. In other words, the judge deassembles his own decision into its constitutive elements, converts them into hypothetical statements, and phrases them in legal terms. And even though the instructions refer only to the law applicable to the case, so the fiction goes, in reality they oftentimes carry with them decisions over the relevant facts or, at least, hints about such decisions, and all this material may be consciously or unconsciously communicated by the judge to the jurors. Conversely, the jurors do not wait for the instructions of the judge to initiate their own process of approximation of norms and facts. Such process has been going on since the first day of trial. The instructions are a ceremony aimed at preserving and reinforcing the prestige, the superiority, and the privileges of the legal profession which the judge represents.[50]

[50] The fiction involved in the instructions performs the social function of focusing the democratic character of the jury trial on the division of labor that takes place in it. In fact, such character, which is real, lies neither in this division of labor nor in the fact that the defendant is judged by his peers (in fact, he rarely is). It lies rather in that the jury trial allows for a fair competition between the decision of a professional bureaucrat and the decision of a group of common citizens. The reason why the democratic character of the jury trial has not been focused on this fact--which has become so evident in recent political trials in the United States--is that this would be too threatening to the legal profession and to the bureaucratic well-being of the law Establishment.

I will now concentrate on some of the sociological implications of the discussions so far in the present section. It is said above that there is variation in the usefulness and in the visibility of *topoi* in dispute processing. Among the many factors that may account for this variation I want to isolate the relative scarcity of written and precise legal rules. It has been suggested that the main reason why throughout the Middle Ages the *topoi* were so widely used in dispute processing lies in the scarcity of legal rules at the time.[51] No comprehensive codification movement had taken place mainly because the political power was too unstable and too decentralized and because the legal profession had not yet developed the skills to write down precise legal rules formulated in general terms. This suggestion has led me to the main hypothesis of my study: In a society where no codification movement has taken place, where the political power is unstable and decentralized, and where no legal profession exists, one would expect a scarcity of precise and general legal rules and, consequently, a wide use of *topoi* in dispute processing.

The legal rules, both by their origin and their structure, tend to establish definite boundaries between what is legal and what is illegal or a-legal. On the contrary, *topoi* involve valorations that discriminate between the just and the unjust, the reasonable and the unreasonable, the right and the wrong. These boundaries, however, are much broader

[51] Cf. Elsener, "Keine Regel" *passim*.

and more ambiguous than the ones made possible by more precise legal rules. As a result, the legal process builds upon a tension between the tendency to narrowly defined either/or options and a tendency to a full consideration of all the rights and the wrongs of the situation. The way in which this tension is resolved or expressed depends upon the particular terms of the dialectical relationship between *topoi* and legal rules in the legal system under consideration. In view of this I will suggest that the wider the use of *topoi* (and the greater the scarcity of precise legal rules) the greater the tendency for the dispute processing to follow a mediation model rather than an adjudication one.

Related with this hypothesis there is another one which draws upon another aspect of the dialectical relationship between *topoi* and norms. Norms tend to confer autonomy upon the legal system--to set it apart from other aspects of the social system--in terms of its normative structure, specialize language, professional operation, bureaucratic organization, and decision output. On the contrary, *topoi* and the complex socio-ethico-political valorations that characterize them tend to blur all the distinctions between the legal system, and all other (ethical, political, economic, educational, etc.) sub-systems within the social system as a whole. As a result, a tension develops within the legal process between the tende to a self-contained identity and the tendency to self-abandon ment in the whole of the social system. Again, the terms of this tension depend on the terms of the dialectical relation-

ship between topoi and norms. I suggest that the wider the use of topoi in dispute processing the greater the tendency for the actualized legal process to intermingle with other social processes.

In the discussion about the constraint of justness and the constraint of harmony these were seen as distinct and complementary. In fact they tend to be distinct when used by the judge. When, however, the parties appeal to the constraint of harmony one has to allow for the possibility that the particular formulation of such appeal is chosen for its rhetorical impact while an effective exercise of the constraint of justness is what is aimed at in real terms. The two constraints were seen as complementary while in fact they may contradict each other in particular instances as, for example, when they point to two opposing directions in which dispute content can be considered. The resolution of this conflict cannot be solved a priori. It depends on the relative power positions of the two constraints in the dispute processing contexts. The sociological analysis of these positions is of crucial importance for the adequate understanding of the legal process. Many factors can account for the relative distribution of power between the two constraints. Here I will consider the relative bureaucratization and professionalization of the dispute processing and the relative effectiveness of sanctions for the violations of the constraints. In a non-bureaucratized non-professionalized dispute processing context the effectiveness of both constraints depends--more or less equally for both of them--on the retaliation that the parties, its representatives, or the group as a whole can mobilize against perceived violation. When the dispute processing becomes bureaucratized and professionalized new types of sanctions are added: the formal sanctions applied by the bureaucratic hierarchy and the informal sanctions applied by the legal profession, particularly the legal scholars, and particularly so in the civil law countries where they often control, directly or indirectly, the promotions, the power, and the prestige of the judges. Both types of sanctions tend to be very effective but they also tend to be unequally distributed by the two constraints. They tend--particularly the sanctions applied by the bureaucratic hierarchy which tend also to be the most effective of all--to concentrate on the effectiveness of the constraint of harmony. In view of this I suggest that the more bureaucratized and professionalized the dispute processing the greater the tendency for the constraint of harmony to prevail over the constraint of justness.

IV. 2.4 The reasonableness test. The parties as interstitial judges.

Gluckman has to be credited for having introduced in legal anthropology the idea of the reasonable man.[52] This idea is probably one of the universals of the law and consequently its consideration can be of crucial importance in re-

[52] Cf. Gluckman, Judicial Process, passim.

covering for the legal scientific analysis the neglected similarities between the processes of law in simple and in complex societies. Upon such basic similarities the analysis of more obvious differences will acquire new signigicance when focused on the variations in the application of the reasonable man standards according to society or type of social relations. Among the Lozi, a status oriented society, the standard is differently applied to people with different statuses. In this society, whenever the litigants are involved in multiplex relationships (relationships which serve many interests), the standard applies to them not in terms of their right-and-duty bearing *personae* but rather in terms of their total social personality. In view of this it is of crucial interest to inquire how the standard works in a contract oriented society and in uniplex relationships. The potential of the standard for comparative purposes is enhanced by the fact that in spite of much variation it is still possible to advance a less than formal definition with general validity: "the reasonable man", says Gluckman, "is more precisely the man who conforms reasonably to the customs and standards of his social position".[53] One could also say that the reasonable man is the man who acts and judges in a way that, in a given community and in a given situation, is considered expected (normal aspect), just (normative aspect), and within the normal capacities of knowledge and evaluation

[53] Cf. Gluckman, *Judicial Process*, 129.

(imputability aspect). The introduction of the normative aspect may be said to contradict the use of the standard by the Lozi to evaluate unlawful conduct, e.g. the conduct of adulterers, thieves, etc. In these cases the *Kuta* members operate with their stereotypes about the ways in which such wrongdoers act and judge, and on this basis they check the evidence and reach judgments. Meeting the standard leads to conviction rather than to acquittal. This, however, does not in fact contradict the operation of the normative aspect, since the latter is here conceived of as a close range normativity covering the normative needs of the behavior as a social role and leaving aside the position of such role in the overall hierarchy of social roles as it is defined and evaluated by the dominant groups, that is, by the groups with power to impose their particular norms as general norms. It is in this sense that Gluckman speaks of "norms of misconduct"[54] and that it is possible to say, without contradicting oneself, that the defendant acted as a "reasonable adulterer" (as an adulterer should) and because of that will be condemned by the *Kuta*.

S.F. Nadel criticizes Gluckman for having "made too much of a principle so basic that indeed it may be taken for

[54] Cf. Gluckman, *Judicial Process*, 129. The concept of norms of misconduct finds a new realm of application in the recent studies on delinquent sub-cultures. Moreover, Gluckman's idea that the stereotypes about wrong doing will have an effect on the real actions of wrong doers (137) is substantiated by the secondary deviance theory and the labelli theory as they have been developed in the field of criminology.

granted. . . . /The judges/ administer the law so that it may conform to what is lawful: which is surely something one can take for granted".[55] That is, if to act reasonably means to act according to custom, then the standard does not add anything to the norms as they are applied in specific cases. Nadel also argues that since Gluckman only deals, broadly speaking, with civil law cases (land disputes, matrimonial and domestic dispute, a few property cases, and the like), "where everyone concerned would ab initio plead reason or accept it as a valid yardstick", nothing is known about the appropriate judicial process in the case of grave crimes and accusations, such as homicide, assault and witchcraft, had the Kuta jurisdiction over this matter. And Nadel feels confident to guess that "the Lozi would, in these situations, discard their guiding fiction of 'reasonable man' for the sharper dichotomy of things simply lawful and unlawful, permitted and forbidden".[56]

As to the last objection little more can be done than to oppose one guess against another. The best guess is the one that invents reality in a right way. And if the way I have been proposing along this chapter is the right way I would then rightly guess that Nadel's guess is wrong because the norms in which grave crimes are defined only apparently

[55] S.F. Nadel, "Reason and Unreason in African Law", 26 Africa (1956), 160-173 (166).

[56] S.F. Nadel, "Reason", 167.

apply in a clear-cut way to particular cases. As a matter of fact they allow for wide regions of penumbra and ambiguity, since all of the gravest crimes can, at times, be committed by reasonable men and with reasonable motives (self-defense, necessity, reasonable mistake, etc.). If the application of such norms appears more clear cut this is only because the horizon of expectations upon which the standard of reasonableness is based is more narrowly and more specifically defined. Consequently, the reasonable man test cannot be opposed to the "sharper dichotomy of things simply lawful and unlawful" since this dichotomy only becomes sharp on the condition that the test has been applied.

Nadel's first point of criticism is both more serious in its own terms and easier to dismiss in the terms of the theory proposed here. In my opinion, the reasonable man test cannot be rescued by the assertion that, in fact, it is not identified with the customary norms, that it allows for ranges of "leeway", and that it refers to the "upright man" rather than to the "customary man", thus having a specifically dynamic dimension. Conversely the reasonable man test cannot be damaged by the assertion that it commands nothing that is not already commanded by custom. I have been arguing that, within the dispute processing context, it is much more profitable to distinguish normative standards according to their functions and their operative positions in the legal process rather than according to their normative contents. The fact is that the reasonable man test and the customary norms per-

form different functions and operate in different ways. The test is a topos, an instrument used by the third party to approximate the customary norms and the facts sub-judice. The question "what (and how) are the customary norms applicable to this case?" is subsidiary to another question, which has to be asked and answered in advance: "How would I, a judge of the Kuta and a reasonable man, have acted if I were in the position of the party (or defendant) at the time of the conduct?" This question establishes a range of alternatives through which the customary norms are set in motion and in specific directions which are not commanded by the norms themselves. By limiting the functions of the reasonable man test to check evidence and to be a basis for decisions, Gluckman, in a sense, legitimizes Nadel's criticism, since such functional characterization neglects the rhetorical potential of the test, its function as a way in which legal arguments can be persuasively reached and phrased so that the judge can understand the case and make it understandable to the audience.

If Nadel's criticism seems to miss the point, there are, however, serious objections that can be raised against Gluckman's treatment of the reasonable man test and, ultimately, against the treatment of the test in traditional jurisprudence which Gluckman reflects. I will argue that the lawyer's approach has imposed unwarranted limitations upon the test and, in consequence, a relevant portion of the many-sided potentialities of the test has been left unexplored.

Two limitations will be considered here: one referring to the actions covered by the test, the other referring to the persons in charge of applying the test. The two limitations are, obviously, interrelated but they can be dealt with separately.

As to the first limitation, the reasonable man test has been traditionally conceived as covering solely the past actions of the parties, that is, the actions that took place before the dispute processing context was set in motion and which constitute the relevant factual content of the dispute. This has been due to an underestimation of (and to a lack of sensitivity to) the procedural normativity of the dispute processing in itself. Such an underestimation is to be reproached, both to the civil law system, and the common law system, because the latter has emphasized the legal process as the ground out of which substantive normativity (norms of decision and norms of conduct) emerges, rather than emphasizing it as a process. When, however, the latter focus is brought to the foreground, it becomes clear that as important is the application of the reasonable man test to the present actions of the parties, that is, to their procedural moves and, in general, to their behavior within the dispute processing context. The third party has his own standards or stereotypes about the ways in which a reasonable party (or his representative) should proceed and behave in a process of the type which is being used in the processing of the particular dispute. He evaluates the procedural conduct of

the parties against this standard and the emerging judgment is instrumental in the approximation of facts and norms and in the organization of a strategy of justification. The importance of the result of this test as applied to present actions in the process is potentialized by its eventual feedbacking upon the result of the test as applied to the past actions of the parties: "unless reasonable grounds are provided, it is doubtful that someone, who is acting unreasonably in the processing of the dispute, has acted reasonably in the past, as he claims to have". This feedback can become very strong, since, while the person who acted in the past is for the third party--particularly in complex societies --a hypothetical agent, the person that is acting in the process is a real agent and this solid reality is played against an elusive hypothesis.[57]

Whenever the settlement of the dispute involves the selection of one of the parties for some future action, e.g. the custody of a child, or the selection of a specific measure to be imposed upon one of them, e.g. a suspended sentence versus jail sentence, it is possible to conceive that the reasonable man test also applies to future actions ("will this particular person perform the necessary action as a reasonable man would?"). This is possible because the future,

[57] In criminal cases and against what the law in books says, the behavior of the defendant in court may be at times a more important factor in assessing the past conduct of which he is accused than whatever evidence can be obtained by other means (the ones to which the judge can legally resort to). And I believe that some of the features of class justice can ultimately be explained by the differential ability of the parties to meet the judge's standards for the reasonable man's behavior in court.

rather than being an unlimited void, consists of a limited range of alternatives extrapolated from a limited past. In view of this it is probably more precise to say that in these cases the test operates in relation to past actions but the evaluation is invested with a specific, future-oriented direction. Be that as it may, it seems to me that it is precisely in these cases that the operation of the test in relation to present actions becomes more crucial. Whatever connections are established between the past and the future they are mediated by the actions in the process (in which such connections take place), that is, by actions that are autonomously necessitated by the process and are not, in their structure, directly related either with the content of the past or with the expectations of the future. The failure to recognize these mediations and feedbacks--and, thus, to recognize and supersede the limitation that the traditional jurisprudence has imposed upon the reasonable man test--has the consequence of leaving uncontrolled the impact they produce.

The second limitation, the one referring to the person applying the reasonable man test, is still of farther reaching consequences. Traditionally the application of the test has been conceived as an exclusive prerogative of the judge. This conception is due to the lawyer's approach and its built-in bias to focus the legal process through the judge's participation. Once this bias is controlled it becomes apparent that the test is also operated and applied by the parties.

Actually, a competition takes place between the application by the judge and the application by the parties, the result of which becomes reflected in the final outcome of the dispute processing. Two structures of competition can be distinguished, one of direct and the other of indirect competition, according to the facts covered by the test. Direct competition takes place when the same (past, present, and future) actions of the parties are evaluated both by the parties and by the judge against the same standard of reasonableness. The first pressure the process exerts upon the parties is that of need of adaptation; the parties have to adapt to the rules of the game and to the performances expected of them. Once the test is recognized as an important topos of the dispute processing, the parties tend to evaluate their actions (and those of their opponent) against the test, and then, either they feel the need to manipulate the evaluation so that their actions appear as the most reasonable (and those of their opponent as the most unreasonable), or else they are deeply convinced that their actions have in fact been the actions of a reasonable man. In both cases the arguments will be phrased and organized in terms of the test and the fulfillment of its requirements. This evaluation and this formulation will be played, along the processing of the dispute, against the judge's application of the test. A reciprocally conditioning process takes place and, as far as the judge is concerned, such conditioning can assume two different emphases according to the circumstances: the judge may have the performance of his role facilitated by being able to discuss the dispute content on familiar normative grounds and to organize his justification according to a strategy accepted by all participants; or the judge may be constrained to the extent that the application of the standard by the parties limits or prevents the consideration of issues or justifications that, from some point of view (for instance, public policies to be adopted), should be considered and be paramount. Gluckman gives an illustration of the first type of emphasis in Case 14: The Case of the Violent Councillor:

> Saywa had elaborated an account of his witnessed actions--dragging the defendant, seizing the whip, picking up the stamping pole--to make it appear as if he had tried to stop the fight, and thus behaved as required by his roles of citizen, headman and councillor. This story was also intended to cover up his gross failure to summon a village-council to judge on the quarrel. In short, Saywa accepted the same norms as the judges, and used them in his probably lying statement to make his behaviour appear reasonable. Hence the judges were able to cross-examine and expose him and give judgment against him, by these same norms.[58]

Gluckman, influenced as he is by the traditional treatment of the reasonable man test, analyses this case solely in terms of Saywa's producing materials upon which the judges can draw in order to apply the test. In fact, what we have here is a competition between Saywa's evaluation and the evaluation of the majority of the judges. This alternative view alone can

[58] Gluckman, Judicial Process, 91.

explain the conditioning process that took place as it is expressed in the last sentence of the above quotation. As far as such process is concerned, Gluckman emphasizes only the facilitation of the judges' role. Nothing is said about possible constraints that Saywa created for the judges by choosing to organize and formulate his defense in terms of the reasonable man test.

Indirect competition takes place when the test is applied to different actions by different participants in the process. The judge applies the test to the past actions (the dispute content), the present actions (in the dispute processing), and the future actions (expected future contributions) of the parties, discriminating among the different roles held by the parties at different times. The parties, as we have already seen, apply the test to their own actions (direct competition) but they also apply it to past and present actions of the judge (indirect competition). The past actions to be covered are both the actions of the judge as a private citizen or holder of some social role and his actions as a judge, his past decisions. The present actions are the actions of the judge in the particular dispute processing setting in which the parties participate. The past social actions of the judge are evaluated against the standards of the reasonable holder of the relevant social role; the past and present judicial actions are evaluated against the standard of the reasonable judge. The parties' objectives in applying the test to the judge are obviously different from those of the

judge when he applies the same test to the parties. The parties use the test to select a particular third party, to choose among alternative lines of arguments and formulations, to organize the bargaining strategy in the shaping up of the "processable" object of the dispute (the definition of the relevant issues), to predict the result of certain procedural moves, to define the levels of collaboration with the other party and with the third party along the processing of the dispute, to organize a priority list of possible outcomes, and to act according to it. Most of this has been neglected in the traditional treatment of the test of reasonableness and, actually, in most of the analyses of the legal process as a whole. The consideration of the social past of the third party runs against the fiction of the formal rationality of the bureaucratized dispute processing and, accordingly, the lawyer's approach to the legal process tends to eliminate it. A tension develops then between this approach and the behavioral approach upon which some analyses of the social past and present of judges have been conducted.[59] Gluckman himself, even though he acknowledges having tried and failed "to relate a series of judgments by particular judges to their personal histories, characters, circumstances and social positions", still gives us some "general impressions":

> One judge who has had much trouble with his own children tended to be severe on youths who had come into conflict with their elders, and to place disproportionate blame on them as against other judges.

[59] Cf. Glendon A. Schubert (ed.), Judicial Behavior: a Reader in Theory and Research, Chicago, 1964.

> Another junior judge who is notorious for his unusual jealousy of his wife--an attitude attributed by the Lozi to the wife's magic--tended to convict of adultery more often than his fellows.[60]

But both Gluckman and other behavioral studies concentrate their focus on correlations between social attributes of judges and the judicial decisions. They neglect to consider the impact of such attributes upon the behavior and attitudes of the parties towards the dispute processing, upon their selection of a third party, when such selection is left to them, or upon their arguments in the process. And the ways in which this impact upon the parties feeds back upon the judge's behavior should also be analysed. When, for instance, a catholic judge is considered by the parties in a contested divorce case as having an unreasonable anti-divorce bias, how does this affect the selection among different procedural strategies in terms of issues to be raised, arguments to be formulated, outcomes to be predicted, etc.? And whenever such judge perceives that such test has been applied to his social being how does he react in terms of his own strategies, arguments, and justifications? I argue that the answer to this type of question is fundamental to understand the internal dynamics of dispute processing both in a bureaucratized and in a non-bureaucratized setting. I also recognize that in a mass society, without an adequate information system to counteract the tendency toward anonymity, it is conceivable

[60] Gluckman, Judicial Process, 322.

that it will become difficult for the parties to [illegible] the social past of the third party. This, however, cannot be extended to the judicial past and present of the third party. As to the judicial past, both the written records and the folk knowledge developed among recurrent participants (advocates, court clerks, etc.) will provide the parties with materials to be evaluated against the test. As to the judicial present, the reasonable judge test will be even more easily applied, the results of this application having, to my mind, a particular impact upon the parties' choice of the level of collaboration with the judge.[61]

In both direct and indirect competition feedback mechanisms take place between the judge's and the parties' application of the test of reasonableness. That is why I come to the conclusion that, at least as far as the operations of this test are concerned, the parties are interstitial judges in the processing of the dispute. The presence of a third party, which in a sense potentializes the partisanship of the parties in the process, leads them also to act as a third party in the dialogue between the dispute settler and the perceived needs or demands of the process itself. The fact that the parties are interstitial judges helps to clarify the reference made in section IV-2-3 to the constraint of justness and to the parties' ability to check the reasonableness of its exercise (and to retaliate against the unreasonable

[61] A recent illustration of such impact is probably to be found in the widely publicized Chicago 7 trial.

exercise) by the judge even before the processing of the dispute comes to an end.

The role of the parties as interstitial judges, when analysed from a sociological perspective, must be converted into a variable and correlated with other variables. I suggest that the impact of this role tends to increase as the dispute processing becomes less dominated by formal legal rules and more dominated by topic-rhetorical reasoning. I also suggest that the impact of this role increases when the dispute processing moves from an adjudication model to a mediation model. This, however, must be true only to a certain degree because in certain forms of mediation the third party tends to cease to be the central figure of the dispute processing and when this happens the role of the parties as interstitial judge loses functional objective. It may even be said that in such cases the role of the interstitial judge is played by the third party himself. As to the actions covered by the test, I suggest that the more bureaucratized the dispute processing becomes the more difficult it is for the parties to focus the performance of their role on the ascertaining of the social past of the judge.

IV-2-5 The explicit and the implicit issues. The object of the dispute as the result of a bargaining process.

To fix the object of a dispute is to narrow it down. That is exactly what the legal process does in defining the dispute content to be processed. It is not in this broad sense, however, that Luhmann speaks of the absorption of social complexity by the legal process or that Fallers speaks of the tension between narrow legalism and moral holism and of the narrowing of issues as a necessary characteristic of law to reach authoritative adjudication (yes or no decisions).[62] The assumption underlying these theories is that the dispute or case has some natural contours out of which the legal process carves the content to be processed. This assumption is either wrong or trivial. It is wrong if it is thought that such contours can be established by resorting to a criterion that is, on the one hand, discriminatory enough to enable a dispute to be distinguished from another dispute and, on the other hand, encompassing enough for such distinction to be made before any specific perspective of analysis (ethical, legal, political, etc.) is applied to the dispute. I don't think that such criterion can be found. The assumption is trivial if it is thought that the natural contours of the dispute are, after all, determined by its social implications because, in such case, one is forced to conclude--when this criterion is pursued to its logical consequences--that every dispute, even the most microscopical one, involves, in one way or the other, the whole fabric of society. If it is so, as I think it is, then it does not make sense to define the narrowing of issues as a specific characteristic of law because all other fields of social action, be they politics, ethics, or economy, have the same characteristic. The rele-

[62] Cf. Fallers, Law Without Precedent, 109.

vant question is then how these different fields proceed in narrowing (or better, in selecting) the issues of disputes to be processed by them. Their different ways and results can eventually become the best criterion to distinguish them.

This line of inquiry is not completely free from dangers. It can be lightly assumed that the selection is a one-way process, that whatever is selected is from then on to be considered in isolation from the totality to which it previously belonged. On the contrary, in light of the discussion in section IV-2-3, it is clear that such totality (or social complexity) is present, not only at the outset, but also throughout the processing of the dispute. The selection that takes place is commanded by the needs and purposes of the legal process, but the evaluation of the selected issues is only made possible by an implicit and parallel evaluation of the non-selected issues. A dialectical relationship exists between the totality and the selected parts, between the relevant and the irrelevant issues. This process is best illustrated in the operations of topoi and, particularly, in their interaction with legal rules. The narrowing of issues is the result of the gradual exclusion of alternatives, and not vice versa. On the other hand, this process, though gradual, is not uni-directional (from breadth to narrowness); it is like a body without back and covered with eyes and its overall movement is commanded not by some internal logic of body structure, but rather by the struggles that take place inside and outside it. Along the processing of dispute shifts of

direction are possible and common and new directions may lead to new inquiries into new issues. Consequently the narrowing as much as the broadening of issues is a characteristic of the legal process. And the key to a deep understanding lies in the explanation of this dialectics.

Such explanation can be most profitably tried through an analysis of structural interactions between the participants in the dispute processing and between them and the relevant audiences. At any given point of the process the selection is a product of the needs and purposes of the processing and of the ways in which participants and audiences accommodate or react to them. In previous sections I analysed the participation of the parties in the constraint of justness and in the constraint of harmony and their role as interstitial judges in the application of the test of reasonableness. This helps to explain why the contribution of the parties in the fixing of the object of the dispute is not limited to their bringing the dispute to the third party, thus setting the dispute processing context in motion. Along the process and through allegations and motions, gestures and postures, words and silences, each party tries to raise the issues to introduce the facts, to advance the directions and evaluations that best fit its purposes. Each party tests his strategy against his opponent's and both accommodate or react according to the needs of the moment. They are, however, involved in a "trialogue", not in a dialogue, and their actions and reactions are often less due to those of the opponent than to

the strategy of the judge himself. The neutrality of the third party is a myth, more useful in certain times and situations than in others. Relative impartiality, when it exists, is the result of a balanced view of the different interests involved. The interests of the parties are never the only ones involved. Besides them, there are the personal interests of the third party, the interests inherent in the role performed by him, and the interests of the relevant audiences to whom he looks for rewards. All these interests are submitted to a complex weighing out operation. In light of its result, the third party organizes his own strategy. It is probably useful to distinguish two situations according to the interests that dominate the third party's strategy.

On the one hand, the dominant interests may be predominantly external to dispute processing in which case the strategy is typically aimed at satisfying external audiences. To the extent that the third party is also part of these audiences he may become their representative in the dispute processing especially when their interests are particularly pressing. An illustration of this can be found in cases 7, 8, 9, and 10 decided by the Lozi Kuta and which Gluckman introduces in the following way:

> The Kuta may have before it a different kind of case which compels it to widen the field of its enquiry. The Kuta is not only a judicial forum but also a council watching over the public interest in land, in schools, in prices, etc., etc. A dispute may raise a question of public policy: the Kuta will then speak as a legislative and administrative council and enquire into any issue, though as a court it should only punish offences against the law.[63]

In case 10 (the case of the quarrelsome teacher) "the suit over the goats raised the whole problem of the school's position in the community and that had to be safeguarded. The 'civil suit' over the goats included a 'criminal trial' of the teacher".[64] In these cases, the court's strategy produces shifts of direction in the processing of the dispute and, here, this leads to a widening of the object of inquiry in relation to the parties' proposal when they brought the dispute to the attention of the Kuta for purposes of settlements.[65] From the point of view of the court members, as members of an external audience, the dispute has social implications in which the parties have no particular interest or an interest not to be involved. The Kuta is successful only because it has sufficient power to override the proposal and the interests of the parties.

On the other hand, the judge's strategy may be governed by interests that are predominantly internal to the dispute processing context. Here it is convenient to distinguish two situations. In the first situation, the judge may find, in the course of the operations described in previous sections,

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[63] Gluckman, Judicial Process, 69.

[64] Gluckman, Judicial Process, 77.

[65] In other situations the superimposition of the court's strategy upon the parties' strategies may lead to a narrowing, rather than to a broadening of the inquiry.

that the outcome he anticipates as the most in harmony with the constraint of justness cannot be made possible through the kind of issues raised up until then by the parties and, particularly, by the party to whom such outcome is most favorable. He may then move to raise the necessary issues or to advance the necessary facts and interpretations or, when such move is not possible or convenient, he may induce the parties to proceed in that way. A nuance of this process is to be found when the just outcome is anticipated less in terms of the just weighing out of rights and wrongs of the case than in terms of the just reaction of the parties to the decision. This is illustrated by the Lozi courts which, according to Gluckman, move to widen the scope of inquiry when they anticipate that the reconciliation of the parties is the best possible outcome of the dispute processing. In the second situation, the judge's strategy is governed by his interests as a dispute settler or by what he perceives to be the needs, limitations and potentialities of the dispute processing context itself: this is the field of operation for judicial policies. He is aware that the processing of the dispute may take directions and raise issues in which he does not want to be involved either because he is unable to control or to solve them or because their control and solution would be too threatening for the survival or self-identity of the role he performs or of the context in which he operates. Conversely, he may want to be involved in certain kinds of issues and directions either because they are particularly adequate to be dealt

with by his role and the overall context or because the latter will be otherwise rewarded by dealing with them. Consequently, he will move to eliminate from the object of the dispute--either by preventing their introduction or by neutralizing them when introduction cannot be prevented--those issues considered detrimental; on the contrary, he will move to introduce issues or facts considered beneficial. The range of manipulation is narrower or broader according to the power relations between the parties and the judge.

On the basis of the preceding discussion I feel warranted to conclude that the object of the dispute is the result of a complex bargaining process between the parties, the third party, and the relevant audiences. This seems to be true irrespective of the type of relations underlying the dispute or of the structural features of the dispute processing context, even though the extent to which (or the ways in which) the bargaining process operate, may vary according to the circumstances. This perspective can be helpful in clarifying or bringing out points of discussion until now obscured or omitted. Two points will be touched at this juncture: the breadth or narrowness of the object of the dispute; the discrepancy or coincidence between the object of the dispute as presented by the parties and the <u>real</u> dispute between them.

The question of the breadth or narrowness of the object of the dispute is a very difficult one indeed because the criterion of measurement, if it exists at all, is very elusive. Gluckman was the first to deal with this question in a

systematic way. He advanced the idea that when the parties in a dispute were involved in multiplex relationships the Kuta tended to widen the object of inquiry because this was needed to reach the reconciliation of the parties, the most desirable outcome when such relationships were at stake. On the contrary, when the dispute was between strangers, the Kuta tended to concentrate on narrow issues without making serious attempts to reconcile the parties.[66] This idea can be easily converted into a hypothesis to be tested in other settings. It is, however, a hypothesis with a high liability to intervening variables and so much so that it can become a meaningless or tautological statement. As a matter of fact, the difference in the object of inquiry between the two situations mentioned by Gluckman may be due not to the presence or absence of a need for reconciliation but rather to the simple fact that in the first situation, involving multiplex relationships, there are more issues to be dealt with, precisely because relationships of this kind are involved. This being so, no correlation is possible because the two variables are not distinct; they are one, in fact. In other words, it is not possible to derive the breadth of the inquiry from the number of issues dealt with in the process. This number has to be tested against the totality of issues emerging out of the relationships between the parties. Only with this in mind is it possible to conceive the object of a dispute between strangers as being broader than the one of a dispute

[66] Gluckman, Judicial Process, 67, 78.

in multiplex relationships in spite of the fact that the number of processed issues in the first case is smaller than the one in the latter case. As a result, the only way to test narrowness/breadth hypothesis is to control first for the type of relationships underlying the dispute and then ask under what conditions the inquiry tends to be broader or narrower. As suggested above, I propose that the range of inquiry is determined by the relative strength of the power positions in the above mentioned bargaining process. I also suggest that when the relative strength of the power positions is controlled, the range of inquiry tends to narrow down as the processing of the dispute becomes more formalized. This latter hypothesis is a modified version of Fallers' ideas on the narrowing of issues and the development of a legal subculture. But, even in this formulation, the hypothesis has to be submitted to three different correctives.

The first corrective concerns the problem of false comparisons. In the last chapter of his book Fallers compares his study of the Soga of Uganda with the Lozi of Zambia as reported by Gluckman, the Tiv of Nigeria analysed by Bohannan, and the Arusha of Tanzania as described by Gulliver. Fallers concludes his comparison with the following proposition:

> . . . there appears to be a quite clear correlation between the differentiation of the bench, in terms of authority, and the legalism of the proceedings, in the sense of differentiation between law and popular morality.[67]

[67] Fallers, Law Without Precedent, 329.

The narrowing of the issues to be processed is precisely one of the points of differentiation. The assumption underlying this proposition is that in complex societies, when the most differentiated benches are to be found, the legalism and, thus, also the differentiation between law and popular morality have reached the highest levels, and that in simpler societies, where the benches are far less differentiated, legalism is much more inchoate but it will develop as the differentiation increases. In light of the perspective I have been presenting in this section I have some reasons to be skeptical about these assumptions. Anthropologists, born and educated in complex societies, tend to take to the field their stereotypes about the functioning of courts in their native countries. One common stereotype --which, in fact, is part of the popular morality--is that in complex societies the courts make strict distinctions between what is legal and what is moral. This stereotype tends to be reinforced when social scientists read the books written by the operators of the legal system. The other stereotype is that in these societies the courts are very rigid in admitting the introduction of facts and issues, which represents a blunt contrast with the accessibility and freedom of argument in the courts of simpler societies. I doubt that these stereotypes reflect a real or, at least, a complete description of the legal processes in more complex societies. As to the strict distinction between the legal and the moral I have been arguing all along that the valorations that take place in the gradual approximation of norms and facts draw upon the social, cultural and moral values dominant in the community or, at least, dominant within the group that controls the dispute processing context. It is possible--and here the hypotheses should focus--that the gradual differentiation of the bench is correlated with changes in the relations between law and popular morality but such changes do not necessarily have to be in the direction of the gradual differentiation between the two. As to the accessibility of the court and the narrowing of the inquiry I argue that, given the class structure and the bureaucratization of complex societies, the different accessibility of courts in complex and in simple societies is clearly seen when analysed in terms of the court fees and of the adequateness of the normative standards to the needs of the different groups in society. Such difference is, however much more ambiguous when analysed in terms of the narrowing of the inquiry. The case perspective is the one usually followed. One takes two cases, one in a court of a simple society and the other in a court of a complex society. One then easily observes that, while in the first court the judges are liberal as to the grounds of action and the parties are free to vent their grievances, in the second court the judges are more rigid as to the object of inquiry and the criterion of relevance is much narrower so that many "important" issues are dismissed from this case. When, however, one changes from the focus on one case to the focus on the constant flow of cases in both courts, one will probably be

able to see that the real difference does not lie in the kind or the number of issues raised but rather in the fact that, while in the court of a simple society a given set of issues is raised and processed in the same process, in the court of a complex society the same set of issues will be broken down and the different issues will be distributed by different processes and assigned to different judges in the same or in different courts. One will thus conclude that the narrowing of issues is only true in a case perspective and that, in view of the structural-functional differences of "cases" in societies with different complexity, this perspective may lead to distorted results and is hence least adequate to define legalism. The real question of the division of labor within the dispute processing as a functional unit takes the place of the false question of the narrowing of issues.

The second corrective is that the problem of the narrowness/breadth of the inquiry tends to be discussed more in terms of what issues are dealt with than in terms of how they are dealt with, in spite of the fact that this last focus can shed light on important features of the legal process. Most of such features center around three related categories: direction, interpretation, presentation. Direction refers to the overall orientation of the valoration to which the dispute content is submitted. Without determining that direction it is impossible to determine this content. The sense of direction is perceptively observed by Gluckman when he comments on the cross-examination conducted by the judges that

"their questioning soon indicates the lines on which they are formulating the merits of the case".[68] This does not mean that the judges reach a definite decision of the case at the outset. It simply means that at an early stage of the process a more or less specific range of possible solutions is established according to the perceived regulation needs of the case. When the parties and the judge agree on the direction to be followed they also tend to agree on what issues and facts are relevant. On the contrary, when they disagree on the direction they also tend to disagree on the relevance. In this case, what will be finally considered relevant depends mainly on the relative strength of the bargaining positions of the participants. Accordingly, the parties may be prevented from introducing certain issues; or they may be allowed to introduce them but the judge will not consider them in the decision; or they may force such a consideration upon the judge in the same or in another (appeal) process.

Interpretation refers to the evaluation of specific facts and issues as they are selected according to the overall direction of the dispute processing. Far more important than the mere introduction of facts and issues is their interpretation. Consequently the struggle for interpretation is more important than the struggle for introduction. That is why a fact or an issue introduced by one party may become possession (and weapon) of the opponent. It is through interpretation that cer-

[68] Gluckman, Judicial Process, 270.

tain issues are clarified at the cost of the obscuration of others. Clarification and obscuration are two dialectically related functions of communication. Legal argument is no exception and so it is conceivable that, in order to reach a given outcome, it may be necessary to clarify an issue, not because its clarification is important in itself, but because, through it, another issue, necessary to reach the opposite outcome, will be obscured. Interpretation also governs the relative depth with which a given fact or issue is discussed. The processing of a dispute may be stalled, accelerated, or re-directed through manipulations of the depth of discussion. Again, the success and the orientation of these manipulations depend mainly on the relative strength of the power positions of the different participants in the processing of the dispute. The element of depth of the discussion further complicates the question of the narrowness/breadth of inquiry. If in a given process few facts and issues are introduced but each one of them is discussed in depth, is the range of inquiry wider or narrower than the range of inquiry in another process where many facts and issues are introduced but all are discussed superficially? It seems to me that in order to make of the narrowness/breadth of inquiry a useful dimension it is necessary to distinguish between its two directions: the vertical (depth coverage) and the horizontal (surface coverage).[69]

[69] To make this distinction, however, it is necessary to assume that the sub-issues in the depth coverage of the main issue are not autonomous in relation to the latter.

Presentation refers to styles or sub-cultural postulates of dispute processing and how they affect the ways in which facts and issues are framed and formulated. To introduce an issue in a frame that is alien to the style or sub-culture of the dispute processing context may not only frustrate the introduction of the issue but also otherwise affect the outcome of the case. The requirements of presentation and the constraints they create for the parties are illustrated by Fallers when he comments on the nature and use of legal concepts in Soga courts:

> Such a concept has already begun to shape and narrow the issues by the time the accuser reaches the court with his complaint, for only if he can describe his cause in a word or phrase that corresponds to a wrong recognized by the court will the court summon the accused and allow the action to proceed.[70]

On the other hand, and given the fact that the processing of the dispute requires, in its initial stage, an operative distinction between facts and normative standards, the parties must present their cases not as isolated and unique phenomena but rather as typical cases in relation to a rule or its exception. It is the typical character that helps the third party to outline the horizon of expectations and to make it understood to himself and to the other participants. The role of representatives, supporters and advocates is precisely to reinforce such a character and, through that, to bend the horizon of expectations in favor of the party they support or

[70] Fallers, Law Without Precedent, 107.

represent.[71] The style and sub-culture of the dispute processing will also condition the ways in which the typical character of the case can be advanced and reinforced.

The third corrective to the traditional treatment of the breadth/narrowness issue refers to the fact that the narrowness/breadth of the inquiry is usually measured in terms of the issues explicitly introduced in the process. There is, however, no other reason to leave out the implicit issues than the consideration that these are of much more difficult detection that the explicit ones. They are not offered to passive observation and recording; they have to be extracted (and, in a sense, invented) from the logical connections of the discourse and from the dialectics between language and silence to which I will refer later. The role played by what is not discussed or not even mentioned because it is self-evident to the participants is of crucial importance to understand the internal dynamics of the dispute processing. The implicit discourse is the fluid out of which the explicit discourse emerges and becomes meaningful. Given the interaction between the two discourses, two directions can be distinguished in the role played by the implicit one: in the early stages of the dispute processing, when the pre-understanding of the case, the topoi, and valorations initiate the gradual approximation of facts and norms, the role of implicitness is at work in the exclusion of implausible solutions; as the processing proceeds and the facts and norms become closely ap-

[71] Cf. also Esser, Vorverständnis, 140.

proximated, that role is re-directed to the construction of self-evidence around the selected solutions. In this respect it is also convenient to distinguish between implicitness of concepts and implicitness of facts because self-evidence can be built both around concepts and around facts. The importance of this distinction lies in that the factors accounting for implicitness may differ and accordingly different correlations are possible between implicitness of concepts and implicitness of facts. It seems to me that, while both facts and concepts may be implicit because of shared knowledge and agreement, concepts may also be implicit because of the inexistence or primitive development of a legal profession for which the formulation and explicitation of concepts might be rewarding. Fallers has to be credited for having dealt with implicitness of concepts in some detail. He also relates such implicitness with the accessibility of the Soga law

> Since the grounds of decisions are so little spelled out, and since crucial subsidiary concepts are so little open to overt statement, everything must be put to the test of courtroom argument.[72]

Since Fallers does not make the above-mentioned distinction he fails to recognize an interesting correlation hidden behind the correlation between implicitness and accessibility, and that is that the implicitness of concepts may, under certain conditions, lead to explicitness of facts. I would also suggest that, under certain conditions, the explicitness of

[72] Fallers, Law Without Precedent, 314.

concepts may lead to implicitness of facts. Such conditions refer precisely to the factors accounting for implicitness because it seems to me that these hypotheses have only the chance of being verified when the implicitness of concepts is solely due to the absence of a legal profession. On the contrary, when both facts and concepts are implicit because of shared knowledge and agreement, opposite correlations may be hypothesized. Fallers suggests that explicitness of concepts "seems to increase as consensus about the law declines".[73] I would add that, under these conditions, conceptual explicitness will lead to factual explicitness. My assumption is that, in light of the model of legal reasoning that I have been outlining, consensus or dissent about law and consensus and dissent about facts can never be separated in the absolute terms assumed by Fallers; there is only room for different emphases. Thus, I would also suggest that factual explicitness tends to increase as the consensus about facts declines and that, under these conditions, factual explicitness will lead to conceptual explicitness.

The distinction between explicitness and implicitness can and must be further complicated by the introduction of a whole range of intermediate communication processes. The dichotomic distinction is thus converted into a continuum along which different degrees of explicitness and implicitness are possible. Statements can be made not to mean what they say on their face but rather to evoke other meanings upon which the

[73] Fallers, Law Without Precedent, 189.

interaction unfolds. This process makes possible the distinction between expression and symptom, the latter being precisely one of the intermediate communication processes. The third party may not express his hostility to the introduction of a certain issue but he may send out symptoms of his feelings. Failure to recognize symptoms in the processing of the dispute tends to affect adversely the position of the inadvertent party. Any of the participants can evoke, through symptoms, the meanings favoring his claim. Whenever the role of the third party becomes formally professionalized, it may become more difficult for the parties to detect the third party's symptoms. Based on this I suggest that the professionalization of the dispute settler tends to lead to the professionalization of the representatives of the parties.[74]

I still want to make a reference to two other types of intermediate communication processes: signs and indexes. Both signs and indexes have a double meaning: the face meaning and the evoked meaning, the latter being the relevant one for the purposes of the discourse. But while signs are intentionally used to evoke a certain meaning, indexes make the evocation possible independently of intention.[75] Signs

[74] The assumption is that only professionals of the same profession can act as equalizers in the struggle for the detection of symptoms. Otherwise an unbalance will be produced which, depending on the power backing the third party, may lead either to an authoritarian dispute processing or to the parties' deserting the processing altogether. It is this unbalance which also explains some peculiar features of dispute processing when great cultural differences exist among the participants and particularly between the parties and the third party.

[75] Cf. also Perelman, New Rhetoric, 122 f.

have a closed texture in the double sense that they evoke specific meanings and/or that they restrict in specific ways the pool of possible interpreters. On the contrary, and for the converse reasons, indexes have an open texture. We have a sign when the dispute settler, lacking a formal power to summon someone to "court", sends him an invitation through a policeman on duty in the community with the intention of evoking the meaning that adverse consequences might be expected if the "invitation" is not accepted. We have also a sign when during the proceedings in court the representatives of the parties make a gesture or utter a word which, according to a prearrangement between them, means that their constituents have allowed them to pursue a given path toward settlement. We have an index when the gesture or word is interpreted by any of the participants as evoking a certain meaning even though no prearrangement had been made and the party that produced the gesture or word did not even want to evoke such a meaning. I suggest that as the professional, social, or cultural gap between the parties and the third party increases the use of indexes tends to increase and the use of signs tends to decrease.

I come now to the second major point to be discussed in this section: the discrepancy or coincidence between the object of the dispute to be processed and the real dispute between the parties. This point is obviously related with the preceding one (narrowness/breadth of inquiry) but must be analysed separately. The distinction between the dispute as

processed and the "real" dispute is very difficult to make but, if made, it may become very useful in the analysis of the different functions of the legal process in different dispute processing contexts and in different societies. In view of my critique of the "natural" boundaries of the dispute, the distinction is only legitimate (1) if it is possible to individualize a number of instances of disputing behavior in which the parties have been involved and (2) if it is possible to identify, among those instances, one that has been selected by one of the parties or by both to be processed by the third party or (3) if it is possible, when the selected instance, because forged, is not part of the disputing behavior, to establish a relationship between the forged and the real dispute. Whenever a discrepancy can be identified it can be analysed both in terms of causes of disputing and in terms of purposes of dispute processing. Particularly among people bound by multiplex relationships or by uniplex relationships recurring over time it is likely that multiple disputing behavior will occur. When this is the case it is possible that most of the instances of dispute will not come to the attention of a third party, either because the parties feel that they can handle them, or because there is no remedy which a third party can provide, or still because, if such remedy is available, it is too costly (or otherwise dysfunctional) to be resorted to. It is further possible that in this sequence, an instance of disputing behavior occurs which one or both parties feel adequate to be processed by the third party. In

such case the selected instance may not explain by itself why the third party has been called upon to intervene. Such an explanation has to be found in the overall history of disputes between the parties. When the selected instance is brought to the attention of the third party different paths of processing may be followed. The parties (or one of them) may want, for some reasons, to use the selected instance as pretext for the intervention of the third party which can then be led to a full consideration of past disputing behavior; or they may prefer to restrict the intervention of the third party to the selected instance. The third party may agree with the parties, for the same or for different reasons, or he may disagree with them. When all participants are in agreement it is proceeded as accorded; when there is disagreement, the processing strategy will depend upon the relative strength of the bargaining positions of the participants.

An illustration of the agreement of all participants to use the processing of dispute for a full consideration of past disputing behavior is given in Gluckman's case 1: the case of the biased father (I eliminate the intervention of the sub-district induna Sikwa).[76] A long quarrel between the parties had been simmering for a long time. When one of the parties began to cultivate disputed gardens the aggrieved party saw in the right to cultivate a legal issue to bring before the Kuta. But he early showed the intention not to sue for the land alone "but to be established as in the right

[76] Gluckman, Judicial Process, 37 ff.

in the whole quarrel". The Kuta agreed and "thus the garden dispute as a legal issue raised the quarrels and ill-feeling within the village". Consequently, the initial discrepancy between the object of dispute to be processed and the real dispute was eliminated. As this occurred the purpose of the dispute processing changed accordingly from the settlement of a garden dispute to "a general venting of grievances".[77]

Whenever the instance of dispute to be selected for processing is somehow forged there is also a discrepancy between the real and the processed dispute which may or may not be maintained until the end. In any case the real purpose of the processing, whether or not achieved, is at odds with the purpose overtly connected with the processed dispute. In this vein, Gluckman comments that "in some cases a plaintiff will sue on a claim he knows is unfounded, in order to bring before the Kuta some kinsman he considers has wronged him in diffuse ways".[78] He illustrates this with case 12 (the case of the unfounded claim) in which "a younger brother sued his elder brother for a beast. Knowing he would lose, but hoping the Kuta would reprimand his brother for steadily failing to treat him properly". Gluckman also mentions that a person may even commit an offense in order to provoke another to bring him to court.[79]

[77] Gluckman, Judicial Process, 47.

[78] Gluckman, Judicial Process, 79.

[79] Gluckman, Judicial Process, 79.

From a sociological perspective it is necessary to determine both the factors that account for the emergence of the discrepancy between the real and the processed dispute and the factors that account for the permanence or elimination of such discrepancy during the processing of the dispute. This is a task beyond the purpose of this section. The relevance of the relative strength of the bargaining positions of the participants has already been mentioned. As to the position of the third party, it seems to me that particular consideration must be given to the presence or absence of constraints stemming from the formalization or from the bureaucratization of the dispute processing context. I suggest that the more formalized and bureaucratized the dispute processing the greater the probability that the discrepancy between real and processed dispute will be maintained. Whenever the discrepancy is maintained the probability that the outcome of the dispute processing is also the final settlement of the dispute tends to decrease.[80]

[80] This correlation may eventually contribute to explain the relative high rates of crime recidivism in complex societies. In fact, given the high formalization and bureaucratization of the criminal dispute processing contexts in such societies, the real dispute between the defendant and the society, as represented by the State, tends to remain out of consideration. What tends to be processed is either a dispute forged either by the State or by the defendant, or a less significant dispute within a chain of disputing behavior between the two. It is in relation to the processed dispute that the punishment tends to be "un-measured": an illusion that creates reality (recidivism).

IV-2-6 Topoi, Forms, and Procedures. Forms as Arguments.

Forms are gestures to be made, words to be uttered, formulas to be written, ceremonies to be performed when such things have to occur in specific ways and at specific points in time so that their objective in the dispute processing may be achieved. Procedures are more or less mechanical decisions about the processing of the dispute. Forms and procedures have much in common in that there is something mechanical and automatic about them. In more complex legal systems--to a great extent the Anglo-American law is an exception--one is used to believe that procedures, when they are not fully mechanical, only raise questions of form, not questions of substance. Question of substance is here conceived as a question to be answered in terms of the rights and wrongs (the merits) of the situation under consideration; question of form is a question to be answered in terms of the presentation of the situation and of its conformity or non-conformity to a pre-formulated model of presentation. These distinctions and the categories of forms and procedures here presented are taken from bureaucratized and formalized legal systems in more complex societies and are used precisely to distinguish formal from informal dispute processing contexts and to determine different degrees of formalism.[81] They have also been used in this capacity by legal anthropologists and

[81] If the purpose of inquiry (and of the use of categories) is, on the contrary, to establish some basic procedural structure common to all dispute processing contexts, then one has to resort to a much broader concept of procedure, as I did in chapter III.

legal sociologists. Thus, Gluckman comments that "Lozi courts are little restrained in their attempt to obtain justice by high demands for ceremonialism or formal conformity in the transactions of everyday life or in the procedure of the courts".[82] Fallers' findings deserve detailed attention. Temporal limitation (the passage of time under the statute of limitation) and res judicata are, in more "developed" legal systems, models of presentation: they involve questions of form or questions of procedure, not questions of substance. Fallers, however, found that this is not the way they are conceived in Soga law. The fact that a long time (never precisely determined) has elapsed after the offense upon which the claim is based was committed and the fact that the same case has already been processed and decided by the court constitute no automatic bar for the legal case to be admitted in court. They are rather factors to be taken into consideration by the judges in their arguments, in their accessment of the evidence and in their judgment on the credibility of the claimant. In all instances, these factors tend to weaken the position of the party to whom they respect:

> Aminsi can reopen the case, but he cannot reopen it without prejudice[83] . . . "Why have you waited so long?" . . . The passage of time does not undermine established rights and create new ones; rather it lessens the likelihood that alleged dormant rights have ever existed.[84]

[82] Gluckman, Judicial Process, 233.

[83] Fallers, Law Without Precedent, 267.

[84] Fallers, Law Without Precedent, 283.

In the conception presented here, temporal limitation and res judicata are, in Soga law, substantive questions. And for this reason one can say that Soga legal system is less formal than a legal system in which the two legal concepts are formal or procedural questions.

A closer analysis of this and other ethnographic mate ial leads me to three further points. The first point has evolutionary outlook, particularly so in the formulation p ferred here; but it can also be formulated in structural terms. If the distinction between simple and complex soci ties is made in terms of levels of division of labor and o levels of professionalization and bureaucratization of rol performance, it seems legitimate to suggest that the moveme from simple to complex societies is concomitant with the mo ment from substantiveness to formality in the processing of disputes. In this vein it can also be suggested that the g eralized use of computers in dispute processing will be a radical step in such movement and so much so that the dis- tinction between substance and form may eventually break do as will be the case whenever it becomes possible to test th "merits" of any case against an exhaustive programming of a matic decision-models. This point shows the pragmatic char acter of this distinction and also the limits of its validi But it seems to me that this distinction has a relative cha acter in still another sense, in the sense that it has its ontological grounds in the realm of intersubjectivity, that is, in the realm of prevalent perceptions of reality, its

forms, and its substances. Having this character in mind, and conceiving the movement from substantiveness to formality as a process of gradual transformation of questions of substance into questions of form, it may be further speculated that the distinction between substance and form is kept in this process, even though its terms change. It was seen above that certain questions, which are questions of substance in Soga law, are questions of form in our more complex society. On the other hand, if Soga society would produce legal anthropologists who would become interested in studying the legal processes of our more complex society it is probable that these social scientists, using the categories of their native legal system to analyse ours, would come to conceive as questions of form questions that we consider as questions of substance. This leads me to speculate that, through the mechanism of the progressive escalation of forms, the distinction between substance and form can be maintained along the movement we are analysing. The idea is that, at a given stage of the movement from simple to complex societies, a given question on some legal issue, until then considered a question of substance, will become a question of form; when the next stage of the movement takes shape the structural needs of society will lead to the superimposition of an escalated level of formalism on the same legal issue, and this level will at first be regarded as ultra-formalism; seen from this level, the question that in the previous stage had become a question of form will now begin to appear as a question of substance; within a shorter or longer time lag this appearance will become prevalent and the ultra-formalism will become formalism tout court; when the next stage of movement steps in the process repeats itself (law of the progressive escalation of forms in society). The validity of this law which, by now, is pure speculation, is limited by two different factors. Firstly, the movement from simple to complex societies and the movement from substance to form are, in reality, never fully synchronized. There is room for all kinds of distortions, since the different social processes, though interdependent, keep residual autonomy in their internal dynamics (law of unequal development).[85] It is, for instance, possible for an elite of law professionals to develop the legal system of a given country to a point absolutely dissonant with the social sub-structure upon which the legal system is based. On the other hand, the legal system itself is not monolithic: different dispute processing contexts may have different substance/form ratios, and beyond the official legal system it is also necessary to consider the unofficial legal systems and, thus, situations of legal pluralism such as the one that constitutes the nucleus of the present study. Secondly, the progressive escalation of forms in society in general and in legal processes in particular can reach a

[85] I am referring to the plurality of social times, to the idea that the social processes and events, occurring in different social strata, classes, or layers which co-exist in the same society, have different temporal dynamics. Ernst Bloch speaks of the non-simultaneity (Ungleichzeitlichk of social times. Cf. Erbschaft dieser Zeit, Zürich 1935, 35 (esp. 70 ff).

point which the social perceptions and experiences, though relative, cannot fully absorb. At this point, a political decision may be needed to de-escalate, that is, to de-formalize social forms. A decision to this effect made by dominant groups in society may explain in part the official creation of neighborhood courts or popular tribunals in some societies. A political decision made by dominated groups in society may explain in part the emergence in slums and ghettos of unofficial neighborhood courts or community courts among which I may include the residents' association of Pasargada.

The second point I want to raise is that the analysis of more informal legal processes may help us to elucidate the internal dynamics of forms and procedures in the dispute processing context. When we compare the forms and procedures stricto sensu (as defined in the present section) that are typical of formal legal systems, with forms and procedures lato sensu (as defined in section III-2) that are to be found in more informal legal systems, it becomes evident that the latter lack the mechanic and automatic character of the former. Pasargada cases will illustrate this. The third party may apply different formal standards to two cases apparently identical or different in respects which from the point of view of stricto sensu formalism should be considered irrelevant. From this point of view such lack of uniformity will be derogatorily labelled as manipulation. From the point of view of a topic-rhetorical conception of the legal process, the lack of uniformity may be interpreted as teleological faithfulness, as the result of a deep understanding of the instrumental function of forms in dispute processing, that is, of the subsidiary character of forms in relation to the substance or merits of the case. Topoi, just as they interact with substantive norms, interact also with forms and procedures in order to achieve the gradual approximation of facts and norms. Forms and procedures may be used as arguments in the exclusion of implausible solutions. Therefore, the effective exercise not only of the constraint of harmony but also of the constraint of justness may depend on the argumentative use of forms and procedures. In sum, forms and procedures are arguments. This is why in more informal legal systems nobody can lose a case on the basis of a technicality and, when the technicality is presented as an argumentative reason, the underlying judgment on the merits is the real ground for the decision. The only explanation for the fact that in formal legal systems someone can be persuaded to lose a case on a technicality as the real ground is probably that in such systems the automatic functioning of forms and procedures has already entered the legal process as congealed persuasion (that is, persuasion without discursive argumentation). In view of this I suggest that as the use of formalism in stricto sensu increases the use of topic-rhetorical legal argumentation decreases. In a legal system in which such formalism predominates, large portions of the dispute processing will be insulated from legal argumentation and thus rhetoric will appear in a recessive form. In Pasargada where

such formalism does not predominate I would expect a large use of topic-rhetorical argumentation.

The last point to be made refers to the emergence in society of folk systems of formalism. A close analysis of the official legal systems in complex societies leads us to the conclusion that they tend to be strict on formalism and loose on ethics. Forms and procedures to be followed at each stage (creation, development, extinction) of legal relationships are described in detail while very little is said about the ethical content of such relationships. Thus, while any violation of forms and procedures prompts the intervention of the legal system, the unjust or unethical character of the relationship has to reach extreme proportions for such intervention--always reluctant--to take place. The reasons for this are manifold and their analysis is beyond the scope of this study. I will only mention a few: the bureaucratization of social processes with its efficiency orientation and, thus, its emphasis on automatic predictability; the formal professionalization of the legal system and the rewards stemming from ideal-typifications such as the autonomy of the legal order and the exclusively legal character of relationships; the cultural tradition of abstract individualism, particularly after the Enlightenment, making it possible to convert the looseness on ethics into an ethical creed (autonomy of will, freedom of contract).

In social life the relationships, even between strangers, are never merely legal. The legal dimension may even become

secondary in relationships between people involved in primary or multiplex relationships of some kind. It seems that, in these cases, the participants tend to be loose on formalism and strict on ethics. If a continuum is established between the two poles, strangeness and multiplex involvement, one can even suggest that as the relationship moves toward multiple involvement a concomitant movement tends to take place which, in regard to formalism, is from strictness to looseness and, in regard to ethics, from looseness to strictness. These nuances in social relations are not adequately reflected in the books of the official legal system. But these nuances and the multitude of factors accounting for them are what determines the needs of people for forms and procedures in their relationships. What people require as formalism depends on what future and what dangers they perceive for the relationships in which they enter and such perceptions depend on those nuances and factors. As a consequence different groups and classes in society may develop different folk systems of formalism which they superimpose upon the official legal system of formalism. In Pasargada, a community dominated by primary relationships, I would expect a folk system that would reflect looseness on formalism and strictness on ethics.

The folk system mentioned here should be analysed not only in terms of the relative strictness or intensity of formalism but also in terms of the kinds of forms and procedures actually used. The second analytical path is full of hazards since it proceeds upon the difficult ground of the genesis of

forms in society. At a more superficial level it is often observable that the kinds of forms used in the folk system are derived from the official system and then modified in order to fit the needs of the group. This shows that the folk and the official system may participate of the same cultural postulates even though they differ on the specifications.[86]

IV-2-7 Language and Silence in Dispute Processing.

Throughout this chapter legal reasoning has been conceived as argumentative reasoning. Under this conception language becomes the nuclear reality of dispute processing. Non-language arguments may also be considered such as gestures, postures, flag, furniture, bible, crucifix, pictures of political or religious leaders, files, written papers, gavel, typewriters, dresses, division and allocation of space in the courtroom, rituals of initiation and termination of proceedings, stratification of floor levels and of visibility, etc. etc. But all these arguments tend to be subsidiary of language arguments. The importance of language makes it necessary to discuss two different issues: the common language; and the relations between language and silence.

At first sight, common language appears as a non-issue since it may be easily assumed that either the participants in the dispute processing speak the same language or interpreters must be used. The stakes are, however, too high for easily accepted assumptions to go unquestioned; articulation, communication, and understanding depend on common language and without them legal reasoning becomes an absurdity. On closer analysis, indeed, this assumption has to be questioned since it does not take into account the myriad of intermediate situations between "the same language" and languages perceived as so different by the groups dominating the dispute processing context as to require the intervention of interpreters.

Traditionally language has been conceived as a neutral field of words and rules of grammar. Recently, however, its cultural and intersubjective character has been fully recognized along with its dependence on a structure of meanings and social experiences. Words, with the probable exception of magic and ritual, are not exchanged as words but rather as meanings and, thus, people with different cultural references may speak different languages with the same words. On the other hand, each language has a potential and an actual vocabulary. Different social and cultural groups carve out different actual vocabularies from an underlying potential vocabulary. Finally, beyond the potential and actual vocabularies recognized by the ruling groups in society, that is, those groups with the privilege to speak officially in

[86] This may be illustrated with the meaning attributed by our culture to writing as a ceremony and to the written product as expression of commitment. In manuals of magic written charms and curses are always considered more powerful, more dangerous, and more difficult to be neutralized. In the love manuals one is advised to keep all received letters and to write none because to write a letter is to commit oneself. All these cultural meanings have passed on both to official systems and folk systems of formalism in our societies. The systems may then differ on the specifics: material to be used, formulas to be respected, guarantees of authority, custody of the document, etc.

the name of the language, there are all kinds of "deviant" vocabularies. These vocabularies, which often demonstrate the tremendous inovative capacity of the language, become "official" vocabularies for the sub-cultures sponsoring them. If it is true that people belonging to the same group tend to solve their disputes using the group resources for dispute processing, while disputes between people belonging to different groups tend to be processed by the official legal system,[87] it is then possible that the latter system and its dispute processing context are, more often than any in society, the stage of competition between different vocabularies and between the different labels--deviant vs. official--attributed to them by different participants. Such competition must be further analysed in terms of the kinds and degrees of damage it inflicts on the communication processes. In his study of cultural bias in the American legal system, D.H. Swett came to the conclusion that:

> When there is a marked cultural difference between the defendant and judge, prosecutor, defense counsel and jurors, there is a consequent lack of articulation in communication and understanding that is often intensified by professional manipulation of the leges. Cultural differences in speech, dress, bearing, and behavior then assume paramount importance. . . .[88]

He illustrates this lack of articulation with The People v. Young Beartracks:

> . . . though all participants in this trial were ostensibly speaking English, they were using two different vocabularies with two different sets of meanings. Witnesses did not understand or share the meanings of the vocabulary used by the professionals in the courtroom culture, and neither these gentlemen nor the jury understood nor shared the meanings of the vocabulary used by the witnesses.[89]

This leads to the distinction between technical and everyday language, another perspective through which hindrances to communication processes can be analysed. Professions develop professional languages because it is through professional languages (probably more than through professional actions) that they are professions. Legal profession is no exception.[90] Whenever the dispute processing becomes professionalized both in respect to the third party and to the representatives of the parties the tendency is for a professional language to develop. The more professionalized the role the more esoteric the language becomes.[91] Whenever technical language becomes dominant in the dispute processing the non-professional participants, such as the parties, the witnesses, the jurors, and the audience, run the risk of alienation. They may become

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[87] Cf. Donald Black, "Social Organization of Arrest", 23 Stanford Law Review (1971), 1087.

[88] Daniel H. Swett, "Cultural Bias in the American Legal System", Law and Society Review 4 (1969) 97.

[89] Swett, "Cultural Bias", 98.

[90] Profession is here understood in its broadest sense of role specialization.

[91] The professionalization of the language may affect some areas of discourse more than others. I suspect that this may explain in part the distinction between question of fact and question of law, or at least the appearance of the self-evidence of such a distinction.

objects of the process rather than its subjects. The relevant communication processes are then diverted to the professionals in the process. The alienation will become particularly evident when the professionals have to communicate with non-professionals. At this point, a de-escalation of professionalization has to take place so that communication may become possible. This process consists in the professionals' peeling off legal concepts until the commonsensical reasoning that they simultaneously contain and cover becomes visible and expressible in everyday language. This process is not an easy one. Prolonged routine work with technical language may blind the professional for the common sense upon which the content of such language is based; common sense may even appear as an absurdity to him.[92]

Whenever the professionalization of the dispute processing reaches only a low degree, the distinction between technical and everyday language is also blurred. This seems to be the case of the Soga law where "legal language remains very close to everyday language"[93] even though the court uses certain verbal formulas to recognize certain wrongs. This intermediate position is implied by Fallers when he concludes:

> The phrase is made up of everyday words, but it is strongly associated in people's minds with the courtroom context and with a particular recognized wrong.[94]

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[92] This is another instance of the need to go beyond the premises of the profession in order to fulfill its goals.

[93] Fallers, Law Without Precedent, 108.

[94] Fallers, Law Without Precedent, 108.

In Pasargada, where the professionalization of the dispute processing reaches still a lower degree, I would expect a legal argumentation based on everyday language. This prediction, however, requires, in order to be fulfilled, a further specification of the relations between technical and everyday language. In the preceding analysis, it has been assumed that technical language derives its basic meanings from common sense as it is expressed in everyday language. This, however, does not portray the whole process because it may also happen that technical languages develop verbal formulas and technical meanings which are then popularized and infused with commonsensical connotations not previously obtainable in the cultural setting. It is then possible that what happens with formalism happens also with technical language: parallel to the official technical language a folk technical language may develop. Everyday language must then be conceived to include the folk technical language.

The second issue--the relations between language and silence--deals with the internal rhythm of communication and the alternation of communicative strategies in dispute processing. Again, this issue, which I regard as of crucial importance, may be easily dismissed as a non-issue. It may be said that silence is merely the chaotic vacuum between spoken words and that, therefore, it cannot be analysed in its own terms but only in terms of the words whose absence is that very silence. Thus, an analysis of silence is by necessity an analysis of spoken words. This objection does

not strike me as convincing. On the contrary I will argue that silence is as positive and articulate a reality as language itself and that, without the recognition of a dialectical relationship between silence and language, it is impossible to reach a deep understanding of the internal dynamics of dispute processing.

Many reasons can be given as to why silence has been so neglected as an object of scientific research. Given the fact that the scientific study of something has to be carried out by scientists of something, and that the social studies in the West have centered around language behavior (as opposed to silence behavior), the social study of silence constitutes a threat not only to accepted scientific boundaries but also to established methods of social research. Secondly, social scientists who think, as I do, that the ultimate goal of their science is controlled speculation and nothing else tend to feel more confident in speculating with words about words than in speculating with words about silence, since the possible coordination, in the former type of speculation, between the object and the instrument of speculation creates an illusion of control which collapses in the latter type of speculation. Thirdly, the usefulness of the studies of silence has not yet been determined. If one were to assume that since the time of the tower of Babel people speak different languages but "speak" the same silence, then the potential of social studies of silence for cross-cultural comparisons would be tremendous. However, such potential has not yet been discovered and, in fact, will not be actualized until the language/silence rhythms in different societies begin to be decoded. Fourthly, and most importantly, there is in the Western civilization a built-in bias against silence and this bias necessarily affects our scientific preferences and capabilities. The Western civilization is a civilization of words as much as some Oriental civilizations are civilizations of silence. If one compares the philosophical works of Hegel, particularly his Science of Logic, with the philosophical works of Shankara--the great philosopher of Hinduism--particularly with his treatise "Crest-Jewel of Discrimination",[95] one is overwhelmed by the fact that while in Hegel there is a desperate effort to eliminate silence, in Shankara silence is effortlessly created and harmoniously orchestrated with the words.

In the above it is already implied that silence is not equally distributed across cultures, across nations, or even across groups and classes in the same society. Silence is a scarce resource and the ruling classes in every society tend to distribute it according to their convenience and the cultural postulates in which they operate. When language is important, the ruling classes tend to appropriate it, distributing silence to the people. Conversely, when silence is important, the ruling classes tend to appropriate it, distribut-

[95] Shankara, Viveka Chudamani, trans. Prabhavananda and Christopher Isherwood (1947; New York, 1970).

ing language to the people. In a totalitarian society, where language is a privilege, the ruling classes will distribute silence to the people keeping language for themselves. In a formally democratic society, people may be freely endowed with language while a few silent actors make all the crucial decisions pertaining to the nation. Societies, however, cannot be evaluated only in terms of the amount and distribution of silence they produce. As will be seen below, there are different kinds of silence and these may be even more important as a criterion of evaluation.[96]

In order to undertake the study of silence and its relations with language the first task consists in rejecting the idea that silence is an amorphous infinite. Silence is a delimited reality. It is delimited by language as much as language is delimited by silence. Without silence, language falls to the ground; and silence is what it is by virtue of language. This is one aspect of the dialectical relationship between language and silence. Another aspect is that silence is not an indiscriminate absence of language. It is rather the self-denial of specific words at specific moments of the discourse so that the communication process may be fulfilled. What is to be silenced is decided by the direction of the discourse and the content of the message to be communicated. Because silence is not a pause in the discourse but rather an integrant part of the communication process, what is silenced is, by necessity, a positive expression of meaning. Hence the different kinds of silence. Only through the analysis of the dialectical relationship between language and silence can one reach a deep knowledge of the discourse of social reality.[97]

It seems to me that the analysis of the relationships between language and silence may be of great use to understand some features of the dispute processing, otherwise neglected. Watching Nader's film "To Make the Balance", on dispute settlement in a Mexican Zapotec court of law,[98] I was fascinated by the prolonged silences of the dispute settler (the presidente). The lively speeches by the parties and the witnesses crossed the desk only to meet the impenetrable ear of a silent listener. After a while the presidente

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[96] In my opinion, the development of societies, which up until now has been measured in terms of material goods produced, could also be measured in terms of the kinds, the distribution and the amount of silence that societies "produce". I suspect that, according to the latter criterion, the developed (according to the former criterion) nations of the West would appear in many respects as underdeveloped or decadent.

[97] Arjuna, the warrior, is in possession of such knowledge when he asks Krishna, the God, in the Bhagavad Gita, that beautiful sacred scripture of Hinduism:

> How is the man of tranquil wisdom, who abides in divine contemplation? What are his words? What is his silence? What is his work? (2, 54, my italics).

Arjuna is sure that by knowing the words only he won't be able to know the full meaning of an attitude or behavior. That is why he asks about silence and about works. Words, silence, and works are thus conceived as a necessary triad of communication and knowledge. Arjuna also shows that he is interested in knowing, not any kind of silence, but rather the silence of the man of wisdom, that is, a positive and delimited reality, a specific content of meaning.

[98] Cf. L. Nader, "Styles of Court Procedure", 69 ff.

would ask some questions and then move to decide. What is the meaning of the presidente's silence? How is it interpreted by the parties? How does it affect the language-behavior of parties and witnesses in the courtroom? When does the presidente ask questions? What is the rhythm between his questions and his silences? Are the lively arguments of parties and witnesses related in some way to the presidente's silence? Is the presidente's silence a monolithic one or are there different kinds of silence at different stages of the process? Is it possible to establish correlations between the amount and the kinds of the presidente's silence and other features of the dispute processing context, such as, the object of the dispute, the seriousness of the offence, the involvement or non-involvement of public officials, the status of the parties in the community, the relationships between the parties, etc.? Barbara Yngvesson, in her study of the dispute settlement in a Swedish village, brings forward the important concept of non-action to express the period of time in which the community takes no action against the deviant behavior and limits itself to watch the deviant person.[99] If the concept of non-action is expanded in order to include not only what is not done but also what is not said about the deviant behavior we are confronted again with the question of the relevance of silence in dispute processing. Here the silence is not appropriated by a particular person; it is a communal posession. This collective silence seems to indicate that the community goes through a period of collective brooding about the deviance occurred, its development, the further behavior of the deviant person, the need and the timing of an overt reaction, etc. Is it then possible to establish correlations between the amount of collective silence and the type of deviance occurred, the relations of the deviant person with the community, etc. etc.? It has sometimes been said that the dispute settler's control over the processing of the dispute can best be measured by the number of questions he asks along the processing and by the number of times he interrupts the parties and the witnesses. There are good reasons to doubt the accuracy of this. At least, one limitation has to be introduced: under what conditions is the control of the dispute processing expressed through questions and interruptions? For, as I will argue here, such control can also be expressed by the absence of questions and interruptions, that is, by silence. To take one example from Hinduism (in broad sense), it is instructive to observe the contrast between two of the officiants in the ancient Vedic rituals which are, after all, dispute settlement processes between people and gods. The hotr, though he recites extensively and loudly, has little control over the ritual while the brahman, though he remains silence, exer-

[99] B. Yngvesson, "Decision-Making".

cises full control.[100]

The preceding considerations, based on existing ethnographic material, indicate that the understanding of the internal dynamics of the dispute processing context can profit a great deal from the analysis of silence. The structure of language and silence in dispute processing is very complex because, at a given stage of the process, different kinds and amounts of silence may be put in operation by different participants (judge, parties, witnesses, audience). Since the different participants give different directions to their argumentative discourse, different silences will also have different meanings. Accordingly, various classifications of silence are possible. The first one distinguishes between what I call procedural silence--as, for instance, when I am silent in order to let someone else speak--and substantive silence, as, for instance, when I am silent in order to express my assent. The third party may exert more or less con-

[100] Louis Renou contrasts them in the following way: The hotr, who, as the etymology of the word suggests, was originally the libationpourer, later becomes primarily a reciter; but his invocations, which are said aloud, impressive though they are, play only a small part in the liturgy as a whole, rather like the music of the chanters. The brahman, who, as his name reminds us, is the repository of the unexpressed power of the formula, is a silent spectator, whose duty it is to see that the operation is carried out with accuracy; he is a professional expert, like the Roman priest. His silence is just as valuable as the speech and melodies of his colleagues. (Louis Renou, Religions of Ancient India, New York, 1968), 32 (my italics)
Also in Bhagavad Gita, Krishna says to Arjuna: "I am the Way and the Master who watches in silence" (9, 18).

trol over the distribution of procedural silence among the parties and audiences. In the formal processings of complex societies he exerts an almost absolute control. In any case he tends to have no or little control over the substantive silences of the other participants. As to the substantive silence, further classifications are possible: silence of acceptance; silence of rejection; silence of assent, silence of reprobation; silence of intimidation; silence of total disagreement; silence of unenthusiastic acceptance; silence of emotional approval; silence of revolt, silence of powerlessness and resignation; silence of respect; silence of disrespect; silence to express explosive tension; silence to express the need for calming down and for further deliberation. It is still possible to distinguish the preceding kinds of silence according to two further criteria. The first one distinguishes silences according to the expectations of the other participants and relevant audiences. Thus: deviant silence and normal silence. Deviant behavior in court can be explained in part by the competition between contradictory definitions of deviant and normal silence. The relative strength of the bargaining positions of the different participants will dictate which definitions will prevail. The sanctions for deviant silence may be formal and informal and may be applied in the same process in which the deviance occurred or in a separate or appeal process. The second criterion classifies silences according to their weight in the communication process. Thus, the distinction between heavy

silence and light silence. "Heavy silence" is an expression used in everyday language. But I use it here not as metaphor--since I take figures of speech to be failed reality--but rather as a factual description, for indeed there is no reason why the weight of things should be measured only in kilos or pounds. Heavy silence takes place in moments of particular tension in the dispute processing, in moments where important decisions are made and dramatic turning points are reached.

The more formalized the dispute processing the greater the tendency for specific meanings to be *a priori* assigned to silences of certain parties at certain stages of the processing. If the party remains silent at a given moment or after being addressed a given question, his silence will have a legal presumption of meaning (assent or admission, for instance). If, after the decision, the losing party remains silent for a specific period of time, his silence will involve the legal presumption of acceptance of the decision and the possibility of appeal will be precluded thereafter. It is in this sense that I speak of the formalization of silence in formal dispute processing which, as we now see, does not involve only the formalization of words and actions but also the formalization of silence. It seems to me, however, that the language/silence structure of audiences remains informal (in this sense) even in formal dispute processing. To be sure, the judge can distribute procedural silence and can even impose sanction for violations (evacuation of the courtroom). But he cannot force the audiences into substantive silence. In this respect, the judge is in fact an object of judgment for the audiences.[101]

The meaning of a specific instance of silence has to be inferred from the logical connections of the discourse, from the structural position of silent participant in the process, and from the preceding and following instances of language of the same participant and of all the others. The analysis of silence and of its relationships with language will shed light on features, otherwise obscured, of the legal reasoning in dispute processing. I will illustrate this with the silence of the third party. What will be said assumes a dispute processing context following the adjudication model. It should not therefore be taken as a factual description of all kinds of processes. It is, in fact, a hypothetical description whose elements are variables even though I convert them, for purposes of exposition, in more or less fixed entities.

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101 If one compares the language/silence structure of the audience in a soccer or baseball stadium with the one of the audience of court proceedings, the differences are striking and are mainly due to the different structural relationship between the audiences and the spectacle. In the baseball field a silent argumentation takes place, an argumentation of movements and thoughts. Thus, the audience is free to choose between silence and language. For instance, excitement and enthusiasm will be shown through language rather than through silence. In the courtroom, on the contrary, an argumentation takes place in which words play a central role. Accordingly, silence is the expected behavior of the audience (in formal processing at least). Silence has usually the meaning of excitement or enthusiasm. Words are sometimes used to express disapproval of the judge's conduct or of the proceedings in general. The judge's need to command silence is, in these cases, the result of his own failures in the processing.

The language/silence structure of the judge can be divided in two different phases according to the time of the decision. In the first phase the judge has begun the process of exclusion of implausible decisions but the range of the plausible ones is still very broad. Accordingly the judge has not yet reached a decision or else his preferences are still too shaky and inarticulate. In the second phase, either the range of plausible decisions has narrowed down so much that the judge is concentrated in weighing out the relative merits of a few alternative decisions, or he has already definite preference for a particular decision and begins to make clear for himself the reason for his preference. In the first phase, silence is used by the judge in order to obtain from the parties all the information which he anticipates, after the pre-understanding of the case, that he may need to reach a decision. The judge shows preference neither for specific pieces of knowledge nor for specific pieces of ignorance. In other words, he claims no right as to knowledge and ignorance. At this stage, this right belongs to the parties. It is up to them to decide about the specific knowledge/ignorance ratio upon which they want to base and justify their claim. The prolonged silences of the third party tend to help this process. Since the silence is only rarely punctuated with language, it becomes very difficult for the parties to control the meaning of the silence and, as a consequence, they are induced to produce information which otherwise they would prefer to suppress or to withhold until a later stage. Another aspect of the language/silence structure of the judge at this stage is that language is not only scarce but also ambiguous. The questions asked tend to be very open and multi-directional They are less questions than invitations for free information. The judge is aware of the fact that the less he asks the more he knows.

In the second phase the language/silence structure of the judge goes through profound changes. To decide is, in a sense, to specify and to intensify convincing knowledge and convincing ignorance. To achieve this, however, it is necessary to control the direction of the inquiry. For this purpose the judge is likely to use an alternation of specific silences and specific questions. In this way, the judge reaches two objectives. On the one hand, he assures himself that he will know more of what he already knows and should know in terms of his preferences for particular decisions. He also assures himself that he will ignore what he already ignores and should ignore in terms of the same preferences. On the other hand, he communicates his preferences to the parties and, in a sense, invites them either to join him or to counteract (particularly when a few alternatives are still open). Thus, in this phase, the questions and silences, though they appear as factual questions and silences, that is, as referring to knowledge and ignorance, are, in essence, normative questions and silences. They point to what should be known and to what should be ignored. They also indicate that the right to knowledge and ignorance belongs now to the

judge. From the first to the second phase this right moves from the parties to the judge. To decide is, after all, to have this right at last.

In mediation this right is never fully relinquished by the parties. They may even keep it intact until the end of the dispute processing, as is the case when the third party is merely a go-between or errand boy. When the third party has the power to participate in decisions about what is to be mediated and how is it to be mediated, then the right to knowledge and ignorance is shared by the parties and the judge. The objectives of the third party are different in adjudication and mediation and so the language/silence structures also differ. In mediation, the judge is mainly concerned with participating in the creation of a horizon of concessions. He does this through the elaboration of ad hoc criteria of reasonableness and of legitimate expectations. By making the horizon visible he transforms it. Assuming that the parties belong to the species of homo juridicus, they advance their proposals of concession according to a plan of minimum risk. It is up to the third party to transform it into a plan of maximum risk. And that is why the parties in mediation are often confronted with proposals that, though appearing as their own, are somehow alien to their intentions and even to their interests. When they try to pull back they may, depending on the skills of the mediator, go not to the original stand but to some different position. Thus a step back may, in fact, be a step forward.

It seems to me that, other factors remaining constant, while the control of the adjudication processing may be achieved (at certain stages at least) through prolonged and ambiguous silences, the control of mediation processing seems to require prolonged instances of language coupled with short and unambiguous silences.