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LOGIC AND LAW: THE EXTENT OF COMPATIBILITY WITHIN PHILOSOPHICAL JUSTICE

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BY

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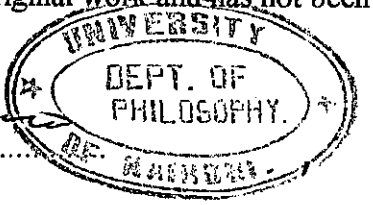
A THESIS SUBMITTED IN PARTIAL FULFILMENT OF THE REQUIREMENT FOR THE AWARD OF THE DEGREE OF MASTER OF ARTS IN PHILOSOPHY OF THE UNIVERSITY OF NAIROBI.

DECLARATION

This thesis is my own original work and has not been presented for a degree in any other university.

Signed .....



MAGERO JACOB

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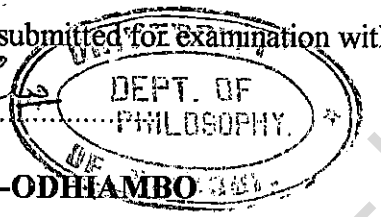

DR. F. OCHIENG'-ODHIAMBO

Date 9.4.99

DEDICATION:

Dedicated to my brother Samson Magero for his inspiration and encouragement in my pursuit of higher education, my brother Amos Magero for the foundation he laid for my pursuit of higher Education, and my dear parents who have seen me this far. I will always be grateful.

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ABSTRACT

An invariant emphasis on the possible prospects (objectivity, efficiency and predictability) of the employment of the logical method in the evaluation of social phenomena implies a state whereby "logical idealism rans away with some minds" i.e. the logical method when invariantly employed is inimical to the recognition, realisation, and appreciation of the human element (the relative unpredictability and the uniqueness of every instantial social event) in reality. This is especially (if not particularly) with regard to the realm of law and the notion of justice.

It is important to note however that the focus of the study in this regard has been on law and the concomitant notion of justice. This has been from the point of view of a keen impartial observer with a critical, analytic, and reflective mind (philosophy or philosopher). Since the notion of justice pervades and permeates all aspects of human social relations and social dynamics in general, subsisting and enduring, it is a notion which encapsulates the dynamics involved in human social problems and the redress (even if just attempts to redress) of them.

The endeavour of this study has constituted in the evaluation therefore of the applicability of logic in the practice of law. This has been actualised by an explication and analysis of logic (and rationality as a natural human endowment) as a discipline, law and justice as notions, and a reflection on the interrelation of the three (logic, law and justice) in respect of human social life.

The activity has led to the conclusion that the applicability of logic in the practice of law can only be appropriately defined in the strict sense by a philosopher. This implies

the assertion that though a formally trained lawyer may be seen to be a good legal decision maker (judge, magistrate or lawyer), a lawyer who is also a philosopher would make a better (if not the best) legal decision maker. The prescription and evaluation of appropriate redress for human social order does not only consist in basing inferences and conclusions on past experience and an anticipation and forecasting of the future on the basis of logical possibilities, but rather, an incorporation as well (in the due consideration) of the recognition of the human element in all social dynamics. It is inappropriate to downplay good conscience, insight, and good faith by emphasising or adopting inductivism and deductivism.

Deductivism would work only for a scenario of closedness, prediterminism, a complete system, universalism, whereby all possibilities are pre-known and the appropriate redress for them pre-set. Inductivism would only work on the basis of the principle of causality and the principle of the uniformity of nature. However, human social life does not operate on the basis of definite causal relationship. Secondly, every individual social event and/or act is unique in a sense due to the relatively high dynamism that plagues social life.

CHAPTER ONE

INTRODUCTION

1.1 BACKGROUND INFORMATION

Law, in the most general sense, is the most invariably dominant and enormously significant governing aspect in and among all beings in reality. Similarly, thought or rationality is a necessary endowment for human beings for the enhancement of appropriate behaviour and response to reality and adverse situations. Logic is the discipline which contains the prescriptions for proper reasoning.

Human formulated and promulgated law is intended to ensure tranquillity and harmony in the social relationships that are expected and intended to ensue between and among individuals and groups of individuals in society [Oruka, 1997:220-221]. This is often and generally the ideal scenario in especially democratic and socialist (or communist) modern states. Though this may not immediately appear to be true of totalitarian and oligarchic states, and dictatorships, order and harmony, even if not ensured in the mood that is naturally expected, are significant goals in such systems of government. This ideal and positive social tranquillity and harmony striven for is what, from a philosophical point of view, is referred to in this thesis as justice.

The basis, need, and desire for justice arises because of conflict between and/or among individuals and groups. Such conflict imply a need for redress culminating into either compensation, retribution or punishment of the offender(s) in attempts to deter such offences in future. Mandate for the process of legal redress is often and generally founded on the faith and trust that such a process is without any bias or prejudice and

would therefore, most probably, ensure appropriate distribution of burdens and benefits between and among conflicting parties.

Generally implied in the practice of law (from a theoretical and philosophical point of view) is the employment of certain logical concepts and principles. This is often insinuated in the procedures and implied justification for certain conclusions and assumptions as observed in legal practice. The employment of logical principles and assumptions often ensures efficiency and objectivity in discourse. This scenario is characteristic and accurately descriptive of the positivistic conceptualisation of legal practice as manifested in legal formalism and 'mechanicalism' [Hart, 1961:126].

There is however a difference between justice from a legal perspective (legal justice or procedural justice) and justice from a philosophical perpective (moral justice or philosophical justice). Though the employment of logical principles and concepts may enhance the observance of procedural justice, logical reasoning may not invariantly ensure philosophical justice.

The most dominant theme in legal literature over time has been the contentions of the two basic schools of thought, namely the positivistic school and the natural law school. In the former, the practice of law as it is, has been upheld the making of decisions and conclusions by legal practitioners on the basis of the prescription of the law as it is formally. This involves (positivism) the strict justification of legal decisions on the basis of the evidence presented before the court. Here, the emphasis is not essentially on the factual reality as it ought to be but rather the logical conclusion on the basis of presented evidence [Latta, 1956:305]. The logical 'truth' or possibility (rather than the factual reality or truth) is therefore implicitly the concern for legal positivism.

In the positivistic school, for example, was the thought in the realm of rationalism to formulate a legal system which would be analogous to the geometry of Euclid [Paton, 1964:171]. The formalism and mechanical predispositions of this kind of legal conceptualisation has been seen in the codification of law (for example in France).

The latter school (the natural law school), on the other hand emphasises the conceptualisation of law and its practice on the premises of what ought to constitute law or justice from the point of view of reason or religion. This latter school has predominated the English and American legal arena as was seen in the culmination into the employment of the principle of Equity in English legal practice where conscience and insight was endeavoured to suffice over and above legal formalism and mechanicalism [General Principles of Law, The Rapid Results College; Course No. 12, a5:37]. The creation of the American supreme court was another evidence for practical distrust of legal formalism as implied in legal positivism [. Maguire, 1980:120].

The scene is complicated by the fact that legal practice necessarily has to involve reasoning. This is because, given that man is generally by nature a rational being, it is difficult for him to tear himself away from his innate rationality especially in his attempts to resolve critical issues as seen in legal conflicts [Paton 1964:74]. An assessment of the nature and concern of logic, law, and justice, with the objective of establishing the significance and relevance of logic to law and subsequently to justice is a reasonable way of harmonizing the relationship between the proponents of the natural law school and the positive law school.

The preceding suggestion is intended to ensure a synthesis of the innate and natural ability of man to attain truth or reason as is provided and dictated by nature (where nature is objective reason as man is capable of realising or the will of God or supreme being) on the one hand, and the human ability to objectively derive 'truth' and accurately associate 'facts' from given or granted information on the other.

1.2 STATEMENT OF THE PROBLEM

From the literature that has been written by such scholars as George W. Paton (1964), William B. Harvey (1975), Tudor Jackson (1970), Gottlied G. (1968) among others, it suffices that the divergence or disparity existant between the positivist law school and the natural law school is based on, significantly if not mainly, the relevance and significance ascribed to logic in legal practice.

In this regard, there are fundamentally two positions. There is the first position that logic is an exhaustive and imperative tool for the practice of law to attain any reasonable status and appreciation in society. In this spirit was (as earlier mentioned) the desire to establish a legal system analogous to Euclidean geometry such that legal problems would be solved by 'calculations' on the basis of logic. In this same spirit was the development of legal code systems as for example in France. The second position is that logic cannot ensure and is irrelevant if not inimical in attempts to ensure invariant success in the endeavour to attain the objective of law or the spirit of law, justice, philosophical justice or moral justice [Gottlied, 1968:15].

In light of the preceding second position is, for example, the principle of Equity (i.e. a transcendence over and above the formalism of law as provided in the respective legal prescriptions and an upholding of the perception of reality as dictated by prudence,

conscience, and insight) as observed in English legal practice and also the establishment of the American Supreme court. The German legend which potrays the devil as a sharp dialectician is an emphasis of the second position and evidence for the distrust for logic if moral or philosophical justice has to be invariantly attained [Paton, 1964:173].

These two positions are not both entirely tenable due to the contradiction implied. It is therefore apparent that a synthesis of the two positions is a more accurate, appropriate, and plausible interpretation of the scenario. This (the synthesis) is based firstly on the fallibility implied in the provision in law for appeal, and prerogative powers which enable a sovereign to act according to his discretion for public good without the prescription of law and even against it. Secondly, the attempt to ensure a synthesis of the two positions is based on the fact of the notwithstanding significance ascribed to procedural justice (to be discussed in chapter four) which relies heavily on logic as implied in the formalism observed in legal positivism.

The apparent paradox is therefore that the practice of law has to entail rationality (logic) on the basis of the fact that man is rational by nature and at the same time rationality or logic is not needed or more precisely has to be somehow suspended for the invariant observance of at least philosophical justice. The problem of this thesis therefore consists in the extent of compatibility between logic and law in light of justice from a philosophical perspective.

1.3 OPERATIONAL DEFINITIONS

1.3.1 Law

Law (man-made or positive law) is the sum total of those general rules of action as enforced by a sovereign political authority ["Law" in Everyman's Encyclopedia Vol.1:488]. The law student will talk of law proper to imply usually a conglomeration of the rules made by a sovereign body, parliament or by judges [Jackson, 1970:1]. It is in this context that this study intends to perceive of law.

1.3.2 Legal justice (or procedural justice)

In this sense, justice refers to the outcome or decision arrived at by the proper functioning of the machinery of law ['Jurisprudence' in Colliers Encyclopaedia Vol. 13:683]. Here, justice is defined as "the logical, almost mechanical, assessment of an act or acts according to the criteria of an accepted and mandatory value structure represented by the law" ['Jurisprudence' in Colliers Encyclopaedia Vol. 13:683].

1.3.3 Philosophical and Moral Justice

Moral justice involves reference to some criterion or set of values, which is presumed to be higher than and superior to that which is embodied in the law. The cardinal rule "let right be done" is an expression of the conviction that should the machinery of the legal procedure fail to achieve a kind of justice commensurate with this higher criterion, then legal judgement must be corrected by some kind of superior moral judgement[cf. 'Jurisprudence' in Colliers Encyclopaedia Vol. 13: 683]. This is usually the ground for democratic states to grant to the executive the power of pardon or commutation. Philosophical justice is observed by the maximisation of the optimisation of the harmonisation of the cognitive and ontological implications of a legal decision. These two terms are going to be used interchangeably due to the universality of rightness intended in their usage generally.

1.4 OBJECTIVES

1. To find out the extent to which logic is applied in the practice of law.
2. To find out the extent to which logic is applicable in law if philosophical or moral justice has to be invariantly observed.

1.5 LITERATURE REVIEW

Paton notes the rationalist intention to construct a legal system analogous to Euclidean geometry, the basis of which thought was the assumption of the possibility of formulation of self-evident truths or axioms and therefore the possibility of deduction by rigorous logic of the whole system from such a base. In this scheme, the axioms of justice were supposed to be discovered or formulated so that when there arose a dispute and such a dispute were presented before the court for decision, the judges could say "Come let us calculate" [1964:171].

Paton goes further to observe that rules of formal logic are of great significance to courts and that fallacies for example may often be most easily exposed by casting an argument in the form of a syllogism. However, he appreciates that the syllogism is a method of demonstration rather than that of engendering or discovering truths or facts. It is Paton's contention as well that the law, notwithstanding the inability of logic to discover truths or facts, cannot dispense with a logical method if it is to have any claim at all to rationality. In this regard, he asks; "can we think at all without following the rules of logic?" He maintains that "formally, thinking is good or bad according as the conclusion does or does not follow from the premises" [1964:74].

It has also been noted that the era of codification saw many lawyers believing that a code could comprehensively deal with legal disputes and that such interpretations as was necessary could be achieved by logical and mechanical methods. The lawyer (it

was hoped) could acquire such logical and mechanical methods or skills without having to refer to philosophy, political science, or economics. This constituted a positivistic conceptualization of law to the extent that conclusions, inferences, and decisions were to be based on an already given foundation and were predetermined ['Law' in Chembers's Encyclopaedia Vol. 8: 443].

The separation of law and justice has its genesis in the significance ascribed to logical conceptualisation and evalulation of social phenomena. This assertion holds well particularly for legal positivism. This is because of the emphasis observed in the same (legal positivism) on logical reasoning as seen in the formalism and mechanicalism characteristic of this school of thought. The same assertion (the separation of law and justice), cannot reasonably be said to apply to the natural law school. This is because here, there is the emphasis on the evaluation of human social phenomena on the basis of the respective and unique circumstantial presentation of events as dictated by conscience and insight (as is requisite for objective reason) other than generalisations as seen in legal deductivism and inductivism (that plagues legal positivism).

In this light, Jackson for example contends that the function of the court is to administer justice according to the law and that whether the court achieves justice is another matter. Jackson in this regard quotes William Temple who was at a time an Archbishop of Canterbury as having asserted in his address to lawyers that "I cannot say that I know much about law having been far more interested in justice" [1970:2].

Roscoe Pound in his article, 'Jurisprudence' also observes that the nineteenth century school of jurisprudence, the analytic school, as the sole method had serious bad consequences. That it led to the treating of new social and economic conditions by

logical deduction from traditional fixed conceptions without consideration of the purposes for which development of the law was needed ['Jurisprudence' in Colliers Encyclopaedia Vol. 13:683]. Thus, Pound holds that the analytic school (which actually falls under legal positivism) led to a "jurisprudence of conceptions" in which legal conceptions are carried out logically simply for logical completeness, without regard to the end of social order. 'Jurisprudence of conceptions' is seen in the so called scientific legal procedure taught in law schools and expounded in text books ['Jurisprudence' in Colliers Encyclopaedia Vol. 13:683].

Harvey in a discussion on law observed that:

> It seems especially appropriate in a gathering of this kind to turn our attention at least briefly from the technical knowledge and skills of our profession to a consideration of the meaning and function of this concept and, hopefully, to the fundamental of the legal order....this apparent conflict between law and justice is still a part of our daily lives [1961:210].

Paton, on commenting on the significance of logic to law observes that:

> To give up logic because of the excesses of a particular method or to worship irrationality because of the mistakes of the past, would be as wise as to sacrifice our eyes because occasionally we see what is not there. To suggest that the best law can be achieved without a proper use of logic is simply non-sense [1964:74].

S. H. Leonard observes that more often than not , any significant belief, no matter how simple is normally founded on thought that involves reasoning from evidence. He further contends that although there are many things that a person believes because someone he or she trusts has told him or her they are true, in such cases, the original discoverer must usually have reached his belief by reasoning from evidence [1957:12].

Leonard further contends that people nevertheless make many mistakes in their efforts to reason from given evidence to a conclusion. That the science of logic teaches laws or principles by means of which one can test the correctness of any piece of reasoning,

either one's own or another's. The preceding assertion has a significant implication on the attitude and mood that ensues in relating such an assertion to the execution of law and administration of justice (whether philosophical or legal) in courts of law.

On the basis of the deemed need for the occasional review and re-evaluation of legal practice, G.F.A. Sawyer has contended that the role of the machinery of justice in society, as well as prejudice, bias and group ideosyncracies among other similar things need a re-examination, a reappraisal or condemnation subject to the results of such re-examination. Sawyer further holds that if it is granted that justice is the goodness or fairness as opposed to badness or unfairness, then suffice is that the criteria for this type of evaluation is implicit in the law itself and necessarily adheres to an ethical or political philosophy [1967:281]. This assertion is made on the basis of the appreciation of the relativity of justice. However, there are those who believe that there is a standard of justice or morality to which all law must conform to be good law [Sawyer, 1967:281].

In line with Sawyer's contention with regard to justice, R.W. James and F.M. Kassam hold that it is reasonable to assume that courts are completely devoid of political sympathies, but that this is only consistently tenable in so far as such sympathies are what those afflicted subscribe to [1973:49].

Due to the epistemological problem posed by natural law i.e. the difficulty in the identification of what constitutes natural law as in the specific prescriptions in form of rules, A.W. Wallace holds that natural law requires implementation by civil law in which case not mere argumentation and research, but rather a validation even by trial and error. He as well cautions that the goal of law-making and of government itself

simply cannot be attained without an on-going search for the best civil law to enact for the personal and the common good [1977:264]. Wallace's contention can reasonably be interpreted to imply a distrust for the consistent tenability of the logical method in legal practice.

The distinction between the state of nature and the state of civil society is used by some scholars in differentiating between natural and positive (or civil) law. These scholars include Thomas Hobbes in his Leviathan, John Locke in his Essays on The Law of Nature, and Baron De Montesquieu in his The Spirit of Laws. These scholars recognise that the law which governs men living in a state of nature is natural in the sense of being instinctive, or a rule of conduct which man's reason is innately competent to prescribe; whereas the civil law originates with specific acts of legislation by a political power, vested in a sovereign person, in a representative assembly, or in the whole body of the people [c.f. Adler and William, 1982:963].

1.6 HYPOTHESIS

An invariant application of logic in the practice of law jeopardises philosophical justice (or moral justice). Here, philosophical justice is the dependent variable while the extent of application or employment of logic is the independent variable.

1.7 THEORETICAL FRAMEWORK

The study has been carried out within the three supreme principles of being. These include the principle of Identity, the principle of Contradiction and the principle of the Excluded middle. The three principles are supreme because they are derived immediately from the concept of being. A being is something that is.

The principle of Identity holds that everything is what it is, that everything is its own being, i.e. identical to itself. The principle of Contradiction is based on the comparison of the concept of being and that of non-being. The two are mutually exclusive and this is of absolute necessity. ' Nothing' is non-being and as such it can never be being. It is impossible for something to be and not be at the same time under the same conditions. The principle of Excluded middle rests on the examination of the concept of being and non-being. Between being and non-being there is nothing i.e. the two exhaust any possibility. Something is something or is not. Everything must either be or not be, there is no third thing possible in between.

The three principles mentioned above have a universal application and have served as the first theoretical framework to guide this study. This is because the rules and principles for proper reasoning as prescribed by logic are derived from the three above mentioned principles. The rules for determining the validity and invalidity of any argument - Deductive, based on form, and Inductive, based on content - are directly or indirectly derived from the three supreme principles of being.

The second theoretical framework within which this study has been carried is the principle of natural justice, under which something, an action, or event is to be considered right and just by reference to objective reason i.e. reason that is innocent of any biases (personal, social or otherwise) and founded in the uniqueness of the respective circumstantial presentation of social reality. This kind of reason is what is seen in for example the Kantian 'categorical imperative', Hooker's 'rational law' and the conceptualisation of natural law and justice on the basis of reason as propounded by Locke. These personalities among others have been discussed in detail in later

chapters for the purpose of the appreciation of the appropriateness of this theoretical framework.

The third theoretical framework within which this study has been carried out is the fact of the relative unpredictability of human social behaviour and reality as opposed to the relative predictability of natural phenomena which render scientific reasoning (which is generally and basically logical) appropriate and invariantly applicable in natural sciences such as Chemistry and Physics [Mill, 1956:546-547].

These three theoretical bases (the three supreme principles of being, the principle of natural justice, and the position that human social behaviour and reality is relatively unpredictable) have served as the theoretical frameworks which have enhanced the verification of the hypothesis of this study.

1.8 JUSTIFICATION AND SIGNIFICANCE OF THE STUDY

1. If law has its function as the social control of human beings or the maintenance of security in society [Oruka, 1997:221], and if logic is defined as the science of correct reasoning, that is, that the science of logic undertakes to discover and state laws in accordance with which any act of thought may be judged good or bad, correct or incorrect, sound or unsound [Leonard, 1957:11], and given that law employs logic to the extent that in the promulgation and practice of law reasoning is involved, an analysis of the extent to which logic can be appropriately employed for the enhancement of the realisation of justice (philosophical) is a relevant and significant activity.

2. Given that law is an aspect which significantly affects every individual in society, a constant evaluation of the way it is practised is necessary for such practice to

receive mandate and appreciation from those to whom it is intended and for the objective of law (justice) to be realised. The preceding justifies this study given that the study is concerned with the practice of law.

3. This study serves as a scholarly contribution to the field of practical philosophy, particularly philosophy of law.

1.9 METHODOLOGY

This study used both primary and secondary sources of data. Primary data was collected through various interviews with the guidance of interview schedules. Those interviewed included professional lawyers, magistrates and other professionals in the field of law such as lecturers of law. The purposive method of sampling was used in sampling the individual professional to be interviewed. Interviews with professional lecturers in philosophy especially experts in philosophy of law and these of logic were conducted. The purposive sampling method was also employed. But here the interviews were open to ensure critical discussion.

The secondary data was obtained through library research which mainly involved conceptual analysis, no quantitative analysis was conducted given that the study was qualitative in nature.

CHAPTER TWO

ON LOGIC AS A DISCIPLINE

2.1 THE DEFINITION AND NATURE OF LOGIC

To philosophise is to deliberately reflect or speculate about oneself, about one's position and thus function as a part of a system; about his experiences and his relations to others [Popkin and Stroll, 1969:224]. Most such reflections have a corresponding branch of philosophy. For example, thinking about the nature of conduct is enganging in ethical speculation; reflecting on the nature of the universe is involvement in metaphysics. Logic can be defined as "that branch of philosophy which reflects upon the nature of thinking itself' [Popkin and Stroll, 1969:224]. Logic attempts an answer as regards the nature of correct and incorrect reasoning.

It is important to note however that not all types of thinking are relevant or of interest to logic. Learning, remembering, day-dreaming, among others are types of thinking which fall within the province of psychology but which logic is not concerned with for example. Logic is only concerned with a specific type of thinking called reasoning. While the concern of psychology is the mental processes of the thinker, logic is only interested in the reasoning itself. Unlike psychology, the task of logic is not accounting for why people think in certain ways but rather the formulation of rules that act as a yardstick for evaluating any particular piece of reasoning as coherent and consistent (logical) or not. Coherence and consistency are therefore core issues in logic.

Entailed in reasoning is the production or presentation of reasons as evidence for a conclusion or assertion endeavoured to be established. Logic can be therefore to this

extent be defined as "the branch of philosophy which attempts to determine when a given proposition or group of proposition permits us correctly to infer some other proposition" [Popkin and Stroll, 1969:225].

Mill, cites Archbishop whately as defining logic as "the science as well as the art of reasoning" [1956:2]. By science, Whatley means the analyis of the mental process (movement from proposition to proposition) which takes place whenever we reason, and by art he means the rules grounded on that analysis for conducting the process correctly. To this extent, logic is a science as well as an art. Logic is a science of reasoned discourse, or of discourse in so far as it expresses thought [Latta, *et al*, 1956:9].

The above definitions should be considered working definitions or operational definitions since so far, they promise to capture all that is intended to be presented as the more accurate conceptualization of logic given the scope of the thesis. This proves Mill's sincere contention that "there is as great diversity among authors in the modes which they have adopted of defining logic, as in their treatment of the details of it" [1956:1].

In all written or spoken intelligible discourse, there is usually a continuity which involves passing more or less naturally and inevitably from sentence to sentence. Oratory aims at persuading its hearers to do, or to refrain from doing something. Oratory is often characterised by feeling and passion. Intellectual continuity connotes reasoning and though oratory may involve reasoning, it can contain very bad reasoning. The bond that runs through the various parts of a poem is one of artistry which may entail some reasoning though it is not requisite but rather subordinate.

On the other hand, a scientific book or statement is characterised by intellectual or rational continuity, a continuity of thought or reasoning as distinct from, for example imagination or feeling. In the works of Euclid and Newton for example, we do not seek to notice eloquence, emotion, or pictorial imagery but rather expect and anticipate a very rigid connection of statement with statement, of thought with thought, to the extent that every step may be appreciated and shown to follow with "an iron necessity, that which preceeds it" [Latta, 1956:1].

Latta asserts that since the subject matter of logic is the intellectual element in discourse, logic can therefore be described as the science of thought [1956:3]. By describing logic as the science of thought, what is meant is that logic investigates, or endeavours to make explicit the principles of thought, the principles on which thinking is based.

Generally, the goal of any science is to discern principles, in this endeavour, the task is not mere observation of facts or events in order to come up with general statements about such facts or events, but rather to unearth the fundamental conditions, laws or principles, which are present in the events and which govern their appearance (the appearance of the events).

Every science expresses thinking at what might be described as its best or thinking of the highest type. Though a scientist thinks well, it is not requisite that he thinks about thinking itself by inquiring about or into the nature and laws entailed in thinking. Therefore all the other sciences are part of the subject matter of logic. Thus the old phrase of describing logic as *Scientia scientiarum*, the science of the sciences. The

various sciences are not 'logics', so to speak, but are rather objects of logical study [Iatta, 1956:5].

Thinking must always be about something. Thought therefore has to have an object. The object of thought in Physics is matter and energy, in Biology it is life, in Psychology it is the mental processes, while in logic, thinking is its own object. This is because logic being the science of thought, is thinking about thought. On this basis logic can thus be said to investigate the form of thought apart from the matter. By form is meant that which is constant in various instances, that which endures and subsists the accidental elements which are fitted into it. The matter in this case constitutes the varying accidental elements or 'substitutes', so to say.

The way we think of things is therefore the form of thought while the accidental or 'substitutable' objects that are thought of constitute the matter. Suffice therefore is that the concern of logic is the form of thought. Notwithstanding logic's concern with the form of thought, the matter (or content) of thought is of significance in that concern but only to the extent that (as Latta puts it):

> Just as physics is interested in particular phenomena not merely in themselves but for the sake of the laws or principles which they exhibit, so logic is concerned with the matter of thought, not on account of its intrinsic interests, but solely because of the forms of thinking which appear in various objects of thought. The form of thought is thus the primary interest of logic [1956:8].

Latta goes further to contend that logic has sometimes been said to be the art of thinking. That logic nonetheless does not teach one how to think nor is it an instrument for the discovery of the truth since one can think (and of course people think) without having to have studied logic and truth is discovered by observation,

experiment, and reasoning, which are part of the subject matter of logic. Logic is only an art in so far as it has practical use.

Logic attempts to set forth ideals of thinking in the light of which we may criticise or evaulate our reasonings. But despite the fact that there are ideals and standards prescribed by logic for accurate thinking, one may conform to such ideals without conscious knowledge of logic just the same way one may have the conscious knowledge of logic without conforming to those ideals.

Mellone in his book An Introductory Text Book of Logic contends that what is meant by the assertion that the aim of logic is to distinguish correct or valid thought from incorrect or invalid ones is not the discovering of truths or facts but rather by correct or valid thoughts is meant, thoughts which are correct or valid with reference to a definate pattern, which is regarded as a rule or regulative principle to be followed [Mellone, 1950:2]. Logic therefore deals with constants, the unchanging pattern(s). This is echoed by Mellone when he asserts that:

> ....It shows that the thinking process is essentially the same, whatever be the particulars thought about....Thinking may be reduced to general types which are the same in all particular applications. It is the aim of logic to discover these types and to show how to regulate thought by them; hence it deals with reasoning as a process common to all the sciences, without regard to their subject matter [1950:2].

Language is of great significance if the goal of logic is to be actualised. This is because for a thought to be communicated or have a practical and cognitive significance, it is necessary that there be language or a language. As Mellone contends:

> ...while thought is prior to language, thought could make no progress without embodying itself in language. As soon as we have an idea, there is an irresistable impulse to give it bodily shape in a word....The thought is purely inward and in a sense abstract; the word has an external existence as a sound or

warranted or not. If logically warranted, in that there is a strong objective relationship between the preceeding and succeding proposition(s), then it is said to be good reasoning. But if the relationship among the propositions or between a proposition(s) and the conclusion is not objective and logical, necessary or probable, then the reasoning is termed as bad reasoning.

Reasoning can be manifested in many or various ways. An argument is for example an instance of reasoning since all arguments involve movement from one proposition to another. But it is important to note that here (in an argument) there is usually involved an element of proof in that one proposition (the conclusion) is said to follow of logical necessity or probability from the other(s) (also called the premises). The premises in this case act as the basis, reason(s) or evidence for the conclusion.

Implied therefore in an argument is an element of doubt with regard to the viability, tenability or "truth" of the conclusion, hence the premises' role of evidence for the conclusion. However, it is not the case that in all reasoning there is this element of doubt about an assertion nor are there always attempts to prove an assertion as in an argument. These other types of reasoning where there is no element of doubt and deliberate attempts to prove therefore include the immediate inferences, and the appreciation of logical oppositions [Copi, 1990:168-178].

Arguments, whether deductive or inductive involve mediate inference(s). All that is important about reasoning is that there is progress from one proposition to another regardless of whether this progress is logically warranted or not and this is why there is good and bad reasoning.

To the extent that there can be observed a movement from one proposition to another (implicit in the other though maintaining the same subject and predicate), logical opposition can be said to constitute a form of reasoning. For example, if "All S are P", then one can without any 'mediator' assert that "Some S are P" by subalternation [Copi, 1990:168-172]. Similarly, to the extent that in the case of immediate inferences a proposition can be realised or inferred implicitly from a stated one, for example, "No S are P" is logically equivalent to "No P are S" by conversion [Copi, 1990:173], immediate inferences constitute forms or types of reasoning.

An explanation is also a form of reasoning in that there is movement from one proposition to another. Though an explanation from the face of it may appear or seem to be an argumentation, it is strictly speaking not an argumentation [cf. Ochieng'-Odhiambo, 1996:87-93]. This is because while in an argument there is an element of doubt or a dispute with regard to a position or assertion, in an explanation, it is only the case that the position or assertion is not clear and so there are attempts to make it clear. While in an argument there is disagreement on the issue in question, in an explanation it is only the case that attempts are made to account for the issue in question for purposes of clarity.

Scientists more often engage in explanations rather than arguments although their operations usually seem and appear to be arguments. Body movements, mental dynamics (thoughts, imaginations, and so on) and other natural phenomena such as earth quakes, global warming, ocean currents, expansion and contration of material and liquids or gases among others as studied and accounted for by Biologists, Geologists, Physicists and Psychologists are more of explanations other than

arguments. Even in instances where there is doubt or disparity about a phenomena by scientists, what usually is the question and the issue often regards the accuracy, viability or tenability of the various or respective purported accounts for such phenomena.

Though there maybe a dispute among scientists, their attempts to resolve such disputes are usually attempts to give a more accurate account for the phenomena. Such an activity boils down to an explanation. In an argument, concern is with the logical connection of propositions while in an explanation the concern is with the actual or factual connection or interrelation of propositions and facts. While an argument may be valid but entail factual falsity, an explanation involves or at least is intended to claim to involve factual truth for it to be considered appropriate, convincing or right.

Although argumentation may be and often is involved in scientists' attempts to account for phenomena, especially at experimental level, it does not (argumentation) notwithstanding constitute the main task of scientists as it were but rather is just part of the whole process of their task or plays a necessary supplementary role. The main task of scientists therefore, is one of explanation.

It is the hope hitherto that it has been brought to light that reasoning is a wide term that can manifest itself in various ways (Logical opposition, immediate inferences and mediate inferences, explanation). The rationale for discussing these particular concepts (later in this chapter) as mentioned above is the fact of their relevance and preponderance in legal matters given that legal preceedings often involve reasoning as evidenced by the dichotomisation between the prosecution and the defence, both of

which strive to prove their positions or show the sustainability or tenability of their position.

Thinking can only be said to be in process when ideas are formed. Ideas can be said to be the intellectual representations of things which image the essences underlying the apparent appearance of phenomena [Bittle, 1950:171]. Thinking constitutes the unification or combination of ideas into judgements in which case sense experience is transcended , and venturing made into the realm of universals.

Just as man realises his full potency by a gradual process of growth and development from relative simplicity to complexity, so does his knowledge of and about things. Man's knowledge somehow ultimately begins with sense experience (smell, touch, hearing, sight, and taste). After sense perception, an idea is normally formed of 'a thing' or 'something'. This usually is as a result of what can be considered to be the constituents of an idea in the form of quality and quantity (colour, texture, shape etc). These constituent parts of an idea are usually combined and ordered by the mind on the basis of the innate ability of the mind.

As a result of this mental operation, an idea can be formed of, for example, a chair, a person , a watch and so on. In other words, by means of habitual observation and study as is the general nature of man, the human mind is usually enhanced to distinguish between various attributes of objects to the extent that it comparatively fully appreciate the identity of things as individuals or particulars. These ideas of things make the foundation of any knowledge.

The mind generally constantly attempts to attain truth. Truth nevertheless is not found in the ideas but rather the ideas contain the elements of truth. After forming various ideas, the mind subjects such ideas to inspection, comparing them in order to establish their agreement or disagreement with each other. As a result of this the mind pronounces their mutual identity (of the ideas) or non-identity in a judgement [Bittle, 1950:172]. As a result, one has two ideas, a subject and a predicate, and the mental pronouncement as the copula. This can better be illustrated by the following proposition as an example:

"Africans are dark in complexion"

In the example above, 'Africans', is the subject, 'dark in complexion' is the predicate, and 'are' is the copula. Here there are two ideas the one of 'Africans' and the other of 'dark complexion'. In the example, a relationship is established between the two ideas, and the relationship is affirmative in that there is agreement between the two ideas. The mental act of pronouncement, in the above case, 'are', is the copula.

Since ideas represent things, judgement or a proposition expresses an agreement or a disagreement between things as they exist in themselves, independent of the mind; if the mind's judgement corresponds with reality, it is true and if not, it is false. Just as ideas are a stage in the development of knowledge and are best expressed by definition and division, so is judgement, especially when such mental judgements correspond to reality. This is because, then, the mind reaches certain judgements that are very basic and self-evident. Such judgements are the foundations of all truths; these are the principles of Identity, of Contradiction, and Excluded middle.

In virtue of the above three principles, on recognition of the truth of a given judgement, some conclusions can be drawn regarding other judgements implied in the explicitly stated ones; this can be realised by the process called immediate inference. As the highest expression of ideas is by definition and division, so the highest expression of judgements is by immediate inference [Bittle, 1950:193].

As a recapitulation of what has been discussed so far, it is important to note that knowledge is a process to the extent that the maximisation of its optimisation is characterised by growth and development from sense experience resulting to the awareness of 'things' or 'a thing' as being.

The height of this awareness is definition and division as manifested in an idea [Bittle, 1950:173]. From this stage of an idea, there is the comparision by the mind of the agreement and disagreement of the various ideas with the aim of pronouncing their mutual identity and non-identity in a judgement. In this judgement the mind realizes or reaches very basic and self-evident judgements that are the foundation of all truth. These are the three principles mentioned earlier. On the basis of logical opposition and eduction [Copi, 1990:168-178], immediate inferences can be made which are the height of judgement. These immediate inferences are made in virtue of the three principles.

However, to the extent that immediate inferences merely explicitly state what is implicitly contained in a judgement or proposition recognised beforehand as true, they are a primitive form of reasoning. Certainly, if one knows that "All mammals are warm-blooded", then such a person would be sure that at least some warm-blooded

beings are mammals. But the advancement of knowledge is comparatively little in this case.

Quite a number of truths are discovered by sense perception. For example one can look outside through the window and see that the sun is shining, a chimney is smoking, and so on. Nevertheless, these kinds of judgements do not have particular value for the advancement of knowledge and the discovery of important truths. Such simple judgements often contain elements which give rise to serious problems of science and philosophy. For example, a question may arise about the size of the sun; is it large or small? What is its shape? Or one may ask, what is life? Is religion a fact or a fiction? , and so on.

Answers to the above questions cannot be obtained by the comparision of ideas alone as it were. To hold that 'people are walking up and down the street' is simple in that one can say that there are beings who are people and who are performing the act of walking up and down the street.

However, the assertion that the sun is approximately 83 million miles away from the earth is one, the truth of which cannot be established by mere sense perception alone nor an analysis of subject and predicate. In this case, nothing is there to show that the predicate must or can be affirmed of the subject. Similarly, such statements as 'the world had no beginning', 'the soul of man is immaterial and immortal', and so on, cannot be said to be true or false on the mere inspection of them in terms of subject and predicate i.e. whether the comprehension of the predicate is included in the comprehension of the subject. At this juncture, the reasoning power has to be utilised.

When the mind cannot observe the agreement or disagreement between two ideas by mere analysis with regard to the implication of the comprehension of the predicate and subject, nor by direct observation or sense perception, there ensues a state of doubt which can be resolved by bringing in a third idea which is known well and comprehended. This third idea serves the purpose of resolving the doubts by it being compared with the two ideas to see the identity or non-identity. If both of the ideas are identified with and in the third known idea, then they can be considered to be identified with each other. This is in virtue of the principle of identity because things which are identified with a third must be identified with each other.

On occassion that one of two ideas is identified with a third which is known and the other is not (the other which is not well known), then it means that the two cannot be identified with each other. This is in virtue of the principle of non-contradiction, because, of two things, if one is the same as a third while the other is not, then the two things cannot be the same among themselves or cannot be identified with each other. In the first case, the one will be affirmed as the predicate of the other, and in the second case it is denied as a predicate of the other. This is on the basis of the principle of non-contradiction.

At this juncture, it can be said that on the observation of the relation between two quesionable ideas with a 'third known', the mind can express a judgement of agreement or disagreement between the two questionable ideas themselves. This is the basic process of mediate reasoning.

Mediate inference or reasoning can therefore be defined as the process by which, from certain truth(s) already known, the mind passes to another truth distinct from the

earlier but necessarily following from or at least claimed to follow from the earlier. There are basically two types of reasoning: Deduction and Induction [Popkin and Stroll, 1969:225-228].

Nyasani defines deduction as "The process of deriving logical consequences of propositions ...the process of reaching and affirming one statement (the conclusion) from one or more statements (the premises)" [1982:14]. Requisite is that there be or claimed to be objective relation(s) bonding the premises with the conclusion. To this extent Nyasani's definition of deductive reasoning should be modified to read as "the process of deriving or claim to deriving logical consquences of propositions." This modification of Nyasani's definition is for the purpose of capturing invalid deductive reasoning.

Example

1. If somebody is wise, then he makes right decisions

2. John is wise

Therefore: 3. John makes right decisions

Symbolised 1. $p \rightarrow q$

2. p

$\therefore$ 3. q

The conclusion in the above example can be realised to be following of logical necessity from the premises. This conclusion can also be seen to be implicitly contained in the premises considered together. In deductive reasoning, when the

conclusion follows rightly from the premises, the reasoning is said to be valid, i.e. the premises offer sufficient and necessary (conclusive) evidence for the conclusion.

When the conclusion does not follow necessarily, or if it is not evidenced conclusively by the premises, then the reasoning is said to be invalid. But deductive reasoning can be said to be valid notwithstanding the truth value (true or false) of its premises. The reasoning may contain true premises and a true conclusion or false premise(s) and a false conclusion but still be valid.

Example (1)

1. All mammals either have fur or hair on their skin.
2. A dog is a mammal.

Therefore 3. A dog either has fur or hair on its skin.

This is an example of valid deductive reasoning which involves true premises and a true conclusion.

Example (2)

1. If men are strong, then they cannot curry heavy things.
2. Weight lifters are strong men.

Therefore 3. Weight lifters cannot carry heavy things.

This example is one of valid deductive reasoning which involves atleast a false premise and a false conclusion. This means that validity is only concerned with the logical structure of a reasoning process not practical truths. There can be an instance of an invalid deductive reasoning which involves a true conclusion.

Example

1. All university students are bright.

2. Juma is a bright person.

Therefore3. Juma is a university student

In the above example assuming that there really exists a bright univesity student called Juma, the example would notwithstanding be invalid.

While in valid deductive reasoning the premise(s) contain the conclusion such that granted the premise(s) the conclusion has to hold, in inductive reasoning, the premises only offer a claimed basis or support for the conclusion. In induction, the conclusion does not follow of logical necessity and certitude. Here, the conclusion follows or is claimed to follow with varying probability depending on the strength of the claimed evidence or support for the conclusion.

Example

1. Ogega is a rowdy university student
2. Kamau is a rowdy university student.
3. Mwanzia is another rowdy university student.

Therefore 4. University students are rowdy.

From this example, the fact that one has come across three cases of students who happen to be rowdy does not offer conclusive evidence for concluding that university students are rowdy unless such a person has enumerated all the instances and possible instances of university students.

It is important to note that with regard to deductive and inductive reasoning consistency is not to be confused with truth. Naturally, the very nature of reasoning

demands that the inference be true especially if the other judgement(s) [premise(s)] are true also. But if the conclusion is drawn from judgements of which one or all are false, there are chances that the conclusion may be false.

Regarding the relationship between consistency and truth in mediate inferences, it can correctly be asserted that a conclusion or inference, if drawn with consistency from true proposition(s) or premise(s), must always be true; the conclusion or inference, if drawn with consistency from false premise(s) or proposition(s), may be true or false. However the biggest problem in any kind of inference or reasoning always consists in the question of the truth of the premises composing the reasoning.

Reasoning (apart from instances of immediate inference and logical opposition) often involves the presentations of a number of 'facts' and minor 'proofs' before their 'truth' becomes clear. The more complicated this process becomes, the higher the chances for error because of the natural weakness of man's mind.

The falsity of a conclusion can therefore emanate from two sources: either from the falsity of the premises or propositions used in the reasoning, which are supposed to give a true statement of facts, but do not; or the falsity of the conclusion may be from a faulty arrangement of true premises or propositions in the reasoning. In this latter case a conclusion which does not follow necessarily from the claimed proof(s) ensues.

For an inference to be true in every respect, it is requisite that the mind guards itself against errors of fact and those of inconsistency. But logic is not concerned essentially with the truths or errors of facts since that is the province of other disciplines. It is on the basis of the preceding assertion that a discussion of the process of reasoning

becomes of critical significance in an attempt to evaluate the justification for general legal procedings. This is because it is the contention of this thesis that truth or fact(not mere logical possibility) should be the sufficing factor for consideration if real justice (philosophical justice), has to carry the day.

2.2 IMMEDIATE INFERENCES

In traditional logic, there are basically four types of categorical propositions. Their four standard forms are conventionally symbolised as:

All S are P - (A)

No S are P - (E)

Some S are P - (I)

Some S are not P - (O)

Immediate inferences involve the implicit realisation of a proposition which is a logical equivalent of one stated or asserted without having to involve a second proposition and a link (in terms of a term) between the two propositions. In immediate inferences, the unexplicitly stated proposition is implicit and evident on consideration of the stated one. There are basically four types of immediate inferences and these include: obversion, conversion, contraposition, and inversion [Bittle, 1950:155-166].

Example of obversion

The process of obversion involves two necessary operations: first, the quality of the proposition is changed (but not quantity). That is, if a proposition is affirmative, ('All S are P' or 'some S are P') it is changed to negative ('No S are P' or 'some S are not

P'). But it does not involve change of the quantity of the respective proposition. After changing the quality of the propostion, the predicate of the proposition is replaced with its complement e.g. "All students are learners" when obverted becomes "No students are non-learners", "No angels are immoral" when obverted becomes "All angels are non-immoral". All operations of obversion are logically acceptable i.e. the original proposition and its obverse are logically equivalents.

Immediate inferences can be summarised thus: obversion of all the four standard form categorical propositions are valid inferences and the original proposition is a logical equivalent of its obverse. Conversion is a logical operation which is only accurate with universal negation (E) and particular affirmation (I). Contraposition is only logically accurate with regard to universal affirmation (A) and particular negation (O). Inversion is an operation which engenders two logically non-equivalent propositions. This therefore means that inversion is an immediate inference which is only logically significant in that by understanding the process (inversion), one can tell whether an inference is right or wrong. Otherwise, knowledge of the process of inversion is only significant to the extent that it is a negative way of showing how to reason correctly [Bittle, 1950:155-166].

The relation which exists between propositions having the same subject and the same predicate, but differing in quality or in quantity or in both is what is called logical opposition. Logical opposition is another source from which a proposition that is stated implies another not explicitly stated. However, this is apart from the four above mentioned operations (obversion, conversion, contraposition, and inversion).

Example of contradiction [(A-O) and (E-I)]

There are two points to note here; contradictories cannot both be true together nor can they both be false together. e.g. if "All native Africans are black in complexion" is true, it cannot also be true at the sametime that "Some native Africans are not black in complexion" and vice versa.

The relations that ensue from the four types of logical opposition can be summarised thus:

If (A) is true: then (I) is true, (E) is false, (O) is false.
If (A) is false: then (O) is true, (E) is doubtful, (I) is doubtful.
If (E) is true: then (O) is true, (A) is false, (I) is false.
If (E) is false: then (I) is true, (A) is doubtful, (O) is doubtful.
If (I) is true: then (E) is false, (A) is doubtful, (O) is doubtful.
If (I) is false: then (O) is true, (A) is false, (E) is true.
If (O) is true: then (A) is false, (E) is doubtful, (I) is doubtful.
If (O) is false: then (I) is true, (E) is false, (A) is true.
[Copi, 1990:168-172]

The notion of logical opposition - as manifested in the relations of contrariety, sub-contrariety, sub-alternation, and contradiction [Copi, 1990:171] - on the one side and immediate inferences - as exhibited in the operations of obversion, conversion, contraposition, and inversion [Bittle, 1950:155] - on the other are necessary and sufficient notions for any claim to reasoning. This is because it is only by the appreciation of them that the mind can be certain of the accuracy and implication(s) of the propositions which are held or in the efforts to attain a conclusion which would

constitute logical consistency. To this extent therefore, a consideration of the concept of logical opposition becomes of great significance especially in court proceedings whereby reasoning is a predominating feature.

2.3 THE PRINCIPLES OF THOUGHT AND THEIR RELEVANCE TO COURT PROCEEDINGS

Though the laws of Thought are normally stated in the form of propositions, they actually are principles of all knowledge. Truth and error could not be distinguished if it were the case that the world was a flux. Nothing could be said about anything because the things could be continuously changing, so that their identity could not be ascertained.

All (continuous) speech, thinking and reasoning depends on the law of identyty. 'Z is Z' means that a thing remains the same (or must be assumed to remain the same) throughout a discussion or when it is thought about. When for example in a discussion or thought the object is a class chair with a definite design and colour, the discussion or thought should proceed with the same conceptulaization of the chair i.e. the chair should not at a point in the discussion or thought be conceptualized as having different qualities from the initial as in design, and colour for example.

The law of non-contradiction is a negative expression of the law of identity. A thing that has a definite nature cannot have and not have at the same time the same quality if it remains the same in various circumstances. Within the same context of reasoning for example, a term must not be used in more than one sense.

The requirement of the law of non-contradiction is that for example in case of a class chair, one should not begin by resoning or thinking about the chair as brown with a

square base and later in the same context, discussion or thought perceive it as if it should be conceptualized as being red and a rocking one with a bowed base. i.e. as the same chair and not the same chair.

No accurate thought nor true knowledge can be actualized or realized unless it is assumed that (though often unconsciously) these laws are valid. It has for example been contended that:

> If these laws do not hold, all coherent speech, all knowledge and thought and all rational communication between different persons are impossible. This is the strongest possible ground for the laws of thought, for it means that these laws are so woven into experience that if they are supposed to be false all experience falls to pieces [Latta, 1956:109].

The same principle expressed in the laws of identity and non-contradition is put in another way by the law of excluded middle. The propositions 'x is z' and 'x is not z' cannot both be true (by the law of non-contradiction). The law of excluded middle says that the two propositions cannot both be false but rather one of them must be true and the other false. The law of excluded middle implies that everything must either have a certain quality or not have it.

The principle of identity contends that something is itself or is dentified with itself. This principle has an intimate relationship with the notion of individuation which enhances knowledge of various beings as respective, individual realities. On the basis of the notion of individuation, it has been argued, human beings as rational beings are justified to be held morally reponsible for their individual and personal acts. Individuation as a notion is based on the contention that it is a practical reality that things can be known as themselves and differentiated from the others [Nyasani, 1996:121]. To this extent, it can be said that the notion of individuation is based

ultimately and metaphysically on the principle of identity. The principle of identity would not have been of any cognitive or priactical significance if it were not to enhance the differentiation and recognition of beings, and in the same spirit the notion of individuation would have been an arbitrary and hence unwarranted conceptualization in the absence of the principle of identity.

The question that arises hitherto is, "of what legal significance is this principle of identity then?" The answer to this question, on the basis of the proceeding lies in the assumption of moral responsibility. Individuals are held morally responsible for their acts as individuals just the same way a group is held morally responsible for its actions as an identified individual entity.

What is normally observed in courts of law is that individuals or groups as explained above are usually charged as individuals. An individual cannot be charged for the wrong done by another unless the two commited the offence together. Even in an instance where there are two or more individuals charged with the same offence, the sentence is normally passed to affect them as individuals e.g. if it is a sentence to four years imprisonment, the individuals would carry the burden as individuals and serve the four years each, if it is an organization constituting of many people, it would be considered as an entity unit and carry its legal burdens and benefits as a unit entity identified with itself. The individual members of such an organisation would not carry (at least not directly) the legal burdens and or benefits of the group.

The principle of non-contradiction asserts that a thing cannot be and not be at the same time under the same circumstances. On this philosophical basis and perspective, the principle of non-contradiction is what dictates that a verdict passed is just one, either

guilty or not guilty (innocent). It cannot be the case that somebody or an accused or defendant is guilty and not guilty at the same time under the same circumstances.

Even in an instance whereby a defendant is charged for various or more than one offence, the charges are usually handled independently and respectively and even if they are such that they are in one way or another inter-related so that it is not possible to try in one without considering the circumstances and facts in the other (because may be they are claimed to have been committed under the same facts and circumstances), the verdicts are usually passed respectively for the individual charges or claimed offences. On one charge the individual may be innocent or guilty while on the other(s) he/she may not be innocent or guilty. It is also in virtue of this very principle of non contradiction that an accused is only allowed to enter one plea, guilty or not guilty so that attempts ensue to reach a legal conclusion, judgement or ruling.

It is also on this very principle of non-contradiction that, from a philosophical perspective, (and logical perspective for that matter) a lawyer or advocate would not serve two contesting parties (plaintiff and defendant) at the same time in the same case. This can be said (and accurately so), to be based on the recognition and adherence to the principle of non contradiction.

If a lawyer or advocate were allowed to represent two contesting parties, this would logically imply that the lawyer or advocate would be affirming and denying the guilt and innocence of each party at the same time, a situation which would render legal proceedings impossible.

The relevance of the three principles of thought, logical opposition, and immediate inferences, as hitherto been discussed to court proceedings is justified by the fact that court proceedings practically involve and/or imply reasoning and involve conclusions or inferences together with assumptions and/or presumptions (as hitherto discussed) to the extent and on which basis there is no way such proceedings can claim innocence or indifference with regard to the three logical notions (the three principles, logical opposions, and immediate inferences).

2.4 THE PRACTICAL SIGNIFICANCE OF LOGIC

It has been contended that:

> It is obvious that it is often difficult, if not impossible, to determine the truth of a proposition directly, but relatively easy to establish the truth of another proposition from which the one at issue can be deduced [Cohen, 1963:22].

It has further been asserted that a theoretical science forms the basis for every rational technique such that logic, being a theoretical study of the kinds and limitations of different inferences, can and actually does enable and enhance the formulation and partial mechanisation of the process employed in successful inquiry [Cohen, 1963:23]. Though the actual attainment of truth relies on individual skills and habits, knowledge of logical principles helps to form and perfect techniques for procuring and weighing evidence.

Logic as earlier pointed out basically concerns itself with reasoning to the extent that various reasoning patterns (also called forms) and the various rules that govern such respective reasoning patterns can be discerned, understood, and appreciated. The concern of logic is therefore not the practical reality but rather the formal or logical

reality of things. This as stated elsewhere is because the truth and practical reality of things is the realm of the various relevant disciplines.

The importance of logic therefore, whatever else it might not be, lies in the tools logic provides for the evaluation of the judgements, assertions or contentions held in the various disciplines vis-a-vis the claimed grounds or basis for such assertions. Logic enhances to evaluate whether what is contended is granted given the foundation(s) on which such contention(s) is based.

It can therefore be contended that the significance of logic can be ascribed to all disciplines in so far as such disciplines upholds certain positions which are claimed to follow from others or based on other(s). Sciences, for example, are generally very dependant on inductive reasoning. Induction is based on two principles, the principle of sufficient reason and the principle of the uniformity of nature.

The principle of sufficient reason asserts that every corporeal being has a sufficient reason for its being. This principle 'evolves' into the principle of causality, that everything (corporeal) has a cause. The principle of the uniformity of nature states that things of the same nature or form act and behave the same everywhere and always under the same circumstances. It is only on the basis of these two principles and assumptions that scientific laws, which are characteristically general, can be justified.

The preceding implies a heavy reliance of science on logic. This is because without a logical rationale (inductive reasoning), the various asserted scientific laws and principles, would not have an invariant justification. Universality, which is generally what science relies on, and which is the main concern for logic (or the 'child of logic')

is what has ensured the tremendous growth and development of technology on which man currently relies on heavily to contain the dictates of nature and the environment.

It is the contention at this juncture of this thesis that the accuracy and prosperity which has been observed and realised by science in general has been due to the relative determinism and predictability of natural phenomena. It is the contention of this thesis that human behaviour or social life is not as determinable and predictable as it is the case with natural phenomena as studied in Physics, Geography, Biology, Chemistry, among others. This (the contention) actually forms the impetus for the attempts to account for the significance and compatibility of logic with law, Logic being a discipline concerned with universals, unchanging reality and forms, while law is a domain that concerns itself with the very dynamic social life.

Though logic is necessarily significant in social life (given that man is basically a rational being), there is a general doubt as to whether social life can be as mechanical and predictable as natural phenomena. To this extent, this can be said to be the reason for the differentiation between natural sciences and social sciences hence the general perception of social sciences as being often 'value laden' (i.e. that there is always a human element and bias in social sciences).

The point hitherto is that the value of logic in natural sciences is almost absolute i.e. that there cannot be natural sciences without knowledge or assumption of logical techniques either deliberately or non-deliberately. Natural sciences and logic therefore are almost if not absolutely perfect 'compatibles' on the basis of the principle of the uniformity of nature and that of causality (Universalism). But there is always (or at least ought to be) a lingering question with regard to the appropriateness of the

employment or presumption of constants or universals for the guidance and evaluation of human behaviour (as implied in the practice of law especially in codified systems which implies an assumption of universality and uniformity in the occurance of social events) hence this study.

However, for the preceding to be appreciated, it is imperative to give an exposition and explication of 'law' as a notion, how it (law) is conceptualised and operates in the realm of physical phenomena and in the realm of human social reality, hence the next chapter.

CHAPTER THREE

NATURAL AND MAN-MADE LAW

3.1 DEFINITION AND NATURE OF LAW

The definition of the word 'law' is problematic particularly due to its usage in many different ways. Adler J. M and Gorman W. assert in this regard that:

> The notion of law is also associated with a diversity of subject matters, and its meaning undergoes many variations as the discussion shifts from one context to another. The most radical difference separates the way in which natural scientists use the term from the way in which it is used in the arts and in morals or politics [1982:962].

The law operates differently in the realm of physical nature and in the realm of intelligent beings like man. Man does not conform to his laws so exactly as the physical world.

The term law can basically be divided in two broad categories. On the one hand, the term can be used to refer to dictates as regards the operations of natural phenomena as studied in Physics, Biology, Chemistry and such like natural sciences. Here is meant the universal and general definite ways and modes in which certain natural phenomena do actually occur, presumably how they have in the past been occuring and how they are expected to occur in the future. The occurence and presentation of such natural phenomena is to this extent, given repeated observations, concluded to be constant or the same in one way or the other. This is the basis of law with regard to natural phenomena. The law of inertia which holds that any body in motion or at rest would always be in such a state unless and until an external force acts on it, is an example of law in this sense.

On the other hand, the term law is also usually meant to imply dictates with regard to expected mode(s) of activity and behaviour as prescribed by man (man-made law or positive law) or as dictated by human reason apart from and without any other personal or subjective motive (i.e without the satisfaction of selfish or egocentric interests) or as dictated by a Divine power or Deity (the latter is called Divine law).

Divine law or the law of God nevertheless can be understood to capture 'law' with regard to the two dichotomies (law in the physical sense and law in the sense of dictates governing human conduct) on the basis that God created the universe thereby instilling a certain definite way of operation or activity as ensues and is observed in the entire universe i.e a definite way in which plants, animals, humans, and inanimate beings do operate or actually ought to operate.

Law can therefore broadly speaking be said to imply on one hand the dictate by which natural phenomena is governed (e.g in Physics, Chemistry, Biology and so on) which constitutes the physical laws or scientific laws. On the other hand law can be construed to connote the dictate by which social phenomena is governed, which include divine law, moral law (or informal prescriptions for human conduct as formulated and upheld by a people), and positive law (which consists in the formal articulation of rules to act as the minimum standard by which men are expected to conform with regard to their social acts).

The conceptualisation of law to the preceding extent connotes an ultimate or supreme source which may be nature (in the sense of dictates in accordance with creation by which natural phenomena operates e.g scientific laws, or in the sense of human reason indipendent of any other influences and biases). On the other hand the ultimate source

may be the human being whereby indipendent or objective reason is not the cardinal overriding dictate. It is under this latter category that positive law or man-made law often tends to fall.

The basis for the assertion that the term 'law' connotes an ultimate source or a sovereign is the inevitability implied by the term in practical discourses. This contention is clearer when the determinism, rigidity, universality, and inevitability with regard to especially the physical or scientific laws is considered. Though the contention may apparently not be consistently tenable with regard to social life, it nevertheless suffices and is implied on the basis of public resentment or civil disobedience with regard to positive law.

The point is that what is believed to constitute what ought to be the case can be compromised to an extent but this would eventually have to be reverted to to ensure harmony in society (e.g. the so called wind of change for democracy as seen in the current debate on constitutional reform in Kenya) hence the inevitability and determinism connoted in the term law.

The preceding often is based (as for the above example of Kenya) on the principle of natural law, natural justice or philosophical justice (to be discussed later). Even in the case of positive law the inevitability and determinism implicit in law is echoed in the fact of punishment for disobedience to the law.

Man-made law can therefore be defined in general as "the sum total of those general rules of action as are enforced by a sovereign political authority". ['Law' in Everyman's Encylopaedia: 488] But this definition is particularly relevant to a mature

political society. However, 'primitive' communities also are ordered by rules imposed by a sovereign political authority which might be a 'tribal' chief or council or accepted by common consent.

It is important to note that the concern of this thesis is not with law in the context of 'primitive' societies but rather in the context of a modern state. The sources of these rules (constituting the law) are various and may be written and unwritten. To this extent then, law can be said to consist any principle that is recognised and enforced by a court in the administration of justice. Alternatively, law can be said to be a body of rules to ensure guidance of human conduct, rules that are imposed upon and enforced among the members of a given state [The Rapid Results College Course No. 12 a 5:5].

The preceding descriptions are both defective in that they exclude public international law, which is law dealing with relations between states. The descriptions notwithstanding are reasonably accurate for the purpose of this study because the concern and scope of study does not include public international law but rather law as generally practiced by respective states.

Some philosophers have postulated the existence of "Natural law". This concept is often known as the "principle of natural justice" and has significantly influenced the development of man-made law. Often discussions of 'justice' refer to this idea (the notion of justice will be discussed in the next chapter). Proponents of this kind of law insist that it is the natural law which is to suffice ultimately and that this law is what enhances justice, the form of justice that is in this thesis referred to as philosophical justice. In this regard it has been contended that:

> Here we are faced by the question whether there does not exist, side by side with the positive law which contains and expresses actual validity another law which

> contains and expresses ideal values (values possibly, nonetheless real for being the ideal): a law which we may call 'natural', because it corresponds 'to the nature of things' or to the nature of man (as a rational being living, or intending to live, in harmony with the rational nature of things): a law founded on what is right in itself, on what is just everywhere and at all times, on what is valuable whether or not it be valid [Banker, 1951:98].

Banker continues to contend that a law has validity, and one is legally obliged to obey it, if such a law is declared, recognised, and enforced by the authority of the legally organised community acting in its capacity as a state. He goes further to insist that law can be said to have value, and one is to obey it not only by an outward compulsion or legally but also on moral basis and by an inward force but only if it has an inherent quality of justice [1951:101]. In this spirit therefore, law ought to have both validity and value and only then can it appropriately operate and be effective.

John Locke, Richard Hooker, and Immanuel Kant have been chosen for consideration in this chapter due to the common denominatior that underlies their conceptualisation of at least what ought to constitute law. These three scholars among others (not discussed) uphold and prescribe the formulation of rules to govern society on the basis of 'reason'. Locke's 'natural law', Hooker's 'rational law', and Kant's 'categorical imperative' are conceptualisations of the basis on which rules have to be founded which (the basis) fit well and constitute the school of natural law.

This thesis (as is shown in the next chapter) perceives justice to connote or imply what is right on the basis and in virtue of objective reason, good conscience, good faith, and insight (i.e philosophical justice). It is on the basis of the preceding note, therefore, that the above scholars have been considered.

John Locke is one of the proponents of the law of nature, that all purpoted law has to be founded on this law which every normal person is endowed with the ability of

realising and appreciating in so far as such a person enjoys the attributes of rationality. In this line he contends that:

> The state of nature has a law of nature to govern it, which obliges everyone and reason, which is that law, teaches all mankind, who will but consult it, that being all equal and independent, no one ought to harm another in his life, health, liberty, or possessions: for men being all the workmanship of one omnipotent and infinitely wise maker; all the servants of one sovereign master, sent into the world by his order, and about his business; they are his property, whose workmanship they are made to last during his, not another's pleasure [Locke, 1954:198].

Locke emphasises the all binding nature of this natural law, that no man can claim freedom from this law and obligation from the same. He also notes the inadequacy of man-made law and its subordinance to the natural law. To him therefore, this natural law is the ultimate and absolute with which all man-made law have to be compatible.

Here he notes that:

> ...it cannot be said that some men are born so free that they are not in the least subject to this law, for this is not a private or positive law created according to circumstances and for an immediate convenience; rather it is a fixed and permanent role of morals, which reason itself pronounces, and which persists, being a fact so firmly rooted in the soil of human nature....since therefore all men are by nature rational, and since there is a harmony between this law and the rational nature, and this harmony can be known by the light of nature, it follows that all those who are endowed with a rational nature, i.e. all men in the world, are morally bound by this law. Hence, if natural law is binding on atleast some men, clearly by the same right it must be binding on all men as well because the ground of obligation is the same for all men, and also the manner of its being known and its nature are the same [Locke, 1954:199].

According to Hooker, law is generally the order which is imposed on an inferior by a superior, so that eternal law, for example, is the law that God has laid down for the direction of his creatures [Legouis and Casamian, 1957:1.3.1]. Hooker uses the term 'natural law' in reference to the law that governs subhuman creatures. According to him, natural agents operate out of simple necessity as dictated by God's wisdom from the very beginning, common sense or fancy is the foundation of the law that governs natural agents (e.g. beasts) which have some sort of freedom, Immaterial beings such

as angels and spirits are governed by intuitive intellectual judgement and voluntary agents according to him are governed by a rule that is founded on reason.

It is however important to note that the above last category of dictates are not to be confused either with the laws that determine natural agents nor with laws which men lay down to govern their actions or those of other men. Hooker does not call this kind of law natural law or human law but rather he calls it 'rational law' or 'the law of human nature'. This law according to Hooker guides towards good action and only it, does so, and it can be known by any man by the light of natural reason. Hooker brings out his conceptualisation of this kind of law when he observes that:

> The nature of goodness being thus ample, a law is properly that which reason in such sort defineth to be good that it must be done. And the law of reason or human nature is that which men by discourse of natural reason have rightly found out themselves to be all forever bound unto in their action .... Law rational therefore, which men commonly use to call the law of nature, meaning thereby the law which human nature knoweth itself in reason universally bound unto, which also for that cause may be termed most fitly the law of reasoning ; this law, I say, comprehendeth all those things which men by the light of their natural understanding evidently know, or at leastwise may know, to be beseeming or unbeseeming, virtuous or vicious, good or evil for them to do [1957:1.8.9].

In agreement with Hooker is the contention that notwithstanding the fact that lives of men cannot sufficiently be directed by rational law, it is nevertheless the foundation of all human law [Faurot, 1971:144]. The example he gives is that of England where according to him "...statute law is often no more than the ratification of common law..." [1971:144]. Faurot goes further to contend that:

> Merely human laws are right and just when they transgress no law of reason and when experience and probable reason show that they are expedient; that is, that they probably make for human happiness [1971:144].

The difficulty and intricacies involved in the formulation of appropriate and just man-made laws is what makes Faurot insist that only "...wise men, and not ...men of ordinary understanding should engage in this task." [1971:146].

Rational law in Hooker's scheme is the equivalent of 'natural law' according to John Locke or the Kantian 'categorical imperative' only that he uses a different name. Hooker's distinction between discursive reason and probable reason helps bring clear what he means by rational law and also helps resolve the confusion and uncertainity which can ensue regarding the difference between rational law and man-made law. By discursive reason he means universal, invariable, and objective justification of a rule. These are justifications which are not based on any bias or orientations whether social, economic, political, or religious, but rather objective reason.

By probable reason on the other hand, Hooker implies and conceptualises justification for a dictate or rule on the basis of its utility for another end. Such dictates or justifications can therefore ensure goodness or justice as a matter of probability not certainty, them (the dictates) possibly being based on caprice. This is the realm of human laws or man-made law.

The preceding is evident by the fact that there have often been in history instances of agitation for law reform. This has often been due to dissatisfaction with certain rules which are either deemed anachronistic, irksome, burdensome or oppressive (e.g. former South Africa under apartheid, Nazi Germany under Hitler). Hence the non-universality and non-invariability of human laws.

'Natural law' and 'rational law' are therefore terms used to describe the unchanging, invariable, and consistently tenable axioms to which appeal can be made to evaluate the intrinsic value of a rule or rules made by human beings. The only difference between the two is in scope. This is because natural law can be used to capture both what objective human reason dictates and what is dictated by divine authority, while rational law as used by Hooker refers only to the dictates of objective unbiased human reason. The two therefore are basically the same in so far as they refer to the unchanging intrinsically valuable dictates which makes them different from human law [by which Hooker means those dictates which are possibly inappropriate or entailing bias(es)].

Kant's contribution to the discussion on law revolves or is centred on two main concepts, the 'hypothetical' and the 'categorical imperative'. According to him, man is characterised by reason or rationality though this is not what always suffices in practical life. Man therefore is more often than not torn in between the dictates of his animal impulses and reason for the direction of his life. This to Kant is always an antagonism between duty and interest, between what man thinks he ought to do and what he thinks will make him happy or achieve his subjective interests.

To Kant, the term 'imperative' implies the kind of necessity that practical reason discloses. When reason serves passions, the imperative involved is hypothetical in the sense that the rule engendered is conditional on the end proposed to it by man's sensuous nature. When reason dictates apart from reference to man's sensuous desires, the imperative involved is categorical. This contention comes out more clearly as follows:

> Now all imperatives command either hypothetically or categorically. The former represent the practical necessity of a possible action as means to something else that is willed (or at least which one might possibly will). The categorical imperative would be that which represented an action as necessary of itself without reference to another end, i.e., as objectively necessary. Since every practical law represents a possible action as good, and on this account, for a subject who is practically determinable by reason, necessary, all imperatives are formulae determining an action which is necessary according to the principles of a will good in some respect. If now the action is good only as a means to something else, then the imperative is hypothetical; if it is conceived as good in itself and consequently as being necessarily the principle of a will which of itself conforms to reason, then it is categorical [Kant, 1909:189].

Kant finally contends that although nothing less than right acts performed from right motives satisfies reason's full demands, reason accepts as a minimal demand that some of these acts be performed from whatever motive is necessary. To Kant therefore, a system of juridical law, prescribing what is objectively right in a world in which men cannot be counted on to perform their duties out of respect for right and love for their fellow constitute these minimal demands ['Justice' in Colliers Encyclopaedia: 686]. In the same line, it has been asserted that:

> Because it is the imperfection of man's will which necessitates the formation of a civil union, law makers will make free use of sensous motives in order to secure obedience to their laws. But outward obedience to law is not an end in itself. Reason commands it only because a system of minimal justice is a necessary prerequisite to the development of virtue in men [Faurot, 1971:193].

Though religion is a variable that has been considered with regard to what constitutes (or at least ought to be perceived as part of what constitutes) natural law and by extension natural justice (e.g. by Thomas Aquinas in his Summa Theologica), the religious variable has not in this thesis been construed to be an invariantly necessary ingredient or a constant in what should constitute law or justice.

The preceding caution is on the ground that, despite there generally being agreement on the existence of a Deity (God) among religions, some religions have propounded rules some of which conflict with those in other religions. The general Islamic faith for

example, with regard to killing in the course of protecting the religion has tended to be perceived objectionable by most other religions particularly christianity.

Terrorist acts by the so called muslim or Islamic extremist [e.g. the human atrocities in Algeria (1988-1999), and allegedly the August 7th bombings in Nairobi and Dar-es-Salaam (1998)] has often evoked the questioning of the tenability of the justification of such acts on the basis of religion.

To the extent that various religions can be seen to be propounding or have already propounded codes of behaviour or teachings which may conflict when attempts are made to sustain such prescriptions to their logical ends, and on the basis of the contention that what constitutes 'right' (from a philosophical point of view) should be universal, objective reason, good conscience, and insight are then better candidates for consideration in the evaluation of what constitutes real justice. A consideration of religion may lead to a state of doubt or uncertainity (as has been shown in the above Algeria, Kenya, and Tanzania examples). There is often doubt and a lingering question as to which religious prescriptions are the right ones in the strict sense (from a philosophical perspective).

3.2 LAW AND OTHER DISCIPLINES

As it should hitherto come out clearly from the discussion on law in this chapter and justice in the next, law endeavours to control human action and conduct. This control is necessitated by the need to ensure harmony and tranquillity in society so that the continual being of society can be ensured.

The need for tranquillity and harmony is entailed by the need for the survival and sustenance of the society on the one hand and the nature of social reality with regard to human beings on the other. This is because history has shown that in the absence of control, anarchy can ensue and spell doom for the existence of society.

Justice is in this thesis perceived to be a notion which describes the attempts to ensure harmony i.e. to ensure the appropriate distribution of benefits and burdens that arise from social relations and human behaviour in general. The preceding is a description of social reality in respect of human beings. The behaviour of human beings can be seen to be manifested in the various social institutions which include economics, religion, ethics, and politics.

It can (from a sociological point of view) be said that human behaviour and action can be evaluated or perceived from an economic point of view, political point of view, religious point of view, or ethical point of view. On this basis therefore, given that law (man-made law) is conceived to be the conglomeration of the dictates that govern human behaviour (or that ought to govern human behaviour), the above named social institutions are quite relevant in the consideration of how law relates to other disciplines.

As pointed out earlier, there has been a strong link between religion and law in most societies over time. Although in modern states there has been a replacement of religion by reason, in other societies this link has been maintained. This point is quite evident in theocratic societies. Religious principles however continue to influence law in modern time in a variety of ways.

Marriage law in Catholic states (e.g. Spain and Italy) for example is an excellent instance of religious influence on law in modern times. But despite the fact that religion still influences law, it is not often the immediate authority from which secular law derives its validity. However, there are cases of direct derivation of law from religious principle.

The conflict in southern Sudan, the case of Iran, Islamic extremists in Algeria are just but a few examples of the significance of religion to law. The Sudan Peoples Liberation Army (SPLA) in southern Sudan is basically a rebel movement protesting against 'Sharia' law which is actually based on Islamic principles. The conflict in Algeria (by 1999) mainly is an instance of the Islamic fundamentalists who are agitating for a predominantly islamic government.

Law (positive law) as has hitherto been discussed involves the control or check on human behaviour or conduct by prescription and proscription. The law states what is permissible and what is forbidden, it also at the same time articulates the consequences of disobedience by stating the 'appropriate' sanctions, burdens and benefits that arise therefrom.

The general intention and objective of law is to ensure order by endeavouring to stipulate rules that show what is expected of every individual and groups of individuals. Given that law has over time been seen to have been questioned occasionally on suspicion or actual perception that it was not appropriate or right, the only thing that can be said to be persistant in law is intention to maintain order and obedience. This point accurately accounts for the oppressive laws and regimes as in

former South Africa under apartheid, former Germany under Nazi rule of Adolf Hitler, just to mention a few.

However, the preceding should not be misunderstood to imply that law is only concerned with ensuring order and obedience no matter what its content is, but rather that this is the only consistent and unchanging feature of law. It is not an unchanging characteristic of law that it emphasises the justification or intrinsic value of the rules laid down but rather its concern is validity (i.e. whether or not an action or event conforms to the dictates of the law). In other words, the external value, validity or utility is what suffices with regard to law (positive law). It is only Natural law that is an exception in this regard because tendancy here is towards the intrinsic as well as extrinsic value of the law.

Ethics on the other hand is more concerned with the internal value of rules. Its concern is mostly with conscience or internal validity of dictates or rules. But here also, ethics is not just concerned with internal validity or value of rules governing human conduct but ultimately that concern is indirectly intended to ensure control and harmony by perpetuating order.

Any answer to the questions "what is the good life for man?" and "how ought man to live?" falls in the domain of ethics. While law is concerned with what is right or wrong on the basis of stipulated rules, ethics is concerned with what is good or bad on the basis of intrinsic value and good conscience. Therefore, the two (law and ethics) are similar to the extent that they both endeavour to control human action by stipulating the expected modes of conduct. They are however different on the basis

that while law emphasises the extrinsic value, ethics emphasises the intrinsic or internal value. While law is formal, ethics is rather informal.

The preceding notwithstanding, it is important to note that a people's conscience in light of their social orientation influences their conceptualisation of external validity or value i.e. a people's general worldview influences what they formulate as rules hence the mutual influence between law and ethics. In this light, it has been asserted that:

> A law at its best is intended as the expression of the social conscience at the time of its enactment. It serves as a formulated commitment of the social conscience; it counter signs its convictions; it proclaims and enforces its demands; it secures recognition of definite personal obligations; it forms and stabilizes a certain preferred and respected order of social operation [Tsanoff, 1955:337].

It has further been noted that:

> ...even at its best, a law is the expression of a certain social conscience at a certain time. Wider experience and changed social conditions may render even the best laws of an earlier period obsolete and unsuitable. Of laws as of men we say: 'They have their day and cease to be'. Some laws on the statute books are like the Ptolemic astronomy or the exploded beliefs in magic and witchcraft [Tsanoff, 1955:339].

Generally and often, religion or beliefs and communication with supernatural beings, with a resultant mutual influence, permeates human social life. In muslim societies for example, religious teachings and indoctrination begin early in life by attending 'Madrasa' (early classes on basics of Islam). This early introduction of individuals into religious beliefs and practices is also characteristic of communities which subscribe to traditional religion, African or otherwise.

In the case of traditional African religions for example, the religiosity of the relevant community or society is often seen in such aspects as farming where sacrifices and offerings may be made to ancestors or God to ensure or bring (or for having brought)

a good harvest. The naming process, and the general expected conduct or behaviour of individuals is usually plagued with such religiousity.

To the preceding extent therefore, individuals in most societies generally grow up with internalised religious beliefs such that such individuals' lives are ultimately governed by religious teachings. The influence and strenghth of religion can be seen in such phenomena as religious fundamentalism and dogma. The effect of Islamic fundamentalism has for example had significant consequences in especially international politics as seen in suicide bombings and other terrorist attacks (e.g. the attempted assassination of the Egyptian president, Hosni Mubarak in Ethiopia.

The relatively very strong sanctions (e.g. eternal suffering in hell and peace in paradise in the case of Christianity) by religion coupled with the fact of the permeability of religion in all the aspects of human life, leads to a situation whereby religion has a strong influence on individuals' perception of the reality, determining often what is good or bad, right or wrong, just or unjust, hence the difficulties in divorcing religion from ethics. This is because ethics constitutes a prescription of how ought man to live or a good life for man. To this extent therefore, what individuals formulate and promulgate as constituting the formally prescribed conduct or behaviour (at least often) has a religious ingredient

Given that law applies the principles which make the basis of governing the society, providing such principles with necessary sanctions, law is basically an application of politics ['Law' in Chembers's encyclopaedia Vol.8:403]. Politics in this regard is understood to constitute the dynamics and the whole scenario of the allocation of resources among individuals and groups that have developed interests.

Law can be said therefore to be a conglomeration of political principles which the political leaders in the state intend to declare in such a way that all the members of the state adhere to them. This aspect nevertheless is not usually easily noticeable. But in instances whereby there is doubt with regard to the interpretation of statutes, precedents or public policy, a choice is often made between conflicting political philosophies. History has proved (with the experience of totalitarian regimes) how much law can be a declaration or the caprice of the ruler. The Nazi regime, Uganda under Idi Amin, the Central African Republic under Bidel Bokassa are good examples.

A clear-cut dichotomy between law and politics is therefore, and however, given social dynamics, difficult to realise although the modern democratic states have constantly endeavoured to separate these two spheres. These attempts at separation have been on the basis of the principle of balance of power. The goal of separation has always been to actualise the safeguard against the abuse of power by government officials thereby guaranteeing security for the citizen.

There has been increasing interrelation between law and economics, an interrelation that has often owed its source from various economic problems such as increased commercial competition, protection of patents, copyrights, currency questions, organisation of economic interests among others ['law'in Chembers's Encyclopaedia Vol. 8:403].

The relationship existant between law and economics is two-way. Law controls and influence economic activities while at the same time economic activities and endeavours may lead to formation of rules and regulations. The endeavour to protect

the interests of consumers is often seen in consumer protection bodies (e.g. the Kenya Bureau of Standards) which stipulate the rights of consumers.

The law to this extent controls production standards through specifications for the good of the consumer. The law as well protects the interests of producers to the extent that it stipulates the limits of the rights of the consumers and checks unhealthy competition between and among various producers.

The interests of consumers and those of producers are often different in that while the producers endeavour to maximise profits by maximising production levels and minimising production costs, the consumer always looks forward to enjoying the supply of the highest quality and quantity of goods and services but at the lowest possible price or cost. The two interests in their ideal are not compatible i.e. both cannot stand together in their ideal conceptualisation. There is therefore always a need to check the distress implied by the incompatibility of these two interests.

The preceding conflict is ideally resolved by an establishment of conditions which would maximise the optimisation of the compatibility of these two basic interests. This means that rules are instituted to control the activities of the consumers and the producers, but there is an *ipso facto* influence of the interest of the consumers and producers to the rules i.e. the interest of the consumers and the producers (what to this extent constitute the economics) therefore ultimately determine the rules instituted (the law). Hence, the mutual influence between the law and economics i.e. 'the rules and interests dynamics'.

There was generally no clear separation between moral and legal conceptions in Greek philosophy and other societies (between law as it ought to be and law as it is). This continued and continues as long as religion or reason is a yardstick for determining the validity of positive law. However, there has been increasing separation of law as it is and law as it ought to be.

Positive law as practiced in modern states presupposes a separation of justice from law. This is due to the dichotomy emphasised as existant between law as it ought to be and law as it actually is. This notwithstanding is difficult to be appreciated or consistently tolerated given the nature of the genesis and conceptualisation of the notion of law (man-made law). This is because for example, ideas of justice, of good or bad law, influence the legislator through public opinion [cf. Banker, 1951:101].

The justice referred to here is the philosophical justice or the moral justice, the justice that is based on the Natural school of law, The justice or 'right' that is based on objective reason, good conscience and insight not mere formalism and logicism as implied in legal positivism. It is this kind of justice that can actually at a point or in a sense differ from the law because the other kind of justice (positivistic justice or procedural justice) is strictly based on what is provided by the law such that separating it from law would involve a contradiction.

The goal of this chapter consists in the exposition and explication of the notion 'law'. This exposition and explication leads to the realisation that the governing of phenomena in the natural physical realm (as concerns Physicists, Biologists, Chemists) is not (or at least ought not be) the same as the governing of human behaviour.

The differentiation of law in the physical realm and the social (as has been shown) is based on the conglomeration of variables that have (or at least ought to have) a bearing with regard to law governing human conduct. These variables as have already been discussed include politics, religion, ethics, economics, and justice. These variables account therefore for the relative unpredictability of human behaviour, a thing (the unpredictability) that is not the case in the physical realm. The next chapter therefore centres on justice since justice is the actual (philosophical justice) or claimed (procedural justice) goal of law.

CHAPTER FOUR

PHILOSOPHICAL JUSTICE AS THE IDEAL

4.1 DEFINITION AND NATURE OF JUSTICE

The notion of justice has great practical significance given the fact that in most social situations there usually are observed differences of interests. This statement makes more sense when one realises that in society or social life in general, burdens or benefits always stand to be distributed on the basis of a cardinal principle upheld by the society.

Injury or harm in social relations normally engender a reaction with the intention of ensuring harmony. This harmony, more often, is realised with the declaration of the individual or party that has to carry a burden or benefit [cf.Korner, 1976:152]. Differences in interests and needs as is characteristic of man's social life can therefore be said to be the basis on which the notion of justice is engendered (at least from a philosophical point of view). Turbulence in social life can therefore be said to be what necessitates the conceptualisation and practical actualisation of the notion of justice.

Justice can therefore be seen to be the notion which attempts (or at least is claimed to attempt for the case of positive or procedural justice) to ensure harmony in social life. This point makes justice to be a serious issue and one of utmost importance and significance for the tranquillity and harmony of social life.

The actualisation of the prevalence of justice can be either through a certain legal procedure as dictated by the relevant law, this is called legal justice. Justice can also be achieved with reference or appeal to an absolute rule of right i.e. an evaluation of

situations and things in respect of what actually constitutes a right thing or action in itself rather than with special reference to a set standard or code as declared by man [cf.'Justice' in Colleir's Encyclopaedia Vol. 13:683]. This is a question of what is right according to the law (legal justice) and what is right in itself as dictated by reason (philosophical justice).

The significance of justice is brought to light in the contention that:

> Justice, of course, is the permanent passion of public life. Every policy maker and litigant claims it. Everyone points to it to justify his or her claims .... There is a way in which the handling of justice and the handling of electricity are the same. In both cases mistakes can be lethal [Maguire, 1980:56-57].

It has further been asserted that justice is the definition for the foundations of human existence. That justice forms the cornerstone of human social life because the conceptualisation of what is just presupposes the definition of person and of society [Maguire, 1980:57].

So far as justice connotes the appropriate distribution of burdens and benefits, justice can be said to be the virtue which renders to each his/her own. The rendering of these dues can be observed in three ways and these correspond to a relevant form of justice. However, it is important to note that these three 'forms' of justice are not to be taken to imply that there are three categories of justice but rather three ways in which the one category, justice, is realised.

The three 'forms' include: individual justice, social justice, and distributive justice. Individual justice connotes the regulation of relationships between individuals. Social justice implies the indebtedness of individuals to the common good. Distributive

justice concerns the distribution of goods by the representatives of the common good [Maguire, 1980:67-68].

The preceding is founded on the basis that social relations among human beings are manifested in three ways. There is one-to-one relationship basis whereby if for example an individual entered a contract with another individual to cut his/her hair, the one owes the other a hair cut, and if one stole another's car, then he/she owes the victim a car's worth of restitution. This is individual justice.

Social and distributive justice however, do not enjoy such basic simplicity as individual justice. This is because what is owed by whom and to whom are never as clearly delineated as in individual justice. At the social level, justice is not reducible to simple equality since unequal demands may justly be made. In this light it has been contended that:

> Equality imports sameness, and we cannot treat everyone the same if there are differences in persons' needs, duties, and merits. Equal treatment of the handicapped and the unhandicapped would be irrational and unjust. A tyrant could mistreat everyone, i.e., on a scrupulously equal basis, but no one would call this fair. What is desired is fair rights - fair being a synonym for just [Maguire, 1980:100].

Social justice concerns individuals' debts to the common good. The essence of this assertion is that each and every individual has to work towards the enhancement of a situation in which human life can flourish. This is a situation in which there prevails a guarantee for respect and hope for all. This form of indebtedness prevails as long as society exists. This means that there have to be limits for freedom in order that an optimum is realised with regard to the actualisation of harmony in respect of differing interests. In light of this it has been asserted that:

> Now, the idea of external right or justice presupposes the idea of a condition in which the freedom of each man is in harmony with the freedom of everyone else.

> This is an idea of pure reason, and as such is highly metaphysical; but it is nevertheless a presupposition of all our thinking about law and right. Men have the idea of a 'universal law of freedom', and from this idea, they come to the notion of right (justice) [Faurot, 1971:194].

In line with the preceding has been the assertion that:

> Right, therefore, comprehends the whole of the conditions under which the voluntary actions of any one person can be harmonized in reality with the voluntary actions of every other person, according to a universal law of freedom. Every action is right which in itself, or in the maxim on which it proceeds, is such that it can co-exist along with the freedom of the will of each and all in action, according to a universal law [Kant, 1887:45].

The agents and agencies of government are the prime subjects of distributive justice. This notwithstanding, other economic and institutional powers also control some of the conduits through which the goods of society flow. Not only the mentioned powers controll distribution, but rather the influence of individual citizens is of significance with regard to the dynamics of distributive justice.

There is always a minimum contentment by the citizens of the way of distribution by the relevant powers before the distribution or for the distribution to be efficiently and effectively effected or actualised. Otherwise, dissatisfaction of the way of distribution by the citizens may culminate into rejection and rebellion. In this regard it has been held that:

> Such things as stake-holders' resolutions, selective boycotts, and other forms of citizen and consumer pressure can have some influence on those corporate powers that are everyday making decisions affecting the common good [Maguire, 1980:69].

In returning to the basis and essence of justice, one realises that the notion, as stated earlier, connotes the attempts (at least ideally) to ensuring harmony in society or social life. This means the ensuring of a check with regard to the actions of an individual to his/her fellow citizens or members of the society and the actions of the society in form of rewards or sanctions towards the individual. Suffice therefore as a summary of that

interrelation is an engendering and culmination into the harmonisation of the values which include liberty, equality and fraternity. In this regard it has been said that:

> The claims of liberty have to be adjusted to those of equality; and the claims of both have also to be adjusted to those of co-operation. From this point of view the function of justice may be said to be that of adjusting, joining, or fitting the different political values. Justice is the reconciler and the synthesis of political values: it is their union in an adjusted and integrated whole: it is, in Aristotle's words, 'what answers to the whole of goodness ... being the exercise of goodness as a whole ... towards one's neighbour' [Banker, 1951:102].

4.2 POSSIBLE SOURCES OF THE IDEA OF JUSTICE

The Roman Catholic Church and Islamic religion and possibly others uphold the significance of God's prescription with regard to what consititutes a just action or justice as a whole. This position is echoed by Thomas Aquinas in his Summa Theologica by the contention that God always acts in an unchanging general rule of right in the universe created by him. That God has also expressed a particular rule of right through the scriptures. In this same scheme there is a general rule of right for mankind in the disclosure of God's being which God himself makes continually to the innate faculty of reason implanted by him in man.

In the preceding context, justice is what religion prescribes. To this extent it has been asserted that:

> We may readily admit that so far as religion is a source of ethical principles, and so far as ethical principles are the source of our notion of justice, religion may be counted as an ultimate source of the notion [Banker, 1951:104].

However, it is opportune to caution here that the preceding should not be taken to imply that religion is an invariantly immediate source, or, even less, to say that it is the one and the only source.

The contention that nature is the source of justice is based on the conceptualisation of the natural order of things as the foundation of law if at all law has to have value or made to have value. This natural order however is not the natural order of natural phenomena as concerns the natural sciences as biology, physics or such like disciplines.

The stoics (e.g. Zeno (334-262 B.C) for example meant by nature a certain ordering principle which was to them, reason and God. This ordering principle was what was in reason that men shared with God. Compatibility of man's social life with nature therefore implied that way of life by man which is in accordance with the prescription of how ought man to live in so far as he/she is man by nature, whereby nature is reason which is that which man shares with God.

To this extent, the stoics deemed nature as having provided a creed. This creed was build on one premise engendering three conclusions. The premise was that men were fundamentally rational beings. That each man was a 'fragment' of the cosmic reason, and that men in so far as they were rational beings, and only then, shared in the all-pervading reason that was the constitution and nature of God.

The three conclusions drawn from the above premiss are "...men, being rational in their nature, should all be regarded as free and self-governing in their actions". [Banker, 1951:107] This constituted the conclusion of liberty. "Men, being all in their nature rational (though some were wiser than others, and there was a distinction between the *sapiens* and the *stultus*), should all be regarded as equal in status" [1951:107]. This constituted the conclusion of equality. "...men, being united to one another by the common factor of reason, should be linked together in the solidarity of a world-society ..." [1951:107]. This was the conclusion of fraternity.

Justice in this regard is drawn from nature as manifested in liberty, equality, and fraternity. Justice is therefore a synthesis to this extent of these three values so that each is observed in the appropriate proportion. Nature has also been perceived to be a source of justice by conceptualising an epoch in which man was characterised by innocence. Here, nature is made or conceived to be a fact of the past, a time when men due to their innocence acted in such a way that harmony ensued due to the absence of any form of corruption. Contractual theorists such as John Rowls, John Locke, Thomas Hobbes, who conceptualises a pre-political society are examples in this regard.

In the theory of Karl Marx, social dynamics can be described by the notion of dialectics. In this context, there is always a dominant ruling class which has interests that conflict with those of the ruled. Society in this scheme historically develops or evolves through epochs. The society here can basically be divided into two classes, the owners of the means of production also called the bourgeois and those who offer their labour for a wage also called the workers or the proletarians.

To Marx, the class that rules makes the laws which best fit the interests of the same class. The bourgeois make the laws that govern conduct, laws that are founded on the interest of the same class. As he predicts, after the revolution when there develops a system of socialised production, whereby the workers take control, the dominant class being the proletariat, the law is determined by these proletarians and it would be in the interest of the same class. The source of justice to this extent is deemed to be the fact of economic strength, moving and acting as it must.

Banker, (1951), cites Duguit Leon whereby Leon in his 1927 edition of Droit Constitutionnel contends that society is characterised by the existence of different occupational groups which produce different things but which are co-dependant with regard to the goods produced by each. This situation connotes solidarity. This solidarity is in two forms: the first one is mechanical solidarity in which sameness or similarity enhances members of a group to produce in co-operation a considerably greater product than they could produce in isolation; the second form of solidarity is organic where different groups with different capacities, on the basis of a system of division of labour, co-operate to produce vastly greater products than could otherwise be produced.

Co-operation here implies solidarity which furnishes in turn the notion of justice. Leon here is seen to trace the notion of justice from the economic factor of solidarity which in his argument ensures the maximisation of the optimisation of production. Leon's conceptualisation of justice is founded on two imperatives: (1) do nothing contrary to the principle of solidarity; (2) co-operate as far as possible in the realisation of that principle [Banker, 1951:111].

The concern to Leon about law is the inherent value of the law as declared by an authority. The impersonal source of the law is what to Leon is of utmost importance to the extent that a rule formulated and promulgated by the authority which contravenes the principle of solidarity is to be made inoperative by first judicial disallowance, failure to which the process of general social negation should ensue by first passive, then defensive and finally aggressive resistance.

From the second imperative, 'co-operate as far as possible in the realisation of the principle of solidarity', the governors are to provide public assistance for the destitute, education for the ignorant, and work for the unemployed, failure of which is considered or is tantamount to neglect of duty remedied by judicial redress or corrected by the process of social agitation and social pressure. To Leon therefore, economics on the principle of solidarity constitute the impersonal and hence imperative source of law and justice.

Law has validity as long as it is declared, recognised, and enforced by an authority that acts on behalf of the community [Korner, 1976:177]. If law has to have value, it must be compatible with the basic cardinal principles of the society as regards the societal moral prescriptions [Hart, 1961:199]. To this extent, the notion of justice can be traced back to ethics given that for law to be effective and practical it must have both value and validity [Wallace, 1977:167].

Control for human behaviour and conduct is a major task of law. On the other hand, any proposition that intends to respond to the questions - "How ought man to live?" and "What is the good life for man?" - implies guidance or direction of human behaviour and conduct. Law and ethics therefore both have the aim and concern to the control and direction of human behaviour.

The common conscience and worldview prevalent among a people (i.e. ethics) forms the informal bedrock of the formal valid legal rules enacted and practiced since such rules often have to have a basis or justification for their formulation. To this extent, the distribution of burdens and benefits in society can be seen to be founded on ethics.

The United States of America (USA) is one of the political units in modern time which has exhibited a strong emphasis on the significance of individuals' rights. The conceptualisation of justice in the USA therefore tends towards the upholding of the individuals' rights and liberties. This contention taken to its logical conclusion boils down to an egoistic conceptualisation of what constitutes the appropriate distribution of burdens and benefits (justice). This can reasonably be said to be characteristic of most capitalist societies and states.

On the other hand, such countries as China, Japan among others have tended towards emphasising the supremacy of the society or community over the individual. In this case therefore, when the interests of the community and those of the individual conflict, it is generally desired that those of the community or society suffice. This contention can be accounted for on the basis of a utilitarian ethical principle. Hitherto ethics can be said to have an influence (directly or indirectly) to law.

4.3 PHILOSOPHERS ON JUSTICE

Plato, Aristotle, Hobbes, and Perelman have been selected here for purposes of ensuring a sufficient representation of the two schools of thought in legal philosophy (The school of positive law and the school of natural law). Plato's ideas on justice are discussed in his works, The Republic , and The Laws, while Aristotle's ideas on justice are discussed in his Nicomachean Ethics. There are two levels of justice that are forcussed in Plato's works: justice at the individual level and justice at the society level. In The Republic, Justice is actualised in society when everyone is given an opportunity to act or play a role in society on the basis of the nature of the person i.e. everyone is supposed to perform the duties he/she is by nature best suited for.

In Plato's ideal society there are three basic groups of people namely the rulers, the soldiers and the workers, each of which is supposed to strictly perform its duties without interfering with the others. In this regard, it is contended in The Republic that:

> Well then, listen, and see if you think I'm talking sense. I believe justice is the requirement we laid down at the beginning as of universal application when we founded our state, or else some particular form of it. We laid down, if you remember, and have often repeated, that in our state one man was to do one job he was naturally most suited for. [Plato, 1987:204]
>
> Interference by the three classes with each other's jobs, and interchange of jobs between them, therefore, does the greatest harm to our state, and we are entirely justified in calling it the worst of evils ...so that is what injustice is. [Plato, 1987:206]

Justice at the individual level according to Plato is realised when there prevails harmony amongst the rational, appetitive, and the spirited elements in an individual. In this regard it is held in the republic that:

> Then we must remember that each of us will be just and perform his proper function only if each part of him is performing its proper function... so the reason ought to rule, having the wisdom and foresight to act for the whole, and the spirit ought to obey and support it [Plato, 1987:218].
>
> When these two elements have been so brought up, and trained and educated to their proper function, they must be put incharge of appetite, which forms the greater part of each man's make up and is naturally insatiable. They must prevent it taking its fill of the so-called physical pressures, for otherwise it will get too large and strong to mind its own business and will try to subject and control the other elements, which it has no right to do, and so wreck the life of all of them [Plato, 1987:219].
>
> And we call an individual brave because of this part of him, I think, when he has a spirit which holds fast to the orders of reason about what he ought or ought not to fear, in spite of pleasure and pain [Plato, 1987:219].

Aristotle's conceptualisation of justice like Plato also assumes the prevalence of "natural" classes. Justice in this case is therefore relative to social and political status. According to Aristotle, nature provides that other people are slaves and others freemen. It is therefore just for him that the master rules over the slave.

However, Aristotle further introduced a distinction of kinds of justice. According to him, corrective or cummutative justice was to ensure the preservation of social order and the general welfare. Distributive justice was based on the principle of giving each man his due. This distinction seems to recognise the difference between procedural and philosophical justice.

Hobbes in his book Leviathan disagreed with the definition of justice in the context of an intuitive perception of universal, absolute concepts. His contention was that society could be maintained by peace and order if men could and do transfer their natural rights to a sovereign power of the commonwealth. This kind of transfer of rights to the sovereign constitutes a covenant or contract and to him, justice can only be defined in this context.

Justice is therefore in this regard what the sovereign prescribes for his subjects in so far as and as long as by so acting ensues the unity of the society by peace and order. This transfer for Hobbes is necessary if at all man has to live and society has to prevail. This is so because to him man is by nature selfish and egocentric to the extent that if the acts of man are not checked by an absolute sovereign power, might would suffice and be the "right" thus life would be too short to live.

It is therefore necessary for Hobbes that everyone surrenders his rights to the sovereign who would determine what is right and wrong. Obedience to the sovereign is therefore necessary. This state of affairs is according to Hobbes better than the state of war which would otherwise prevail in the absence of such a contract. What the sovereign dictates notwithstanding is however not "just" in itself as it were but rather because it is the better alternative [Sterba, 1995:116-142].

Perelman in his The Idea of Justice and the problem of argument conceptualises two forms of justice, formal justice and concrete justice. He suggested a number of popular principles of justice which he believed conformed to what he termed the principle of formal justice. These principles include:

(1) To each the same thing
(2) To each according to his merits
(3) To each according to his works
(4) To each according to his needs
(5) To each according to his rank
(6) To each according to his legal entitlement

Formal justice to Perelman is based on the principle that 'beings of one and the same essential category must be treated in the same way'. The only question that might arise according to him is what constitutes or should constitute the essential category [Perelman, 1963:12-24].

To Perelman, since formal justice is purely formal and abstract, there should be no controversy over it. This is because apart from the question of the constitution of the essential category for qualification for identical treatment, the precept that all members of the one category should be treated alike is unquestionable. The justification for this contention to him is that, if the individuals belong to the same category, and if that category is essential for the purpose in hand, then there would not be a reason for differentiating them. The only rational thing to Perelman is thus the treating of such individuals the same [Perelman, 1963:12-24].

The account for this tendency and reality is what he terms 'inertia'. Here he employs an analogy between the principle of inertia in physics and the psychological predisposition and fiat of treating beings of one and the same essential category alike.

But Perelman further holds that this psychological fiat should be contrasted with the concrete circumstantial causes constituted by social conditions in different milieu [Perelman, 1963:45-59]. This is what concrete justice is founded on according to Perelman. In this light it has been observed that:

> Individual history and experience of specific social conditions are the causal influences on judgement about the principle of concrete justice, on whether moral merit, or hard work, or rank, or need, is the proper criterion for a 'just' distribution. So any argument in favour of one of these conceptions must take account of the different susceptibilities of different audiences; it must conform to the principle of rhetoric, not to those of formal logic [Raphael, 1980:91].

Raphael has further contended that "what seems rational to one group is sheer prejudice in the eyes of another" [1980:92].

Thomas Hobbes has served as an example of the positivistic conceptualisation of justice (legal or procedural justice). Though it might not immediately be clear why Hobbes can be considered under this conceptualisation, a keen understanding of the following discussion makes the appreciation possible.

Hobbes contends that due to the egocentric nature of man, that every individual has to surrender all the natural rights to a sovereign power who would have absolute authority in order to ensure security and future survival of the society. This is because otherwise, life would be short, solitary, nasty and brutish.

Though Hobbes can apparently be seen to have tended towards a utilitarian conceptualisation of justice to the extent that each individual was to surrender his/her rights for the good of the entire society, the fact that Hobbes emphasised the necessity of a strong sovereign who was above the law, a sovereign who was to determine and

define what was 'right' and 'just', his contention is quite compatible with legal positivism as is echoed in the modern status of legislative bodies such as parliament.

Generally, in modern states, often the citizens entrust their powers to their representatives in parliament or suchlike legislative bodies. It is the relevant legislative body therefore that determines what is by law considered to be right or just. The relevant legislative body prescribes and proscribes the expected behaviour. In some systems (e.g. in Kenya), it is the President who finally signs a bill for it and before it can be considered to be law. To this extent, it is the President who eventually and ultimately decides on what is right or wrong, just or unjust, legal or illegal.

Since the court is expected to only proceed with total conformity with the law and in case of uncertainity refer or appeal to the objective(s) or intention(s) of the legislators, Hobbes's position can to this extent be considered to belong to the school of positive or procedural justice.

It is however important to emphasise at this juncture that what the sovereign defines to be constituting what is right or just may not necessarily be what could actually be considered to be right or just with reference to, for example, the Kantian "categorical imperative" or the prescription of God as man is capable of realising through reason and the scriptures as in Aquinas's scheme or the "rational law" based on objective reason as contended by Hooker. Dictatorial and despotic systems of government prove the preceding caution.

Aristotle with regard to his corrective or commutative justice which involves the ensuring of the preservation of the social order and the general welfare can also be

considered to be an aspect which justifies the consideration of him under legal or procedural justice.

The types, extents, and forms of legal redress (distribution of burdens and benefits) are issues that are usually determined by individuals who do not necessarily have to intend to ensure the good of the public (common good) but who may possibly intend to secure and maintain their position and authority (i.e. subjective or egocentric good). Due to this possibility, it is only appropriate that this corrective or commutative justice be categorised under legal or procedural justice.

The preceding is the case especially bearing in mind the fact that Aristotle appreciated the distinction of individuals in society on the basis of their 'natural' predisposition i.e. some born to serve others and some born to be served. On this same basis (the consideration of individuals on the claimed basis of what role they are by nature best fitted to perform in society) Plato's conceptualisation of justice (particularly justice in society) also falls under procedural or legal justice.

Chaim Perelman's conceptualisation of concrete justice is another example relevant to the discussion on legal or procedural justice (justice from a positivistic perspective). This is based on Perelman's contention that the psychological predisposition for treating similar cases alike be contrasted with concrete circumstantial causes on the basis of differing social conditions.

Perelman might *prima facie* be perceived to be tending towards the upholding or emphasising on natural justice. However, to the extent that the determinants or variables to be considered here are social conditions or milieu (not objective reason or

the will of God) concrete justice in Perelman's scheme therefore falls under legal or procedural justice (not natural or philosophical justice as conceived in this thesis). This is because concrete justice in this sense does not connote a universal, unchanging or invariant standard to which reference can be made (e.g. objective reason or 'true' prescriptions by God) but rather varying standards.

The conceptualisation of justice on the basis of circumstantial social melieux as is the case with Perelman implies relativism which may give room for discretional judgements or caprice which on objective evaluation might be inappropriate for the direction, control and evaluation of human conduct vis-a-vis what constitutes the intrinsic or objective good. On this basis, concrete justice in Perelman's scheme constitutes a conceptualisation of justice from the perspective of legal or procedural justice.

When two of the principles held by Perelman to be conforming to what he considered formal justice - (5) To each according to his rank , and (6) To each according to his legal entitlement - are considered, the relevance of Perelman's conceptualisation of justice with regard to legal positivism can be appreciated. This is because for example when each is treated according to his legal entitlement (i.e. when the relevant legal system functions properly with the strict conformity and observance of the legal procedure as set by the sovereign), then this principle is just an emphasis of legal or procedural justice.

It is here important to note that one's "rank" and "legal entitlement" might be based on mere segregation and caprice (e.g. Black individuals' ranks and legal entitlements in the former apartheid South Africa and Jews' ranks and legal entitlements in Nazi

Germany) thus these two principles only fit well with procedural or legal justice not necessarily natural justice or philosophical justice.

4.4 LEGAL JUSTICE AS AN ATTEMPT TO ACTUALISE PHILOSOPHICAL JUSTICE

Justice as a notion pervades all human relations and social life in general and is of utmost significance. This notion is so significant that it has for example been asserted that "if you don't know what individual justice means, you will soon have ample time to ponder its meaning in jail". [Maguire, 1980:70] In the same line it has also been asserted that "much that is legal is wicked and if you conflate justice and law, then law can crash you and you have no redress" [Maguire, 1980:120].

However, a close analysis of the preceding discussion on justice and discussions on justice in general engenders a realisation of two perspectives from which the notion of justice can be approached. As earlier mentioned, there is legal justice and moral justice (philosophical justice).

The reason for upholding and emphasising justice from the philosophical perspective in this thesis is that no matter how justice is conceptualised, one way or another the conceptualisation can (at least ideally) be perceived to eventually boil down to either of the two forms of justice, legal or moral (philosophical). However, the justice that is ideally (or claimed to be) the goal of courts of law is philosophical or moral justice though this is attempted to be done by the observance of legal or procedural justice.

The supreme court of the United States of America is evidence for the above contention and tendency. The main task of this court is to ensure that despite the realisation of legal justice, the decisions arrived at in the courts of law have to be

compatible with the dictates of moral or philosophical justice. In this regard, it has been asserted that:

> This court is asked to do much more than pronounce upon the causes of litigants. It is asked, rather, to be a philosophical forum, to ponder the meaning and destiny of our common life. In this the court reflects the moods at the birth of this nation. The United States has indulged in juridical positivism - which confuses morality with mere legality - but it was not born of it. The declaration of independence and the various bills of rights, so jealously assembled by the states, were bright with convictions about that which was 'just by nature', in Aristotle's phrase, over against that which was merely 'legal' [Maguire, 1980:120].

Hitherto, the point is that, though legal justice is the immediate goal of the court, philosophical justice is the more desirable and the one that the court would and do ideally (or at least claim to) strive to attain. This comes out clearly in the assertion that:

> What makes one acknowledge a standard of conduct as a legal standard is not its having a certain place in one's personal practical system, but its being an internally valid component of an externally valid legal system. In any society in which a particular legal system is externally valid the question of how far one's personal practical system and the legal system coincide may not merely be a question of theoretical interest but become a moral question of life and death [Korner, 1976:181].

The preceding highlights the position that it is not only enough for external legal validity to suffice but rather that notwithstanding the external legal validity of rules, such rules or systems ought as well to have internal validity or value for them to be considered constituents of justice (philosophical justice) i.e. external legal validity has to coincide or be compatible with internal validity (or what constitutes an intrinsically 'right') for philosophical justice to be actualised.

To this extent, any claim to justice, for it to have any practical positive significance (it is maintained in this thesis), has to conform to the dictates of philosophical justice i.e. good conscience, insight, good faith and objective reason.

This chapter has endeavoured to actualise an exposition and explication of the notion 'justice'. The discussion has led to the revealing of the supremacy of natural or philosophical justice over legal or procedural justice. The supremacy of philosophical justice has been shown to be based on the justification for the formulation and application of the law. The justification, however, mainly holds if such formulation and application of law is not just based on mere caprice and/or bias.

The notion of justice has also been shown to be deemed as influenced by religion, 'nature', economics, and ethics. Given that it has been shown (in this chapter) that the preceding disciplines have been considered to have an influence on justice (philosophical), there is an imperative need therefore for the discussion and evaluation of the extent to which deduction and induction as logical concepts can be employed if philosophical justice has to be attained or observed. The next two chapters (five and six respectively) therefore serve the purpose.

CHAPTER FIVE

DEDUCTION AND LANGUAGE IN LAW

5.1 PREAMBLE

This chapter endeavours to discuss the relevance of logic in law by discussing deduction, enthymemes and language as logical concepts. Legal proceedings are usually intended to culminate eventually into a judgement. This is because in litigation especially, there are normally presented different claims and counter claims. The real task in such proceedings is the establishment of 'facts' and the applicable rule, then the judge or magistrate endeavours to weigh the evidences presented by each party (plaintiff and defendant) for their claims and make a ruling [Harvey, 1975:117].

Of cardinal importance in courts of law or the practice of law in general is the weighing of evidence presented for a claim and the establishment of the applicable rule. To this extent logic is significant in the practice of law because knowledge of logical concepts and principles can enhance one to establish the viability of an assertion given certain evidence or claimed evidence for such an assertion. i.e. The relationship ensuing between the facts and the claimed inference vis-à-vis the law stipulations.

5.2 THE CONSTRUCTION OF JUDGEMENT

Judgement in general terms can be said to be the settled outcome of inquiry. The concern of judgement is what can be described as the concluding objects that emerge from inquiry in their status of being conclusive [Dewey, 1938:120]. An instance of judgement in this sense is the judgement of a court of law in settling an issue in controversy.

Trials in court offer examples of problematic situations which require settlement. Uncertainty prevails and there usually is dispute about what to be done due to the conflict on the significance of what has taken place, even if there is an agreement about what has taken place as a matter of fact (which more often than not is not always the case).

On the one hand, there are advanced propositions in respect of facts involved; witnesses come up to say or testify what they have heard or seen; written records are offered and so on. On the other hand, there are efforts to determine the admissibility or relevance and the weight of facts offered as evidence for adducing rules of law and what can be considered factual materials and its significance is determined by the rules of the judicial system.

To the extent that judgement can be described as the settled outcome of inquiry [Dewey, 1938:120], reasoning can be said to be entailed and requisite before judgement can be reached. In the whole scenario of the proceedings in court, there are usually attempts to formulate propositions from a whole complex and conglomeration of events and ideas, the establishment of the relationship(s) that hold among those propositions, and the making of a decision with regard to the stipulation of the law depending or on the basis of the conclusion which follows from the established propositions or claims. In this regard, it has been observed that:

> The structure of judgement can be identified as conjugate distinction and relation of subject - predicate. Observed facts of the case in their dual function of bringing the problem to light and of providing evidential material with respect to its solution constitute what has traditionally been called the subject. The conceptual contents which anticipate a possible solution and which direct observational operations constitute what has traditionally been called the predicate. Their functional and operative correspondence with each other constitutes the copula. [Dewey, 1938:124]

It can generally and with reasonable accuracy be concluded at this point that the issue of evidence is the crux of the matter in legal proceedings. This is especially on the basis of the premiss that the court ought to decide strictly on the basis of the evidence presented before it [Latta, 1956:305].

5.3 THE WEIGHING OF EVIDENCE IN COURT

There are basically two degrees of proof in law. The first is one whereby a proposition is established simply with a probability of over half, and this is called preponderance of evidence. The second is one in which it is only allowed a probability which is very close to certainty, so much that somebody who acts upon that difference is considered unreasonable. It is this second degree of proof and probability that is usually referred to as proof beyond reasonable doubt. The first degree of probability (preponderance of evidence) is what is normally considered sufficient in civil cases while proof in criminal law requires the second [Cohen, 1963:347].

As regards the evidence presented in court, there are basically two types: first is testimonial evidence in which a witness asserts as to the existence of the facts at issue; and secondly is circumstantial evidence whereby facts are cited or produced by inference so that the facts at issue are decided. The two kinds of evidence may vary with regard to their respective degree of directness or remoteness with which they bear on the point at issue. Due to this fact, certain evidence may be rejected for being too remote [Cohen, 1963:347-348].

To this extent, one realises that the kinds of reasoning in court with regard to the types of proof and the types of evidence can be conceptualised in the frames of some logical

concepts such as deduction, probability, and induction. These concepts are going to be discussed in detail subsequently in this and the next chapter.

5.4 DEDUCTION AND LAW

There are basically two important and necessary things to be established before a judicial decision can be made. First, there has to be stated the criteria for the satisfaction of a legal concept (e.g. negligence), and secondly the condition for the application of the concept has to be clearly articulated as well as the necessary condition for the non-application of the concept. Once these requirements are satisfied and established, propositions with regard to the case can well be formulated and the resulting argument form is one of deduction.

In the preceding regard, if there arises doubt as to the criteria of the application of a legal concept appearing in a legal rule, a judge has to conclude that a certain party has satisfied the criterion for that concept, then the judge will specify a sufficient condition for application of that concept. After specifying that criterion, the judge may then deductively conclude that the party satisfied it. Similarly, in a context of doubt in which a judge has to conclude whether a given party has not satisfied the criteria for an applicable legal concept, the judge has to specify a necessary condition for the non-application [Brewer, 1996:997].

This form of argument pattern enables a judge to reach what can generally be described as deductive closure. Closing a case or concluding a case or deciding a case would not have been possible if the judge only articulated a sufficient condition of a concept (without specifying if such a condition was met or realised or observed) and also held that the concept did not apply or articulated only a necessary condition while

also holding that it did apply (without articulating whether the condition was met or not). This pattern of argument reflects a close connection between legal justification and deduction.

The above contention can be made clearer if one considers very simple but appropriate hypothetical illustrations below:

(i)

1. Anybody who kills another or others with a forethought malice is punishable by death
2. Njoroge killed Patel with a forethought malice

Therefore 3. Njoroge is punishable by death

(ii)

1. Anyone who hits another or others deliberately and not in self defence is punishable by two years imprisonment.
2. Kimani hit John deliberately and it was not in self defence

Therefore 3. Kimani is punishable by two years imprisonment.

From the two illustrations above, one can easily appreciate the above discussion in which were highlighted the requirements of law which imply deductive reasoning patterns. For example, in the discussion is highlighted the issue of a legal concept with the question of the satisfaction of such a concept by the requirement of the articulation or stipulation of the necessary and sufficient conditions for the application of a concept (e.g. in the first example is murder and in the second assault), the necessary conditions for the non-application of a concept (e.g. in the first example no aforethought malice and in the second self defence) and the stipulation of whether a suspect or an accused is subject to the general rule or concept or not.

The preceding requirements can from the above illustrations be seen to imply deductive reasoning in law. In this regard it has been asserted that:

> In Anglo-American legal practice, judges do not - indeed, cannot - state all of the necessary and sufficient conditions for a legal concept. But they may logically evolve a concept that begins abstractly with perhaps only a few clear (non vague) applications into one that moves asymptotically toward a complete definition that specifies all of the concept's necessary and sufficient conditions. Although the idea of logical evolution may be something of a philosophical fiction, many of the most famous of the highly open-textured analogical opinions immediately move to offer precise (non vague) necessary or sufficient conditions, which are then applied deductively in the final step of the opinion [Brewer, 1996:1001].

In the same line it has been held that:

> The judge is not called upon to determine what course would be intrinsically the most advisable in the particular case in hand, but only within what rule of law it falls; what the legislature has ordained to be done in the kind of case, and must therefore be presumed to have intended in the individual case. The method must here be wholly and exclusively one of ratiocination or syllogism; and the process is obviously what in our analysis of the syllogism we showed that all ratiocination is namely, the interpretation of a formula [Mill, 1956:616].

To this extent, it is here believed to be accurate enough to contend that the significance of deduction or deductive reasoning in legal practice and law in general is unquestionable. The only issue that remains is the question of the appropriateness of this form of reasoning in practical contextual circumstances given the nature of human social life.

Before focus is made on the limits of deductive reasoning pattern in legal reasoning, it is important to give a brief history of this kind of thought. It has been contended that in Europe, formal scholastic Cartesian thinking had influenced the legal arena to the extent that civil law had been engendered by people who adored Greek geometrical models of reasoning as criterion of rationality. That these men saw abundant stores of propositions in Roman codes. That the reason for this was that civilian lawyers in Europe were better trained than their English counterparts and so it was difficult for

them to relegate the precepts of right thinking in which they had been trained [Gottlied, 1968:15-16].

Further, it has been maintained that the logic of deductive as well as formal thinking had become vivid to the minds of enlightened men by the time of Spinoza (the period of rationalism). That those who made the codes in the eighteenth century were attempting to establish fundamental postulates from which all rules would logically follow. The expectation was that new problems could be anticipated and so what was endeavoured was to establish agreed solutions before the problems arose.

The idea in this line of thought was that the code-makers believed that a perfect code could be devised which would then govern all possible combinations of circumstances. Judges would then almost act like machines because judicial discretion would not be there [Gottlied, 1968:15-16]. Gottlied, (1968), cites John Stuart Mill to have asserted in his Treatise on Logic that under a code system, the judge follows in his reasoning a method of syllogistic reasoning [Gottlied, 1968:16].

Gottlied further holds that mathematical rather than geometric reasoning modes sufficed among Roman law commentators in the nineteenth century. He holds that for example in Germany, Savigny and the pandectists (his followers) subscribed to deductive reasoning model in what was called 'juristic mathematics of concepts'. There has been also a claim that there have been proposals to replace judges by electronic machines capable of extrapolating the right decisions from stored datum of legal propositions [Gottlied, 1968:16].

The preceding scenario as has generally characterised the legal scene in the continent of Europe is not the case in the United States of America [Maguire, 1980:120-124] nor in English common law. An example of a high court judge whose contention is against the formalism and deductivism upheld in Europe has been cited thus

> We have in England a deep distrust of logical reasoning; and it is for the most part well-founded. Fortunately, our judge-made law has seldom deviated into that path; but on some of the rare occasions when it has done so, the results have been disastrous [Gottlied, 1968:15].

5.4.1 ENTHYMEMES AND LAW

An enthymeme can be defined as "an argument that is expressible as a categorical syllogism but that is missing a premiss or a conclusion"[Copi, 1991:270]. A categorical syllogism is a two premised argument in which class inclusion or exclusion is asserted either in part or in whole.

An enthymeme can also be described as an abridged syllogism which lacks either one of the premises or the conclusion [Bittle, 1950:265]. most ordinary and common discourses usually take the form of syllogistic reasoning though in a disguised form. This is what from a logical point of view is described as an enthymeme.

Example (1)

Kimani is intelligent therefore Kimani can be a university student.

In this example, there is one premiss which is omitted. This is that "All intelligent people can be university students". The argument in its complete form should be:

1. All intelligent people can be university students.

2. Kimani is an intelligent person

Therefore 3. Kimani can be a university student

An enthymeme which has the explicit major premiss missing as the one above is called an enthymeme of the first order.

Example (2)

All politicians are immoral therefore Kamau is immoral.

In this second example, the missing premiss is "Kamau is a politician". The argument expressed in its complete form is:

1. All politicians are immoral

2. Kamau is a politician

Therefore 3. Kamau is immoral

An enthymeme that has the minor premiss mising as in this second example is called an enthymeme of the second order.

Example (3)

Bribery is corruption and corruption is an avoidable evil.

In this example, the conclusion is missing. The conclusion should be that "Bribery is an avoidable evil". An enthymeme that lacks a conclusion is called an enthymeme of the third order. This argument written in its complete form should read:

1. Corruption is an avoidable evil

2. Bribery is corruption

Therefore 3. Bribery is an avoidable evil

Though enthymemes do not constitute another form of inference apart from deduction and induction, they are of great practical significance in common discourse. To this extent for example, inductive reasoning can be seen to basically constitute enthymemes of the first order.

Legal reasoning can be critically analysed and reconstructed in order to establish from a theoretical point of view the relevant logical form implicit therein. The form may be deductive, inductive, analogical or otherwise. The point is that from certain legal concepts such as precedent, there can be established the underlying form of reasoning. Induction for example forms the basis for the concept of precedent (to be discussed in the next chapter). This type of enthymemicity is 'structural'. In this regard it has been held that:

> What is not perspicuos in the manner of presentation of an informal argument, and what therefore calls for theoretical explication, is its logical type (inductive, deductive, etc.) [Brewer, 1996: 995].

The significance of structural enthymemicity with regard to law can be appreciated on the basis of the earlier critical discussion on deducion. However, this type of enthymemicity is more of a theoretical concern than practical though significant to this thesis as a whole notwithstanding.

Apart from structural enthymemicity, there is also practical enthymemicity under which judges and laws offer good examples. A judge or a magistrate has to interprete the argument in a relevant precedent case so that the rule that such a precedent establishes can be brought to light and a decision reached as to whether the rule established should affect the decision of the judge or magistrate or not. The rule in a precedent is usually not articulated or stated in no uncertain terms, it is usually implicit on the basis of the

argument established by the relevant precedent. It is therefore the task of the judge or magistrate to infer the rule.

Enthymemicity can also be considered from semantic and pragmatic (not the pragmatism of William James) perspectives. Though this kind of dichotomisation 'boils' down to the earlier (structural and practical), the consideration of it enhances a more vivid exposition of the significance of enthymemicity as a logical concept in legal reasoning.

The sufficing feature in 'semanticism' is the endeavour to explicate the general meaning by identifying and analysing the semantic (literal, logical) properties of sentences as distinct from the things that those sentences are used to do in particular circumstances or contexts. On the other hand, contextual judgements by speakers and interpreters affect interpretation of language and this is the pragmatic perspective of enthymemes [Brewer, 1996:987].

Judgement is often made about how a sentence(s) or a statement or group of statements, given the literal meaning, is or are used in the relevant context to assert something other than what is literally meant. The point here is that statements can be made or sentences can stand to one another in such a way that given the knowledge of the motive, intention, or goal of whoever presents or has presented such statements, inference can be made and articulated in conformity with the relevant and or respective motive or intention or goal.

Given the knowledge or anticipation of the motive of the presenter, the interpreter can formulate other sentence(s) that would fit in the scheme without jeopardising the

intention or goal of the presenter (and even enhancing such motive or intention further and more than had the speaker or presenter done). This can be done for example if the statements or sentences as they are or stand imply a contradiction or do not capture an instance which the interpreter conceives and perceives to belong to the cases or instances that are or were intended by the presenter given the knowledge of the motive and intention of the presenter thus requiring clarification or updating by the addition of another or other statement(s) or sentence(s).

The interpretation of rules or law in general and especially statutes offer a good example that helps put the preceding discussion more vivid. When law has to be effected, a statute(s) has to be interpreted and applied. From a theoretical point of view as would concern structural enthymemicity or semanticism (whereby the concern would be the literal or logical meaning of the statute or legislation), the task should be easy because all that is needed to be done is the application of the "letter of the law".

However, structural or semantic interpretation (from a practical or pragmatic point of view), if consistently or invariantly employed would possibly engender inconsistency with regard to the tenor of the statute. Injustice, ambiguities, and general unreasonableness not intended by the legislative body would arise therefrom and or be incidental thereto. Hence, literal interpretation or the emphasis on semantics and logical meaning have to be checked vis-a-vis the practical or pragmatic circumstantial presentations of issues or facts.

To the preceding extent, the judge or magistrate has a two-fold task: firstly it has to be established the exact meaning or the literal or logical meaning of the legislation or statute; secondly, the intention or motive of the relevant legislature or legislative body

or the legislators has to be considered i.e. the spirit or intention of the law. A consideration of the technical rules of interpreting statutes shows the practical significance of enthymemicity as a logical concept in respect of law.

Technical Rules of Interpreting Statutes:

A consideration of the technical rules of interpreting statutes as presented below enhances the appreciation of the practical significance of enthymemes (as discussed earlier) in law [General Principles of Law, The Rapid Results College; course No. 12 a5 : 53-55].

(a) The first principle is that the statute must be read in its plain sense, and the ordinary meaning of the words for common terms are to be ascertained, accepted, and put into effect. This is the cardinal rule in all ordinary cases, and is referred to as the grammatical or dictionary interpretation, and often as the "Golden Rule".

b) This literal interpretation may be facilitated by not slavishly adhering to every single word or phrase, and by considering the preambles or introductions (but not debates on the statutes), and title in the Act. "General words" which, if literally interpreted, would lead to an inconsistent result, may be restricted in their meaning by reference to the context, while unusual, technical or scientific meanings can be adopted if it is clear that such meanings must be read into the statute.

c) Where the text contains an obvious error, e.g. the omission of a negative, or a wrong reference to a schedule, the judge must acknowledge and correct it.

d) Where the text is logically defective, i.e self contradictory, ambiguous, inconsistent and likely to lead to strict interpretation to an unreasoanable, unjust or immoral decision clearly alien to the intention of the legislature, the judges must make it logically perfect by interpreting it according to the *sententia* (sense) and not the *litera* (word). The judges are not allowed, however, to usurp legislative power by superimposing their own ethical conceptions; they can remedy logical defects, but not ethical. When once the judges have ascertained the true intention of the legislature,

they must apply the words as written, however repugnant they may seem to the judges' moral or common sense.

e) Where a statute is incomplete, either because the law-making body intentionally has left defects to be fitted in, or (more likely) because it could not contemplate all future cases therein, then the judges must supplement it by logical interpretation.

f) A statute must be construed as a whole. This signifies that although a single expression may, standing alone bear a particular meaning, nevertheless if on reading of the whole statute it becomes clear that a different construction was intended by the legislature, it must be interpreted accordingly. It must be construed *antecedentibus et consequentibus* (by what has gone before and what follows after).

g) Where a particular phrase is capable of two different constructions the one leading to sense, the other to absurdity, the court will adopt the former interpretation.

h) Where particular words are used, followed by general words, the general words are no wider in scope than the particular words.

i) The rule *Expressio Unius est exclusio alteruis* (the express inclusion of one implies the exclusion of the other) is that express words specifying a particular thing will be given a limited meaning, even though a wider meaning would otherwise have applied.

To the extent that in enthymemes the interpreter has the task of filling in or completing the reasoning, argument or assertion by submitting the missing premiss or conclusion or inference (within definite beacons, logical or practical), the technical rules of the interpretation of statutes as presented above serve to show the practical significance of enthymemicity as a logical concept in law. The task of a judge or magistrate of discerning the rule that a precedent establishes as discussed earlier also serves as a good example of the practical significance of enthymemes as logical concepts in the practice of law.

However, notwithstanding the implied deductivism in legal practice as hitherto discussed, there are objections to this kind of conceptualisation of the legal arena in respect of practical dictates. Reasoning and especially deductive reasoning presupposes and is necessarily dependant on classification. For example, if the previous first example is considered:

1. Anybody who kills another or others with aforethought malice is punishable by death.

Here, there are implied two classes, the first is that of people who kill with a forethought malice and the second is those who are punishable by death. The assertion in this proposition is that anybody who belongs to the class of people who kill with aforethought malice also belongs to the class of people who are punishable by death. The second premiss:

2. Njoroge killed Patel with aforethought malice

The assertion in this second premiss is that Njoroge belongs to the first class (the class of people who kill with a forethought malice). Granted this two premises, the conclusion follows of logical necessity that:

Therefore 3. Njoroge is punishable by death

Simple and easy as this conclusion may seem to be derived, it is only so on the assumption that the classes or the classification has already been done. However, the main problem in legal reasoning is the establishment of classifications or classes. If a term is given a definite interpretation and defination, then a conclusion may be drawn on the basis of such definitions and intepretations.

If for example by 'aforethought malice' is intended and articulated to imply a deliberate illegal and avoidable motive to harm, or self defence to mean an unavoidable and legally justified reaction by one to save his/her life, then it is easier to conclude given certain considered empirical facts. But logic cannot help in the classification of particulars, in which case it cannot tell the truth of premises. An argument can be logically valid even if it has false premises, for example:

1. All women are men

2. Mary is a woman

Therefore 3. Mary is a man

The above example though logically valid is not sound i.e. though the conclusion follows of logical necessity, it has at least a false premiss. For justice to be achieved (at least philosophical justice) the arguments in law have to be sound [contain true proposition(s) and be valid] and be cogent (in case of inductive reasoning) [Copi, 1990:45-54]. Logic to this extent cannot help classify particulars which is the crux (or at least ought to be the crux) of the matter in legal reasoning.

The formulation of a major premiss (rule) and a minor premiss (fact) of a judicial syllogism (a syllogism is a two premised argument) though possible, the greatest difficulty in legal decision making is the issue of adoption and formulation of such premises. More often than not there are usually many competing major premises (rules) advanced, but syllogistic reasoning cannot enable one to determine the appropriate one to be adopted or the applicable one.

The selection of the relevant facts, which make up the minor premiss from the total situation in which a choice or judgement is required, cannot be resolved by reference to the deductive syllogism nor:

> ...can questions about factual situations not contemplated in the major premise of the syllogism such as questions involving novel factual circumstances be deductively resolved by resort to premises antecedent to such circumstances [Gottlied, 1968:18].

There is often also the issue of uncertainties in legal situations emanating from either authoritative examples (precedents) or authoritative language (legislation). The extent or degree of similarity between a case already decided in the past and what is considered a similar case to be decided can be very much mind-boggling. There is always a question of the 'essential' or 'necessary' attributes which should point to the extent of similarity. The point is that the qualities or attributes which should be considered before deciding whether or not two cases should be treated alike is often a problematic issue.

The uncertainties with regard to the relevant similarity of cases make it very difficult for the decision on whether or not an individual case should be considered i.e. whether the case falls within the class of things referred to by the rule so that the rule becomes applicable to that case or not. This kind of uncertainty makes it often difficult (if not impossible) for deductive reasoning to be invariantly tenable often leading to resort to analogical reasoning.

The preceding is based on the position that deductive reasoning presupposes the existence of a general rule and an identification of an instance which falls under or is captured by the general rule. However, the main legal task is often the problematic

decision (as stated earlier) on whether or not the relevant particular case is to be captured by the general rule (the major premiss).

Similarly, uncertainties emanating from authoritative language or legislation render deductive reasoning extremely difficult. There is always a limit to the extent to which general language can guide in identifying particular instances. The uncertainty that is observed in precedent or legislation is what has been called 'open texture' [Hart, 1961:124].

Given that human beings are not "Gods" and so they cannot know all possible facts and possible combinations of such facts in order to formulate watertight and accurate general rules, and given that on the same basis classifications cannot therefore be made in advance (classifications which are exhaustive for all possibilities as implied in legal codification), deductive reasoning is not invariantly tenable in legal situations. In this regard it has been held that:

> If the world in which we live were characterised only by a finite number of features, and these together with all the modes in which they could combine were known to us, then provision could be made in advance for every possibility. We could make rules, the application of which to particular cases never called for a further choice. Everything could be known, and for everything, since it could be known, something could be done and specified in advance by rule. This would be a world fit for 'mechanical' jurisprudence [Hart, 1961:125].

However, it has been maintained in the same line that :

> Plainly this world is not our world; human legislators can have no such knowledge of all the possible combinations of cirmstances which the future may bring. This inability to anticipate brings with it a relative indeterminacy... [Hart, 1961:125].

5.4.2 CONCLUSION ON DEDUCTION AND LAW

Suffice hitherto therefore is that despite the possibility of deductive reasoning in the practice of law (from a theoretical point of view), and the subsequent objectivity and

efficiency realisable therefrom, it is important that a judicial decision maker and all legal practitioners realise that due to the fact that human beings are not all knowing, that not all possible combinations of social reality can be anticipated exhaustively and accurately (presuppositions for deductive reasoning), all cases should be handled in due regard for their unique circumstantial presentation and manifestation on the basis of objective reason if philosophical justice has to prevail and actually seen to prevail.

However, the circumstantial manifestation referred to here is not to be understood to imply sheer caprice or relativism as may be based on respective social milieu but rather an appreciation of justified uniqueness of events on the basis of good conscience, good faith, objective reason and insight.

5.5 LANGUAGE AND LAW

Logic is closely connected with general grammar and "it is not always easy to draw a sharp line between the grammatical and the logical writings of philosophers like Aristotle, Duns Scotus, and C. S. Peirce" [Cohen, 1963:17]. This notwithstanding, the immediate concern of logic cannot be restricted to words. The validity of reasoning however depends on the consistency with which the relevant language is used such that the words used must faithfully follow the order and connection of the items denoted by them.

Like any science logic proceeds on the premiss that certain words have certain meanings, that they denote certain things, relations, or operations. It is on the basis of this that informal fallacies of ambiguity can be detected (e.g. the fallacy of equivocation and that of amphiboly) [Cohen, 1963:17]. In this light Copi,

(1990:128), quotes Gottlob Frege, Charles Sanders Peirce and William Ian Beardmore Beveridge respectively thus:

> It is indeed not the least of the logician's task to indicate the pitfalls laid by language in the way of the thinker.
>
> ...the woof and warp of all thought and all research is symbols, and the life of thought and science is the life inherent in symbols; so it is wrong to say that a good language is important to good thought, merely; for it is the essence of it.
>
> Careful and correct use of language is a powerful aid to straight thinking, for putting into words precisely what we mean necessitates getting our own minds quite clear on what we mean.

The intimate relationship between logic and language, on one hand and practical reality on the other can be appreciated by considering the philosophy of logical atomism as was developed by Bertrand Russell and his student Ludwig Wittgenstein. In his Tractatus Logico-philosophicus, Wittgenstein contended that for a sentence to assert a fact, it is requisite that there be something in common with regard to the structure of the sentence and that of the fact.

The preceding is what is known with reference to Wittgenstein as the 'picture theory' whereby the ideal language mirrored the world in the same way a map mirrors it, the one-to-one isomorphism. In this scheme, every proper name in the ideal language has a corresponding entity, and each predicate a corresponding property. To the extent that facts are composed of objects and their properties, the ideal language gives the structure of facts [Rorty, 1967:128].

It is not the case however that only what one says counts, but rather how one says it is also equally important. The language in which something is expressed can ensure the difference between truth and falsehood, between boredom and fascination, and so on. Good reasoning therefore has to be characterised by clarity and objectivity if the

central purpose of reasoning has to be the establishment of useful fact. In this regard, it has been contended that:

> Presenting a case well means not only stating the case but also caring that the case be grasped: clarity is an indication of the arguer's good faith. Though being clear is a skill of detail, not of principle, it is helpful to cultivate the following habits: needle details; seek simplicity; expose structure [Weddle, 1978:47].

The contention is carried further that:

> A well-argued case not only persuades its friends but also attracts the uncommitted and the unfriendly. Nothing alienates the uncommitted and the unfriendly like provocative language [Weddle, 1978:50].

Clarity and objectivity are necessary attributes for enhancing good reasoning and the establishment of a firm base to facilitate the actualisation of the ideal objective of logic i.e. the establishment of universals with regard to reasoning for the purpose of evaluating the quality of 'instantial' reasoning (piece meal examples or instances of reasoning).

Hitherto, it has been shown the necessity of language whether symbolic or verbal for the sustenance and actualisation of the concern of logic, thought. Thinking without the employment or application of language, symbolic or verbal is difficult (if not impossible) to conceptualise. Language basically performs three functions: these include the informative, the expressive and the directive [Copi, 1990:66].

The informative function of language serves to communicate information. The presentation of arguments and the affirmation and denial of propositions constitute an informative function. The information entailed here may be true or false, but the point here is that whether true or false, information is delivered notwithstanding. Hence, "informative discourse is used to describe the world, and to reason about it" [Copi, 1990:66].

Practically, descriptions can be accurate or inaccurate, appropriate or inappropriate, just as reasoning may be good or bad on the basis of set rules of logic. When language is used to express the feelings of the speaker or to evoke certain feelings in the listeners, it is in such a case said to serve an expressive function.

Commands and requests are expressions of thought that are directive in nature. Commands and requests essentially endeavour to evoke action or prevent it in another person or party on instruction(s). This is the third function of language, directive. The distinction of the three functions of language as presented above should not be erroneously understood to imply that language can be used in ordinary discourse and serve only one of the functions. More often than not, the use of language in ordinary discourse involves a combination of the three functions.

All these three functions of language can be observed in law. Rules as is the main feature of law are often directive in character. They consist in prescribing and proscribing conduct and behaviour. The directive character and nature of legal language as seen in rules is evidenced and enhanced by the sanctions that go hand in hand with the rules. Punishment is given for those who transgress the directives or instructions as held in the rules, and the offended are rewarded by compensation or otherwise by appropriate redress.

The informative function of language can be seen in law with regard to rules as they stipulate the rights, duties, and obligations that are expected of individual(s) or groups in respect of the relevant law. The rights of parents, children, and citizens are generally stated or implied in the constitution and specifically articulated in the statutes in the respective Acts. The legal duties and obligations of individuals especially public

servants such as police officers or army officers and even administrators are often clearly articulated in the respective Acts. In this case and to this extent, language serves an informative role in law.

With regard to actual proceedings and activities in courts of law, language serves to inform the court of the 'facts' in the case. Testimonial evidence and expert opinion serves to inform the court or bring to the attention of the court what 'actually' happened or is supposed to have happened. Such information may be true or false, accurate or inaccurate, but information needed by the court for it to reach a decision or judgement nevertheless. This is always done through language, symbolic as in the presentation of physical evidence or traces of evidence or sign language and verbal communication by human beings.

The concern of the court (at least the ideal concern) is the facts, what really happened or ought to have happened. This philosophically implies a need for a necessary correspondence between the evidence presented and facts or real events as put before the court. Such evidence has to have the fullest possible representative power of the relevant actual event or fact.

To this extent, there is need for a language which can with the highest degree possible enhance this philosophical objective. Wittgeinstein's 'picture theory' with the one-to-one isomorphism between the language and the objective reality and Russell's ideal language offer the ideal answer to the preceding requirement.

The expressive function of language though significant in law, is not as significant as the informative and directive function. This is because formally, the concern especially of the court and law in general is not emotion but what the law stipulates or what can

be inferred on the basis of objective reason or rationality. Emotions such as anger, hate, love, mercy and so on are generally immaterial when it comes to legal issues especially in the "eyes of the law".

Some lawyers have been known to deliberately provoke witnesses in cross examination so that such witnesses get angry and loose their rational power. Such lawyers often do that in order to render the witness insensitive and uncritical about the questions asked and the anticipated possible implications of such questions and possible answers, in which case the interests of the lawyer's client stand to be favoured [Thouless, 1952:50-60]. But this notwithstanding, the respective judge or magistrate is formally expected to be sensitive to such practices and discourage them especially if such provocations are deliberate.

On the other hand, emotions can be evoked on the side of the judge or the magistrate. This may be deliberately done by the defence or the prosecution The emotion evoked would be mercy and sympathy or hate. A consideration of the legal practice of mitigation whereby lawyers often would give or submit reasons as to why their client is or are innocent or if guilty only deserving a light sentence is evidence for the practical significance of the expressive function of language in the practice of law [Thouless, 1952:50-60].

Witnesses have also been known to at times give very emotionally carrying accounts and narrations of events and at times even breaking into tears in the course of the narration. This scenario can influence the attitude and the impression that the magistrate or judge may have towards the accussed or the plaintiff (complainant).

The judge or magistrate may decide the case without having been influenced by the emotions evoked in him by the defence or the prosecution. This can be done by a strict adherence to 'the letter of the law' and this would conform very well with the positivistic conceptualisation of justice, legal or procedural justice. However, judges being human beings, can in one way or another be influenced by the evoked emotions. This is especially so if subscription is made to the contention that justice has to have the dimension of mercy. In this regard for example it has been contended that:

> Justice untouched by mercy is minimalistic and stinting in its response to persons. Justice is incipient love and thus has some native ties to generosity and enthusiasm ....True justice must have at least a spark of great-souled appreciation of the persons to whom it attends. Where this is not present in a society, the extremes of poverty and wealth will co-exist, exploitative power will wax strong, and the poor will wax weaker and poorer [Maguire, 1980:123].

On the same note it has further been maintained that:

> This link to mercy and enthusiasm is true for all forms of justice but is especially true for social-distributive justice which would direct powerful societal patterns of redistribution [Maguire, 1980:123].

From a logical point of view however, emotions have no place but rather objective facts such that this link of justice and mercy as in the preceding quotation forms a point at which law parts from logic if the assertion is sustained. By appealing to mercy law accommodates a logical fallacy, *argumentum ad misericordiam*.

All this said and done hitherto, the questions that suffice are: to what extent can language be claimed to be able to represent accurately and sufficiently what actually happened or what should happen in the future? To what extent can language exhaustively represent objective practical reality which is already experienced or which is anticipated especially when the realm of concern is within social life? To what extent therefore is Russell's ideal language and Wittgenstein's 'picture theory' with the one-

to-one isomorphism between language and the corresponding objective reality practically significant ideas?

If the world has to be investigated in itself, then analysing the language in which it is described would most probably give a greater insight into the description, but not into what is described [Rorty, 1967:127]. In this regard, it has been asserted that "the knowledge of things is not to be derived from names. No; they must be studied and investigated in themselves" [Plato, 1937:439]. In the same light, it has also been said that "...words often impede me and I am almost deceived by the terms of ordinary language" [Descartes, 1927:104]. Moreso has been the assertion that "...those fallacies which we are apt to put upon ourselves by taking words for things" [Locke, 1957:18]. Further still, there has been the contention that:

> ...most parts of knowledge have been so strangely perplexed and darkened by the abuse of words, and general ways of speech wherein they are delivered, that it may almost be made a question whether language has contributed more to the hindrance or advancement of the sciences [Berkeley, 1929:120].

To this extent, it can be realised that notwithstanding the informative, directive, and expressive functions of language, language has a limit as to the extent to which it can most accurately if not exhaustively enhance the representation of the objective reality. i.e.What acutally happened and what should happen as a matter of fact.

There is often a possibility of language not being able to represent all the relevant aspects of a phenomena especially due to inadequacy of vocabulary. Due to lack of a word or a term that can accurately represent an aspect of an event, such an aspect might be left out or a substitute word may be used to describe it which might lead to a misrepresentation or engender an inaccurate impression. This is often so especially to those who might not have had sense experience of the event or phenomena.

In law, though key concepts and terms are usually certainly defined, the definition of terms and concepts with regard to human beings is not strictly speaking the same as definition of relatively predictable, almost mechanical natural phenomena as in physics and chemistry. This is because the presentation, perception and conceptualisation of notions in social life has a possibility of change due to the flexibility of social life and the dynamism of the same. On the basis of this, it has been said that:

> ...human foresight is limited and the variety of fact-situations endless. Every generally worded statute, sooner or latter, will fail to provide a certain direction as to the handling of those inevitable legislative nuisances, the cases nobody thought of [Harvey, 1975:752].

In the same regard it has been held that:

> The essential incompleteness of empirical descriptions is one of the reasons for the 'open texture' of empirical terms. It makes it impossible to define empirical terms exactly as opposed to geometric terms like 'triangle' which can be defined completely. We never can be quite sure that we have included in our definition everything that should be in it: we can always make our definitions more detailed, more specific. The level of generality on which the facts are stated can always be questioned, and every definition, in Waismann's words, stretches into an open horizon. [Gottlied, 1968:47].

On the basis of the fact that social life is relatively highly unpredictable, legal terms and concepts in their attempt to capture all possible combinations of situations and the description for the same (especially in codified legal systems), would tend to be obscure and ambiguous due to the myriad possible combinations of facts in social reality. This is quite in line with observed uncertainties arising from language (legislation) or cases (precedents). The safeguard for this predicament however is the provision in the technical rules (discussed earlier) for the interpretation of statutes and the inference of rules from precedents on the basis of the motive of the legislator.

To this point therefore, it can reasonably and accurately be asserted that language cannot invariantly, exhaustively or sufficiently represent social reality to the extent

that Russell and the early Wittgenstein would conceptualise in their ideal language. This is because of a conglomeration of factors as discussed above ranging from inadequacy of vocabulary to ambiguity or vagueness of terms and concepts as a result of the dynamism characteristic of social life. The summary of the significance of language as a necessary notion for consideration under logic in respect of law is ensured by the contention that:

> However rich and accommodating we may consider our language to be, words are not precision instruments. Their meanings shift through time and throught different contexts.... In responding to pressing demands for new law or for the modification of the old, legislators labour under severe handicaps. While they may see one facet of a problem reasonably clearly, or one specific context in which the problem may arise, it is frequently difficult in anticipation to see the various guises in which the problem may appear and to state the legal solution in a form of language that will embrace all of the cases with which the legislature wants to deal - or would want to deal if it thought of the cases - but will not be so broadly inclusive as to appear to cover matters with which the legislature was not concerned [Harvey, 1975:748].

Harvey's assertion to this extent is very much in line with the latter Wittgenstein's contention that one should not ask for the meaning of a word but rather the use (i.e. One should not worry about the meaning of a word but rather be concerned with how the word is used).

This chapter has considered the extent of appropriateness of deductivism in legal practice. The next chapter considers the appropriateness of inductivism in legal practice.

CHAPTER SIX.

INDUCTION AND LAW.

6.1 BACKGROUND INFORMATION

Induction as a logical concept has a broad range and scope of significance with regard to reasoning involved in law or legal thought. Induction as a broad term is evidenced in the practice of law by a consideration of the basis of certain logical notions as analogical reasoning under which the legal concept of precedent serves as a practical example. probability is another logical concept which is intricately connected with the concept of induction and infact which characterises the inferences engendered by inductive reasoning or induction. under probability, the legal concepts of testimony and circumstantial evidence serve as good examples.

For fear of the confusion that may ensue by a discussion on all these legal and logical notions inseparably, these various logical concepts with their corresponding legal examples will be discussed separately but as subtopics of the main topic, induction. This will proceed by a brief consideration of authoritative evidence for the relevance of induction (as a kind of reasoning) to legal practice and law in general, a discussion on induction as a type of reasoning, and a discussion on the logical concepts under induction.

Induction as a kind of reasoning is based on two basic assumptions; first that events are causally connected and second that nature is uniform on the basis of the principle of the uniformity of nature. It has been contended that the principle of causality is evolved from the principle of sufficient reason , just as the latter is a development of

the principle of identity and the principle of contradiction . That these principles cannot and need not be proved since they are self-evident and need only be explained in order to show their truth and validity [Bittle, 1950 :305].

According to the principle of sufficient reason, everything must have a sufficient reason to be what it is because if it did not, it would have no existence and it would be nothing , therefore if a being exists , it must have a sufficient reason why it exists and why it is that particular thing rather than another. The principle of causality is therefore necessary for all contingent and temporal beings that undergo change. To this extent , the principle of causality forms a logical foundation for induction. A cause can be defined as "anything that contributes in some positive manner toward the production of another thing in its existence and being.''[Bittle,1950:307].

On its own, the principle of causality cannot justify the general and broad assertions made under induction. This is because what is demanded by the principle of causality is merely that every physical change and natural phenomenon must have a cause or sufficient reason for its existence.To this extent, it accounts only for those occurrences in nature which actually happen. It explains only the particular, isolated happenings.

The principle of causality cannot justify absolutely universal laws because such laws are generalisations that go beyond individual cases that have been observed. It is the principle of the uniformity of nature which together with the principle of causality form the logical basis for induction. The principle holds that nature is uniform in its causality that the same non-free causes under the same conditions will always produce the same results [Bittle, 1950:316].

6.2 ANALOGICAL REASONING AND LAW

The use of an illustration in an attempt to clarify a meaning in the process of explaining any abstract matter is usually an advantage. This is generally true because a mental picture is often easily understood than a form of words. The objective for such illustrations normally is to enhance a vivid picture of an abstract matter, they are not intended to be a method by which anything new can be found out about the abstract matter. But when a concrete illustration is used with the intention of deducing new conclusions, it ceases to be a mere illustration but becomes an argument 'by analogy.'

By analogy is meant the process of reasoning whereby a conclusion is made by the mind from known characteristics of one thing or a group of things to the unknown characteristics of another thing or the similarity of the things. The argument by analogy can be symbolised thus; because (Y) has properties or attributes (a) and (b) which are also held by (X), it must also have the property (c) which too belongs to (X).

Such inferences are only probable, not certain. If the relevant items compared are perfectly alike, the conclusion would be certain. But no two things or facts are perfectly alike in all details; there often exist differences together with resemblances. Alike things differ in other respects such that for example (a) and (b) may be respects in which(X) and (Y) resemble one another, when (c) may actually be one which differentiates (X) from (Y). In light of this it has been asserted that:

> There will always be the danger of concluding to a difference rather than to a resemblance, and this danger increases with the complexity and obscurity of the things or facts compared because in such cases the number of differences may be far greater than the number of resemblances. Hasty generalizations must be avoided [Bittle 1950:348].

Important to note about analogical reasoning is that not all resemblances are important, only significant resemblances are valued in analogical reasoning and a larger number of significant resemblances ensure greater probability and brings the conclusion closer to being certain. But the distinction between significant and insignificant resemblances is often difficult to make in an analogical inference. Deep and extensive knowledge of facts and their relative value is the practical requirement for safeguarding the mind from error.

Argument by analogy is not however a necessarily dishonest or crooked method of thought though it could be dangerous always requiring careful examination. When an argument by analogy is not expanded into a clearly recognisable form, for example when a judge refers to 'the long arm of the law', such analogy implied by the choice of words but not definitely expressed is called a metaphor. A metaphor is often used for the mere purpose of illustration and if the user of a metaphor, purposely or not draws any new conclusion from the implied analogy then there is use of the argument from analogy though in a disguised form.

Though analogical thinking is not necessary crooked thinking, the use of imperfect analogy can be really crooked argumentation. It is even worse to use a metaphor or an argument in analogy form if there is actually no true analogy.

The most basic and fundamental requirements for good and accurate analogy or analogical reasoning are first that there be sufficient warrant to believe that the presence in an 'analogical' item of some particular characteristic or characteristics justifies one to infer the presence in that item of some other characteristics (s). Such a warrant is what Brewer terms 'Analogy Warranting Rule' (AWR) [1996:965]. This

rule according to Brewer, states the logical relation between the characteristics of compared items that are known to be shared and those that are inferred.

The second requirement is the explanation and justification for the analogical reasoning or the analogy. Brewer terms this requirement 'Analogy Warranting Rationale' (AWRa).This rationale constitutes the explanation as to why, for example in the 'eyes of the law', (or 'for the purpose of the argument) the logical relation ascribed among the characteristics articulated by the analogy warranting rule either does obtain or should obtain. Analogical reasoning in law involves the comparison of a number of items, these may be cases (precedents), events, persons, among others. The structure of argument by analogy notwithstanding variations of the items compared or the characteristics by which they are compared remains the same.

6.2.1 PRECEDENTS

This term (precedent) refers to authoritative and binding decisions of judges. Such decisions may be termed judiciary law, case law, adjudication. In a historical review of the growth of English law, it can be noted that Royal judges' decisions would normally be based on existing or assumed customs, their aim being to unify the law (common law).

The arguments of the pleaders and the judge's ruling had began to be recorded towards the end of the 13th century by some anonymous reporters. Members of the legal profession found these notes significant and relevant for reference and study. These notes were later followed by reports compiled by professional lawyers and printed in volumes. These latter reports contained a statement of the facts in the issue, a summary of the pleader's arguments, and the verbatim judgements of the judges.

These reports first pocessed only persuasive authority such that though they were evidence that such was the law, judges were not bound to accept the decision as binding on them.

Towards the end of the 18th century, the doctrine of the "Binding Force of Precedent" became accepted by the judges. While around this time continental countries were codifying their respective legal systems, in England, it was adopted the doctrine of the binding force of precedent. Courts are therefore often bound by decisions of higher courts and sometimes by those of equal status [The Rapid Results College : General principles of law, course No.12 a5:25-26].

An example of the significance of the concept of analogy can be illustrated by the case of Adams V New Jersey steamboat Co. [Brewer, 1996:935]. This was a case in which goods had been stolen from the cabin of a steamboat passenger though the steamboat owner had not been negligent in the provision of security. Before the court, were two precedents; first that an innkeeper had a strict liability duty to an inn guest, and another that a railroad sleeping-car owner had not a strict liability duty to a sleeping-car passenger. The judge was here to use the two examples to decide on whether or not the steam boat was relevantly similar to the inn or to the rail road car, in respect of the possible strict liability duties of its owner.

Another example of an instance requiring analogical reasoning is the case of California V. Carney [Brewer, 1996:935] where the United states supreme court was to establish whether, for the purpose of applying the warrant requirement of the fourth amendment, a motor home parked off the street was relevantly similar to a house, or if

it was instead relevantly similar to a car, because warrants are usually required for the search of the former but not the latter.

To this extent, it can be appreciated that the logical concept of analogy or analogical reasoning, which is a manifestation or an example of the wider kind of reasoning, induction, is of great legal significance and relevance. From the above example of analogical reasoning by precedent, it can be realized that there is involved reasoning that proceeds directly from one or more individual instances to a conclusion about another individual instance without the mediation of any generalization. To this extent, analogical reasoning by precedent in law is a manifestation and example of inductive reasoning in the practice of law.

In analogical reasoning, the items compared are known as analogates. The item(s), on the basis of which a conclusion is inferred for another(s) is /are called the primary analogates(s), while the item for which a conclusion is inferred on the basis of the characteristic(s) or attribute(s) held by another(s) is called the secondary analogate(s) [copi, 1991 : 450].

In the above examples, the analogates include, for the first example; the steamboat, the inn, and the rail road-car. For the second example the analogates include; a motor home, a house, and a car. The primary analogates in the first example are; the inn and the railroad sleeping-car. The primary analogates in the second example are a house and a car. The secondary analogate in the first example is the steamboat and in the second it is a motor home parked off the street.

Copi, (1991:450-452), presents six principles on the basis of which analogical reasoning can be evaluated. These include:

(1) the relevance of the similarities shared by the primary and secondary analogates. Here, the argument is weakened if the similarities are of little or no relevance to the factor in issue. The argument on the other hand is strengthened if the similarities are of relevance.

(2) The number of similarities. An increase in the number of the relevant similarities makes the conclusion more probable while a small number of the relevant similarities enhance a lower probability for the conclusion inferred.

(3) Nature and degree of disanalogy. The differences that exist between analogates or the compared items are called disanalogies. If the disanalogies are such that they are relevant and significant to the conclusion, then the more they are, the lesser the probability of the conclusion and the strength of the argument. But if the disanalogies are of no or little relevance and significance to the conclusion, the strength of the argument and the probability of the conclusion is increased.

(4) Number of primary analogates. The higher the number of the primary analogates, the stronger is the argument and the more probable that the conclusion will actually hold and vise versa. In case there is among these primary analogates one which in one way or another, when considered alone with the secondary analogate is inimical or jeopardises the conclusion, such a primary analogate is called a counter analogy due to the fact that it favours a conclusion other than the one in question.

(5) Diversity among the primary analogates. When the primary analogates are quite diverse, though they have a particular attributes(s) or characteristics(s) common between or among them, an attribute(s) which is/are ascribed to the secondary analogate, then the probability of the conclusion is increased because if there were little or minimal diversity among the primary analogates, it would be possible that there would be a common factor among them which is the more significant with regard to the conclusion drawn, a factor which in the actual sense may be the distinguishing one between the primary analogates and the secondary analogate i.e.

A factor absent in the secondary analogate which then renders the conclusion less probable.

(6) Specificity of the conclusion. The more specific a conclusion from analogical reasoning is, the lesser is its probability, and the weaker is the argument in general.

These six principles which can be used to evaluate the quality, strength, and accuracy of analogical reasoning in general are of great legal significance when the legal practice of precedent is considered. From the examples of precedent used earlier, the question of mobility for example can be considered a relevant similarity between a steamboat and a railroad car, in that because these two are mobile and so it is difficult to ensure security in them (because it is easy for one to steal and get away easily due to the fact that they are mobile), that then the steamboat owner has no strict liability duties because it is difficult for him to maintain security, just as it is for the railroad sleeping car-owner. The relevance of the first principle (1) can therefore be seen.

The more the number of relevant similarities between a steamboat and a railroad sleeping-car, the higher the probability and accuracy of the conclusion drawn and the argument presented for why a steamboat owner should, like a railroad sleeping-car owner not have strict liability duties for his passengers, and vise versa. The significance and relevance of the second (2) principle can thus be appreciated.

The fourth principle can also be seen to be relevant in legal reasoning in that for example, if there were more examples of cases which involved mobile objects or things that had passengers who had languages but whose owners had no strict liability duties, then the conclusion with regard to the steamboat owner as argued above would have been more probable and more accurate and the argument would be stronger.

The sixth principle (6) has even greater relevance and significance because of its common manifestation or prevalence in legal settlements especially with regard to claims for damages and compensation. Justification and basis for this sixth principle is that it has generally been observed that similar (relevantly) individuals and or groups of individuals have often had to be awarded compensations of different amounts regardless of their similarity and earlier court decisions regarding the same claim(s).

The task here is to show mainly and basically that the logical concept of analogy together with the principles on the basis of which analogical reasoning can be evaluated has legal significance. To the extent that four (1,2,4 and 6) out of the six principles have been shown to have practical legal significance, the point is made clear.

Most important in the endeavour to show the significance of analogical reasoning (as is involved in precedent) in legal practice has been to identify a practical precedential legal scenario with a corresponding principle governing the evaluation of analogical reasoning in general. The goal here has been to ensure clarity and maximise the possibility of the appreciability of the significance of analogical reasoning to legal practice.

On this basis, the first, second, fourth and sixth principles have been deemed appropriate for the purpose. The third and fifth principles may not (at least not immediately and/or clearly) have immediate or easily identifiable corresponding practical scenario(s) to justify their immediate or obvious relevance.

Hitherto, it can reasonably and accurately be asserted that analogy as a logical concept has great and preponderant significance in the practice of law. Under the equal

protection doctrine in law and morals [Brewer, 1996: 936], the principle of formal justice which can be described as the requirement that "like cases can be treated alike," is often, being that general, too vague to resolve particular cases. This is because persons or groups of persons are in many ways "alike and unlike" i.e. similarly and dissimilarly circumstanced. This is the basis and justification for supplementary reasoning in legal matters as manifested in the concept of precedent and this basically is analogical reasoning.

6.3 PROBABILITY AND LEGAL JUDGEMENTS

The fundamental objective of both philosophy and science is the attainment or acquisition of certain knowledge. There are basically two extreme states of mind with regard to knowledge endowment, these are complete ignorance and full certitude. Ignorance is said to prevail when a being is capable of having some knowledge but does not actually have such knowledge. Certitude on the other hand consists in the absence of the fear of the possibility of error, because of recognized valid reasons. The realm of mental attitudes existant between these two extremes is what is described as probability.

"The probability of an event is the reason we have to believe that it has taken place, or that it will take place." [Boole, 1958:224]. It is further maintained that:

> The measure of the probability of an event is the ratio of the number of cases favourable to that event, to the total number of cases favourable or contrary, and all equally possible [Boole, 1958:224].

To this extent, probability in the mathematical context, is the concern of the state of the knowledge of the circumstances under which an event may happen or fail. The expectation for an event varies with the extent and quantity of information present,

information, which concerns the circumstances of the event. Probability can therefore be described as the expectation based on partial knowledge. Awareness of all the circumstances affecting the prevalence of an event can change mere expectation into certain knowledge thus eliminating probability. But since not all things can be known with certitude, much of the knowledge held by people is only probable, not certain.

Probability is observed at two levels. First, probability manifests itself as a mental phenomenon of expectation, and second, probability can, and actually manifests itself as a mathematical or objective numerical measure of the circumstances upon which expectation is founded.

Statistical application of probability for example are independent of the mental phenomena of expectation, and they are rather based on the assumption that given the present or past, the future can be anticipated and expected to take the same trend as the past and/or the present, that the circumstances remaining constant, the same event is expected to recur with a definite numerical frequency. This is not to be perceived to be an attempt to calculate hope and/or fear, but rather a mathematical, objective computation. However, this is not the context or perspective in which the logical concept of probability is intended to be discussed here. It is the mental perspective of expectation that is relevant and is actually to be discussed in this thesis.

A number of methods can be employed to obtain probable truth. These include analogy, statistics, testimony, and circumstantial evidence. The logical concept of analogy with its relevant example of judicial precedent as manifestations or evidence for judicial or legal inductive reasoning has already been discussed.

Statistics is a discipline which has relevance to this thesis only to the extent that underlying it is the concept of probability, and being of no immediate primary significance to legal reasoning, it is not going to be discussed in further details. Testimony and circumstantial evidence on the other hand have immediate practical significance to legal practice and will therefore serve as practical evidence for the significance of the logical concept of probability in legal reasoning.

6.3.1 TESTIMONY

First and foremost, it is of utmost importance to bring to light the fact that no matter what character or status of a witness in court, there is always a possibility of error and or inaccuracy by fabrication or down playing of the evidence presented before the court for judgement [Waller, 1998:220-237].

Though a witness may present evidence as facts and actually is supposed to only present facts and not personal opinion except and unless it is expert opinion [Jackson, 1970:320-322], and this is usually ensured by the requirement that the witness presents evidence under oath (the truth, the whole truth, nothing but the truth) [Waller, 1998:220-237], the witness, as long as he/she presents the purported facts (or opinion as an expert which then is assumed to be facts) consistently without incurring or engendering contradiction, even if all is lies cannot be penalised [Latta, 1956:305] unless there is evidence that such evidence is lies and is deliberately presented as lies.

As a safeguard for this kind of predicament, and for the sake of justice (at least philosophical justice), there is the oath taking, but the expectation and requirement of the oath notwithstanding, the judge or magistrate can ,and often make rulings against such evidence presented as facts (both testimony facts or expert opinion). The logical

implication in this scenario is that the evidence presented by a witness as fact(s) or expert opinion is treated as just probable and the probability of the validity of such evidence is only increased by the requirement that the witness takes oath because one is not legally supposed (and important that not that he/she is not expected) to say or tell a lie under oath especially in court.

The other attempt to increase the probability of the validity of the evidence presented by a witness (at least from a philosophical point of view) is the requirement that there be consistency in the evidence presented, that there be no contradiction(s) in the evidence presented. But given the possibility that a witness can lie very consistently, and the possibility that such a witness can tell a lie or lies under oath, the judge or magistrate is expected to at least have an insight into the evidence presented, consider all probabilities and make objective, independent professional judgement if at least philosophical justice is to be observed. The question of probability can to this extent be seen to be very preponderant in the activity of the court of law.

Testimonial evidence being the assertion of a human being as to the existence of the facts at issue [Cohen, 1963:347] can only be considered to at most and best be ground for probable conclusion(s) and the evidence itself should also at best be considered to be only probable. This contention is in line with the assertion that:

> Since testimony is based on perception, memory, and narration, the personal equation of the witness frequently involves error. Such evidence to be acceptable, must be self-consistent, must be in agreement with other established facts and must be in accordance with the known laws of the intrinsic possibilities of the event [Bittle, 1950:359].

However, it is the position and contention in this thesis that such requirements for the acceptability of testimonial evidence notwithstanding, there cannot be claimed any

certitude (at least not philosophical certitude), it is probability that is preponderant. This is because of the ever presence of the possibility of falsification on the grounds of the fallibility of human beings.

Although Bittle describes testimony or testimonial evidence as "the information or evidence obtained from competent and reliable witnesses" [1950:359], unless by "competent and reliable witnesses" he means utmost and absolute reliability and competence, a situation that is unacceptable from this thesis's point of view given the fallibility of man, testimony or testimonial evidence is only probable and conclusions drawn from it should only be treated as probable not necessary or absolute.

It is at this point contended in this thesis that due to the often treatment of such testimonial evidence as facts and absolute facts (at least for the purposes of the relevant cases), there is often engendered a violation of moral or philosophical justice. This is because some appeals are usually made to the court of appeal and earlier decisions altered (sometimes radically).

The preceding being appreciated as a general indisputable common observation and experience, acceptable even in the absence of authoritative evidence, is ground for emphasising that testimonial evidence be treated as only probable and therefore engendering only probable conclusions. It is due to the recognition of the probability implied therefore that there is a provision for appeal. But the question is whether all rulings in court are always followed by a seeking of redress from the court of appeal.

It is due to the treatment of testimonial evidence as facts(s) and absolute fact(s) that there is an apparent breach of the principle of non-contradiction with regard to some

judgements passed in courts, when rulings of both a lower court and a court of appeal or a higher court are considered together vis-a-vis the same accused, that at one point he/she is guilty and at another he/she is innocent under the same circumstances and for the same charge (in cases which involve such reversal). Even the very provision for appeal presupposes and implies the consideration or perception (not treatment) of testimonial evidence as only probable approximation to the truth, the reality, which is the concern for justice, at least moral or philosophical justice.

If such testimonial evidence were not actually to be perceived or considered to be only probable, there would not be any logical justification for the provision of appeals, at least in light of the principle of non-contradiction. It is on the basis of the notion of probability that alterations and reversals of court rulings can be exonerated or dissociated from the breach of the principle of non-contradiction unless there is a change of the status of the evidence considered by the court of appeal by either reduction or elimination or increase or addition of more evidence, testimonial or otherwise.

6.3.2 CIRCUMSTANTIAL EVIDENCE

Circumstantial evidence can accurately be said to constitute the relevant facts or circumstances that enable and enhance the drawing of 'legitimate' inferences to a principal fact, a principal fact that can then explain the existence and presence of those relevant circumstances or facts [Bittle, 1950 :359].

Given that a crime can be committed in the absence of a witness, and given that criminals generally and often wish to commit crime in the absence of a witness as often is evidenced by the killing of witnesses to conceal evidence or threatening of such

witnesses against revealing evidence, courts often rely on circumstantial evidence for convicting criminals or acquitting defendants.

Circumstantial evidence is usually a kind of hypothesis (an educated thought-out tentative answer to a question or solution to a problem). Reasoning here proceeds that since a crime was committed, that there must be a criminal or criminals responsible. That there are various possibilities for the identity of the culprit(s) but only one is true (by the principles of identity and non-contradiction). The logical procedure consists in the elimination of all suspects (or possible causes) in order to remain or establish the guilty party or parties (the true cause). This is attained by attempts to show that the relevant circumstances of the case point strongly to the guilt or supposition of one conclusion or party.

If for example a murdered man has in his hand a piece of cloth from a coat and that a coat which has a part of it torn is found in a defendant's house and the coat belongs to the defendant, the argument can proceed thus;

(1) If the scrap came off the coat of the accused, it will fit the tear of the latter (the accused).
This tear is compatible with this scrap.
Therefore the scrap came off the coat of the accused.

(2) The owners of coats are most often their wearers.
This coat was owned by the accused.
Therefore the accused wore this coat at the time of the assault

(3) If the wearer of the coat was the assailant, the victim of the struggle would tear at the assailant's clothing.
Torn off is a piece of the defendant's coat.
Therefore the assailant must have been the defendant.

Cohen, (1963), summarises this kind of argumentation (circumstantial evidence) thus: "if x did the deed, then the phenomena M_1, M_2, ... M_n should be observed; but the phenomena M_1, ... M_i are observed; therefore x did the deed" [:350]. This kind of argumentation can be said not to be conclusive on three counts:

(1) The argument affirms the consequent and does not prove that the phenomena could not be observed if (x) had not done the deed.

(2) Because of the myriad of possible combinations of events in social reality, it is extremely difficult if not impossible to prove with certainty (logical and factual) that if (x) did the deed the particular phenomenon must always (rather than sometimes or often) follow. On this basis, it is easy to contest the reliability of circumstantial evidence since to this extent, it is only probable.

(3) There is often lack of logical and factual certitude that the observed phenomena must be the ones which precisely had to be observed had (x) been the one who did the deed. Here addressed is the question of sufficient evidence. The objection here is based on the contention that the observed phenomena may not be the necessary evidence for the commitment of the crime though it is considered to be sufficient and treated as if it were the necessary, absolute, and conclusive evidence.

The objection to the treatment of circumstantial evidence as certain evidence by the inferences drawn from it which influence the ruling or judgement passed is based on contesting the significance and weight ascribed to the notions of sufficient evidence and necessary evidence.

If the court defines what constitutes necessary and what constitutes sufficient evidence, then on the very basis of the fallibility of human beings and the myriad possible combinations of facts which might accurately or inaccurately point to actual or non-existent 'social reality', it is emphasized that circumstantial evidence should only be treated as probable evidence and only probable conclusions should be drawn on the

basis of it. This is actually what happens given the provision of appeal as a possibility or opportunity to contest judgement.

However, concern is raised here because of the fact that such evidence, though considered to be probable, is actually treated as certain and judgements passed in very certain tone and terms save for the addition that the accused has fourteen days to appeal. Though the evidence is actually probable, there is often a possibility of an accused serving a long jail sentence or even a murder sentence on the basis of circumstantial evidence especially if such an accused does not appeal and even if he/she does appeal. This treatment of circumstantial evidence as certain evidence to this extent is inimical to moral or philosophical justice.

The probability character and nature of circumstantial evidence is emphasized when it is contended that:

> As a rule, a number of significant and relevant circumstances must unite in order to furnish convergent evidence. The greater their number and the more varied their character, the higher is the degree of probability that they contain the correct solution of the problem [Bittle, 1950:357].

6.4 FALLACIES AND LAW

Hurley defines a fallacy as "a certain kind of defect in an argument" [1991:108]. Rafalko contends that "there are infinitely many ways that arguments can go wrong. When an argument goes wrong, we say that a fallacy has been committed" [1990:134]. Copi asserts that:

> A fallacy is an error in reasoning. As logicians use the word it designates not any mistaken idea or false belief, but typical errors, mistakes that arise commonly in ordinary discourse, and that render unsound the arguments in which they appear [1990:91].

From the preceding, it can be inferred that a fallacy is basically bad or wrong

argumentation. However, it is important to note that for a reasoning to be considered fallacious it has to be appealing from the face of it i.e. one should easily see it in the first instance as correct, right, or appealing. An argument may be bad or wrong because of the poor form or structure of the argument in which case the argument does not involve a conclusion which follows of logical necessity from the premises.

Bad or wrong arguments which consist in poor structuring of the premises or bad form of the argument are said to commit a formal fallacy or fallacies. To the extent that the defect arises from poor form of the argument, this type of fallacy is relevant only to deductive reasoning. This is because only deductive reasoning has definite forms called the four figures. Therefore, formal fallacies are as a result of bad deductive reasoning.

An argument can as well be bad or wrong on the basis of an error emanating from the content of the argument. If an argument has premises which on critical analysis do not or does not guarantee proof of the conclusion, then such an argument is said to commit an informal fallacy. To the extent that the error is detected on the basis of the analysis of the content of the argument or the premises, informal fallacies are relevant only to inductive reasoning. Therefore, bad inductive reasoning is said to engender informal fallacies.

Examples of Fallacies:

(1) A Formal Fallacy

The fallacy of denying the antecedent;

1 If Peter goes to Europe in winter, he will catch Pneumonia

2 Peter will not go to Europe in winter

∴ 3 Peter will not catch Pneumonia.

1. $p \rightarrow q$
2. $\sim p$

$\therefore$ 3. $\sim q$

This form of reasoning is fallacious or logically incorrect because unless it is stated categorically clear that (q) would or can be the case if and only if (p), (q) cannot be denied on the basis of (p) having been denied as in the above case.

1 $p \equiv q$
2 $\sim p$

$\therefore$ 3 $\sim q$

For example it is not the case that (unless categorically stated) if Peter will not go to Europe in winter then he will not catch pneumonia. Peter can catch Pneumonia even without having gone to Europe in winter. Better still, Peter can catch pneumonia even if he goes to Europe in Summer, Winter, Spring or Autumn. So unless it is stated clearly that Peter will catch pneumonia if and only if he goes to Europe in winter ($p \equiv q$) it is incorrect to assert that given that Peter will not or did not go to Europe in Winter, that then he will not or did not catch pneumonia.

(2) Informal Fallacy;

(a) Appeal to the masses (*Argumentum ad populum*)

Since most housewives use Omo as their regular washing detergent, Njeri, who is a housewife, should use Omo for her regular washing.

(b) Fallacy of converse accident

The fallacy of converse accident is said to have been committed when the unique

circumstantial attribute(s) of an individual are (is) ascribed to other individual(s) similar to the earlier but who or which are not in the same circumstances as the earlier.

> Since Njeri is a housewife and uses Omo as her regular washing detergent, all housewives should use Omo as their regular washing detergent.

In the first example, (*Argumentum ad populum*), it is not the number of housewives who use Omo as their regular washing detergent that should necessitate or should form the basis for Njeri's use of the same detergent but rather the relevant and appropriate qualities that such a detergent has which fit Njeri's washing needs. This is because notwithstanding the big number of housewives who use the detergent, the detergent may not be appropriate for Njeri's needs.

In the second example (converse accident), unless other individuals which are or who are essentially similar to one (whose attribute(s) are known) share or are in exactly the same circumstances as the one in question, the attributes of the individual or the one cannot validly be ascribed to the larger majority i.e.attributes which hold only because of the unique circumstance(s) of the individual.

Njeri for example may be using Omo just because of a perfume present in the detergent, a perfume which she finds pleasant but which however has got nothing to do with the goodness or the appropriateness of the detergent for cleaning. This makes it incorrect to assert that then all housewives should use Omo (especially if the relevant factor is the cleaning ability).

6.4.1 APPEAL TO IGNORANCE*(Argumentum Ad Ignorantiam)* AND LAW.

In most legal systems, generally the defendant is presumed or assumed innocent until proved guilty. It is therefore the duty of the prosecution to prove the defendant guilty

failure for which the defendant has to be set free. The prosecution may fail to prove the guilt of the accused because of lack of "sufficient evidence" or if the argument(s) presented by the prosecution has a shortfall in which case prosecution would not have proved the guilt of the defendant "beyond reasonable doubt" [Waller, 1998:48-52].

Similarly, in a case where an individual or plaintiff, for that matter, claims damages or compensation, the burden of proof rests on the plaintiff i.e. the plaintiff has to show that he/she qualifies for such compensation in virtue of the law by meeting some standard of proof such as "preponderance of evidence" or "beyond reasonable doubt".

The legal argument therefore with regard to the burden of proof as it rests upon the prosecution to establish the guilt of the accused may be symbolized thus:

Let (p) be: The conglomeration of 'facts' that point to the guilt of the defendant (i.e. preponderant evidence or proof beyond reasonable doubt).

Let (q) be: The legal implication of the guilt of the defendant (i.e. fine, jail or otherwise as the case may be).

(p) and (q) are on the assumption that there has been established the validity of the applicable rule by the court.

The argument will therefore be symbolised as:

1.If (p) is established, then (q) will have to follow.
2. But (p) is not established.
Therefore 3. (q) should not follow.

1. $p \rightarrow q$
2. $\sim p$
$\therefore$ 3. $\sim q$

From a logical point of view, the above conclusion (~q) does not follow logically.

This argument form therefore commits the fallacy of denying the antecedent. From a logical point of view, it is only the consequent, which can be denied in which, case the antecedent would validly be denied:

1. $p \rightarrow q$
2. $\sim q$

$\therefore$ 3. $\sim p$

In this case, no fallacy is committed and the argument is valid. This is called *Modus Tollens.*

Similarly, the legal argument with regard to the burden of proof as it rests upon the plaintiff to establish his/her qualification for the award of compensation or damages may be symbolised thus:

Let (p) be: The conglomeration of 'facts' that the plaintiff presents to the court to prove that he/she qualifies to be compensated or awarded damages (i.e. preponderant evidence or proof beyond reasonable doubt).

Let (q) be: The legal implication for the plaintiff having successfully carried the burden (i.e. award of damages or compensation).

Here also (p) and (q) are on the basis of the assumption that there has been established the validity of the applicable rule by the court. The argument therefore takes the form:

1. If (p) is achieved by the plaintiff, then (q) will have to follow.
2. But (p) is not achieved by the plaintiff.

Therefore 3. (q) should not or does not follow.

1. $p \rightarrow q$
2. $\sim P$

$\therefore$ 3. $\sim q$

This argument also commits the fallacy of denying the antecedent. The consequent

cannot validity be denied on the basis that the antecedent is denied. Rather, the antecedent can validly be denied on the basis of denying the consequent as shown earlier. Alternatively, the consequent can be affirmed on the basis of affirming the antecedent.

1. $p \rightarrow q$
2. P

$\therefore$ 3. q

This is a valid argument form and it is called *Modus Ponens*.

It does not follow of logical necessity that if the burden is not successfully carried then either the accused or defendant is innocent or the plaintiff is actually not qualified to be awarded damages or compensation, at least as a matter of fact if not from a legal point of view (if philosophical justice or moral justice has to have any significance).

Argumentum ad ignorantiam is said to have been committed if a proposition is said to be true because it has not been proved false or false because it has not been proved true, [Copi, 1990:93]. With regard to the legal concept of the "burden of proof", a defendant is assumed or presumed to be innocent until and unless he/she/it is proved guilty i.e. the argument proceeds that since the defendant has not been proved guilty, he/she/it is innocent.

Also with regard to a plaintiff's claims for damages or compensation, the plaintiff's claim is assumed or presumed to be not the case (in which case then it is false) until and unless such a plaintiff proves his/her/its case. In this second case, there is an assumption that the plaintiff might bring in an effort to get the award for damages and that is the reason for making the plaintiff carry the burden [Brewer, 1996:998]. In the

first case, the defendant is presumed innocent on the basis of individual freedom and liberty which is tantamount to natural justice, hence the demand that the prosecution carries the burden of proof [Waller, 1998:49].

The presumption of innocence can be justified on the logical basis that whoever makes a claim has to prove it, that if the prosecution makes a claim (guilt) about the defendant, then it is upon the prosecution to prove its claim. Similarly, if a plaintiff makes a claim he/she/it has to prove the claim. The plaintiff is required to prove the claim because otherwise outrageous claims would possibly be made by plaintiffs, claims which cannot easily be disproved [Waller, 1998:48], appeal to ignorance.

From a philosophical perspective, the assumption by the law and court is that necessary or sufficient conditions for proving (p) (in the earlier symbolised arguments) can exhaustively be defined or stated so that if they cannot be achieved, then 'not- q' follows. This is the only logical justification for negating (q) i.e. these are the only circumstances under which the negation of (q) can be justified.

However, the philosophical objection is that such standards as regards the implied invariant definition of the necessary and or sufficient conditions for proving (p) cannot be said to be exhaustive given the myriad of modes of presentation of social reality. The notion of 'sufficient evidence' is relative and debatable and not invariantly applicable because it is based on an assumption from a metaphysical point of view of knowledge of all the possible combinations of facts and their ontological and cognitive implications, an assumption which is falsified by the metaphysical ground of the finitude of man with regard to being and knowing. The notion of 'necessary conditions' is also questionable and subject to falsification on the basis of the

metaphysical conceptualization presented above.

The legal notions of 'sufficient evidence', 'necessary conditions', which the law implies to be capable of accurately and exhaustively defining, the notions of 'preponderance of evidence', and 'proof beyond reasonable doubt' are notions which when subjected to the critical philosophical sieve boil down onto 'probable possibility' not 'necessary possibility' (as explained above).

The derivation and/or induction of inferences or conclusions on the basis of such notions as given above are contestable from a philosophical point of view. The reasoning involved in the formulation of such notions implies assumptions which do not pass philosophical scrutiny. This is in virtue of the dynamic non-mechanical and hence unpredictable nature of social reality.

The conclusions drawn (not-q or ~q) are based on the assumption that (q) can follow if and only if (p) is the case. But (p) cannot be defined exhaustively in the first place ($P_1 \ldots P_2 \ldots P_n$), it can only be defined partially ($P_1 \ldots P_2 \ldots P_i$), but then the argument proceeds as if ($P_1 \ldots P_2 \ldots P_n$) is equivalent to ($P_1 \ldots P_2 \ldots P_i$) which is wrong on the basis of the preceding discussion. The correct argument form should have been:

1. $p \equiv q$
2. $\sim p$

$\therefore$ 3. $\sim q$

From the preceding, the questions that suffice are, should the defendant then be presumed guilty until proved innocent (as in French legal system) and should the plaintiff's claim for damages be presumed true or valid unless proved otherwise? But wouldn't such presumptions logically imply the same form of reasoning discussed

earlier, reasoning that fails the critical philosophical test?

This apparent dilemma is another instance of the point at which logic parts with law. Law, when subjected to rigorous logical analysis as shown above fails to pass the test, in the same way or in other words when law employs logic to the letter, law is bound to fail in its spirit i.e. its ideal objective would not be achieved.

6.4.2 APPEAL TO INAPPROPRIATE AUTHORITY (*Argumentum Ad Verecundiam)*

Reference to expert opinion or position in attempts to resolve critical issues which fall in the domain of the expert or authority referred to is logically justified. But when appeal is made to an expert or authority whose competence with regard to the issue in question is questionable on the basis of the indifference or even worse, irrelevance of the authority to the issue, a fallacy of appeal to in appropriate authority is said to have been committed.

It is common practice in law for appeal to be made to authority. This appeal is made either by 'standing by' the decision or 'going by the decision' passed or made by a higher court through precedent, or appeal to authority may be made by the accommodation of expert opinion or expert testimony (but only if such expert presents testimony or opinion through the spectacles of his/her profession not when he/she presents arguments which would have to be considered on their own merit).

But much as the authority appealed to whether higher court or expert might be the appropriate authority, such appeal has a possibility of a practical shortfall in the sense that there is for example a possibility of an expert consistently telling lies or even tell a single lie which would alter the whole impression created in the court.

Though there is a requirement that such expert opinion or testimony be in conformity with the agreed or settled principles or axioms in the profession, due to the constraint of time and the general bulk of work, such strict requirement may not be observed and it might even be sometimes difficult for the court to detect such a lie unless alerted by some other expert in the relevant discipline, a thing that can possibly not be achieved.

Secondly, issues that are usually brought before the court to resolve are often issues of varied fields of knowledge ranging from religion and ethics to economics and politics. This is because social problems manifest themselves in various modes. To this extent, appeal to the decision of a higher court (which is appeal to court anyway) as an authority implies that the court is capable of or is the appropriate authority to deal with matters of all such relevant domains.

There is reasonable ground for contesting such an assumption which is actually implied by appeal to the decision of a higher court, especially given that it is the judge or magistrate to finally decide on the matter, and given that judges, magistrates, and lawyers in general are not known to have formal training in issues of religion, ethics, economics, politics and others as the scenario in courts is the case, in which case and to which extent thus, the higher court (and the court for that matter all the same), is not the appropriate authority (at least not from the practical point of view or as a matter of fact) though appropriate from a legal point of view. The judge or magistrate is not a philosopher-king [Plato, 1987:115-223].

It can even be argued that essentially, it is the legislators who make laws, and it is according to these laws that actions may be judged as right or wrong but only in virtue of the law as it is made by the legislators, not necessarily in virtue of the intrinsic

circumstantial practical truth. On this ground, the rhetorical question is "Are the legislators the appropriate authority in the strict sense to appeal to in attempts to resolve all sorts of problems in practical life as it is implied? Are legislators philosopher-kings?."

6.4.3 ARGUMENT AGAINST THE PERSON (*Argumentum Ad Hominem*) AND LAW

An argument can only correctly be judged good or bad on its own merit not on the basis of the person presenting it. If the rebut to an argument is directed to the person and not the argument that person presents, the fallacy of *ad hominem* is said to have been committed

In law, particularly with regard to the admissibility of a witness to give testimony, the character of the individual has to be considered. But caution has to be taken here to distinguish between the validity of the argument(s) presented by the witness and the testimony of the witness. The arguments presented have to be evaluated on their own merit while the nature and character of the person can really influence the weight of the testimony given by such a person. As has been observed:

> If I am a notorious liar, severally paranoid and delusional, known to take bribes, and convicted several times of perjury, then that will severely weaken my testimony, but it will have no bearing at all on the validity of my argument. (of course you will want to check carefully on the truth of the premises in my argument; and if any of the premises are based on my testimony, then my problems and flaws will be good grounds for doubting the truth of that testimony.) if I am a trained observer with a strong reputation for honesty and no special stake in this case, that will give my testimony substantial credibility, but any argument I give will have to make it on its own, without any help from my character [Waller, 1998:180].

Bittle defines testimony or testimonial evidence as,"...the information or evidence obtained from competent and reliable witnesses" [1950:359]. To this extent, it can be seen that the character or credibility of a person or group of persons influences the

reliability of their evidence "in the eyes of the court". Although there is an attempt for example in Kenya to check for an outright *ad hominem* by section 55 (1) of the Evidence Act as quoted by Jackson thus :

> In civil cases, the fact that the character of any person concerned is such as to render probable or improbable any conduct imputed to him is inadmissible except in so far as such character appears from the facts otherwise admissible [1970:323].

This provision notwithstanding does not absolutely rule out the relevance of the character of the individual with regard to the weight of his/her testimony or its reliability.

From a logical point of view therefore, fallacious reasoning (*ad hominem*) can be tolerated in legal practice. This is justified by the practical and common sense ground that there are higher chances for an individual who has a bad moral record or background and a criminal record to give unreliable evidence more than one who has a good moral record with no criminal record at all. Though this is inductive reasoning in which case no conclusion should be claimed to follow with certainty, it is reasonably if not highly probable that the consideration of the character of the witness or defendant will enhance a more accurate and appropriate judgement or decision. This is another instance of the distinction between logic and law.

6.4.4 APPEAL TO MERCY (*Argumentum Ad Misericordiam*) AND LAW

When an arguer proceeds to prove his position by evoking emotion, particularly mercy in the opposing party, without presenting objective facts that can reasonably prove his position, such an arguer is said to commit the fallacy of appealing to mercy or *Argumentum ad misericordiam*.

When a lawyer for example tries to prove the innocence of his client by submitting statements which evoke mercy and endeavours that such feelings be considered for the innocence of his client, that would be fallacious reasoning. But what often could appear to be a fallacy of appeal to mercy when a lawyer issues statements with the intention to ensure a softer or a lighter sentence for his client, is not strictly speaking an appeal to mercy but rather can be seen to be a plea to ensure that commensurate punishment is meted i.e. that the punishment meted be commensurate with the crime committed or offence by special reference to the relevant circumstances.

6.4.5 THE FALLACY OF COMPLEX QUESTION (or double barrel fallacy) AND LAW

The fallacy of complex question is said to have been committed when one asks a question which is such that it implies more than one question to the extent that a straight forward answer (eg. Yes or No) to it implies an answer to the hidden or implied question(s), but an answer which is not strictly speaking intended by whoever answers.

It is important to note that reasoning can only be considered as an instance of a fallacy of complex question if the question is formulated in a deliberate way such that what is intended by whoever asks the question is not just the sincere or obvious answer but rather that the expected answer is deliberately and cunningly intended to show the response to the other hidden question(s) (answers which probably would otherwise not have been given as such had the questions been asked separately). The point here is that what is implied in the response to the question, though technically follows, is not strictly speaking, practically and sincerely the case but is rather treated as if it were the reality or the case.

The emphasis on logicism, mechanicalism and formalism (at least as implied by legal positivism) provides a loophole for a lawyer to employ this tactic (asking complex questions). This has often been seen in the characteristic insistance of lawyers in their cross examination of witnesses to for example get only "Yes" or "No" answers.

The appropriate way for one who is faced with the predicament of responding to such complex questions to resolve the problem is to break down such a question into its component parts (the various respective questions). If the responding party is allowed or is capable of splitting the complex question, then the fallacy is not committed. But if the question is framed in such a way that the respondent does not realize the other implied questions in it or better still, if whoever asks the question insists on alternatives which lead the respondent to an implied answer (often undesirable from the point of view of the one to answer), then the fallacy is committed.

The practice of asking complex questions by lawyers in courts of law is a common phenomenon [Thouless, 1952:222]. Such questions are usually asked with the deliberate intention of having a witness contradict him/herself or a defendant to incriminate him/herself [Thouless, 1952:222]. As already mentioned above, the formalism involved in legal positivism or law as it is often practiced paves way and tolerates the rigidity as requiring a straight forward answer, a provision which gives a leeway for this kind of fallacy to occur without any redress.

The above example should not however, be taken and misunderstood to mean that such reasoning is strictly speaking ordained in law as such but rather it is more appropriate to assert that it is the relative rigidity of the law as seen in strict formalism that provides a loophole for such fallacious reasoning.

As can be inferred from the whole of the preceding discussion on fallacies and law, legal reasoning can at times deviate from the expected correct reasoning from a logical point of view. What might seem incorrect reasoning on the basis of the rules and principles of logic might on the basis of the unique practical and pragmatic circumstantial reality be acceptable as has been shown in this subsection of the chapter. What might seem fallacious reasoning from the point of view of strict logic might be acceptable granted certain assumption(s) which are deemed necessary for practical and pragmatic purposes .

To this extent therefore, it can be said with reasonable accuracy that subjecting legal reasoning to the rigorous sieve of logic might be inimical to justice (philosophical justice or moral justice). In line with this caution is the contention that:

> ... the oldest disciplines concerned with human affairs - historiography and jurisprudence - supply the earliest examples of the two techniques of influencing human behaviour otherwise than by a direct application of the carrot or the stick: namely, indoctrination with certain attitudes through selective dissemination of information, and the smuggling in of judgements of value disguised as judgements of fact [Andreski, 1972:96].

It is also important to note here that as can be seen from the above discussion, the kind of fallacies that often are of relevance and significance to law as it is practiced are mostly informal fallacies. As had been noted earlier, the defective reasoning in informal fallacies is realized on the basis of the examination or analysis of the content of the argument.

The nature of legal problems is such that focus is mainly and essentially on the content of assertions, "facts." The main concern is not (or at least should not) strictly speaking be the reasoning *per se* but rather the content or elements of the reasoning. Reasoning here can therefore be (to a reasonable extent) said to be relevant only in as much as

and insofar as law is practiced by generally rational beings and only to that extent.

Inductivism is therefore the predominating reasoning involved in legal practice. To this extent therefore, it can reasonably be inferred that this is the reason for mainly observing informal fallacies as the significant and most relevant type of fallacies in legal practice. It is also on this basis (Inductivism) that certain fallacies can be tolerated in law due to the practical reality apart from theoretical consideration (e.g. *Argumentum ad hominem*). The formal fallacy that is clearly observable or at least implied in law is the fallacy of denying the antecedent (already discussed), but still this apparent formal fallacy is under the umbrella of the apparent informal fallacy *argumentum ad ignorantiam* (appeal to ignorance).

So far, the type of reasoning, induction, has been shown to be of significance in respect of the practice of law. Under the broad topic of induction have been discussed the two examples of logical concepts as exhibited in the practice of law. Under analogical reasoning as an example of induction in law have been discussed the legal concept of precedent and the notion of formal justice.

Under probability as a logical concept have been discussed the two legal notions of testimony or testimonial evidence and circumstantial evidence. But such significant relevance of such logical concepts in legal practice notwithstanding, there are certain shortfalls with regard to invaried emphasis on inductive reasoning in general in law. It is the contention of this thesis therefore that consistent inductive reasoning in law at least partially accounts for the possibilities of moral injustice or philosophical injustice.

It is therefore imperative and opportune to highlight articulately the grounds for the preceding assertions and contentions with regard to legal inductive reasoning vis-a-vis the practical reality of human social life as common sense and day-to-day experience generally predisposes the mind of any keen impartial observer to perceive the scenario.

The main foundation and justification for inductive reasoning are the two principles; the principle of causality or sufficient cause and the principle of uniformity of nature. Granted the truth and validity of these two principles, inductive reasoning is of great cognitive and practical significance especially with regard to the reality of natural phenomena as concerns the natural sciences as physics, chemistry, Biology among others.

The two main questions that arise are first; to what extent is cause-effect or causal relationship in social life or social phenomena the same as in natural science or natural phenomena? Put in other words, is it more practically viable, accurate and appropriate to treat social phenomena or reality as constituting of mere antecedents and consequents or to treat it as constituting causes and determinable or determined effects such that from the effects, the causes can be traced? Secondly, 'although there is no reasonable doubt as to whether every individual contingent being or thing, event or effect must have a cause (and a sufficient cause for that matter) for its being or existence, is it accurate and appropriate enough to assert that there exists the uniformity of nature in social life as it is in the natural world as is the concern of Physics, Chemistry, Biology and so on?'

It is the position and contention of this thesis that it is more appropriate to assert that social reality should be considered as consisting and constituting of antecedents and

consequents other than asserting that invariant causes and effects is the case. This contention is based on the general and common observation that the same social effect can be based on different causes and the same social cause can engender different social effects.

A man for example can give charity donations because his/her conscience tells him/her or because such a man subscribes to a certain religious ideology or the donations may be given by such a person with the motive of achieving fame or recognition in the society. A very unpopular corrupt politician may initiate development projects in his constituency with the motive of not actually endeavouring to ensure development in the constituency as such but to clear the air or erase the bad image he has and the bad attitude his constituents have or for just the purposes of gaining the so called political mileage. Such a case would be very different from a situation whereby a wealthy, dedicated moral philanthropist or politician initiates development projects due to his personal conviction that every man has a duty and obligation to improve the lives of others if he is capable of it materially.

The various political ideologies which include Democracy, Aristocracy, Oligarchy have had many people subscribing to them as the right system or form of government. Capitalism on one hand and communism and socialism on the other have also had followers and propounded and perceived to be the right strategy for achieving development though they are radically different. The top-down and up-down approaches to development are another example of the complex and unpredictable nature of social life. The revolutionary or violent approach with the intention of attaining positive liberty, fraternity, and generally positive political harmony has

historically engendered varying effects, in some places it has worked and in some it has even complicated and worsened the situation.

The American revolution for example can be seen as a success story. But the various coups and rebel movement in Africa have often proved to be a failure with regard to attaining the goal of positive and sustainable political harmony. The cases of Angola, Mozambique, Somalia and Sudan are examples.

At personal or individual level, a person can shed tears out of joy or out of anger or bitterness just as one may laugh out of joy or sarcasm. It does not mean that if one sheds tears then such a person is angry or bitter, nor does it mean that if one laughs then such a person is amused or happy. This is not the case as when motion can be explained or accounted for under standard conditions by the three laws of motion as were propounded by Isaac Newton. It is neither the case as a falling object on earth can be accounted for by the law of gravity, nor is it the case as power (in physics) would be predicted or established on knowledge of work done and the time taken.

To this extent, it has been shown by practical examples that human behaviour or social phenomena is not as determinable or predictable as natural reality or phenomena is, and on this ground therefore, social phenomena cannot invariantly be accounted for on the basis of cause-effect relationship as is the case in natural or physical phenomena. Social phenomena can therefore only be invariantly accounted for on the basis of antecedent–consequent basis with regard or emphasis to contextual predisposition and practical circumstantial reality.

The first objection to the invariant applicability of the inductive method to the evaluation and prediction of social reality has been based on the contention that social phenomena or life cannot be accounted for or predicted on the observation of cause-effect or causal relationship as in natural phenomena.

The second objection to the application of the inductive method in the evaluation of social phenomena and the prediction of the same is based on the relevant incompatibility of the principle of the uniformity of nature with social dynamics. The question is "to what extent can social predispositions be said to have the same effects and consequences on various instances or cases at the global level, continental level, national level, family level, or individual level?"

Although all human beings so far belong to the same planet, earth, and have various common essential attributes and characteristics, differences at either individual level or group level always exist often engendered by varying goals or interests. These varying goals and interests are often based on the differences with regard to social milieu or socialization or nurture. The differences especially at individual level maybe based on natural factors as genetics which may and often influence the psychological predispositions of individuals thus affect their action and reaction to reality.

Different upbringing or socialization of various individuals or groups of individuals would often lead to individuals or groups of individuals who would often act and react to reality in generally different ways due to the generally different world views that they possess. Ethnocentrism is a practical effect and evidence for the differing world views and perceptions or conceptualisation of reality among individuals and groups. Ethnocentrism can be said to be based at least on the fact of different cultures and

moral standards to the extent that one group of individuals views the others who do not belong to their group as having an inferior culture, that the earlier is superior to the latter or vice-versa.

On the unpredictable nature of social reality and human behaviour in general, It has been contented that:

> Concerning the physical nature of man as an organized being...there is, however, a considerable body of truths which all who have attended to the subject consider to be fully established; nor is there now any radical imperfection in the method observed in this department of science by its most distinguished modern teachers. But the laws of mind, and, in even greater degree, those of society, are so far from having attained a similar state of even partial recognition, that it is still a controversy whether they are capable of becoming subjects of science in the strict sense of the term; and among those who are agreed on this point there reigns the most irreconcilable diversity on almost every other [Mill, 1956 :546].

The contention and reasoning goes further thus:

> Are the actions of human beings, like all other natural events, subject to invariable laws? Does that constancy of causation, which is the foundation of every scientific theory of successive phenomena, really obtain among them? [Mill, 1956:547].

Mill, (1956), asserts that this is often denied by a majority of scholars. To this extent, he conforms to the contention of this thesis. However this thesis denies Mill's assertion that:

> ...given the motives which are presented to an individual's mind and given likewise the character and disposition of the individual, the manner in which he will act might be unerringly inferred; that if we knew the person thoroughly, and knew all the inducements which are acting upon him, we could foretell his conduct with as much certainty as we can predict any physical event [1956:547].

The objection to the practical tenability of the above contention by Mill is based on the rejection of part of the premises on which it is built. For example, no claim to certain knowledge of the motives on another individual's mind can be justified. All that can be done with certainty is an approximation, anticipation, or prediction of such

motive(s) by a consideration of the relevant circumstances, past observation, and experience, in which case only probable inference(s) can be made.

On the premiss on the character and disposition of an individual, it is not the case, it is held in this thesis, that a schizophrenic for example will invariantly detest social gatherings even if such a person is wedding or hosting a party or if such a person is a leader and a nationalist patriotic one who has to preside over celebrations for a National day.

It is also at this point in this thesis maintained that it is not invariantly true that an introverted personality would hold back his ideas even if such a person were faced with a life threatening crisis or danger, that such a person would refrain from opening up and discussing with others ways and means of wriggling out of the problem. An extrovert would not invariantly go telling people about his movements and activities about the time a crime in which he was involved was committed.

What should be emphasized and abundantly made known is that typology or categorization of personalities is based (or actually ought to be based) only on the predominant characteristics or behavioural manifestations and should not be taken to reflect how an individual or type of individuals would invariantly behave as implied by Mill's assertion. On this note, it is inaccurate to contend that one can foretell another's conduct with as much certainty as can physical events be predicted, merely on the basis of 'knowledge' of the character and disposition of the individual in question. Mill continues to contend that:

> No one who believed that he knew thoroughly the circumstances of any case, and the character of the different persons concerned, would hesitate to foretell how all of them would act. Whatever degree of doubt he may in fact feel arises from the uncertainty whether he really knows the circumstances or the character of

> some one or other of the persons, with the degree of accuracy required; but by no means from thinking that if he did know these things, there could be any uncertainty what the conduct would be [1956:548].

The reaction again to Mill's assertion above is that such an assertion is only of theoretical significance than one of practical significance. This is because no one can, with all philosophical and practical sincerity claim to know thoroughly the circumstances of any case. The mind can always accommodate an additional idea or information with regard to the circumstances surrounding an event or issue.

Though one may claim absolute knowledge of circumstances especially if such a person physically perceived the event by any or combination of the five senses, there often cannot be ruled out the possibility of such an event having significantly been influenced by another physically observable or non-observable factor which the person who claims absolute or true knowledge is not aware of or even incapable of being aware of.

In such circumstances, the inference or conclusion drawn from such claimed absolute knowledge may not accurately or absolutely conform or be compatible with the reality of the case or event. In this case, such a person who claims thorough or absolute knowledge of the circumstances of an event would strictly speaking not be thoroughly or absolutely aware of such circumstances. This is an objection which is echoed in the earlier objection to the possibility of absolute knowledge of all the possible combinations of events in order that invariantly accurate rules can be formulated, a requirement for the justification for invariant deductive legal reasoning, as discussed earlier in chapter five.

Secondly, a claim to knowledge of the character of somebody is debatable. From common sense and general everyday experience, there have been people who have shocked those who believed to have known them well by acts or deeds or attributes associated with them in total contravention of what would have been expected of them.

This point in relation to legal matters can be put for example that if a person is known to have a bad history, it does not follow of logical necessity or with any certainty that such a person is guilty of the crime he is charged of even if such a history points very strongly to his capability for having committed the crime. Such information can only increase the probability that such a person actually committed the crime, but does not certainly point to the guilt of such an accused.

It is common practice for courts to refer to criminal records of accused persons and lawyers insisting and emphasising the good conduct or track record of their clients in order to 'prove' their innocence or so that the judge or magistrate would reduce or give a lighter sentence for the client.

It is also common practice for magistrates and judges to give the reason that the offence was the first one to have been committed by the accused given the records and so deserving a lighter sentence. Notwithstanding the 'validity' of such reasoning on the basis of common experience and observation, if such reasoning is maintained to its logical end, it engenders the logically absurd end of the fallacy of *argumentum ad hominem* both abusive and circumstantial, in which case instead of concern being focused on the facts presented before the court in order to show the innocence or guilt of the accused, concern is emphasised on the character of the accused which logically

is wrong. Although knowledge of the character of the accused is reasonably significant for practical purposes, this is wrong from a logical point of view and this is an instance of the point at which logic parts ways with law.

The objection to invariant applicability and practical significance of inductive legal reasoning can be summarized thus:

> To pretend that inductive reasoning can guide the making of judicial decisions overlooks the objection that induction can be used only when the observables and the propositions under which they fall are beyond our power to change. The borrowing of the language of natural science to describe normative processes serves merely to blur irreducible distinctions between separate universes of discourse [Gottlied, 1968: 20].

Inductive reasoning is only invariantly significant in judicial decision making to the extent that it ensures objectivity and efficiency, other than that, this form of reasoning cannot invariantly ensure especially moral or philosophical justice where insight and contextual circumstantial perception is required other than generalisations on the basis of apparent similarities, commonality and instantial piecemeal observations.

This chapter and chapter five have mainly focussed on the logical concepts that are implied in legal reasoning. The implications of such reasoning vis-a-vis the nature of human social life have also been considered. Suffice therefore is the question of the extent to which logic as has been found out to be applied in law, facilitates, enhances or ensures the realisation of the objective of the law, justice (philosophical justice), hence the next chapter on logic and Justice.

CHAPTER SEVEN

ON LOGIC AND JUSTICE

7.1 PREAMBLE

This chapter is intended to address the question of the extent to which the employment of logic can enhance the actualisation of the spirit of law, the ensuring of harmony and order in society by appropriate redress. By 'appropriate' is meant the perception of social reality and the evaluation of the same on the basis of the merit of a decision about a conflict or controversy in virtue of the intrinsic practical and circumstantial presentation of the case (through the employment of objective reason and conscience).

The definitions and nature of logic, law and justice have already been discussed in chapters two, three, and four respectively. The significance of logic in law has been discussed in chapters five and six by focusing on the practice of law and a consideration of the theoretical implications of such practice from the point of view of logic.

Also made was a consideration of the caution that has to be exercised in the evaluation of such practices on the basis of logical principles given the practical nature of social reality with man at the centre of focus. Subsequently, if not consequently, this chapter endeavours to discuss and bring to light the practical implication of the employment of logic in the practice of law in special and due regard for the spirit or goal of law, justice, philosophical justice for that matter.

In chapters five and six, the concern has been with the practice of law, the theoretical implications of such practice from the point of view of logic, and the limits to which

legal practice can (if not should) be perceived in the spectacles or perspective of logic- i.e. Seen to be logical or evaluated on the basis of the rules and principles of logic - due to the pragmatic and practical requirements or imperatives as dictated by the nature of social reality.

In this chapter, concern is with the consideration of how far logic can enhance the achievement of justice. An emphasis on the adherence to formalism which implies logical reasoning as underlies legal positivism or procedural legal justice, and an abuse of the knowledge and appreciation of logical principles such as contradiction by lawyers as for example discussed by Ochieng' - Odhiambo in his masters thesis titled "On Justice and Justice in Law" [1985:123-125] have been the grounds for the distrust for lawyers and procedural legal justice in general as means for actualising moral justice or philosophical justice. In this spirit, there has been an assertion that:

> We proceed from bourgeois premises that in the words of Charles Dickens 'the law is an ass - a idiot'. Shakespeare is known to have said, ' the first thing we do, let's kill all the lawyers' and Martin Luther that, 'good lawyers , bad Christians' [Mihyo, 1977:1].

In this same light, it has also been said that "legal reasoning is, essentially, debaters reasoning, and debaters reasoning will not solve fundamental clashes of value or difficult empirical questions" [Posner, 1993:45]. This is because legal reasoning does not equip lawyers with the tools they need to understand the social consequences of law [Posner, 1993:45].

In the same line of criticism to the formalism and emphasis on 'logicism' as often observed in legal practice, it has been observed that " those who are deemed great justices have not been those clever dickerers who with exegetical wizardry, made patchwork solutions from the decisions of the past" [Maguire, 1980:121].

It has also been maintained that the great justices were the philosophical judges who moved within the spirit of the classical Roman jurists, believing that:

> law and right can and must always be sought for less in the detailed rules of the laws than in their foundation, that is, in the intrinsic nature of things, which is the perennial and inexhaustible source. It is in this philosophical orientation that the superiority of Roman jurisprudence lies as compared with the modern positivist schools [Vecchio, 1952:73].

Although truth is the ideal goal of courts of law as evidenced by requirement for testimony under oath, there is often a tendency of the question of objectivity, efficiency, and consistency taking precedence and truth eventually being down-played. If a lie can consistently be said therefore, and especially with no evidence presented before the court that would falsify or cause doubt with regard to the reliability of such a lie, then the court would just, as it is said, decide on the basis of the evidence presented before it. This is one of the very significant if not main reason and basis for the criticisms levelled against legal positivism and procedural legal justice and the detest for the same as is clear from the above quotations. This point is evident from the contention that:

> If a witness is prepared to swear that black is white and no evidence to the contrary is offered, the evidence before the court is that black is white, and the court must decide accordingly. The judge and the jury may think otherwise - they may have even private knowledge to the contrary - but they have to decide according to the evidence [Latta, 1956:305].

However, if justice has to prevail, particularly moral or philosophical justice, the extent to which truth is approximated and achieved is of cardinal importance such that any reduction to the approximation of the truth implies a diminution of the extent of philosophic justice observed and this is only if justice can be measured, but if the case is that justice is absolute such that there are no degrees, then tempering with the truth necessarily implies injustice. This latter conceptualisation is the one subscribed to in

this thesis, hence the consideration of the extent to which logic can enhance truth if not engender truth.

7.2 LOGIC AND TRUTH

In logic, when a proposition is presented in such a way that it is coherent and comprehensible, such a proposition is said to be logically possible, just the same way a conclusion which does not contradict the data on the basis of which it is inferred is said to be a logically possible conclusion. In the same spirit, a conclusion which contradicts the data or premises from which it is inferred is said to be impossible while one which is such that its denial contradicts the data is said to be necessary [Toulmin, 1964:169].

This doctrine of logical possibility and impossibility is what has predominated legal positivism as manifested in the formalism that is often emphasised, giving rise to the impression that 'the logical point of view' is an accurate and appropriate substitute to ethics, that the logical perspective is the more rigorous than those of the practical and explanatory sciences (e.g. Sociology, political science, among others). But this 'logical' criteria of possibility, impossibility and necessity cannot (given the practical reality in social phenomena), show invariantly and therefore reliably whether a respective conclusion in practical life is genuinely possible, impossible or necessary. This contention is echoed in the assertion that:

> In life, the inferential acquisition of knowledge requires the cultivation of both sound intuitive and inferential processes, it being an important insight that we reach truth either by intuition or by inference and predominantly, by a combination of both processes. A valid inferential process does not necessarily bring us to further truth unless the evidence we believe in is true also [Bastable, 1975:325].

It is further added that:

> Competence, of course, includes being properly informed in each and every context in which we presume to reason. To arrive at true conclusions, one must have sound and accurate information to begin with. Further, this information cannot be properly subjected to an inferential process, unless it is well formulated [Bastable, 1975:325].

What is of utmost importance in practical life with regard to the viability of a conclusion or assertion is therefore not just its consistency with the relevant data, but "...that it is a genuine candidate solution whose backing we shall have to investigate and whose acceptability we shall have to evaluate." [Toulmin, 1964:170].

Consistency and coherence are prerequisites for rational assessment. When a man purports to make an assertion but incurs a contradiction in his attempts to do so, he cannot even be understood. In such a case the question of the truth of what he says cannot be reached even if such a man is sincere. Until a case is stated in consistent, coherent form (especially when the presenter is sincere), questions about the merits of the argument or conclusion cannot yet be asked. Self contradictory statements and conclusions which are inconsistent with the available data have to be dismissed before a case can be stated clearly or in proper form. Incoherence in this light therefore is a preliminary matter, this, from a logical point of view can be said to be the rationale for preliminary objections in legal practice.

A statement or an argument that does not involve a contradiction is one against which no preliminary objection on grounds of incoherence or inconsistency, can be levelled, but the point is that it is a mistake to down-play truth in favour of consistency i.e. to perceive a statement or argument in its favour as true on the mere basis of its consistency. In this regard, it has been said that:

> Logic cannot guarantee useful or even true propositions dealing with matters of fact, any more than the cutler will issue a guarantee with the surgeon's knife he manufactures that operations performed with it will be successful. However, in offering tribute to the great surgeon we must not fail to give proper due to the

> quality of the knife he wields. So, a logical method which refines and perfects intellectual tools can never be a substitute for the great masters who wield them: nonetheless it is true that perfect tools are part of the necessary conditions for mastery [Cohen, 1963:23].

Logical implication and the truth of premises are two distinct issues. Although an ideal argument should consist in proper form, consistency, and truth of both premise(s), and the conclusion, logical implication does not depend on the truth of premises because it can hold, and justifiably so, between false propositions, between a false proposition and a true proposition, and may in fact fail to hold between true propositions. The discussion on reasoning in the second chapter offers good examples and an illustration of the above point.

Logical considerations are more of formal considerations than considerations which can necessarily engender or show the truth. To this extent therefore, logical considerations can only reliably serve as "preliminary formalities of argument stating" [Toulmin, 1964:169-170] and therefore having nothing to necessarily do with the actual merits of any argument or proposition.

It is the nature of social reality that utterances are made at definite times and in respective situations, and for this reason, such utterances have to be understood and assessed in respect of the relevant context. This point is from a philosophical perspective to be seen to be the rationale for legal decision makers, judges and magistrates, to, in situations of uncertainty about the applicability of a rule, resort to analogical reasoning and reference to the motive and intention of the legislators or the spirit of law. This is also true with regard to relations holding between most practical arguments because "...the arguments we encounter are set out at a given time and in a

given situation, and when we come to assess them, they have to be judged against this background." [Toulmin, 1964:182].

About the caution that has to be exercised when assessing the significance of logic in practical situations, it has been held that:

> Clearly many forms of life provide the opportunity and the need of developing those qualities of thought that are often called logical. And these qualities need to observe the human proportion of life, for too much clarity may be imported into interpersonal relationships and it is often unrealistic and burdensome to insist on proof - according to a dictum of Aristotle's, indeed, it is a mark of an educated man not to demand in any subject matter more certainty than that subject admits of, humanly [Bastable, 1975:326].

The emphasis on the need to separate logical possibility or logically true assertions or propositions from practically viable and true assertions (as should be the case in legal practice) is again seen in the assertion that:

> ...people with intellectual capital invested in them should retain no illusions about the extent of their relevance to practical arguments. If logic is to remain mathematical, it will remain purely mathematical; and when applied to the establishment of practical conclusions it will be able to concern itself solely with questions of internal consistency [Toulmin, 1964:185].

To this extent therefore, legal procedural justice as observed in legal positivism equates logical possibility and internal consistency on one side with practical-empirical external reality which does not and need not really and invariantly adhere to the ideal of logic, universalism, due to the human element that characterises and predominates social life. This is the greatest cause, if not the only cause, for general public mistrust and lack of confidence in positive law practitioners (i.e. those who, practice law as it is) such as judges and magistrates [Mihyo, 1977:1], and also the need to separate legal justice or procedural justice from moral justice or what Ochieng'-Odhiambo, (1985) describes as philosophical justice, what constitutes 'real justice' in this thesis.

Though logic may at times enhance the attainment of true conclusions, conclusions which constitute assertions that are in accurate conformity with practical objective reality, this scenario is just a question of coincidence because the essential nature and concern of logic is the form and structure of reasoning as manifested in a combination of propositions, not the truth of the propositions. In this light, it has been asserted that:

> Even in ordinary conversation, the ideas connected with the word logic include at least precision of language... and we perhaps often hear persons speak of a logical arrangement, or of expressions logically defined, than of conclusions logically deduced from premises. Again, a man is often called a great logician, or a man of powerful logic, not for the accuracy of his deductions, but for the extent of his command over premises [Mill, 1956:2].

There are basically two ways in which or by which truth can be known, attained, achieved or observed. Firstly, truths can be known directly, and of themselves through or by intuition in which there is involved immediate apprehension of things apart from at least not direct empirical experience, or truths may be known directly, and of themselves through consciousness, in which case direct sense experience is involved. Secondly, truths can be known through the medium of other truths, and this is the subject of inference. In this later case, reasoning is involved either by argument or explanation.

In legal practice and especially in court proceedings, the above categorisation of the medium through which or by which truths can be realised is evident. The ultimate concern of courts of law is normally the evidence presented for the assertion or claim, either of the prosecution regarding the guilt of the defendant or of the plaintiff who claims damages or compensation.

It is the ultimate task of the court to regard the evidence presented before it for claims of both the prosecution and the defence, and decide accordingly. These attempts to evaluate and decide on which claim should suffice on the basis of the strength and reliability of the evidence presented entail, constitute, and involve reasoning. This reasoning involves and includes the various arguments presented and the explanations offered especially through expert evidence or opinion.

The conclusion or 'truth' arrived at by the court through the decision of the magistrate or judge constitutes and involves the latter category of the medium through which 'truths' can be known, (the inference). Here, various types of reasoning are involved, deduction and induction mainly and analogical reasoning, enthymemetic reasoning among others as sub-types of reasoning as discussed in chapters five and six.

However, a judicial decision can only be made on the basis of another equally, if not more critical conglomeration of 'truths' as presented by witnesses and experts through testimonial evidence and circumstantial evidence. This conglomeration of 'truths' which forms the foundation for the ultimate judicial decision as is to be made by a magistrate or judge is predominantly one constituting of 'truths' known directly, and of themselves.

The 'truths' known directly here involve the evidence presented on the basis of 'raw data' or sense perception as in what was or is seen, heard, tasted, smelt or felt (not emotional feeling), while the truths known of themselves constitute the natural innate or deliberate abstract appreciation of the logical notions of logical opposition which involve the appreciation of the logical relations of contrariety, sub-contrariety, sub-

alternation, and contradiction on the one side and immediate inference consisting of conversion, obversion, contraposition and inversion on the other.

It is opportune to note that the significance of the two notions of logical opposition and immediate inference to legal practice in general and the reality of court proceedings, though cannot easily be realised exists. 'Truths' arising from sense perception can more easily be understood and appreciated as a category of truths involved in legal practice. But logical opposition and immediate inferences are notions which every average mind is potentially capable of appreciating and actually appreciates as implied by good reasoning in every instance. This is because these notions are the foundations for any mediate reasoning.

The difficulty in the appreciation of their significance (logical opposition and immediate inferences) is based on the fact that they are very abstract and 'natural' if not innate mental pre-dispositions such that though they are constantly and always employed in every discourse, they are not often noticed by whoever employs them due to the spontaneity involved in their usage. They constitute part of one of the two categories of ways of attaining truth (the other part is sense perception), hence their discussion in the first chapter to great lengths and detail in order to ensure the appreciation of their significance with regard to truth as discussed in this chapter. Whatever we are capable of knowing must belong to the one class or to the other, "...must be in the number of the primitive data, or of the conclusions which can be drawn from these." [Mill, 1956:3]

Though the logical notions of logical opposition and immediate inference do not add any more knowledge to whatever proposition is at hand in the strict sense, they

enhance the attainment of truth by ensuring the possibility of the simplification or clarification of propositions which in their initial presentation appear or actually are difficult to work with or grasp vis-a-vis other propositions, in issue or observed or experienced practical reality.

For example, such a proposition as "some politicians are corrupt" if true or known to be true can, depending on the context or situation of usage be more handy for one to draw other inferences or conclusions if interpreted by knowledge of logical opposition to "It is false that No politicians are corrupt," also by immediate inference, a proposition such as "No genuine priests are corrupt" can be used to engender other inferences depending on the other relevant propositions, by changing it or understanding it or appreciating it as "No corrupt people are genuine priests." More often than not logical opposition and immediate inferences are notions which are actualised by mental abstraction and appreciation in discourses rather than verbally pronounced, hence their subtlety with regard to practical significance in ordinary discourse.

The preceding said and done, it is important to, at this juncture, emphasise that laws of logic are laws about thought, that they are not to be understood to be laws that regard what has to, as a matter of fact, be taken for truth, rather they are "...the most general laws, which prescribe universally the way in which one ought to think if one is to think at all." [Hacking, 1979:288].

It is equally important to add, however, that one's thoughts need not necessarily be taken to constitute the truth or objective reality, otherwise there would be no justification for the distinction of people as insane and others as normal, or the caution

that one is not justified to assert with certainty that all men are mortal by the mere fact that most men he/she has come across or heard of so far have died. For a conclusion to be regarded as actually true, it has to be based on true evidence (propositions) and arrived at by a process that is logically valid.

The other point that needs discussion with regard to the extent to which logic can enhance the achievement of truth, and thus justice (philosophical justice), concerns what is normally considered to be a fact in courts of law. What is considered 'relevant facts' in courts of law need not necessarily be what as a matter of fact due to the unique circumstantial presentation of social phenomena be or constitute the real and relevant facts [cf. Bruce Waller, 1998:231].

What the court defines and describes to constitute the facts relevant to the case may either not capture all that should actually constitute the relevant facts of the case in the strict sense or such facts may even possibly engender an impression which, due to their inaccuracy, lead to inappropriate or inaccurate conclusions.

In general legal practice, especially in legal positivism (the practice of law as it is), conclusions are usually deduced or by induction engendered or derived on the basis of the 'facts' presented before the court, and strictly on such 'facts' i.e. logic is employed as is implied by the emphasis on the requirement of the administration of the law to the letter. The question that arises regards the extent to which such information described and defined as 'facts' by the court constitute the real truth on the basis of the practical reality. The sensitivity to this question is seen in the contention that:

> By ignoring facts relevant to moral rules and principles, a court would cut itself off from much of the total setting of a case, with the detrimental effects already noticed in trials by chance. A rational decision - and this requires repetition - must be a decision of the total situation in which it occurs. Facts which have

> moral or ethical significance, form part of this 'total situation' [Gottlied, 1968:59].

Stuart Hampshine, (1949), is also quoted by Gottlied from his (Hampshine's) book Fallacies in Moral Philosophy as saying that:

> The word 'fact', here as always, is treacherous, involving the old confusion between the actual situation and the description of it; the situation is given, but not the 'facts of the situation'; to state the facts is to analyse and interpret the situation. And just this is the characteristic difficulty of actual practical decisions, which disappears in the textbook cases, where the 'relevant facts' are pre-selected [Gottlied, 1968:58].

It is maintained in this light that legal choice and judgement are made not on the basis of raw fact, but on the basis of an account or description of an event [cf. Gottlied, 1968:50]. To this extent, the preceding contention is very much in line with the contention in this thesis when it is maintained that:

> The correspondence between material facts and the operative facts of legal rules depends upon the authenticity of the material facts themselves. If the view which the court takes of the total setting of a case is mistaken - or downright wrong - then the rationality of its decision is impaired. The decision is then based on a hypothetical situation which exists only in the mind of the court. Obviously a defective mode of proof can impair the rationality of an inference by falsifying the actual circumstances of the case [Gottlied, 1968:53].

But the divergence between this thesis and Gottlied begins when Gottlied holds that "....But a defective mode of proof does not impair the rationality of the process of reasoning on the basis of the facts proved and believed" [1968:53]. Gottlied justifies his contention by maintaining that the difference between his contention and that of fact-sceptics is that the fact-sceptics are concerned with the proof of facts i.e. with evidence, while Gollied's position is concerned with the rationality of reasoning on the facts proved and believed. Legal positivism and procedural legal justice somehow conform very much to Gottlied's criteria and therefore subscribe by implication to that school of thought.

The emphasis by Gottlied to this extent is logic or rationality, which apparently is what is implied in the practice of legal positivism and procedural legal justice. But Gottlied is again seen to abandon his position to conform to the contention of this thesis when he eventually asserts that both aspects of the question (the rationality and the objective facts as they are in reality) are however vital to decision making [Gottlied, 1968:53].

However, the question that ought to suffice is whether rationality or the actual facts should suffice if philosophical justice or moral justice has to be observed as is emphasised in this thesis. The answer to this question in this thesis is that if philosophical or moral justice has to suffice, then what is of paramount importance is not just the correct rationality or consistency as is implied in legal positivism and procedural legal justice, but also the real facts, the practical and intrinsic empirical facts.

In a case where there is conflict between the logically implied decision or conclusion and a decision or conclusion based on insight and practical facts, the latter should suffice. This is evidenced by the possiblity of accommodation of reasoning which from a logical point of view can be said to be fallacious as discussed earlier in chapter six. The legal notion of Equity is another example of an instance of safeguard for the jeopardy of moral or philosophical justice by invariant formalism and logicism as implied in legal positivism.

The word Equity is derived rom classical Latin *aequitas* meaning fairness or reasonableness. The practical application of *aequitas* signified the conformity and adherence to the Spirit of the law, law as it ought to be, the equivalence of natural law which enhances moral justice or philosophical justice, not the strict and invariant

conformance to the strict letter of the law. The practice of Equity therefore connoted and led to a subsequent modification of the letter of the ordinary law which was based upon the moral rule of a former age.

The practice of this notion had its orgin in English legal practice where the King or the Chancellor would be appealed to. But the notion in itself had highly characterised Roman law where the principle of Natural justice was emphasised, the equivalent of philosophical justice. The basis of the administration of Equity was conscience which at times led to principles and conclusions incompatible with rules of common law [The Rapid Results College: General Principles of Law Course No. 12 a5: 34-47).

The point is that the notion of Equity emphasises the significance and superiority of the employment of objective reason and conscience and a consideration of cases in virtue and respect of their unique circumstantial presentation and manifestation where decisions have to be made on the basis of such uniqueness other than preconceived solutions or solutions based on logical possibility and impossibility, deduction, and induction.

The notion of Equity is therefore a reference to the cardinal rule "let right be done." Equity can therefore accurately be said to be a justification for prerogative powers whereby a sovereign is endowed with the power to act according to his or its discretion for the sake of public or common good without the prescription of the law and even against it. This can be seen in such instances as presidential amnesty.

The preceding implies the appreciation of the contention that a strict adherence to the prescription of the law as it is, legal decision making that is based on deductions and

inductions on the basis of the legal code and prescriptions, the employment of strict logic, may jeopardise the spirit of the law, moral justice or philosophical justice. Hence the need to let conscience, insight, and objective reason to suffice by perceiving legal issues in their respective unique circumstantial presentations.

7.3 LOGIC IN MORAL REASONING

The undesirable consequent of the employment of strict logic in the practice of law as discussed above has led to some scholars suggesting a redifinition of logic or put in other words, a reconsideration of the rationality employed in disciplines or realms which call for practical reasoning especially with regard to human behaviour and social reality.

Gottlied, (1968), for example observes that John Dewey in his essays, 'Logical method and Law' (1924), and 'Essays in Experimental Logic' (1916), held that the legal process calls for a reconsideration of the traditional views about logic itself, that either logic has to be abandoned or that it must be a logic relative to consequences rather than to antecedents, a logic of prediction of probabilities rather than one of deduction of certainties. This 'logic' would therefore imply that reflective evaluation is a realistic alternative to deduction and to induction [Gottlied, 1968:23].

Gottlied also notes J. C. Hutcheson's contention in Readings in Jurisprudence by Cohen and Cohen, (1951), that a hunch or intuition of what is the just solution for a particular case is the effective determining factor in a judge's decision [1968:24]. Hutcheson's contention is very much in line with the notion of 'Synderesis' which is described as "the habit or innate ability in man to recognise the first principles of the

moral order and so of natural law without recourse to discursive reasoning..." [Wallace, 1977:168]. Synderesis is therefore the internal source from which emerges man's knowledge of the natural law.

There has often been a strong appreciation of the mutual influence existant between law and morality. It has been argued that the existant morality influences the relevant law just the same way as the law influences the morality. In this light, it has been observed that:

> The factual review of the interrelation of morals and laws is fairly plain and need not be over drawn. In their various fields of activity men are involved in an ever more complex social texture of rights and obligations. The attainment and the secure possession of the moral goods and values which men pursue require a system of socially acknowledged demands and guarantees on which the individual can rely and with which he has to reckon. These are the laws; in conformity to them the individual respects the rights of others and finds his own rights acknowledged and protected [Tsanoff, 1955:336].

On the basis of this recognition of the relationship and mutual influence existant between law and morality, it has been suggested that logic can be employed therefore to deduce or induce propositions or assertions (and therefore by implication in the case of legal matters), decisions or conclusions which can be said to conform to justice, philosophical justice. In this regard, it has for example been asserted that:

> Writers on moral philosophy have mostly felt the necessity not only of referring all rules of conduct, and all judgements of praise and blame, to principles, but of referring them to some one principle; some rule or standard, with which all other rules of conduct were required to be consistent, and from which by ultimate consequence they could all be deduced [Mill, 1956:621].

In light of the proceeding assertion, Oldenquist, (1984), has attempted to illustrate the logic of moral reasoning thus:

> Suppose that I say, 'I feel that I ought to take this book and give it back to Jones' (so reporting on my feelings). You may ask me, 'But ought you really to do so?' (turning the question into an ethical one), and it is up to me to produce my 'reasons', if I have any. To begin with, then, I may reply that I ought to take it back to him, 'because I promised to let him have it back before midday' - So, classifying my position as one of type(s_1). 'But ought you really?', you may

> repeat. If you do, I can relate S_1 to a more general(s_2), explaining, 'I ought to, because I promised to let him have it back.' And if you continue, to ask, 'But why ought you really?', I can answer, in succession, 'Because I ought to do whatever I promise him to do' (s_3), 'Because I ought to do, whatever, I promise anyone to do' (S_4), and 'Because anyone ought to do whatever he promises anyone else that he will do' or 'Because it was a promise' (S_5). Beyond this point, however, the question cannot arise: there is no more general 'reason' to be given beyond one which relates the action in question to an accepted social practice [Oldenquist, 1984:320].

However, this thesis objects to the assumption implied, that given the mutual influence existant between law and morality, that because logic can be used (as shown above) to deduce or induce propositions, assertions or conclusions that have a moral basis, that then the employment of logic in law can enhance invariantly (as is implied) the observance of moral justice or philosophical justice.

This is because the assertion that there is mutual influence between law and morality should, given practical observation only be taken or interpreted to mean that there is an area of overlap between law and morality, not that all law is moral or that all morality is law, but rather some law is moral and some morality is law.

By moral justice or philosophical justice as is used in this thesis is meant the equivalent of the adherence to the principle of natural law as contended in the Kantian 'categorical imperative', or Hooker's 'rational law', the employment of insight, good conscience and objective reason as contained in the notion of Equity.

To this extent therefore, unless the 'moral' code or assertions or propositions from which legal conclusions or decisions are derived or deduced conform to the principle of natural law (as discussed in chapters three and four), logic cannot serve to ensure invariantly philosophical justice or moral justice as the term is used in this thesis notwithstanidng Oldenquist's attempts and those of others who may subscribe to such a school of thought. This objection is even more justified given that Oldenquist

himself observes that "...the test for answering questions of this simple kind remains the accepted practice, even though the particular action may have unfortunate results." [1984:319].

The objection to the reliability of logic with regard to its invariant capability to enhance the actualisation of decisions which conform to the principle of natural or philosophical justice is mainly based on the unreliability of logic to ensure the attainment of conclusions which constitute facts in the strict practical sense of the term (the correspondence between an idea or proposition with the external objective reality).

The objection is therefore ultimately based on the imperative distinction between logical possibility and the actual practical truth. This is because for philosophical justice or moral justice to be achieved, it is a minimum and uncompromisable requirement that all the data on the basis of which conclusions are drawn or decisions made consist of the acutal (not merely logical) facts of the case, not the hypothetical facts as presented before the court or defined by the law, but rather the actual truth in the strict sense of the term.

This unreliability of logic with regard to the evaluation and conclusion about practical social reality is echoed in the assertion that:

> With the original data, or ultimate premises of our knowledge; with their number or nature, the mode in which they are obtained, or the test by which they may be distinguished; logic, in a direct way at least, has, in the sense in which I conceive the science, nothing to do. These questions are partly not a subject of science at all, partly that of a very different science [Mill, 1956:4].

The assumption therefore that, since law and morality mutually influence each other, and that on the basis of a code of moral principles and a cardinal moral principle that forms the foundation of such a code, that logic can be employed to deduce and induce

conclusions on such a moral code and therefore engender legal conclusions which conform to justice in the philosophical sense is erroneous. This is because it implies an assumption that (as earlier mentioned) all law is moral and all morality is law which is not the case.

The assumption is also erroneous because it implies that what is considered 'moral' is necessarily equivalent to what is just or right on the basis of intrinsic evaluation, insight and objective reason (as would be required of philosophical justice or rightness). This however is not the case because 'morality' in that respect does not necessarily imply rightness in the strict philosophical sense because then there would be varied 'moralities' (mere opinions) [cf. Pojman, 1993:xi-xvi] all of which would claim their being right as evidenced by ethnocentrism. This situation implies a breach of the principle of non-contradiction, that a respective morality is right and wrong, superior and inferior under the same circumstances. This is philosophically intolerable.

In the above assumption is the regard for the respective propositions or assertions which make up the 'moral' code and the axiomatic or general proposition on the basis of which conclusions are drawn to be right, correct, and intrinsically so, (the requirement for philosophical justice) but this is objected to.

The axiomatic and respective propositions or assertions that make up the 'moral' code have to be evaluated on the basis of their own individual practical viability such that if they are all intrinsically right on the basis of objective reason, insight, and good conscience, then whichever conclusion derived from them or induced on their basis or whichever decision is reached on the basis of them would be correct.

This means therefore that logic is only significant at a preliminary level or of secondary importance if invariant philosophical justice has to be observed. As it is rightfully observed:

> Logic, however, is not the same thing with knowledge, though the field of logic is co-extensive with the field of knowledge. Logic is the common judge and arbiter of all particular investigations. It does not undertake to find evidence, but to determine whether it has been found. Logic neither observes, nor invents, nor discovers, but judges [Mill, 1956:5].

In this same regard in respect of logic, it has been maintained that:

> ...it does not teach that any particular fact proves any other, but points out to what conditions all facts must conform, in order that they may prove other facts. To decide whether any given fact fulfills these conditions or whether facts can be found which fulfil them in a given case, belong exclusively to the particular art or science, or to our knowledge of the particular subject [Mill, 1956:3].

Hitherto, it is clear that the significance of logic with regard to the enhancement of the actualization of philosophical justice or moral justice is to the extent that logic can enable the ordering of ideas in a way that if such ideas are actually as a matter of fact true or constitute the real truth, then on the basis of logical principles, conclusions can be engendered which would conform to philosophical justice.

However, as hitherto clear, the problem in the achievement of philosophical or moral justice consists in the formulation of intrinsically right or appropriate propositions or rules (the major premises), and also the realization of instances whereby the continual employment of logical reasoning jeopardises the spirit of the law, philosophical justice. This implies that the legal decision maker should be capable of knowing when he/she can defy logical principles if the spirit of law has to be sustained and harmony between the practice of law and its spirit ensured.

Logic therefore serves only a preliminary and secondary role i.e. the ensuring of general consistency, but only to the extent that such consistency is not such that it implies a deviation from what is imperative on the basis of objective reason, insight and practical circumstantial presentation of events. Only then and to such extent would logic enhance the actualization of moral or philosophical justice. In this regard, it is noted that:

> Every decision is a choice between different rules which logically fit all past decisions but logically dictate conflicting results in the instant case. Logic provides the springboard but it does not guarantee the success of any particular dive [Brewer, 1996:932].

To overcome the problem posed by the inadequacy and unreliability of logic with regard to the enhancement of philosophical justice or moral justice on the one hand and the need to employ rationality in discourse anyway even if in practical life on the other, some scholars have suggested a unique logic for the various respective fields in which strict logic as is known in traditional logic texts, is inappropriate. It has for example been observed that:

> ...logic is concerned with the criteria for the rationality of arguments in a given field, as well as with the reasons for employing such criteria, and with the necessary relations between the concepts used in a particular discipline and the necessary implications of procedures adopted [Gottlied, 1968:169].

The questions that arise from the preceding contention however are for example, can one rightfully or justifiably talk of a definite criteria for the rationality of arguments in a discipline like law where the human element of unpredictability and significant dynamism plagued and characterised by infinite possibilities is predominant? Secondly, can one justifiably assert the possibility of 'necessary relations' between the concepts used in a field like law and the 'necessary implications' of procedures adopted, given the human element?

The answers to the above questions according to this thesis are negative. This is because Gottlied's contention [1968:169] can only invariably apply in physical sciences where there exists reasonable predictability on the basis of the definite causal relationship that exists in that realm. But this is not the case in the social realm where man is the focus.

Gottlied further asserts that: "Since reasoning guided by rules is not reducible either to deductive reasoning, nor to inductive and scientific reasoning, it is either not rational or rationality consists also of at least another form of reasoning." [1968:169].

In response to the above contention by Guttlied, this thesis affirms the earlier (it is not rational) and denies the latter (rationality consists also of at least another form of reasoning). The earlier however is also affirmed but modified thus, "since reasoning guided by rules is not invariantly reducible either to deductive, inductive nor scientific reasoning, it is not always logical". This is because in certain instances deductive, inductive and scientific reasoning might appropriately be employed in legal reasoning as discussed in chapters five and six.

The latter suggestion that rationality be considered as consisting also of at least another form of reasoning implies an eventual relativism. But relativism with regard to logic is here perceived to consitute an absurd scenario whereby every disciple or realm of knowledge would therefore be justified to claim a unique logic. This would boil down to the logical absurdity whereby by the same token and on the same merit individuals would claim their own respective unique 'logics'. This is a situation which is in total contravention of the cardinal ideal of logic, universalism, and even eventually

imply solipsism (that only what one thinks or is in one's mind exists). Unfortunate as it is, this is the philosophical end of 'logics'.

There would not be a definite frame for reference in attempts to evaluate the quality of a particular reasoning process in the respective fields and on this basis any field would make any outrageous claim as long as there would be the unique circumstantial justifications for such claims. But the question that has to suffice at such points is whether such reasoning would constitute logic in the way its defination has generally been internalised. How would the reasoning in the respective 'logics' be evaluated? What would be the frame of reference, logic or the 'logics'? If the latter, wouldn't there be a begging of the question (Petitio principii) [cf. Copi, 1990:102]. It is therefore the assertion of this thesis that the accommodation of 'logics' is not the answer to practical reasoning but rather there is need to appreciate the inadequacy of the logical method in the evaluation of human social behaviour.

It is on the basis of the recognition of the inevitability of the employment of logic (given the general innate rationality of man) in the practice of law as discussed in chapters two, five, six, and seven on the one hand, and a realization of the inappropriateness of the invariant employment of logic in practical discourse, that there is an imperative need for reconsideration of the criterion for an appropriate and ideal legal decision maker i.e. one who can accurately know the points at which logic has to be somehow suspended for the enhancement of philosophical justice. Hence the next chapter which constitutes the conclusion and recomendations of this thesis.

CHAPTER EIGHT

CONCLUSION AND RECOMMENDATIONS

The ideal objective of law and courts of law, at least in all sincerity, should be to establish facts, the reality or truth, not as just defined by the court or law, but really as such facts or truth present themselves as a matter of fact. This should be with the cardinal aim of actualizing a redress which establishes the observance of justice in the philosophical sense as discussed earlier.

However, logic can only guide towards the establishment of such facts or truth in the strict sense with limits (as discussed in chapter seven) given the general unpredictability of social phenomena. Philosophical justice concerns itself with the establishment of inferences or conclusions on the basis of concrete practical circumstantial presentation of reality through the 'spectacles' or perspecptive of objective reason, good conscience and insight, not on the basis of formally derived or induced conclusions as it is characteristic of legal positivism as manifested in procedural legal justice.

What ought to be (the logical possibility) might conform to the objective practical external reality, but this is not invariantly so. In this latter case, philosophical justice or moral justice is compromised i.e. generalisations as by legislation and legal formalism are appropriate but only as long as and in so far as they are not inimical to proper inference and conclusions in virtue of the adherence to the dictate of objective reason, good conscience and insight as is requisite for the observance of moral or philosophical justice.

The prescribed or expected modes of behaviour and activity in society is generally based on the culture which is a consequent of the relevant social and physical environment. The values, 'morals' and all other social characteristics prevalent in a society generally reflect the world view of such a society. However, whether such 'morals', values or otherwise are right or wrong, evil or righteous, good or bad is another issue altogether.

Laws are significantly based on such traditional or customarily prescribed behaviour or practices (e.g. Common law, Customary law) or the law, even if not directly based on such customary practices, is influenced by them (statutory law). The observance of justice, as conceptualised in this thesis, is the ensuring that what is appropriate or right (in the strict sense or as a matter of fact) carries the day.

The main question that this thesis has attempted to answer has been; "To what extent can logic enhance the observance or realization of what is appropriate or right in light of the human element in practical social reality? i.e. To what extent can logic ensure the observance of philosophical justice? Hence, to what extent is logic compatible with law, given that the objective of law is to ensure justice and that the kind of justice which ought to suffice (if the prevalence of law has to have any justification) is philosophical justice?

The answer in this thesis is that logic can ensure that thought or reasoning about a code of conduct or prescribed behaviour is correct in the sense that an assertion can be engendered or derived from, and on the basis of the given code, or that an assertion can be inferred given what has been previously observed in reality and in respect of the case or facts at the given moment.

Logic can therefore be relevant only to the extent that it enables one or guides one to derive from a given code of conduct given as an instance or induce a conclusion with reference to the relevant code. Logic can therefore enhance the decision as to whether a given observed behaviour or act is 'right' or 'wrong', 'righteous' or 'evil', 'good' or 'bad' only in virtue and special reference to the given code of behaviour.

However, logic cannot enable one to pass judgement on the rightness or wrongness of a given act in itself apart from or without such special reference to a certain standard or code of behaviour. If the prescribed code is the right or justified one in virtue of objective reason, good conscience and insight, then logic when properly applied would engender appropriate conclusions but only if the respective unique practical circumstantial presentation of events is put into consideration. Otherwise, logic is indifferent or would in fact possibly lead to philosophical injustice if the assumed code is (by the criteria of objective reason, good conscience and insight) not the right one.

What inevitably suffices here therefore, and what constitutes the recommendation of this theses is that, legal decision makers and practitioners should be people of high integrity, non-partisan, and witnesses of philosophical justice. This means that such legal decision makers and practitioners should be high approximations to the Platonic philosopher-king [cf. Plato, 1987:115-223]. As Maguire rightly observes with regard to justice in the supreme court in the United States of America;

> As a nation, we have not thought deeply enough about the business we commend to this court, if we did, we would see that it makes no sense for all of the judges to be lawyers. A number of other disciplines and perspectives should contribute to that philosophical forum that we call the supreme court. The 100 per cent quota of lawyers we have for this unique body tends to give a positivist cast to the court and frustrate its prime purpose because of the mechanical jurisprudence that many of our lawyers have imbibed in their training [1980:122].

The American supreme court is a body that was established with the sole objective of ensuring the observance of philosophical or moral justice, the practice of law with an invariant adherence to the dictates of natural justice. This implies a recognition of the inadequacy of the positivistic practice of law as it is epitomised in procedural legal justice. Maguire's position shows the appreciation of the fact that knowlegde of the law and its interpretation is not enough to ensure appropriate redress with the objective of sustaining positive harmony and tranquillity in society by proper distribution of benefits and burdens.

The knowledge of the law and its interpretation needs to be combined with other endowments (ethical as perceived through the philosophical eye that is critical, reflective, and analytic) as is requisite for the harmonization of the formal law and the practical reality. Hence, the need for a legal decision maker to be an approximation to the platonic philosopher-king.

Hitherto, this thesis has established that since man is generally a rational being, he has often employed logic in the formulation and application of the rules intended to govern conduct and behaviour in society (law). It has also been established in this thesis that the application of the logical method in the formulation and application of rules only has theoretical justification and sustainability (not necessarily practical or pragmatic justification).

However, given the nature of social life as characterised by the human element (as already discussed), the employment of logic can engender and imply practical shortfalls in virtue of the expected outcome of the practice of law. This has been seen in the establishment of such safeguard institutions as for example the American supreme

court, the application of the principle of equity and the justification for prerogative powers which enable a sovereign to at times transgress the prescription of the law to ensure conformity with the cardinal rule, "let right be done". These are just among other possible examples.

Due to the preceeding scenario, it is the conclusion of this thesis that logic in this regard has only two purposes to serve in the practice of law: first that it serves to ensure objectivity and impatiality and secondly, that it serves to ensure efficiency in legal practice. But these two basic functions should be maintained if and only if they serve to actualise philosophical justice, otherwise philosophical justice would be jeopardised in the invariant application of logical reasoning. This is due to the fact of the relative indeterminacy and dynamism of social life.

Consequently therefore, it is requisite on this basis that a legal decision maker or practitioner be characterised by good moral and ethical foundation, good power of judgement (intellectual), conscience and insight. It is therefore the recommendation here that the curriculum for training in the legal profession equally emphasise dissemination of such knowledge and skills. This can with reasonable convenience and efficiency be actualized by a mandatory training in philosophy proper throughout the legal training course.

It is a recommendation in this thesis that individuals to be admitted for a course in law be seen to have shown aptitude for the ideal judicial decision maker as discussed,and qualification to practice after the course should also be based on this standard. Then, and only then, would there be a maximization for the optimization of the actualization of philosophical justice or moral justice (it is here important to note that moral justice

is used as an equivalent of philosophical justice). To this extent therefore, the hypothesis of this thesis that "an invariant application of logic in the practice of law is inimical to philosophical justice or moral justice", stands.

There is the question of what the law is and what it ought to be. The emphasis here is (or actually ought to be) on what it ought (the law) to be (i.e. to act as an ideal goal to ensure the success of its objective or spirit). The issue here is not only how the legal system operates as such but also how it ought to operate.

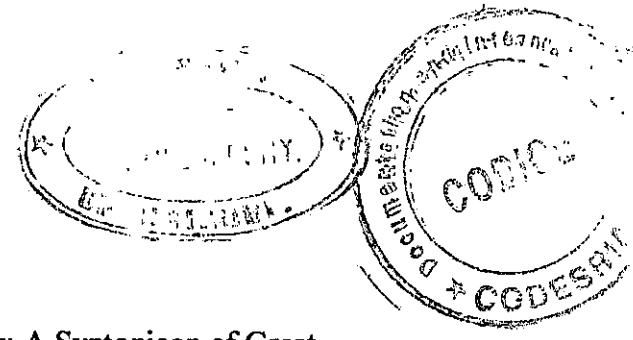
The preceding is a question of consistency because the spirit (or at least the ideal goal) of law or a legal system is to ensure justice from a philosophical point of view. The attempts or measures to implement this agenda (at least the purpoted attempt or claimed attempt) is what forms the basis for objection to legal positivism in general or how the law operates or is practiced.

The point here is that, law or a legal system would possibly be self defeating, contradictory, and inconsistent if just left to operate as it is or as it so wished.This is because, firstly, the justification for its existence (the law or legal system), and secondly the possibility of the achievement of its goal, would possibly be jeopardized by mere formalism, 'logicism' and generally positivism.

The justification for the existence of law (at least from a philosophical point of view) is the ensuring of security, harmony and tranquillity in society. These values in their ideal and harmonised sense constitute philosophical justice. The goal and aim of law or any legal system therefore (atleast the ideal goal and aim or claimed goal and aim) from a philosophical point of view is the actualization of philosophical justice, what in this

thesis is interchangeably referred to as moral justice. But as realised in the fifth and sixth chapters, the invariant or strict employment of logic as implied in legal positivism may jeopardise the goal or spirit of the law for which the law (or legal system) is formulated to (or atleast claimed to be formulated to) actualise, hence inconsistency.

To this extent and on this basis therefore, philosophical or natural justice has to be seen to suffice or at least act as the ideal goal. But the ideal should not be seen as unattainable, otherwise, whoever sets it (the ideal) and claims to work towards it would be enganged in an underdog, self-defeating, and absurd activity or task.



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