5

NOMOS: THE LAW OF LIBERTY

> As for the constitution of Crete which is described by Ephorus, it might suffice to tell its most important provisions. The lawgiver, he says, seems to take it for granted that liberty is a state's highest good and for this reason alone makes property belong specifically to those who acquire it, whereas in condition of slavery everything belongs to the rulers and not to the ruled.
>
> Strabo*

THE FUNCTIONS OF THE JUDGE

We must now attempt to describe more fully the distinctive character of those rules of just conduct which emerge from the efforts of judges to decide disputes and which have long provided the model which legislators have tried to emulate. It has already been pointed out that the ideal of individual liberty seems to have flourished chiefly among people where, at least for long periods, judge-made law predominated. This we have ascribed to the circumstance that judge-made law will of necessity possess certain attributes which the decrees of the legislator need not possess and are likely to possess only if the legislator takes judge-made law for his model. In this chapter we will examine the distinct attributes of what political theorists have long regarded simply as *the law*, the lawyer's law, or the *nomos* of the ancient Greeks and the *ius* of the Romans[1] (and what in other European

languages is distinguished as *droit*, *Recht*, or *diritto* from the *loi*, *Gesetz*,[2] or *legge*), and contrast with it in the next chapter those rules of organization of government with which legislatures have been chiefly concerned.

The distinct character of the rules which the judge will have to apply, and must endeavour to articulate and improve, is best understood if we remember that he is called in to correct disturbances of an order that has not been made by anyone and does not rest on the individuals having been told what they must do. In most instances no authority will even have known at the time the disputed action took place what the individuals did or why they did it. The judge is in this sense an institution of a spontaneous order. He will always find such an order in existence as an attribute of an ongoing process in which the individuals are able successfully to pursue their plans because they can form expectations about the actions of their fellows which have a good chance of being met.

To appreciate the significance of this it is necessary to free ourselves wholly from the erroneous conception that there can be first a society which then gives itself laws.[3] This erroneous conception is basic to the constructivist rationalism which from Descartes and Hobbes through Rousseau and Bentham down to contemporary legal positivism has blinded students to the true relationship between law and government. It is only as a result of individuals observing certain common rules that a group of men can live together in those orderly relations which we call a society. It would therefore probably be nearer the truth if we inverted the plausible and widely held idea that law derives from authority and rather thought of all authority as deriving from law—not in the sense that the law appoints authority, but in the sense that authority commands obedience because (and so long as) it enforces a law presumed to exist independently of it and resting on a diffused opinion of what is right. Not all law can therefore be the product of legislation; but power to legislate presupposes the recognition of some common rules; and such rules which underlie the power to legislate may also limit that power. No group is likely to agree on articulated rules unless its members already hold opinions that coincide in some degree. Such coincidence of opinion will thus have to precede explicit agreement on articulated rules of just conduct, although not agreement on particular ends of action. Persons differing in their general values may occasionally agree on, and effectively collaborate for, the achievement of particular concrete purposes. But such agreement on particular ends will never suffice for forming that lasting order which we call a society.

The character of grown law stands out most clearly if we look at the condition among groups of men possessing common conceptions of justice

but no common government. Groups held together by common rules, but without a deliberately created organization for the enforcement of these rules, have certainly often existed. Such a state of affairs may never have prevailed in what we would recognize as a territorial state, but it undoubtedly often existed among such groups as merchants or persons connected by the rules of chivalry or hospitality.

Whether we ought to call 'law' the kind of rules that in these groups may be effectively enforced by opinion and by the exclusion from the group of those who break them, is a matter of terminology and therefore of convenience.[4] For our present purposes we are interested in any rules which are honoured in action and not only in rules enforced by an organization created for that purpose. It is the factual observance of the rules which is the condition for the formation of an order of actions; whether they need to be enforced or how they are enforced is of secondary interest. Factual observance of some rules no doubt preceded any deliberate enforcement. The reasons why the rules arose must therefore not be confused with the reasons which made it necessary to enforce them. Those who decided to do so may never have fully comprehended what function the rules served. But if society is to persist it will have to develop some methods of effectively teaching and often also (although this may be the same thing) of enforcing them. Yet whether they need to be enforced depends also on circumstances other than the consequences of their non-observance. So long as we are interested in the effect of the observance of the rules, it is irrelevant whether they are obeyed by the individuals because they describe the only way the individuals know of achieving certain ends, or whether some sort of pressure, or a fear of sanctions, prevents them from acting differently. The mere feeling that some action would be so outrageous that one's fellows would not tolerate it is in this context quite as significant as the enforcement by that regular procedure which we find in advanced legal systems. What is important for us at this stage is that it will always be in an effort to secure and improve a system of rules which are already observed that what we know as the apparatus of law is developed.

Such law may be gradually articulated by the endeavours of arbitrators or similar persons called in to settle disputes but who have no power of command over the actions on which they have to adjudicate. The questions which they will have to decide will not be whether the parties have obeyed anybody's will, but whether their actions have conformed to expectations which the other parties had reasonably formed because they corresponded to the practices on which the everyday conduct of the members of the group was based. The significance of customs here is that they give rise to

expectations that guide people's actions, and what will be regarded as binding will therefore be those practices that everybody counts on being observed and which have thereby become the condition for the success of most activities.[5] The fulfilment of expectations which these customs secure will not be, and will not appear to be, the result of any human will, or dependent on anyone's wishes or on the particular identities of the persons involved. If a need arises to call in an impartial judge, it will be because such a person will be expected to decide the case as one of a kind which might occur anywhere and at any time, and therefore in a manner which will satisfy the expectations of any person placed in a similar position among persons not known to him individually.

HOW THE TASK OF THE JUDGE DIFFERS FROM THAT OF THE HEAD OF AN ORGANIZATION

Even where the judge has to find rules which have never been stated and perhaps never been acted upon before, his task will thus be wholly different from that of the leader of an organization who has to decide what action ought to be taken in order to achieve particular results. It would probably never have occurred to one used to organizing men for particular actions to give his commands the form of rules equally applicable to all members of the group irrespective of their allotted tasks, if he had not already had before him the example of the judge. It therefore seems unlikely that any authority with power of command would ever have developed law in the sense in which the judges developed it, that is as rules applicable to anyone who finds himself in a position definable in abstract terms. That human intention should concern itself with laying down rules for an unknown number of future instances presupposes a feat of conscious abstraction of which primitive people are hardly capable. Abstract rules independent of any particular result aimed at were something which had to be found to prevail, not something the mind could deliberately create. If we are today so familiar with the conception of law in the sense of abstract rules that it appears obvious to us that we must also be able deliberately to make it, this is the effect of the efforts of countless generations of judges to express in words what people had learnt to observe in action. In their efforts they had to create the very language in which such rules could be expressed.

The distinctive attitude of the judge thus arises from the circumstance that he is not concerned with what any authority wants done in a particular instance, but with what private persons have 'legitimate' reasons to expect, where 'legitimate' refers to the kind of expectations on which generally his

actions in that society have been based. The aim of the rules must be to facilitate that matching or tallying of the expectations on which the plans of the individuals depend for their success.

A ruler sending a judge to preserve the peace will normally not do so for the purpose of preserving an order he has created, or to see whether his commands have been carried out, but to restore an order the character of which he may not even know. Unlike a supervisor or inspector, a judge has not to see whether commands have been carried out or whether everybody has performed his assigned duties. Although he may be appointed by a higher authority, his duty will not be to enforce the will of that authority but to settle disputes that might upset an existing order; he will be concerned with particular events about which the authority knows nothing and with the actions of men who on their part had no knowledge of any particular commands of authority as to what they ought to do.

Thus, 'in its beginnings law (in the lawyer's sense) had for its end, and its sole end, to keep the peace'.[6] The rules which the judge enforces are of interest to the ruler who has sent him only so far as they preserve peace and assure that the flow of efforts of the people will continue undisturbed. They have nothing to do with what the individuals have been told to do by anybody but merely with their refraining from certain kinds of action which no one is allowed to take. They refer to certain presuppositions of an ongoing order which no one has made but which nevertheless is seen to exist.

THE AIM OF JURISDICTION IS THE MAINTENANCE OF AN ONGOING ORDER OF ACTIONS

The contention that the rules which the judge finds and applies serve the maintenance of an existing order of actions implies that it is possible to distinguish between those rules and the resulting order. That they are distinct follows from the fact that only some rules of individual conduct will produce an overall order while others would make such an order impossible. What is required if the separate actions of the individuals are to result in an overall order is that they not only do not unnecessarily interfere with one another, but also that in those respects in which the success of the action of the individuals depends on some matching action by others, there will be at least a good chance that this correspondence will actually occur. But all rules can achieve in this respect is to make it easier for people to find together and to form that match; abstract rules cannot actually secure that this will always happen.

The reason why such rules will tend to develop is that the groups which happen to have adopted rules conducive to a more effective order of actions

will tend to prevail over other groups with a less effective order.[7] The rules that will spread will be those governing the practice or customs existing in different groups which make some groups stronger than others. And certain rules will predominate by more successfully guiding expectations in relation to other persons who act independently. Indeed, the superiority of certain rules will become evident largely in the fact that they will create an effective order not only within a closed group but also between people who meet accidentally and do not know each other personally. They will thus, unlike commands, create an order even among people who do not pursue a common purpose. The observance of the rules by all will be important for each because the achievement of his purposes depends on it, but the respective purposes of different persons may be wholly different.

So long as the individuals act in accordance with the rules it is not necessary that they be consciously aware of the rules. It is enough that they *know how* to act in accordance with the rules without *knowing that* the rules are such and such in articulated terms. But their 'know how' will provide sure guidance only in frequently occurring situations, while in more unusual situations this intuitive certainty about what expectations are legitimate will be absent. It will be in the latter situations that there will be the necessity to appeal to men who are supposed to know more about the established rules if peace is to be preserved and quarrels to be prevented. Such a person called in to adjudicate will often find it necessary to articulate and thereby make more precise those rules about which there exist differences of opinion, and sometimes even to supply new rules where no generally recognized rules exist.

The purpose of thus articulating rules in words will in the first instance be to obtain consent to their application in a particular case. In this it will often be impossible to distinguish between the mere articulation of rules which have so far existed only as practices and the statement of rules which have never been acted upon before but which, once stated, will be accepted as reasonable by most. But in neither case will the judge be free to pronounce any rule he likes. The rules which he pronounces will have to fill a definite gap in the body of already recognized rules in a manner that will serve to maintain and improve that order of actions which the already existing rules make possible.[8]

For the understanding of the process by which such a system of rules is developed by jurisdiction it will be most instructive if we consider the situations in which a judge has not merely to apply and articulate already firmly established practices, but where there exists genuine doubt about what is required by established custom, and where in consequence the litigants may differ in good faith. In such cases where there exists a real gap

in the recognized law a new rule will be likely to establish itself only if somebody is charged with the task of finding a rule which after being stated is recognized as appropriate.

Thus, although rules of just conduct, like the order of actions they make possible, will in the first instance be the product of spontaneous growth, their gradual perfection will require the deliberate efforts of judges (or others learned in the law) who will improve the existing system by laying down new rules. Indeed, law as we know it could never have fully developed without such efforts of judges, or even the occasional intervention of a legislator to extricate it from the dead ends into which the gradual evolution may lead it, or to deal with altogether new problems. Yet it remains still true that the system of rules as a whole does not owe its structure to the design of either judges or legislators. It is the outcome of a process of evolution in the course of which spontaneous growth of customs and deliberate improvements of the particulars of an existing system have constantly interacted. Each of these two factors has had to operate, within the conditions the other has contributed, to assist in the formation of a factual order of actions, the particular content of which will always depend also on circumstances other than the rules of law. No system of law has ever been designed as a whole, and even the various attempts at codification could do no more than systematize an existing body of law and in doing so supplement it or eliminate inconsistencies.

The judge will thus often have to solve a puzzle to which there may indeed be more than one solution, but in most instances it will be difficult enough to find even one solution which fits all the conditions it must satisfy. The judge's task will thus be an intellectual task, not one in which his emotions or personal preferences, his sympathy with the plight of one of the contestants or his opinion of the importance of the particular objective, may affect his decision. There will be given to him a definite aim, although not a particular concrete end, namely the aim of improving a given order of actions by laying down a rule that would prevent the recurrence of such conflicts as have occurred. In endeavouring to perform this task he will always have to move in a given cosmos of rules which he must accept and will have to fit into this cosmos a piece required by the aim which the system as a whole serves.

'ACTIONS TOWARDS OTHERS' AND THE PROTECTION OF EXPECTATIONS

Since for a case to come before a judge a dispute must have arisen, and since judges are not normally concerned with relations of command and

obedience, only such actions of individuals as affect other persons, or, as they are traditionally described, actions towards other persons (*operationes quae sunt ad alterum*[9]) will give rise to the formulation of legal rules. We shall presently have to examine the difficult question of how such 'actions towards others' are to be defined. At the moment we want merely to point out that actions which are clearly not of this kind, such as what a person does alone within his four walls, or even the voluntary collaboration of several persons, in a manner which clearly cannot affect or harm others, can never become the subject of rules of conduct that will concern a judge. This is important because it answers a problem that has often worried students of these matters, namely that even rules which are perfectly general and abstract might still be serious and unnecessary restrictions of individual liberty.[10] Indeed, such general rules as those requiring religious conformity may well be felt to be the most severe infringement of personal liberty. Yet the fact is simply that such rules are not rules limiting conduct towards others or, as we shall define these, rules delimiting a protected domain of individuals. At least where it is not believed that the whole group may be punished by a supernatural power for the sins of individuals, there can arise no such rules from the limitation of conduct towards others, and therefore from the settlements of disputes.[11]

But what are 'actions towards others', and to what extent can conflict between them be prevented by rules of conduct? The law evidently cannot prohibit all actions which may harm others, not only because no one can foresee all the effects of any action, but also because most changes of plans which new circumstances suggest to some are likely to be to the disadvantage of some others. The protection against disappointment of expectations which the law can give in an ever changing society will always be only the protection of some expectations but not of all. And some harm knowingly caused to others is even essential for the preservation of a spontaneous order: the law does not prohibit the setting up of a new business even if this is done in the expectation that it will lead to the failure of another. The task of rules of just conduct can thus only be to tell people which expectations they can count on and which not.

The development of such rules will evidently involve a continuous interaction between the rules of law and expectations: while new rules will be laid down to protect existing expectations, every new rule will also tend to create new expectation.[12] As some of the prevailing expectations will always conflict with each other, the judge will constantly have to decide which is to be treated as legitimate and in doing so will provide the basis for new expectations. This will in some measure always be an experimental process,

since the judge (and the same applies to the law-maker) will never be able to foresee all the consequences of the rule he lays down, and will often fail in his endeavour to reduce the sources of conflicts of expectations. Any new rule intended to settle one conflict may well prove to give rise to new conflicts at another point, because the establishment of a new rule always acts on an order of actions that the law alone does not wholly determine. Yet it is only by their effects on that order of actions, effects which will be discovered only by trial and error, that the adequacy or inadequacy of the rules can be judged.

IN A DYNAMIC ORDER OF ACTIONS ONLY SOME EXPECTATIONS CAN BE PROTECTED

In the course of this process it will be found not only that not all expectations can be protected by general rules, but even that the chance of as many expectations as possible being fulfilled will be most enhanced if some expectations are systematically disappointed. This means also that it is not possible or desirable to prevent all actions which will harm others but only certain kinds of actions. It is regarded as fully legitimate to switch patronage and thereby disappoint the confident expectations of those with whom one used to deal. The harm that one does to another which the law aims to prevent is thus not all harm but only the disappointment of such expectations as the law designates as legitimate. Only in this way can 'do not harm others' be made a rule with meaningful content for a group of men who are allowed to pursue their own aims on the basis of their own knowledge. What can be secured to each is not that no other person will interfere with the pursuit of his aims, but only that he will not be interfered with in the use of certain means.

In an external environment which constantly changes and in which consequently some individuals will always be discovering new facts, and where we want them to make use of this new knowledge, it is clearly impossible to protect all expectations. It would decrease rather than increase certainty if the individuals were prevented from adjusting their plans of action to new facts whenever they became known to them. In fact, many of our expectations can be fulfilled only because others constantly alter their plans in the light of new knowledge. If all our expectations concerning the actions of particular other persons were protected, all those adjustments to which we owe it that in constantly changing circumstances somebody can provide for us what we expect would be prevented. Which expectations ought to be protected must therefore depend on how we can maximize the fulfilment of expectations as a whole.

Such maximization would certainly not be achieved by requiring the individuals to go on doing what they have been doing before. In a world in which some of the facts are unavoidably uncertain, we can achieve some degree of stability and therefore predictability of the overall result of the activities of all only if we allow each to adapt himself to what he learns in a manner which must be unforeseeable to others. It will be through such constant change in the particulars that an abstract overall order will be maintained in which we are able from what we see to draw fairly reliable inferences as to what to expect.

We have merely for a moment to consider the consequences that would follow if each person were required to continue to do what the others had learned to expect from him in order to see that this would rapidly lead to a breakdown of the whole order. If the individuals endeavoured to obey such instructions, some would at once find it physically impossible to do so because some of the circumstances had changed. But the effects of their failing to meet expectations would in turn place others in a similar position, and these effects would extend to an ever increasing circle of persons. (This, incidentally, is one of the reasons why a completely planned system is apt to break down.) Maintaining the overall flow of results in a complex system of production requires great elasticity of the actions of the elements of that system, and it will only be through unforeseeable changes in the particulars that a high degree of predictability of the overall results can be achieved.

We shall later (in volume 2, chapter 10) have to consider more fully the apparent paradox that in the market it is through the systematic disappointment of some expectations that on the whole expectations are as effectively met as they are. This is the manner in which the principle of 'negative feedback' operates. At the moment it should merely be added, to prevent a possible misunderstanding, that the fact that the overall order shows greater regularity than the individual facts has nothing to do with those probabilities which may result from the random movement of elements with which statistics deals, for the individual actions are the product of a systematic mutual adjustment.

Our immediate concern is to bring out that this order of actions based on certain expectations will to some extent always have existed as a fact before people would endeavour to ensure that their expectations would be fulfilled. The existing order of actions will in the first instance simply be a fact which men count on and will become a value which they are anxious to preserve only as they discover how dependent they are on it for the successful pursuit of their aims. We prefer to call it a value rather than an end because it will be a condition which all will want to preserve although no one has aimed

at deliberately producing it. Indeed, although all will be aware that their chances depend on the preservation of an order, none would probably be able to describe the character of that order. This will be so because the order cannot be defined in terms of any particular observable facts but only in terms of a system of abstract relationships that will be preserved through the changes of the particulars. It will be, as we have said before, not something visible or otherwise perceptible but something which can only be mentally reconstructed.

Yet, although the order may appear to consist simply in the obedience to rules, and it is true that the obedience to rules is needed to secure order, we have also seen that not all rules will secure order. Whether the established rules will lead to the formation of an overall order in any given set of circumstances will rather depend on their particular content. The obedience to unsuitable rules may well become the cause of disorder, and there are some conceivable rules of individual conduct which clearly would make impossible the integration of individual actions into an overall order.

The 'values' which the rules of just conduct serve will thus not be particulars but abstract features of an existing factual order which men will wish to enhance because they have found them to be conditions of the effective pursuit of a multiplicity of various, divergent, and unpredictable purposes. The rules aim at securing certain abstract characteristics of the overall order of our society that we would like it to possess to a higher degree. We endeavour to make it prevail by improving the rules which we first find underlying current actions. These rules, in other words, are first the property of a factual state of affairs which no one has deliberately created and which therefore has had no purpose, but which, after we begin to understand its importance for the successful pursuit of all our actions, we may try to improve.

While it is, of course, true that norms cannot be derived from premises that contain only facts, this does not mean that the acceptance of some norms aiming at certain kinds of results may not in certain factual circumstances oblige us to accept other norms, simply because in these circumstances the accepted norms will serve the ends which are their justification only if certain other norms are also obeyed. Thus, if we accept a given system of norms without question and discover that in a certain factual situation it does not achieve the result it aims at without some complementary rules, these complementary rules will be required by those already established, although they are not logically entailed by them. And since the existence of such other rules is usually tacitly presumed, it is at least not wholly false, though not quite exact, to contend that the appearance of some new facts may make certain new norms necessary.

An important consequence of this relation between the system of rules of conduct and the factual order of actions is that there can never be a science of law that is purely a science of norms and takes no account of the factual order at which it aims. Whether a new norm fits into an existing system of norms will not be a problem solely of logic, but will usually be a problem of whether, in the existing factual circumstances, the new norm will lead to an order of compatible actions. This follows from the fact that abstract rules of conduct determine particular actions only together with particular circumstances. The test of whether a new norm fits into the existing system may thus be a factual one; and a new norm that logically may seem to be wholly consistent with the already recognized ones may yet prove to be in conflict with them if in some set of circumstances it allows actions which will clash with others permitted by the existing norms. This is the reason why the Cartesian or 'geometric' treatment of law as a pure 'science of norms', where all rules of law are deduced from explicit premises, is so misleading. We shall see that it must fail even in its immediate aim of making judicial decisions more predictable. Norms cannot be judged according to whether they fit with other norms in isolation from facts, because whether the actions which they permit are mutually compatible or not depends on facts.

This is the basic insight which through the history of jurisprudence has constantly appeared in the form of a reference to the 'nature of things' (the *natura rerum* or *Natur der Sache*),[13] which we find in the often quoted statement of O. W. Holmes, that 'the life of law has not been logic, it has been experience',[14] or in such various expressions as 'the exigencies of social life',[15] the 'compatibility'[16] or the 'reconcilability'[17] of the actions to which the law refers.

THE MAXIMAL COINCIDENCE OF EXPECTATIONS IS ACHIEVED BY THE DELIMITATION OF PROTECTED DOMAINS

The main reason why it is so difficult to see that rules of conduct serve to enhance the certainty of expectations is that they do so not by determining a particular concrete state of things, but by determining only an abstract order which enables its members to derive from the particulars known to them expectations that have a good chance of being correct. This is all that can be achieved in a world where some of the facts change in an unpredictable manner and where order is achieved by the individuals adjusting themselves to new facts whenever they become aware of them. What can remain constant in such an overall order which continually adjusts itself to external

changes, and provides the basis of predictions, can only be a system of abstract relationships and not its particular elements. This means that every change must disappoint some expectations, but that this very change which disappoints some expectations creates a situation in which again the chance to form correct expectations is as great as possible.

Such a condition can evidently be achieved only by protecting some and not all expectations, and the central problem is which expectations must be assured in order to maximize the possibility of expectations in general being fulfilled. This implies a distinction between such 'legitimate' expectations which the law must protect and others which it must allow to be disappointed. And the only method yet discovered of defining a range of expectations which will be thus protected, and thereby reducing the mutual interference of people's actions with each other's intentions, is to demarcate for every individual a range of permitted actions by designating (or rather making recognizable by the application of rules to the concrete facts) ranges of objects over which only particular individuals are allowed to dispose and from the control of which all others are excluded. The range of actions in which each will be secured against the interference of others can be determined by rules equally applicable to all only if these rules make it possible to ascertain which particular objects each may command for his purposes. In other words, rules are required which make it possible at each moment to ascertain the boundary of the protected domain of each and thus to distinguish between the meum and the tuum.

The understanding that 'good fences make good neighbours',[18] that is, that men can use their own knowledge in the pursuit of their own ends without colliding with each other only if clear boundaries can be drawn between their respective domains of free action, is the basis on which all known civilization has grown. Property, in the wide sense in which it is used to include not only material things, but (as John Locke defined it) the 'life, liberty and estates' of every individual, is the only solution men have yet discovered to the problem of reconciling individual freedom with the absence of conflict. Law, liberty, and property are an inseparable trinity. There can be no law in the sense of universal rules of conduct which does not determine boundaries of the domains of freedom by laying down rules that enable each to ascertain where he is free to act.

This was long regarded as self-evident and needing no proof. It was, as the quotation placed at the head of this chapter shows, as clearly understood by the ancient Greeks as by all founders of liberal political thought, from Milton[19] and Hobbes[20] through Montesquieu[21] to Bentham[22] and re-emphasized more recently by H. S. Maine[23] and Lord Acton.[24] It has

been challenged only in comparatively recent times by the constructivist approach of socialism and under the influence of the erroneous idea that property had at some late stage been 'invented' and that before that there had existed an earlier state of primitive communism. This myth has been completely refuted by anthropological research.[25] There can be no question now that the recognition of property preceded the rise of even the most primitive cultures, and that certainly all that we call civilization has grown up on the basis of that spontaneous order of actions which is made possible by the delimitation of protected domains of individuals or groups. Although the socialist thinking of our time has succeeded in bringing this insight under the suspicion of being ideologically inspired, it is as well demonstrated a scientific truth as any we have attained in this field.

Before we proceed further it is necessary to guard ourselves against a common misunderstanding about the relations of the rules of law and the property of particular individuals. The classical formula that the aim of rules of just conduct is to assign to each his due (*suum cuique tribuere*) is often interpreted to mean that the law by itself assigns to particular individuals particular things. It does nothing of the kind, of course. It merely provides rules by which it is possible to ascertain from particular facts to whom particular things belong. The concern of the law is not who the particular persons shall be to whom particular things belong, but merely to make it possible to ascertain boundaries which have been determined by the actions of individuals within the limits drawn by those rules, but determined in their particular contents by many other circumstances. Nor must the classical formula be interpreted, as it sometimes is, as referring to what is called 'distributive justice', or as aiming at a state or a distribution of things which, apart from the question of how it has been brought about, can be described as just or unjust. The aim of the rules of law is merely to prevent as much as possible, by drawing boundaries, the actions of different individuals from interfering with each other; they cannot alone determine, and also therefore cannot be concerned with, what the result for different individuals will be.

It is only through thus defining the protected sphere of each that the law determines what are those 'actions towards others' which it regulates, and that its general prohibition of actions 'harming others' is given a determinable meaning. The maximal certainty of expectations which can be achieved in a society in which individuals are allowed to use their knowledge of constantly changing circumstances for their equally changing purposes is secured by rules which tell everyone which of these circumstances must not be altered by others and which he himself must not alter.

Precisely where those boundaries are most effectively drawn is a very difficult question to which we certainly have not yet found all the final answers. The conception of property certainly did not fall ready made from heaven. Nor have we yet succeeded everywhere in so delimiting the individual domain as to constrain the owner in his decisions to take account of all those effects (and only of those effects) we could wish. In our efforts to improve the principles of demarcation we cannot but build on an established system of rules which serves as the basis of the going order maintained by the institution of property. Because the drawing of boundaries serves a function which we are beginning to understand, it is meaningful to ask whether in particular instances the boundary has been drawn in the right place, or whether in view of changed conditions an established rule is still adequate. Where the boundary ought to be drawn, however, will usually not be a decision which can be made arbitrarily. If new problems arise as a result of changes in circumstances and raise, for example, problems of demarcation, where in the past the question as to who had a certain right was irrelevant, and the right in consequence was neither claimed nor assigned, the task will be to find a solution which serves the same general aim as the other rules which we take for granted. The rationale of the existing system may for instance clearly require that electric power be included in the concept of property, though established rules may confine it to tangible objects. Sometimes, as in the case of electro-magnetic waves, no sort of spatial boundaries will provide a working solution and altogether new conceptions of how to allocate control over such things may have to be found. Only where, as in the case of moveable objects (the 'chattels' of the law), it was approximately true that the effects of what the owner did with his property in general affected only him and nobody else, could ownership include the right to use or abuse the object in any manner he liked. But only where both the benefit and the harm caused by the particular use were confined to the domain in which the owner was interested did the conception of exclusive control provide a sufficient answer to the problem. The situation is very different as soon as we turn from chattels to real estate, where the 'neighbourhood effects' and the like make the problem of drawing appropriate 'boundaries' much more difficult.

We shall in a later context have to consider certain further consequences which follow from these considerations, such as that the rules of just conduct are essentially negative in that they aim only at preventing injustice, and that they will be developed by the consistent application to the inherited body of law of the equally negative test of compatibility; and that by the persistent application of this test we can hope to approach justice without

ever finally realizing it. We shall then have to return to this complex of questions not from the angle of the properties which judge-made law necessarily possesses, but from the angle of the properties which the law of liberty ought to possess and which therefore should be observed in the process of deliberate law-making.

We must also leave to a later chapter the demonstration that what is called the maximization of the available aggregate of goods and services is an incidental though highly desirable by-product of that matching of expectations which is all the law can aim to facilitate. We shall then see that only by aiming at a state in which a mutual correspondence of expectations is likely to come about can the law help to produce that order resting on an extensive and spontaneous division of labour to which we owe our material wealth.

THE GENERAL PROBLEM OF THE EFFECTS OF VALUES ON FACTS

We have repeatedly emphasized that the importance of the rules of just conduct is due to the fact that the observance of these values leads to the formation of certain complex factual structures, and that in this sense important facts are dependent on the prevalence of values which are not held because of an awareness of these factual consequences. Since this relationship is rarely appreciated, some further remarks about its significance will be in place.

What is frequently overlooked is that the facts which result from certain values being held are not those to which the values which guide the actions of the several individuals are attached, but a pattern comprising the actions of many individuals, a pattern of which the acting individuals may not even be aware of and which was certainly not the aim of their actions. But the preservation of this emerging order or pattern which nobody has aimed at but whose existence will come to be recognized as the condition for the successful pursuit of many other aims will in turn also be regarded as a value. This order will be defined not by the rules governing individual conduct but by the matching of expectations which the observance of the rules will produce. But if such a factual state comes to be regarded as a value, it will mean that this value can be achieved only if people are guided in their actions by other values (the rules of conduct) which to them, since they are not aware of their functions, must appear as ultimate values. The resulting order is thus a value which is the unintended and unknown result of the observance of other values.

One consequence of this is that different prevailing values may sometimes be in conflict with each other, or that an accepted value may require

the acceptance of another value, not because of any logical relation between them, but through facts which are not their object but the unintended consequences of their being honoured in action. We shall thus often find several different values which become interdependent through the factual conditions that they produce, although the acting persons may not be aware of such an interdependence in the sense that we can obtain the one only if we observe the other. Thus, what we regard as civilization may depend on the factual condition that the several plans of action of different individuals become so adjusted to each other that they can be carried out in most cases; and this condition in turn will be achieved only if the individuals accept private property as a value. Connections of this kind are not likely to be understood until we have learned to distinguish clearly between the regularities of individual conduct which are defined by rules and the overall order which will result from the observance of certain kinds of rules.

The understanding of the role which values play here is often prevented by substituting for 'values' factual terms like 'habits' or 'practices'. It is, however, not possible in the account of the formation of an overall order to replace adequately the conception of values which guide individual action with a statement of the observed regularities in the behaviour of individuals, because we are not in fact able to reduce exhaustively the values that guide action to a list of observable actions. Conduct guided by a value is recognizable by us only because we are acquainted with that value. 'The habit of respecting another's property', for example, can be observed only if we know the rules of property, and though we may reconstruct the latter from the observed behaviour, the reconstruction will always contain more than a description of particular behaviour.

The complex relationship between values and facts creates certain familiar difficulties for the social scientist who studies complex social structures that exist only because the individuals composing them hold certain values. In so far as he takes for granted the overall structure which he studies, he also implicitly presupposes that the values on which it is based will continue to be held. This may be without significance when he studies a society other than his own, as is the case with the social anthropologist who neither wishes to influence the members of the society he studies nor expects that they will take notice of what he says. But the situation is different for the social scientist who is asked for advice on how to reach particular goals within a given society. In any suggestion for modification or improvement of such an order he will have to accept the values which are indispensable for its existence, as it would clearly be inconsistent to try to improve some particular aspect of the order and at the same time propose means that

would destroy the values on which the whole order rests. He will have to argue on premises which contain values, and there is no logical flaw if in arguing from such premises he arrives at conclusions which also contain values.

THE 'PURPOSE' OF LAW

The insight that the law serves, or is the necessary condition for, the formation of a spontaneous order of actions, though vaguely present in much of legal philosophy, is thus a conception which has been difficult to formulate precisely without the explanation of that order provided by social theory, particularly economics. The idea that the law 'aimed' at some sort of factual circumstance, or that some state of facts would emerge only if some rules of conduct were generally obeyed, we find expressed early, especially in the late schoolmen's conception of law as being determined by the 'nature of things'. It is, as we have already mentioned, at the bottom of the insistence on the law being an 'empirical' or 'experimental' science. But to conceive as a goal an abstract order, the particular manifestation of which no one could predict, and which was determined by properties no one could precisely define, was too much at variance with what most people regarded as an appropriate goal of rational action. The preservation of an enduring system of abstract relationships, or of the order of a cosmos with constantly changing content, did not fit into what men ordinarily understood by a purpose, goal or end of deliberate action.

We have already seen that in the usual sense of purpose, namely the anticipation of a particular, foreseeable event, the law indeed does not serve any purpose but countless different purposes of different individuals. It provides only the means for a large number of different purposes that as a whole are not known to anybody. In the ordinary sense of purpose law is therefore not a means to any purpose, but merely a condition for the successful pursuit of most purposes. Of all multi-purpose instruments it is probably the one after language which assists the greatest variety of human purposes. It certainly has not been made for any one known purpose but rather has developed because it made people who operated under it more effective in the pursuit of their purposes.

Although people are usually well enough aware that in some sense the rules of law are required to preserve 'order', they tend to identify this order with obedience to the rules and will not be aware that the rules serve an order in a different way, namely to effect a certain correspondence between the action of different persons.

These two different conceptions of the 'purpose' of law show themselves clearly in the history of legal philosophy. From Immanuel Kant's emphasis on the 'purposeless' character of the rules of just conduct,[26] to the Utilitarians from Bentham to Ihering who regard purpose as the central feature of law, the ambiguity of the concept of purpose has been a constant source of confusion. If 'purpose' refers to concrete foreseeable results of particular actions, the particularistic utilitarianism of Bentham is certainly wrong. But if we include in 'purpose' the aiming at conditions which will assist the formation of an abstract order, the particular contents of which are unpredictable, Kant's denial of purpose is justified only so far as the application of a rule to a particular instance is concerned, but certainly not for the system of rules as a whole. From such confusion David Hume's stress on the function of the system of law as a whole irrespective of the particular effects ought to have protected later writers. The central insight is wholly contained in Hume's emphasis on the fact that 'the benefit . . . arises from the whole scheme or system . . . only from the observance of the general rule . . . without taking into consideration . . . any particular consequences which may result from the determination of these laws, in any particular case which offers.'[27]

Only when it is clearly recognized that the order of actions is a factual state of affairs distinct from the rules which contribute to its formation can it be understood that such *an abstract order can be the aim of the rules of conduct*. The understanding of this relationship is therefore a necessary condition for the understanding of law. But the task of explaining this causal relationship has in modern times been left to a discipline that had become wholly separate from the study of law and was generally as little understood by the lawyers as the law was understood by the students of economic theory. The demonstration by the economists that the market produced a spontaneous order was regarded by most lawyers with distrust or even as a myth. Although its existence is today recognized by socialist economists as well as by all others, the resistance of most constructivist rationalists to admitting the existence of such an order still blinds most persons who are not professional economists to the insight which is fundamental to all understanding of the relation between law and the order of human actions. Without such an insight into what the scoffers still deride as the 'invisible hand', the function of rules of just conduct is indeed unintelligible, and lawyers rarely possess it. Fortunately it is not necessary for the performance of their everyday task. Only in the philosophy of law, in so far as it guides jurisdiction and legislation, has the lack of such a comprehension of the function of law become significant. It has resulted in a frequent interpretation of law

as an instrument of organization for particular purposes, an interpretation which is of course true enough of one kind of law, namely public law, but wholly inappropriate with regard to the nomos or lawyer's law. And the predominance of this interpretation has become one of the chief causes of the progressive transformation of the spontaneous order of a free society into the organization of a totalitarian order.

This unfortunate situation has in no way been remedied by the modern alliance of law with sociology which, unlike economics, has become very popular with some lawyers. For the effect of the alliance has been to direct the attention of the lawyer to the specific effects of particular measures rather than to the connection between the rules of law and the overall order. It is not in the descriptive branches of sociology but only in the theory of the overall order of society that an understanding of the relations between law and social order can be found. And because science seems to have been understood by the lawyers to mean the ascertainment of particular facts rather than an understanding of the overall order of society, the ever repeated pleas for co-operation between law and the social sciences have so far not borne much fruit. While it is easy enough to pick from descriptive sociological studies knowledge of some particular facts, the comprehension of that overall order which the rules of just conduct serve requires the mastery of a complex theory which cannot be acquired in a day. Social science conceived as a body of inductive generalizations drawn from the observation of limited groups, such as most empirical sociology undertakes, has indeed little to contribute to an understanding of the function of law.

This is not to suggest that the overall order of society which the rules of just conduct serve is exclusively a matter of economics. But so far only economics has developed a theoretical technique suitable for dealing with such spontaneous abstract orders, which is only now slowly and gradually being applied to orders other than the market. The market order is probably also the only comprehensive order extending over the whole field of human society. It must at any rate be the only one we can fully consider in this book.

THE ARTICULATION OF THE LAW AND THE PREDICTABILITY OF JUDICIAL DECISIONS

The order that the judge is expected to maintain is thus not a particular state of things but the regularity of a process which rests on some of the expectations of the acting persons being protected from interference by

others. He will be expected to decide in a manner which in general will correspond to what the people regard as just, but he may sometimes have to decide that what *prima facie* appears to be just may not be so because it disappoints legitimate expectations. Here he will have to draw his conclusions not exclusively from articulated premises but from a sort of 'situational logic', based on the requirements of an existing order of actions which is at the same time the undesigned result and the rationale of all those rules which he must take for granted. While the judge's starting point will be the expectations based on already established rules, he will often have to decide which of conflicting expectations held in equally good faith and equally sanctioned by recognized rules is to be regarded as legitimate. Experience will often prove that in new situations rules which have come to be accepted lead to conflicting expectations. Yet although in such situations there will be no known rule to guide him, the judge will still not be free to decide in any manner he likes. If the decision cannot be logically deduced from recognized rules, it still must be consistent with the existing body of such rules in the sense that it serves the same order of actions as these rules. If the judge finds that a rule counted on by a litigant in forming his expectations is false even though it may be widely accepted and might even be universally approved if stated, this will be because he discovers that in some circumstances it clashes with expectations based on other rules. 'We all thought this to be a just rule, but now it proves to be unjust' is a meaningful statement, describing an experience in which it becomes apparent that our conception of the justice or injustice of a particular rule is not simply a matter of 'opinion' or 'feeling', but depends on the requirements of an existing order to which we are committed—an order which in new situations can be maintained only if one of the old rules is modified or a new rule is added. The reason why in such a situation either or even both of the rules counted on by the litigants will have to be modified will not be that their application in the particular case would cause hardship, or that any other consequence in the particular instance would be undesirable, but that the rules have proved insufficient to prevent conflicts.

If the judge here were confined to decisions which could be logically deduced from the body of already articulated rules, he would often not be able to decide a case in a manner appropriate to the function which the whole system of rules serves. This throws important light on a much discussed issue, the supposed greater certainty of the law under a system in which all rules of law have been laid down in written or codified form, and in which the judge is restricted to applying such rules as have become written law. The whole movement for codification has been guided by the

belief that it increases the predictability of judicial decisions. In my own case even the experience of thirty odd years in the common law world was not enough to correct this deeply rooted prejudice, and only my return to a civil law atmosphere has led me seriously to question it. Although legislation can certainly increase the certainty of the law on particular points, I am now persuaded that this advantage is more than offset if its recognition leads to the requirement that *only* what has thus been expressed in statutes should have the force of law. It seems to me that judicial decisions may in fact be more predictable if the judge is also bound by generally held views of what is just, even when they are not supported by the letter of the law, than when he is restricted to deriving his decisions only from those among accepted beliefs which have found expression in the written law.

That the judge can, or ought to, arrive at his decisions exclusively by a process of logical inference from explicit premises always has been and must be a fiction. For in fact the judge never proceeds in this way. As has been truly said, 'the trained intuition of the judge continuously leads him to right results for which he is puzzled to give unimpeachable legal reasons'.[28] The other view is a characteristic product of the constructivist rationalism which regards all rules as deliberately made and therefore capable of exhaustive statement. It appears, significantly, only in the eighteenth century and in connection with criminal law[29] where the legitimate desire to restrict the power of the judge to the application of what was unquestionably stated as law was dominant. But even the formula *nulla poena sine lege*, in which C. Beccaria expressed this idea, is not necessarily part of the rule of law if by 'law' is meant only written rules promulgated by the legislator, and not any rules whose binding character would at once be generally recognized if they were expressed in words. Characteristically English common law has never recognized the principle in the first sense,[30] even though it always accepted it in the second. Here the old conviction that a rule may exist which everybody is assumed to be capable of observing, although it has never been articulated as a verbal statement, has persisted to the present day as part of the law.

Whatever one may feel, however, about the desirability of tying the judge to the application of the written law in criminal matters, where the aim is essentially to protect the accused and let the guilty escape rather than punish the innocent, there is little case for it where the judge must aim at equal justice between litigants. Here the requirement that he must derive his decision exclusively from the written law and at most fill in obvious gaps by resort to unwritten principles would seem to make the certainty of the law rather less than greater. It seems to me that in most instances in which

judicial decisions have shocked public opinion and have run counter to general expectations, this was because the judge felt that he had to stick to the letter of the written law and dared not depart from the result of the syllogism in which only explicit statements of that law could serve as premises. Logical deduction from a limited number of articulated premises always means following the 'letter' rather than the 'spirit' of the law. But the belief that everyone must be able to foresee the consequences that will follow in an unforeseen factual situation from an application of those statements of the already articulated basic principles is clearly an illusion. It is now probably universally admitted that no code of law can be without gaps. The conclusion to be derived from this would seem to be not merely that the judge must fill in such gaps by appeal to yet unarticulated principles, but also that, even when those rules which have been articulated seem to give an unambiguous answer, if they are in conflict with the general sense of justice he should be free to modify his conclusions when he can find some unwritten rule which justifies such modification and which, when articulated, is likely to receive general assent.

In this connection even John Locke's contention that in a free society all law must be 'promulgated' or 'announced' beforehand would seem to be a product of the constructivist idea of all law as being deliberately made. It is erroneous in the implication that by confining the judge to the application of already articulated rules we will increase the predictability of his decisions. What has been promulgated or announced beforehand will often be only a very imperfect formulation of principles which people can better honour in action than express in words. Only if one believes that all law is an expression of the will of a legislator and has been invented by him, rather than an expression of the principles required by the exigencies of a going order, does it seem that previous announcement is an indispensable condition of knowledge of the law. Indeed it is likely that few endeavours by judges to improve the law have come to be accepted by others unless they found expressed in them what in a sense they 'knew' already.

THE FUNCTION OF THE JUDGE IS CONFINED TO A SPONTANEOUS ORDER

The contention that the judges by their decisions of particular cases gradually approach a system of rules of conduct which is most conducive to producing an efficient order of actions becomes more plausible when it is realized that this is in fact merely the same kind of process as that by which all intellectual evolution proceeds. As in all other fields advance is here

achieved by our moving within an existing system of thought and endeavouring by a process of piecemeal tinkering, or 'immanent criticism', to make the whole more consistent both internally as well as with the facts to which the rules are applied. Such 'immanent criticism' is the main instrument of the evolution of thought, and an understanding of this process the characteristic aim of an evolutionary (or critical) as distinguished from the constructivist (or naïve) rationalism.

The judge, in other words, serves, or tries to maintain and improve, a going order which nobody has designed, an order that has formed itself without the knowledge and often against the will of authority, that extends beyond the range of deliberate organization on the part of anybody, and that is not based on the individuals doing anybody's will, but on their expectations becoming mutually adjusted. The reason why the judge will be asked to intervene will be that the rules which secure such a matching of expectations are not always observed, or clear enough, or adequate to prevent conflicts even if observed. Since new situations in which the established rules are not adequate will constantly arise, the task of preventing conflict and enhancing the compatibility of actions by appropriately delimiting the range of permitted actions is of necessity a never-ending one, requiring not only the application of already established rules but also the formulation of new rules necessary for the preservation of the order of actions. In their endeavour to cope with new problems by the application of 'principles' which they have to distil from the *ratio decidendi* of earlier decisions, and so to develop these inchoate rules (which is what 'principles' are) that they will produce the desired effect in new situations, neither the judges nor the parties involved need to know anything about the nature of the resulting overall order, or about any 'interest of society' which they serve, beyond the fact that the rules are meant to assist the individuals in successfully forming expectations in a wide range of circumstances.

The efforts of the judge are thus part of that process of adaptation of society to circumstances by which the spontaneous order grows. He assists in the process of selection by upholding those rules which, like those which have worked well in the past, make it more likely that expectations will match and not conflict. He thus becomes an organ of that order. But even when in the performance of this function he creates new rules, he is not a creator of a new order but a servant endeavouring to maintain and improve the functioning of an existing order. And the outcome of his efforts will be a characteristic instance of those 'products of human action but not of human design' in which the experience gained by the experimentation of generations embodies more knowledge than was possessed by anyone.

The judge may err, he may not succeed in discovering what is required by the rationale of the existing order, or he may be misled by his preference for a particular outcome of the case in hand; but all this does not alter the fact that he has a problem to solve for which in most instances there will be only one right solution and that this is a task in which his 'will' or his emotional response has no place. If often his 'intuition' rather than ratiocination will lead him to the right solution, this does not mean that the decisive factors in determining the result are emotional rather than rational, any more than in the case of the scientist who also is normally led intuitively to the right hypothesis which he can only afterwards try to test. Like most other intellectual tasks, that of the judge is not one of logical deduction from a limited number of premises, but one of testing hypotheses at which he has arrived by processes only in part conscious. But although he may not know what led him in the first instance to think that a particular decision was right, he must stand by his decision only if he can rationally defend it against all objections that can be raised against it.

If the judge is committed to maintaining and improving a going order of action, and must take his standards from that order, this does not mean, however, that his aim is to preserve any *status quo* in the relations between particular men. It is, on the contrary, an essential attribute of the order which he serves that it can be maintained only by constant changes in the particulars; and the judge is concerned only with the abstract relations which must be preserved while the particulars change. Such a system of abstract relationships is not a constant network connecting particular elements but a network with an ever-changing particular content. Although to the judge an existing position will often provide a presumption of right, his task is as much to assist change as to preserve existing positions. He is concerned with a dynamic order which will be maintained only by continuous changes in the positions of particular people.

But although the judge is not committed to upholding a particular *status quo*, he is committed to upholding the principles on which the existing order is based. His task is indeed one which has meaning only within a spontaneous and abstract order of actions such as the market produces. He must thus be conservative in the sense only that he cannot serve any order that is determined not by rules of individual conduct but by the particular ends of authority. A judge cannot be concerned with the needs of particular persons or groups, or with 'reasons of state' or 'the will of government', or with any particular purposes which an order of actions may be expected to serve. Within any organization in which the individual actions must be judged by their serviceability to the particular ends at which it aims, there

is no room for the judge. In an order like that of socialism in which whatever rules may govern individual actions are not independent of particular results, such rules will not be 'justiciable' because they will require a balancing of the particular interests affected in the light of their importance. Socialism is indeed largely a revolt against the impartial justice which considers only the conformity of individual actions to end-independent rules and which is not concerned with the effects of their application in particular instances. Thus a socialist judge would really be a contradiction in terms; for his persuasion must prevent him from applying only those general principles which underlie a spontaneous order of actions, and lead him to take into account considerations which have nothing to do with the justice of individual conduct. He may, of course, be a socialist privately, and keep his socialism out of the considerations which determine his decisions. But he could not act as a judge on socialist principles. We shall later see that this has long been concealed by the belief that instead of acting on principles of just individual conduct he might be guided by what is called 'social justice', a phrase which describes precisely that aiming at particular results for particular persons or groups which is impossible within a spontaneous order.

The socialist attacks on the system of private property have created a widespread belief that the order the judges are required to uphold under that system is an order which serves particular interests. But the justification of the system of several property is not the interest of the property holders. It serves as much the interest of those who at the moment own no property as that of those who do, since the development of the whole order of actions on which modern civilization depends was made possible only by the institution of property.

The difficulty many people feel about conceiving of the judge as serving an existing but always imperfect abstract order which is not intended to serve particular interests is resolved when we remember that it is only these abstract features of the order which can serve as the basis of the decisions of individuals in unforeseeable future conditions, and which therefore alone can determine an enduring order; and that they alone for this reason can constitute a true *common* interest of the members of a Great Society, who do not pursue any particular common purposes but merely desire appropriate means for the pursuit of their respective individual purposes. What the judge can be concerned with in creating law is therefore only improvement of those abstract and lasting features of an order of action which is given to him and which maintains itself through changes in the relation between the particulars, while certain relations between these relations (or relations of a

still higher order) are preserved. 'Abstract' and 'lasting' mean in this context more or less the same, as in the long term view which the judge must take he can consider only the effect of the rules he lays down in an unknown number of future instances which may occur at some future time.

CONCLUSIONS

We may sum up the results of this chapter with the following description of the properties which will of necessity belong to the law as it emerges from the judicial process: it will consist of rules regulating the conduct of persons towards others, applicable to an unknown number of future instances and containing prohibitions delimiting the boundary of the protected domain of each person (or organized group of persons). Every rule of this kind will in intention be perpetual, though subject to revision in the light of better insight into its interaction with other rules; and it will be valid only as part of a system of mutually modifying rules. These rules will achieve their intended effect of securing the formation of an abstract order of actions only through their universal application, while their application in the particular instance cannot be said to have a specific purpose distinct from the purpose of the system of rules as a whole.

The manner in which this system of rules of just conduct is developed by the systematic application of a negative test of justice and the elimination or modification of such rules as do not satisfy this test we will have to consider further in Volume 2, chapter 8. Our next task, however, will be to consider what such rules of just conduct *cannot* achieve and in what respect the rules required for the purposes or organization differ from them. We shall see that those rules of the latter kind which must be deliberately laid down by a legislature for the organization of government and which constitute the chief occupation of the existing legislatures, can in their nature not be restricted by those considerations which guide and restrict the law-making power of the judge.

In the last resort the difference between the rules of just conduct which emerge from the judicial process, the *nomos* or law of liberty considered in this chapter, and the rules of organization laid down by authority which we shall have to consider in the next chapter, lies in the fact that the former are derived from the conditions of a spontaneous order which man has not made, while the latter serve the deliberate building of an organization serving specific purposes. The former are *discovered* either in the sense that they merely articulate already observed practices or in the sense that they are found to be required complements of the already established rules if the

order which rests on them is to operate smoothly and efficiently. They would never have been discovered if the existence of a spontaneous order of actions had not set the judges their peculiar task, and they are therefore rightly considered as something existing independently of a particular human will; while the rules of organization aiming at particular results will be free inventions of the designing mind of the organizer.