

THE RULE OF LAW AS THE QUEST FOR LEGITIMACY

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Law in aid of development

One of the political and legal concepts greeted with the greatest scorn and cynicism in contemporary Africa is the notion of the rule of law. For those committed to the “active state” idea of government, and to centralised economic planning as a technique for development, there is indeed a good basis for this cynicism. For there exist certain conceptions of the rule of law that are compatible only with the Spencerian ideal of “least government”¹ (i.e. an inactive state), or are almost incompatible with the modern African tendency towards centralised economic planning.

These conceptions—going back to A.V. Dicey² and restated by F.A. Hayek³—view the granting of discretionary powers to government officials as incompatible with the rule of law. Undoubtedly, such notions are no longer prevalent in contemporary legal and political literature; but they still persist. One can sense their presence behind otherwise innocuous and acceptable statements frequently made by barristers, judges, political scientists, among many others. And Hayek himself, in a work published as recently as 1960,⁴ has harped on the same theme. For these reasons, it is worthwhile discussing some aspects of it even if briefly, in order to find out whether they have any merits at all.

Laissez-faire and natural law conceptions of the rule of law

To Dicey, the rule of law calls for the elimination of wide discretionary authority from the governmental process.⁵ Yet many economic experts now hold that wide discretionary powers are essential to economic planning.⁶

For Hayek, the rule of law means the existence of formal rules which “do not involve a choice between particular ends or particular people”,⁷ and which are there for the use of everyone, for the purpose for which people will decide to use them. It is only such formal rules, he contends, that can lead to predictability of laws. Such predictability, he continues, involves the very opposite of economic planning “of the collectivist kind”. Here, Hayek is not referring only to the comprehensive planning of the so-called communist countries. He also includes any sort of planning which imposes on the obligation to choose between higher wages for nurses or doctors, and more extensive services for the sick, more milk for children, and better wages for agricultural workers; or between employment for the unemployed or better wages for the already employed, etc.⁸ This kind of planning would include those that take place in both welfare states and socialist economies.

Under planning, Hayek argues, the state uses substantive rules to direct the individual’s action to particular economic ends. It also discriminates between different groups in the society as regards economic and social advantages because, in order to give the

same objective opportunities to people with different levels of living, it is necessary to treat them differently. The particular effects or applications of such rules are unpredictable, because in the end somebody's views will have to decide whose interests are more important.⁹

To the extent that planning necessarily involves deliberate discrimination between particular needs of different people, and allows one group to do what another must be prevented from doing, the state which carries out planning is necessarily not impartial. For, to be impartial means "to have no answer to certain questions or to the kind of questions which, if we were to decide them, we decide by tossing a coin".¹⁰

Thus, concludes Hayek, planning is the sure road to serfdom. "... any activity of the government deliberately aiming at substantive equality of different people. . . (and) any policy aiming directly at a substantive ideal of distributive justice, must lead to the destruction of the rule of law. . . It cannot be denied that the rule of law produces economic inequality: all that can be claimed for it is that this inequality is not designed to affect particular people in a particular way".¹¹

There are, indeed, many philosophical questions one could ask about Hayek's conception of the rule of law. Can there be a substantive law which does involve a choice between particular ends or particular groups of people? Can there be a law which ensures predictability as understood by him? Can there be a state which is impartial as here understood? Is discretion to officials necessarily a bad thing?

The question whether or not certain laws embody choices and discriminate between different groups in society poses a false problem. Which choices are made, and in whose interest the choices work: these are the critical questions. This is just another way of saying that the state can never be impartial, in the sense in which Hayek explains impartiality.

The kind of unpredictability of laws which Hayek abhors is in fact inherent in the application of all law. Laws are general rules in the sense that there are myriads of particular cases which could conceivably fall under them, but all of which a given law cannot enumerate beforehand. A particular rule of law has a hard core meaning, as well as a penumbral meaning. The determination of cases which fall within the hard core is generally clear enough. With regard to the penumbra, however, cases can hardly be decided except on the basis of the full circumstances of the moment. This is as true with rules handled by administrative officials as it is with those dealt with by judges of the ordinary courts.

Discretion is in the very nature of laws that are meant to be applied to myriad cases. Discretion may be too wide for the purposes in question, but the necessity of discretion one cannot avoid. Nor is this necessarily a bad thing. The argument against it should not be that it is unnecessary, but that it may cause excessive havoc if it is not properly conceived.

In any case, even if Hayek's conception of the rule of law were philosophically tenable, its utility to a country that has already opted for economic planning would still be open to question. The need for wide discretion for the purposes of planning, and the quest for substantive equality at least in the case of the socialist-oriented countries, obviously fly in the face of such a conception. It is a mythological conception of the rule of law, which poses a false antithesis between predictability of the law and central

planning of economic activities. This utopia of a fixed and round system of legal rules, itself a kind of false Benthamism, is better fitted to the philosophy of neo-liberalist economists hankering after an atomistic society than to theories of central planning.

The question of discretion aside, there are some ideological problems which rear their heads with regard to this notion of the rule of law. It assumes the existence of so-called inalienable rights and liberties, which good governments anywhere in the world should not touch, or touch only slightly. Predominant among such rights are property rights, although the right to free expression and freedom of association for political and other actions also feature quite prominently. Sometimes the philosophical foundation chosen to support this notion is natural law.¹² But natural law is a rather weak foundation for such rights. Central to the classical, scholastic, and Kantian theories of natural law (and their modern variants) is the notion that law is a branch of a universal morality, and that its validity should be judged only in this light. With the classical and scholastic theories, law is further viewed to be, in some sense, antecedent to government, whose activities it should therefore limit.

Our contemporary secular civilization no longer accepts with candour the view that there are self-evident propositions about morals, or inevitable truths about morals, politics, or human nature.¹³ Moreover, as the eighteenth century Scottish philosopher, David Hume, would argue,¹⁴ reason cannot fully tell us what we ought to do, or that any particular goals are worth pursuing. Reason, including Kantian rationalism itself must receive its moving force from the will. Reason essentially describes the means which are necessary for realizing the purpose which the will has determined.

Modern conceptions of natural law have sprung up, intent on increasing its appeal to the modern mind. Roscoe Pound, for example, argued that the basis of the concept lay in an acceptance of the idea that the individual needed protection from something other than the existing positive legal rights. "Those interests which are secured are called legal rights; those which ought to be secured are called natural rights".¹⁵ He does not make it clear why such pre-legal norms should be called "rights" and, there is no reason why "ought-statements" should necessarily have "natural" origins. The notion of natural rights still has its Lockean connotation of rights that are innate in man and for the protection of which society was formed.

H.L.A. Hart, himself essentially a legal positivist, has also set out what he considers to be "the minimum content of natural law". This minimum content is based on certain characteristics about man and society which make certain rules for human survival reasonable and necessary. For example, man is vulnerable, and has limited altruism. Society's resources are limited, etc. Therefore we need, at minimum, rules restricting the use of violence; we need mutual forbearance and compromise; and we need some minimal form of the institution of property, private or public.¹⁶ But again, one may grant the necessity and reasonableness of all these rules, without seeing the need to call them "natural law", except in the rather novel sense that it is in the "nature" of men to seek such conditions. Hume made similar kinds of arguments for the observance of rules and the rights of others, basing himself solely on the benefit which accrues to society by such obedience.

In modern times the so-called inalienable rights have acquired direct juridical validity aside from their philosophical justification. The United States provides the first

example of such incorporation. Inalienable or fundamental rights are usually used co-terminously with the term "due process of law." In the United States, at least, due process has two aspects to it: procedural and substantive. Procedural due process involves, among other things, publication of laws, notice of the specific charges brought against persons, opportunity to be heard, open hearing, and right to cross-examination. Basically, it is "an assurance of fair procedures".¹⁷ Substantive due process aims at limiting the substantive content of legislation on the representation that it unreasonably invades the liberty or property rights of the individual, although that piece of legislation may, on its face, be constitutional. It demands the existence of "an arguably rational connection between the measure taken and some permissible state objectives".¹⁸

In systems where these rights are more or less respected, and where the judiciary is actually concerned to enforce them, the rule of law has tended to become a conservative force in its application. The concept has been invoked consistently in attempts to place property the most critical of institutions in a period of rapid economic transformation—effectively beyond the reach of societal power. It is as if property rights existed before society.¹⁹ Sometimes these constitutional rights are used to protect vested interests, where they were meant to protect such purely human rights as freedom from racial discrimination.²⁰

The point here is not that these rights can never be used to serve progressive and radical causes.²¹ It is simply that the notion of substantive due process itself makes it more congenial for conservatism than for any other approach to social change. It is a notion whose usefulness depends peculiarly on the kinds of people that make up the judiciary.

The situation is worsened when we have conservative judges on the bench. Behaving as if the rule of law means the rule of judges, they may sit as a super legislature to determine the wisdom, need, and propriety of laws that touch national economic problems and social conditions. The experiences that President Franklin Roosevelt of the United States had with the Supreme Court in his New Deal measures are now hackneyed examples of such judicial sabotage. But these are still instructive, in that they point out the facility with which "inalienable" rights may be interpreted to stifle reform, even when the judicial precedents do not fully support such interpretations. Some of the New Deal legislation were struck on grounds of substantive due process,²² and others on grounds of federal infringements of state's rights.²³ There is considerable doubt whether the existing judicial precedents supported such decisions.²⁴

The situation with these constitutional rights in many developing countries border on melodrama. One gets the impression that some countries write them into their constitutions primarily for purposes of window-dressing, so that they, too, can be called "democratic."

Fundamental rights written into constitutions are invariably qualified by such phrases as: "subject to such restrictions as may be necessary for preserving public order," "save where the public interest so requires." In several countries, these necessary qualifications have been interpreted in a manner that amounts to taking back with one hand what was given away with the other. African countries are no exceptions to this.²⁵ Insofar as the fundamental rights deal with freedom of expression and political asso-

ciation, these are either ruled out, seriously circumscribed, or transformed into other forms, by the logic and exigencies of *de jure* or *de facto* one party systems.

A common explanation offered for the disregard of these rights is that power has been put in the hands of a megalomaniacal dictator. Other explanations have centred around the historical-cultural background of the African peoples. Thus Adda Bozeman²⁶ has sought to show that law and organisation in Africa, as in the rest of the non-western world, derive their significance from two cultural traits. First, it is said, primary loyalties centre on family, lineage and tribe. Hence, in political and social organizations, the stress is inevitably put on group loyalty, while individual rights count very little. Second, there is the religion of ancestral worship that leads to a total dependence on supernatural powers. Hence the state emerges as a metaphysical entity; real power and responsibility, and limitations on them rest in the world of spirits and ancestors. In consequence, Bozeman predicts, the sense of individual rights and obligations cannot really be expected to develop in Africa as in the rest of the non-western world, and governmental power will continue to be harsh, arbitrary and violent.

The drawback in Bozeman's extremely useful analysis that it leans too much on the past in explaining the present and making predictions about the future.²⁷ For it is not so much the past of the Africa people, or the authoritarian complexes of African political leaders, as the nature of the economic, social, and political challenges facing the continent today, that has determined, and will determine the fate of the rights of individuals. More often than not, the responses to such challenges have been the result of deep-seated ideological orientations. The political leadership of a nation may view liberty, for example, as an instrumental value, as something to be used to obtain something else; and not as a self-justifying value, a metaphysical absolute. If so, it is desirable to be honest about the contradictions, devise new forms of rights, or find different philosophical bases for these rights.

In much more recent times, conceptions of the rule of law as shown by the resolutions of the various conferences held by the International Commission of Jurists since 1959²⁸ have sought to embrace something other than the civil and political rights of the individual. They now explicitly encompass the establishment of "social, economic, educational and cultural conditions under which his (the individual's) legitimate aspirations and dignity may be realized".²⁹ The notion behind these conceptions is that without these economic and other opportunities being made available to the citizenry of a country, the civil and political rights would not be too meaningful. It is doubtful that men afflicted with hunger or illiteracy would bother very seriously about exercising these rights. Many social scientists have indeed stressed the importance of the social and economic correlates of democracy.³⁰

These new formulations certainly go a long, long way from those of Dicey, Hayek, and the natural law constitutionalists, and become much more relevant to the problems of developing countries because they are dynamic. However, they cannot, and do not pretend to, posit the detailed manner in which these countries should approach the resolution of the necessarily delicate balance between political rights and economic opportunities. That is a problem which every country would have to solve on its own. It would seem, however, that the scope and time-horizon of a country's programme bears

a direct relationship to the extent to which certain individual rights will be allowed or encouraged.

In fact, there is no reason why the rule of law should be viewed only in terms of safeguards of individuals rights, though justification for such safeguards may be readily forthcoming. The essence of the rule of law lies in its juxtaposition to "the rule of men." This aphorism is not meant to express the utter absurdity that laws are capable of governing society without the help of men. Rather, it seeks to state the following basic principles: that all state power ought to be exercised under the authority of law; and that there should be rules of law governing the election and appointments of those who make and execute policy, as well as the manner in which such policies are made and executed, in such a way as to ensure rationality and fairness in the decision-making process. This state of affairs is thus contrasted with a regime of caprice or arbitrariness in which acts or omissions are traceable to the whims of the particular man or men in power at a given time. The transcendental notion of "inalienable individual rights" must have been smuggled into the concept of the rule of law somewhere along the line.

But viewed properly, and stripped of its mystical natural law or nineteenth century *laissez-faire*, liberal-democratic bias, the rule of law is as desirable to the new nations of Africa in their quest for rapid development as it is to the old nations of Europe and America. What is needed is a reformulation of, and a different philosophical justification for, the concept in order to make it appropriate for the purposes of rapid development.

The juridical quest for legitimacy: the rule of law in the context of economic planning

An attempt at reformulating the concept of the rule of law for this purpose may well start with a re-christening of the concept itself in order to avoid confusion with its traditional implications and emphasis. Such an exercise has indeed been carried out by Soviet jurists. Regarding the rule of law as a bourgeois concept, they introduced the notion of "socialist legality" in the early 1950s as part of the general post-Stalinist liberalization process. Socialist legality called for the abolition of exceptional procedures for crimes against the state; the abolition of crimes by analogy and retroactive legislation; a narrower definition of crimes; the right to counsel; the right of appeal; and so on.

The trouble with using the term "legality" to describe the ideas connoted by the rule of law is that it may easily lead to a confusion between mere "law-abidingness" by officials (legality or constitutionality in the ordinary sense) and the idea of justice—legitimacy. That there is a distinction between the two notions has been pointed out quite clearly by d'Entreves.³¹ If we ourselves were to rename the concept of the rule of law, we would have to use some abbreviated word for what we call the juridical quest for legitimacy; for this is, at bottom, what the whole idea is about.

Underlying all arguments for the rule of law is the need for governments to legitimize their rule to the governed, i.e. justify their position as rulers on grounds other than their mere possession of the instruments of coercion. Sociologists remind us that there are three basic ways in which this can be done. These are the personal charisma of the ruler; tradition, i.e. the long-standing internalization in the society of the values which the rulers expound; and legal-rational arrangements, i.e. the rational pursuit of the interests of the society through the institutionalization of a system of roles and of rationality in

the decision-making process.³² Here, the rulers legitimize their position by meeting the claims and demands of their constituents.

Charisma does not last forever. In Africa, the charisma of nationalist leaders, stemming from the exciting days of the fight for political independence, wanes quite rapidly after freedom is won and economic and other problems become acute. It becomes more and more obvious that charisma needs to be routinized. As far as tradition is concerned, modern African nations have simply not existed long enough to enable their peoples to internalize the new political culture in the way the older societies have done. In the absence of myth and symbol, in absence of long-continued tradition, the political-legal order can ensure its legitimacy only by meeting the demands of the people. The demands of the peoples of Africa are for economic development and social progress; and this is most likely to be attained within the framework of political legitimacy.

Now, our concept of the juridical quest for legitimacy may be said to contain six essential elements.

First, it connotes the use of state power, through rules of law for the establishment of the economic and social system agreed upon by the people through constitutionally sanctioned representative institutions or other acceptable surrogates. It is immaterial whether such a system is socialist, capitalist, or a mixed economy geared towards socialism or capitalism.

Second, it implies the assurances of some sort of predictability (but not Hayek's predictability) in the conduct of state officials by the prior existence of a basic law covering the subject-matter that falls within their fields of operation.

Third, it demands the precise definition of the roles and status of such public officials by law.

Fourth, it commands the creation of control devices to ensure that public officials abide by these norms.

Fifth, it embraces procedural guarantees necessary to assure fairness in adjudication and the application of sanctions,³³ without hamstringing the administration of justice or frustrating the imposition of basic order in the community.

Sixth, and as a corollary of the foregoing tenet, it demands equality of treatment before the law in the application of a general rule to all cases where, according to its content, the rule should be applied. Unifying all the elements of the juridical quest for legitimacy are the demands for the existence of legal barriers to governmental arbitrariness, defined as the absence of legal authority for acts done; and the demand for some procedural safeguards for individuals alleged to be in conflict with the law.

The first element in our formulation points to no particular content in policies that the political leadership may pursue. The leadership may be committed to the pursuit of individual rights, or to societal rights. Even when it is concerned with individual rights, it may be more interested in "economic" rights than such rights as freedom of speech and freedom of association. It may be committed to rapid economic development through central economic planning. For this purpose, the leadership may want to use the processes of law to establish roles in the bureaucracy, and to detect and punish or discourage attempts to thwart the development objectives for personal or other reasons. It may therefore want to establish rules of law to guide policy-making and execution, rather than to leave them entirely to the whims of bureaucrats. Hence the first element

in the juridical quest for legitimacy does not commit us to the defence of the status quo, and at the same time allows us to incorporate rapid economic and social change as a variable in the legal system.

Why are the other elements of the juridical quest for legitimacy necessary and desirable in the African context? Why should Africa, consumed in the passion for rapid economic development, bother about predictability and control of bureaucratic action, about definition of roles and procedural due process? Is the call to abide by these standards not one of those manifestations of intellectual neo-colonialism so ubiquitous in Africa?

It is indeed noble to be nationalistic. Sometimes, however, nationalism becomes a mere excuse for the mistakes and short-sightedness of a nation's leaders. For we may discover, on philosophical grounds other than those offered by mystical natural law, liberalism and so on, that there are serious reasons why the elements of the juridical quest for legitimacy outlined above should be embraced. One such philosophical ground may be the principle of utility.

This is not necessarily a reference to the specific content that the nineteenth century British utilitarians imputed to utility. In their system utility was to be measured by the greatest good of the greatest number. John Stuart Mill, one of the utilitarians, fed into this *desideratum* the liberalist conception of the state already alluded to. But we have already noted how the imperatives of central planning render inappropriate such a conception. The utilitarians' measurement of utility—the greatest good of the greatest number—itself presents some conceptual problems. It is not the inherent vagueness of the measurement that bothers us, for one could levy the same argument against apparently acceptable concepts such as “the public interest,” and “the common good”. But one problem with utilitarianism occurs when utility comes into conflict with justice, whatever canon of justice one adopts. We have no reason to believe that utility and the just two need coincide all the time.³⁴ For example, an individual's share in the common good cannot be equated with his “just” share in any simple manner; for there is no “pre-established harmony” to guarantee that all of the particular individual's legitimate claims will be recognized.³⁵ It is true that Jeremy Bentham added to utilitarianism the distributive formula: “everybody to count for one, and nobody for more than one.” But to the extent that this implies an arithmetic equality, it does no real service to utilitarianism, since it would appear to rule out the issue of deservation—whatever criterion one uses to measure such “deservingness”. Clearly, for utilitarianism to be just, it should be modified into what Nicholas Rescher has termed, “*ceteris paribus* utilitarianism”.³⁶ That is, it should be regarded as no more than a point of *prima facie* merit, to be adopted in the absence of further considerations of equity, legitimate claims and deservation.

The lasting validity of the principle of utility is not to be found in any specific answers that it furnishes to decision-makers as regards the interests of a society. It is rather its ability to set the platform for a debate, in secular terms, as to the constitution of the public interest in any given society. It is with this perspective that we refer to utility as an argument for the juridical quest for legitimacy in Africa. In talking about utility, we are referring to the basic notion that policies may be judged desirable on the strength of their longterm usefulness to the public as a whole.

On utilitarian grounds—that is, from the point of view of the long-term interest of Africa, the juridical quest for legitimacy would seem to be desirable to African societies. People in power tend to be rather oblivious about the need for legitimacy. In part, this is because some of them like to think they will be in that position all their lives. But the wheel of political fortune turns all the time. Where control by popular vote remains a reality, a majority may be shortlived. Where no such control exists, there is always the possibility of a forcible overthrow of a particular political leadership. In either case, those who, only yesterday, may have been perpetrating illegal acts themselves become the object of such acts today. When this happens, they find that they do not have even a moral basis for complaining. All they can do is to endure their fate quietly, hoping that one day it will be their turn to wield the axe again. Thus, it would appear that everyone, whether or not in momentary political ascendancy, whether or not he commands the keys to the armoury in a military camp, has a long range interest in nurturing an atmosphere of legitimacy.

In violent revolutionary times, it is understandable that the actors on the political scene should want to push this consideration to the background. The preoccupation in such moments is the seizure and maintenance of political power, since without it, it is self-evident that neither the programme of the revolutionaries, nor anything else they seek to do, can be done. This disposition of revolutionaries (military or otherwise), is as true in the developing countries as it is with various historical periods in the older European and American nations. But there must be something wrong with a society that seeks to enthrone caprice as a grand permanent part of its political structure.

Predictability is also desirable in any human society, African or otherwise. All persons, under normal circumstances, plan their affairs on the basis of what they can and cannot do. The constraints on them may be physical, psychological, or financial. But some are also legal, for the various laws in the community defined the range of behaviour permissible to them. If, therefore, a state official were to act without the warning of some prior legal provision made public, the result would be to unduly unsettle everybody's plans and expectations.

A precise definition of the roles of public officials is necessary. In the absence of role definitions, decisions either are not taken, or they are taken by persons without authority to do so, or else by the top leadership of the state apparatus who know nothing about the situation. In every case, the result is inertia, incoherence, or probable arbitrariness.

It is not enough to assure predictability. Control devices to curb bureaucratic excesses are also necessary. They are necessary on at least two grounds. First, in the absence of such controls, bureaucrats would most probably use their powers arbitrarily to sabotage the programme of the administration. Second, such powers may be used either in outright violation of the rights of citizens, or in more indirect acts of bureaucratic insensitivity. This would appear to be undesirable because "the good life" for the attainment of which those powers are granted, encompasses something more than freedom from hunger. Economic development is, after all, only a means towards the good life.

The impression has been created, even among many intellectually sophisticated socialists, that economics is the sole concern of socialism—especially socialism of the Marxist variety. In part, this derives from a polemical emphasis on economics which,

according to Engels, became necessary at some point in the history of Marxism in order to distinguish it effectively from other theories of socialism considered as spurious.³⁷ In part, too, it derives from the fact that the first socialist country in the world, the U.S.S.R., felt it necessary during the Stalinist period to carry out its industrialization and collectivization at such social cost. That the polemics against other socialist theories resulted in an erroneous emphasis on the economic aspect of life against the cultural and other aspects was later admitted by Engels. He consequently argued that the proper Marxian formulation was simply that the economic is not the only, but the ultimately, determining factor.³⁸

Attempts have been made to justify what happened in the U.S.S.R. under Stalin.³⁹ But the fact that the People's Republic of China, for example, did not have to carry out a similar programme at the same cost suggests that the Russian experience was not necessarily the result of socialist theory and the socialist concept of man. That experience might well have been the result of certain cultural traits and practical political exigencies. As already suggested, a state that seeks to carry out an ambitious programme within a short-time horizon is bound to be more authoritarian than its counterpart devoted to some other purposes. Even so, it is necessary that economic development does not become the be-all and end-all of life in Africa, however genuine the desire of state officials for economic development may be.

Interestingly enough, the desire of state officials for economic development is, in many cases, not even genuine. The invocation of development becomes a marvellous excuse for amassing personal wealth. In Africa, many state officials, who start their careers with the best of intentions, may very soon become a "bureaucratic bourgeoisie," more interested in the development of self than in the free development of all.

All such manifestations of administrative pathology hamper the juridical quest for legitimacy, and must be checked by various types of control devices: institutions which, in the lawyer's language, help to curb administrative malfeasance, misfeasance, and nonfeasance.

Notes

1. Herbert Spencer, *The Man Versus The State*, Cadwell, Idaho, Coxton Printers, 1965.
2. A.V. Dicey, *the Law of The Constitution* London, Macmillan, 1950.
3. F.A. Hayek, *The Road to Serfdom*, Esp. chapter 4., Chicago, University Press, 1965.
4. F.A. Hayek, *The Constitution of Liberty*, London, Routledge & K. Paul, 1960, chapter 15.
5. A.V. Dicey, *op. cit.* (8th ed.), p. 198.
6. Alfred Frisch, "L'Avenir des Technocrates," Bulletin, Sede, Futuribles, 1964.
7. F.A. Hayek, *The Road to Serfdom*, *supra* p. 75.
8. *Ibid.*, p. 78.
9. *Ibid.*, p. 74.
10. *Ibid.*, p. 76.
11. *Ibid.*, p. 79.

12. Jacques Maritain, *The Rights of Man and Natural Law*, London, G. Bles, The Centenary Press, 1943, Emil Brunner, *Justice and Social Order*, New York, Harper Brothers, 1945, p. 39., Carl J. Friedrich, *The Philosophy of Law in Historical Perspective*, Chicago, Chicago University Press, 1963, pp. 27-34.
13. For a general criticism of the Natural Law thesis, Felix E. Oppenheim, "The Natural Law Thesis: Affirmation or Denial?" *American Political Science Review*, Vol. LI No. 1. (March 1957).
14. Henry D. Aiken (ed.), *Hume's Moral and Political Philosophy*, Darien, Conn. Hafner, 1968, sec. v.
15. Roscoe Pound, "Interests of Personality", 28 *Harvard Law Review* 343 (1915),
16. H.L. A Hart, *The Concept of Law*, Oxford, Clarendon Press, 1961, pp. 190-193.
17. Noel T. Dowling and Gerald Gunther, *Constitutional Law: Cases and Comments*, 1965, p. 862.
18. Charles L. Black, *Perspectives in Constitutional Law*, Englewood Cliffs N.J. Prentice Hall, 1963, p. 80. Also, *Alloeyer v Louisiana*, 165 U.S. 578 (1897), in which the U.S. Supreme Court for the first time invalidated a state statute on grounds of substantive due process.
19. For rebuttals of such notions of property, see Rousseau's "Discourse on the Origins of Inequality". Also, C.E. Ayres *The Theory of Economic Progress*, New York, Schocken Books, 1962, pp. 167-168; and F. Engels, *The Origin of the Family, Private Property and the State*, *passim*, 1972, London, Laurence & Wishart
20. *Santa Clara Country v Southern Pacific R.T.*, 118 U.S. 394 (1886) where the Supreme Court held, without discussion, that corporations were "persons" within the meaning of the 14th Amendment, and therefore entitled to the "due process" provided by that amendment.
See opinions of Justices Black and Douglas in *Connecticut General Life Insurance Co. v Johnson*, 303 U.S. 11 (1938), for disagreement with the interpretation given in the 1886 case.
21. The Warren Court of the U.S., in the fifties and sixties, got itself a great reputation for its outspoken pursuit of justice for the underprivileged through its pressure on American society for racial equality, basing itself on the 14th Amendment. See *Brown v Board of Education*, 347 U.S. (1954),
22. *Morehead v New York* (1936), 298 U.S. 587.
23. *U.S. v Butler* (1936), 297 U.S. 1; *Railway Retirement Board v Alton* (1935) 295 U.S. 330; *Carter v Coal Co.* (1936), 298 U.S. 238.
24. On the "due process" argument in relation to the states, see the majority opinion in *West Coast Hotel v Parrish*, discussing and overruling one such precedent, *Adkins v Children's Hospital*, 261 U.S. 525 (1928); Charles Black, *op. cit.* p. 32 mentions only one such precedent on the federal level: *Adair v U. S.* 161 (1908). On the "state rights" argument, see Black p. 31. By July 1937, of course, the trend had changed. The Supreme Court approved a "due process" case: *West Coast Hotel v Parrish* 300 U.S. 379 (1937); and a "states' rights" case: *NLRB v Jones & Laughlin* 301 U.S. 1 (1937).
25. D.L. Grove. "The 'Sentinels' of Liberty: The Nigerian Judiciary and Fundamental Rights", 7 *Journal of African Law* 152 (1963). Also, *In Re Akoto, Ghana Civ. App.*

- 42/61. Here, of course, the court ruled that the articles in question were not rights, but mere declarations of moral commitment to them.
26. Adda Bozeman, *The Future of Law in a Multicultural World*, Princeton, Princeton University Press, 1971, pp. 85-120.
 27. See T.M. Ocran, "Law Or Culture?", A review of Bozeman's book in *African Social Research*, Vol. 13, 1972.
 28. The Declaration of New Delhi (1959), the Law of Lagos (1961), the Resolution of Rio de Janeiro (1962), and, in particular, the Declaration of Bangkok (1965).
 29. International Commission of Jurists, *The Rule of Law in a Free Society: A Report of the International Congress of Jurists 3* (1959) pp. 2-4, 5-8, 44-46.
 30. Seymour M. Lipset, *Political Man*, chap. 2 "Economic Development and Democracy" New York, Doubleday Anchor, Books 1963, Phillips Curtwright, "National Political Development: The Measurement and Social Correlates", in Polsby, Dentler, and Smith, (ed.). *Politics and Social Life*, Boston, Houghton Mafflin, 1963, p. 569.
 31. A.P. d'Entreves, *The Notion of the State*, Oxford, Clarendon Press, 1965 pp. 141-149.
 32. Max Weber, *The Theory of Social and Economic Organization*, (ed.), New York, Free Press of Glencoe, 1964, p. 33.
 33. Such procedural guarantees may include: publication of laws to their addressees; notice to the alleged offender of the specific charges brought against him; opportunity for him to be heard by a duly-constituted tribunal (not necessarily a court) before being punished; and the right to cross-examine his prosecutors and their witnesses.
 34. John Stuart Mill, "Utilitarianism", printed in *Utilitarianism, Liberty and Representative Government*, Everyman's Library, No. 482, 1970.
 35. Nicholas Rescher, *Distributive Justice*, Indianapolis, Bobbs, Merrill, 1966, p. 41.
 36. *Ibid.*, p. 166
 37. Friedrich Engels, "Letter to Conrad Schmidt", August 5, 1890; "Letter to Joseph Block", Sept. 21-2, 1890, in Lewis S. Feuer, Marx and Engels, *Basic Writings on Politics and Philosophy Inc.*, Garden City, New York, Doubleday 1959, pp. 395-400.
 38. *Ibid.*
 39. O. Leikin, "The Kulak Reaction", quoted in Zigurds Zile, *Ideas and Forces in Soviet Legal History*, Madison, College Printers and Publisher's, 1967, pp. 154-9.