A Contribution to General Theory of Law in the Underdeveloped Context*

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I. Introduction

This essay is an interpretative sketch of the place of law in the context of underdeveloped societies. The thrust of its main themes and hypotheses is drawn from Latin American experience, but both the nature and purpose of the essay set limits on its usefulness as a study of the law of those societies as such. It will rather, on an abstract level, attempt to analyze orthodox and deviant views of social order and the varieties, characteristics and idiosyncracies of legal thought in the context of social structure, politics, economy and forms of social consciousness. Given the enormity of the subject it is perhaps unnecessary to say more by way of disclaimer than to underscore the word, sketch.

An observer, trained in the liberal legal tradition, particularly its welfare corporate state variety, is likely to note the following characteristics in the legal system of the underdeveloped societies when he attempts to relate law to questions of social change. In the face of unprecedented social change, the activities of lawyers persist to centre around courtrooms and legal study is obstinately confined to the conceptual heaven. The courts’ opinions, to the extent that they are comprehensible, tend to alternate between extreme formalistic dogmas and purposive opportunism. The legal profession, still drawing the most “intelligent”

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segment of the nations' youth, seems to avoid the problems of the social order and public affairs or even new professional opportunities created by economic change. In short one gains an impression that the formal legal system is only peripherally related to the events of political and social life.

This essay is not so much a comprehensive description of such features of the underdeveloped legal order as it is a theoretical sketch of the social historical context of underdevelopment to the extent that it bears upon an understanding of the legal order.

The neglect of some empirical illustrations and what might appear to be obfuscations are deliberate. The latter, insofar as it is not deliberate, also may have to do with the incongruence of the intellectual baggage with which the author approaches the subject.

An explanation of the conceptualization of underdevelopment is in order. It will give voice to the fact that the formal law and legal institutions in non-Western societies is a product of cultural interaction between the world liberal capitalist development and traditional societies. Since the advent of liberal capitalism, I identify the following modes of social historical change: liberal capitalism, its fascist variety, colonial domination and underdevelopment, revolutionary socialism and right-wing socialism. Needless to say, these categories are ideal-typical and problematic. Fascism is to be treated as something more than bygone historical phenomena: it constitutes a subterranean current of liberal capitalist development. The metamorphosis of classical liberal society if ever existed in historical reality, has taken two forms, liberal corporate welfareism and fascism. The distinction between liberal capitalism and authoritarian fascism has to do with the constellation of various historical factors, inter alia, the power struggle among the royal power, landed gentry and third estate, the place of the latter in the declining feudal order and the manner in which it was transformed in the revolutionary bourgeoisie, the ideological distinction between state and society, the political protection of national economy, the "precocious" rise and politicization of the working groups, the romantic despair of abstractness, individuality and instrumental rationality as exemplified by conservative thought\(^{(1)}\), and so on. For the present concern, liberal capitalism stripped of its legal fabric is fascism. The relevance of the fascist model is related to the thesis that the politico-legal system of underdevelopment parallels fascism in many respects. This argument will be explicated and qualified later.

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The distinction between revolutionary socialism and right-wing socialism is not of immediate concern in this essay. Suffice to say here that this distinction is based on two interrelated theses: (i) The genesis of the right-wing socialist model is in the international power balance, not a social revolution.

(ii) In revolutionary socialist development the tension between normative ideals and the social practices continues to play its historic role.

The modern intellectual tradition in the West grew out of the historical context of liberal capitalist development. Its varieties of currents reflect attitudes toward the liberal capitalist society. The reference point for interpretation was the historical uniqueness of democratic capitalism in contrast to both its immediate past and other civilisations. The lack of a parallel to the Western liberal capitalist development in “unhistorical history,” which Hegel characterised as “the repetition of the same majestic ruin,” (2) was explained with varying degrees of theoretical sophistication as the “Asiatic mode of production,” “irrational forms of religiosity,” and so on. What was it about the West that liberal capitalism developed from the “womb” of the feudal order? More pertinently for the present purpose, how does the “autonomous” legal system relate to the liberal capitalist development? These are important questions both intellectually, and, historically, because the interpretation of the past affects the present and future.

Some historical studies have been concerned with this question, but it is posed, often from a nationalistic point of view, in a different form: Given knowledge of the existence of other historical possibilities would a liberal capitalist development have taken place but for colonization?

Thus the question becomes hypothetical. Liberal capitalism, in the course of its development and diffusion, has embraced the whole world and thus shaped the basic features of the world and its components. It may be the case that the origins of the contemporary underdevelopment are to be sought for more in relationships between non-Western societies and the global expansion and domination of liberal capitalism than in their “traditionality.” Indeed there is nothing that has been untouched by this development, nor is there any “traditional” community in these societies in the authentic sense of that word. Contemporary underdevelopment is, in large part, the historical product of the past and continuous economic, political and cultural relations between developed and

(2) Hegel, Philosophy of History, 106.
underdeveloped countries. Underdevelopment has been generated by the same historical process as capitalist development. In the course of capitalist expansion a pattern of metropolitan-satellite relationships came into existence: Metropolises tended to develop and colonies to underdevelop. The social structure, the forms of social consciousness and the economy of the colonies correspond to the domination of the metropolis. It is in this context that modern law and legal institutions were introduced.

However, a caveat is in order. By this argument I do not mean to suggest a kind of mono-causal analysis of the bare structure of the underdeveloped society. It attempts rather to relate the phenomena of underdevelopment to the main currents of the intellectual tradition to which liberal capitalist development has given rise, to locate the problems in our interpretation of modern history, and thus, to point to the limits of both classical social theories and their inferior successors in understanding underdevelopment. Hence this is not an apology for the current fashion in social analysis and historical study, the fashion which emphasizes the circular-multiple-correlations approach in which everything is seen as linked up with everything else or alternatively emphasizes accidents.

The thesis is rather to underline the uniqueness of the historical experience of colonialism and underdevelopment. Underdevelopment is not a less developed or an imperfect form of liberal capitalism in transition thereto. It is a sui generis among the forms of historical change in the modern era.

II. Social Structure and the Legal Order

It is characteristic of underdevelopment that on the one hand, ideology assigns a historically critical role to the bourgeoisie, and yet, on the other hand, there is no such a class. In the West, the development of liberal capitalism in general, and the autonomous legal system in particular, is the history of the rise of the mercantile groups and the transformation of the third estate into the triumphant revolutionary bourgeoisie. The forms of the political state and the varieties of legal thought were largely determined by the place of the bourgeoisie in the course of the emergence of the civil society.

The historical form in the non-Western societies contemporary to the liberal capitalist society was the colony. The social stratification and division of labour of colonial society shaped the basic features of the social structure. The class of comprador mercantile groups, minor bureaucrats and intellectual évolué, in short, the modernised came into being in the
context of the colonial domination. They are the linkage of the metropolis to the colonised masses, the agent of the modernisation. The introduced legal system is bound up with this stratum of the society and its ambivalent place in the colonial society. The composition and characteristics of this symbiotic social class varied, and yet, its centrality to the colonial structure had remained constant and become more consolidated. These middle men constituted the lowest order of the hierarchical structure of the colonial domination which came into direct contacts with the colonised masses, as minor bureaucrats of the colonial administration or as comprador agents for the metropolitan economy. The nascent legal profession, though some individual members might have been active in the nationalistic cause, was never more than a branch of this stratum in the colonial context.

The symbiotic middle men increasingly filled the place of the landed gentry whose influence continued to wane. Their nobility in the hierarchical colonial order was attributable to their mastery of the metropolitan language, proximity to power and market economy. The formalistic view reflects, on the one hand, the intellectual milieu of the metropolitan culture, which was the reference point, and on the other hand, the ambivalent relation of the middle men to the colonised masses. Legal formalism replaces Catholicism as the metaphysical framework for social organization. It is the esoteric conceptual heaven in which a fragile normative justification of the colonial order take place.

The dialectical relationships between the middle men and the colonised masses are of central importance for the interpretation of underdevelopment because the colonial forms of social stratification and division of labour tend to persist after the political decolonisation, and the ambiguity of the ideology of the present authoritarian states and the intractable crises of the legitimacy of the normative order is traceable at least partly to those relationships.

It is common in developmental analysis of the underdeveloped structure to stress the dichotomy between rural and urban, traditional and modern. It is not my present purpose to debunk this thesis. The rural peasant economy was usually the first part of society that came into very intense contact with the modern capitalist economy and its legal forms of contract and property ownership. The rural exchange system which was based almost entirely on barter was suddenly drawn into international capitalism and deluged with foreign made textile products, pots, pans, farming tools, dye stuff, etc. The
peasantry had to offer agricultural products to obtain this foreign merchandise.

The place of the peasantry in society was of central importance for the future development of the social structure. (i) Since decolonisation, it was continued to be the food supplier for the urban areas whose main economic activities are in the export sector financed by foreign capital. Through this channel the rural economy is related to the world market. The major asset of the economy, cheap labour, can remain as such only when the cost of living is reasonably checked. Hence in the successive varieties of financial and price control holding the rice price below production cost has been regarded as a panacea. The legal device, "land to the tillers," has not significantly altered the fundamental relationship between the rural economy and industrial sector. (ii) The persistence of this relationship in part accounts for the increasing rural migration. The "floating population," squatters and *lumpenproletariat* continue to grow. This phenomenon, a consequence of rural dilapidation, is indeed a hallmark of the underdeveloped structure, a source of futile social anomic. (iii) Historically, romantic ideals could become actualised as social forces only if they had appeal to the consciousness of the peasantry.

The present barreness and lackadaisical form of romanticism reflects partly the ambivalent place of the peasantry and the "floating population" in the society. The rural areas have been drained of their vitality, economic and cultural values and youthful population. Today the size of the rural population is less than that of "urban" areas. The rural migrants exist in a way both inside of and outside of the social system. (iv) Political decrees and agricultural regulations are the only aspects of the administrative and legal order that affect the life in the village except criminal sanctions and voting for the opposition when the administrative interference slackens. Agricultural regulations tend to disfavour the rural poor. Rural social stratification appears trivial after the land reform, viewed from outside; but it is a life and death matter for the farmers. The land rezoning project is a case in point. It aims at increasing productivity and the amount of arable land by pooling together the land-pieces owned by individual farmers and redistributing them to each of farmers according to he owned before. The poor tend to get the worst pieces which are sometimes scattered in different places. By migrating to the urban areas, thus becoming "the floating population," even this contact with the administrative and legal system is lost.

Another stratum of the society which lies in the marginal zone of the legal system is.
industrial workers. It is a major contradiction of the economy and the normative order that the goal of economic activities is asserted to be the rise in the living standards of the people, and yet their cheap labour is probably its only asset in international market competition and its only incentive for the foreign capital. Various labour laws remain ornamental. The limited effective areas of the labour laws tend to give way to the acute competition for the world markets and for the inducement of the foreign capital and the increasing governmentalisation of the unions. Because the underdeveloped countries compete among themselves in the world markets with labour-intensive products, the competition is about whose labour is cheaper.

The oligopolistic interests tend to operate above the formal legal system, so to speak. The major decisions on the authorisation of foreign loans, banking benefits, repayment guarantees for the foreign loans by the government or government-controlled banks, import licences, etc. are made in a closed, informal fashion. Underdevelopment is marked by the symbiotic context in which oligopolies develop and control the market system. It is distinguishable from the fascist model by the fact that the oligopolies are dependent upon both political ruling groups and the metropolitan enterprises. The perpetual crises of legitimacy entails a higher cost for the maintenance of power, which, compounded by the doctrinal haziness of the dominant ideology, leads this class to a glaringly hedonistic life style. The worth of a parvenu is determined by his fetishistic display of his possessions, and yet this contradicts the normative justification of the social stratification. The hedonism is stimulated by the economic structure which tends to perpetuate the “shallow” market and the inability of the oligopolies to transform themselves into “capital goods” industries, in addition to political exactions. Hence the meagre accumulated capital is likely to find a more profitable market in the luxurious leisure industry and real estate speculation.

The “middle” strata consist of small and middle merchants and manufacturers and the employees of the governments, oligopolies and quasi-governmental corporations. These groups are the most legalistic, if only about property matters. The law of contract, property and negotiable instrument is relevant to the social life of these groups to a limited extent. The bulk of the civil cases grows out of the disputes involving parties belonging to these groups over the ownership and other “real rights” to houses and their sites. The formalistic legal reasoning of the courts corresponds to this situation. To the “middle man” it is foreign to seek his interests in an organised fashion and to be concerned
with metaphysical political and civil rights. But he, who cannot manipulate the legal order as the oligarchical groups and yet knows something about the legal system, is willing to resort to the formal legal processes when his last and only hold in the social world is at stake, such as his physical freedom or his house.

The assertion of property rights, and thus legal formalism, finds its limit when it counters the state. The judiciary, founded upon the ideal of a legal system with general and abstract legal rules autonomous from politics and other economic and social forces, a method of thought corresponding to the autonomy of the legal rules and institutional independence, has groped for its raison d'être in the protection of the property rights of the “middle” class. Having retreated from, or never ventured into, the political and civil rights through purposive opportunism, this has been the only remaining battleground for the assertion of its worth and autonomy. And it often becomes its Armageddon.

III. Law and Politics

Legal formalism corresponds to the liberal conception of society and politics. The system of general and abstract legal rules provides individuals, who have been released from the feudal hierarchical order and are constantly in pursuit for private interests and individual ends, with the framework for social life. It establishes a system of rules of conduct when the divine has receded from this social world and thus ceased to sit in the normative judgement of the mundane life. The legal order is legitimated by the disappearance of the distinction between the ruler and the ruled, the law-maker and those to whom the law is applied and treating everyone equally as citizen, property-owner and contract-maker. The abstraction of social man as the legal person and his equality before law thus serves a profound ideological function by obscuring the inequalities of the social world and reformulating economic and political struggle in terms of formal and general legal concepts and propositions. Through the universal application of the general legal rules the problems of social life and divergent conceptions of right and wrong are transformed into the questions of logical necessity. The system of the general legal rules is rational in that it embodies the instrumental rationality of a civil society where everyone pursues private ends and subjective values. The state, as the guarantor of the legal rules, is viewed as standing above the social competition and struggle, hence as neutral and universal.

The agent of the destruction of the traditional social order in the underdeveloped
context was colonialism. The traditional normative order disintegrated in the face of the colonial domination and market economy, and the replacement was the colonial order justified in terms of technological efficiency epitomised in the form of military power. Men were increasingly set loose from the disintegrating old order and atomized while prohibited from constructing new forms of social life. Any voluntary grouping of the colonised constituted threat to the colonial order. The technological superiority of colonialism, especially when it is used to subjugate the colonised, could never be elevated to normative significance in the moral consciousness of the masses. The scattered and splintered subjects assert their humanity only through despondent, passive, and yet, determined non-cooperation with the legal order in the colonial situation.

In an underdeveloped context, particularly where political decolonisation was not won by the struggle of the indigenous organisation of political forces, these features of the colonial legacy tend to persist. For the maintenance of the social order, the bureaucracy was reorganised with the same class of the people that manned the lowest echelon of the colonial bureaucracy. The former legal system was retained and the nobility of the legal profession was enhanced by its scarcity. The bureaucratic reorganisation presumed the continuity of the colonial social structure. In the absence of mass political organisations taking part in the political processes, the emergence of the military, facilitated by the international politics, was to be of profound political significance. With the consolidation of the international market-oriented oligopolies, the three pillars of the symbiotic authoritarian state are completed. Then legal formalism remains as an ideology of the nonexistent revolutionary bourgeoisie: legal formalism in its practical form consists of the legal order that legitimizes the authoritarian state and underdeveloped social structure. It has filled the vacuum left by the Catholic social order, not its just and humane, but its “Legalistic” aspect. This form of legal formalism furnishes an impression that there is a standing system of the legal rules from which the authority of the political power is derived and with reference to which social conduct is normatively judged. But a normative structure based on this form of legal formalism devoid of the metaphysical and empirical foundations (such as open political competition and autonomous market) of liberalism is necessarily negative and empty.

It is the dilemma of the authoritarian state that there is no system of coherent ideas and method of legitimation. In the age of democracy, the social order cannot
be any longer sanctified by a divine design and political authority has ceased to be viewed as a heavenly mandate, therefore subscription to the democratic myth is inevitable. And yet the adherence to democracy subverts the authoritarian order. The social contractarian legitimacy can be effective to the extent that the political practices approximate to the constitutional and legal standards. Since this cannot be the case in the authoritarian political process putatively regulated by the written constitution, the electoral process subverts the legitimacy that exists. In elections, the ruler always wins, albeit a pyrrhic victory; the electoral process, instead of performing the "legitimation function," "integration function," etc., produces "post-electoral syndromes" ranging from political protests to runaway inflation. Indeed the most formidable threat to the authoritarian rule arises from the political milieu created in the aftermaths of an election. It is paradoxical for the authoritarian state that, on the one hand, a semblance of procedural fairness in the electoral process is necessary for the attainment of the minimal end for which elections are held, and on the other hand, its foundation is subverted to the same degree as the election is fair. Hence the election in the authoritarian context is no more than a compromise between guaranteed reelection and the maintenance of democratic appearance.

The liberal state becomes profoundly political by denying its being political; it is most powerful when it appears standing above the civil competitions and particular interests. The general constitutional and legal rules and the universal application thereof is both a pillar and the emperor's new clothes of the liberal capitalist state. In a pseudo-civil society in which the pattern of social stratification and the corresponding forms of the social consciousness have been radically bifurcated, the political state stripped of the system of the general legal rules must perpetually resort to the naked force, and search for some trans-constitutional sources of legitimation. It is the fate of the appeals to these mythical sources that they must be abandoned before the contradictions become too pronounced. Where there is no civil society, there is no democratic state, and in a qualified sense, viciss versa. It is the contradiction of the authoritarian state that its dominant form of ideology is the development of a civil society composed of citoyen, contract-makers, property-owners and entrepreneurs without the corresponding forms of the normative framework; it becomes the tragedy of the underdeveloped society that it attempts to form a liberal democratic state without its being a civil society.
In the civil society of individual ends, particularistic interests, private life and subjective values, the political state is viewed as the incarnation of the communal, the general, the public and the rational. The authoritarian state cannot appear to have these qualities. It is its ultimate despair and source of solace that it is not expected to do otherwise. The authoritarian states then face either of two alternatives: it inculcates the democratic myth, and risk subversion, or it at least atrophies the formal legal order to suit its political conditions and considerations, and thus present themselves in a naked form.

It follows from the above analysis than an experiment with open democracy in the underdeveloped context is precarious and ephemeral. This can be exemplified by the short-lived, yet recurring period of relative openness. The flux of sudden political organizations and activities of hitherto scattered and despondent individuals of various social strata marks this period, which in turn are likely to be seen inevitably by dominant groups as threatening to the existing social order once they begin to sort out their interests amidst communal euphoria. The existing legal framework, having been tailored to suit the interests of the ruling groups, is never sufficient to meet new popular demands, which in turn necessitates various ex post facto "revolutionary" legislation. Hence a liberal democratic government in the underdeveloped context faces one of the following paths: (i) It becomes an authoritarian state itself. (ii) It continues to be as it is and to be overthrown by the reaction. (iii) Or it attempts to respond to the popular expectations and meets the same fate.

I shall begin the discussion of another variety of the legitimacy of the legal order by alluding to the passage of the classical liberal state into the corporate state in the advanced industrial societies. In the course of this transformation, the doctrine of social utility, welfarism, finds acceptance to the same degree as social contract theory fades: the system of the general rules declines to the extent that various open-ended standards, principles, general clauses, policies, etc., are in ascendancy and the classic boundary between the legal on one hand and the the moral, economic and political on the other is blurred. The legitimacy of the social order relies at least as much upon the realisation of individual, substantive, albeit episodic, justice as upon the reference to formal equality. This corresponds to the conception of the social world as a compromise among the pluralistic groups and interests organised in the forms of various social institutions which mediate between individuals and the state. In the course of the incorporation of the social elements,
which are external to the hitherto homogeneous social system of the propertied and "enlightened" bourgeoisie, into the social structure, the tension between the society and the state, the possible and the actual, disappears. The contradictions between the general and the particular, between the public and the private, between reason and desire, etc. are safely obscured in the particularistic standards of individualised justice, the quasi-public/quasi-private functions of the corporations, unions and other intermediary social institutions and the bundle of roles which an individual performs in his compartmentalised social life. A new form of sanctification descends upon this social world, reinforced by the material comfort and the awareness of the limit of the technological exploitation of the nature.

I hope by now that it has become clear why this sort of legitimation can hardly find a place in the context of underdevelopment. First, it is in diametrical opposition to the structure of social stratification founded upon the subjugation of industrial workers and farmers to an oligopoly whose access to the international markets is mainly based on the cheap labour, not to mention the fact that it has no words to say about the increasing "floating" population. Welfarism is incompatible with a developmental economy the thrust of which consists in the development of oligopolistic industries which can compete in the world market. Secondly, it contradicts authoritarian politics by threatening the social group that sustains the power. Further, more significantly and ironically, the operation of welfarism which consists of the determination and application of particularised substantive standards in various social contexts seems to require a general system of legal rules (or alternatively a universal system of the precepts of distributive justice), through which a particular is reconciled with other particulars and related to the general. It may not indeed be far-fetched to say that, in the course of the capitalist development, the liberal variety can only be distinguished from the fascist one by the effectiveness of the legal system of general formal rules. In the former, the formal legal system of the liberal state is maintained as the framework in which the particular instances of the formulation and application of various policies, goals and values are to be reconciled among themselves and related to the general social order, albeit in ad hoc fashion. In the latter case the deluge of "general clauses," which sweeps away the liberal legal system, can only be orchestrated by the whims of a Führer. (3)

(3) Hedemann's Die Flucht in die Generalklauseln is a well known tract for the analysis of the deluge of general clauses and open-ended standards during the Weimar Republic, albeit he took the flight himself too later.
Then, in an authoritarian state in which the formal legal system exists in an atrophied form, welfarism is bound to end up in "reform programs" of "revolutionary" juntas. It is also no wonder that the cultivation of charisma remains the unfulfilled dream of a grand panjandrum.

Since most of social and political problems are not translated into legal forms in the authoritarian state the main function of the courts lies in assisting the administration in policing the population. Purposive variety of legal reasoning or "policy-oriented" approach in legal thought works largely to suit the political exigencies of the authoritarian rule. Hence, paradoxically, the teleological consideration of extra-legal policies, goals and values becomes the exercise of "judicial self-restraint" and "judicial activism" consists in the adherence to legal formalism. When the judiciary attempts to assert its autonomy, its shield is a deft exercise of formalistic reasoning.

When a court chooses to consider only the act in question, to see it as, in Kelsen's words, "an end point of imputation," (4) this usually means that it is determined to ignore the political milieu.

The question of judicial autonomy reflects in an institutional form the antipathy between the legitimacy of the social order and authoritarian rule: for the justification of the increasing social inequalities and obfuscation of the political arbitrariness, the authoritarian rule needs a semblance of judicial autonomy, and yet it cannot afford it. When the authoritarian ruler, unable to generate popularity and respect among the populace, endeavours to reinforce the political culture of apathy and withdrawal, any sign of an autonomous political authority and prestige cannot be tolerated. By the same token, political ascendency through ingratiation begins with a public display of humility and servility.

Hence the formal legal system in its authentic form may be incongruent to the authoritarian rule in the following aspects:

(i) Its frame of reference, the body of the general legal rules, the idea of formal equality and equality before law and its empirical, if not logical, presupposition of the free market and the open political process contradict the policies and standards of the authoritarian power. (ii) Its dogmatic method of thought is not conducive to the interests

(4) Kelsen, Pure Theory of Law, 98.
and goals of the authoritarian power, which derives its strength from the negation of procedural fairness and the particularistic preferential treatment of certain groups. Any system of thought deviant from the authoritarian logic must be discouraged. Hence court proceedings are likely to be viewed as providing a forum in which the politically sacred are openly and legitimately challenged with reference to a set of norms autonomous from the political authority in a language unmanageable by political and economic expediencies.

(iii) The authoritarian psychology is jealous of the relative autonomy of the legal profession whose career is less subject to, and whose source of livelihood is less dependent upon, political control in the context of the bureaucratic updraft toward the apex. The rise of a new breed of the legal professionals more swayed by liberal ideals, the assertion of judicial autonomy in the area of property rights, and, to a limited extent, political crimes have led the ruling group to take various measures to curb the limited judicial independence.

However, in the last analysis, the formal legal system may serve authoritarian politics and the oligopoly: (i) The body of legal rules can always be revised according to the policy considerations of the ruling group through the legislature which serves as the conveyor-belt for legislation drafted by the administration. Then, there is also the ultimate measure, the abrogation of the constitution under a martial law. (ii) In formalist legal thought, especially in the Germanic tradition, there has been a strand which tends to accept the power that be. It is indeed the logical consequence of the formalist conception of the legal order devoid of liberal metaphysics that the legal system is a logical structure of legal dogmas founded upon the ultimate norm which is in turn determined by the factual conditions of politics. The dogmatic formalism of legal positivism stops at the gate of the ultimate “norm”; there is no place in this system of thought for the normative evaluation thereof. This bureaucratic tendency of legal positivism is complemented by the political purposiveness discussed earlier in serving the authoritarian state. (iii) The legal professionals are drawn from the same social backgrounds as the ruling group and its bureaucracy or identify their political and other interests with those of those groups after they are recruited into the profession. To the extent that this statement holds, what appears to be opportunistic purposiveness on their part is merely the reflexion of their view of the social order. Further the ruling group can always decide who these professionals will be or revamp the judiciary by altering the institutional laws. And in
sofar as their professional interests remain clustered around private clients they can at least coexist with authoritarian power. Furthermore more ambitious breeds volunteer as legal technicians for the procrustean job to "indigenize" the liberal legal system. (5)

The foundation of legitimacy of a liberal state is the principle of the identity of the ruler and the ruled, the law-maker and those to whom the law is applied. In the pseudoliberal social order, the people first become the theoretical oracle of sovereignty and then mere object of political power in practice. And then the incongruence between theory and practice leads the ruling group to retrogressively abandoning the theory. So far as the masses are concerned, law belongs to the ruler who makes, amends and abolishes it. It lies beyond their reach and comprehension. They come to know it only when it comes to them to punish. In the hierarchical social order the ruler was the law-giver because he was a surrogate for a divinity, thus there could be, theoretically, no sense of alienation from royal decrees. Or there might have been less sense of estrangement in the social relationships which were governed by internalized normative standards. Through the desanctification and disintegration of the traditional order men had begun to see the social world as an inherently artificial and human design.

In the authoritarian state, it is inculcated that the people make the law, and then, this is deemphasized to the same degree as it is asserted that the ruler does whatever is appropriate for the welfare of the people. The revolutionary conception of the social order which had accompanied the obscure third estate in the feudal order to its transformation into the triumphant citizenry of the liberal state is paraded here as sterile but inevitable slogan devoid of its philosophic and historical underpinnings. Hence law remains as others’ business, as under colonial rule. The experience of the authoritarian power may be all the more estranging precisely because it is asserted that the authoritarian law is made by the people and for the people, while they cannot be subjects who know and act in political life; they are permanently relegated to the status of objects which are known and acted upon. "Legal alienation", on the one hand, catches these central characteristics of the masses' view of the social order and attitude toward the legal system, and on the other hand, reflects the contradiction of the normative order in general and the haziness of

(5) In a similar vein, David Trubek sums up the relationship between legalism and authoritarian politics as "legalization" of politics and politicization of the legal system in the Brazilian context. Toward a Social Theory of Law: An Essay on the Study of Law and Development, 82 Yale L.J. 1, 15-6.
the political legitimacy in particular.

And yet, the underdeveloped social order is a relatively stable one. To be sure individual rulers, bureaucrats and oligopolies rise and fall, and there are even the periodic euphoric outbursts of common unity among the scattered masses. But these do not affect the general features of the social order. I shall discuss on this stability in instability in the context of my treatment of the problems of the social consciousness and the normative order below.

IV. Law and Economic Regulation

The structure of commodity production in the underdeveloped economy is largely determined by a compromise between the developmental policies and the export and investment interests of the “metropolitan” economies. In the early stage of capitalist development production of consumer goods for the home market and for export had predominated. The pattern of “international” trade in this period is characterized by the exchange of the consumer commodities of the metropolitan economy for the food stuff and raw materials of the colony. Consequently the industrial structure of the economy was largely determined by the market for such commodities at home and abroad, and production of “capital goods” was limited to the demand at home.

The colonial market developed for the sale of the imported goods from the metropolitan economy, and exchange value of the local products was determined in this market context. The idea of the free market holds here to the extent that the export interests competed among themselves in the colonial market.

The shift of emphasis in industrial production from consumer to capital goods at the later stage of capitalist development had a profound implication for the emergence of a novel pattern of international trade and consequently for the structural changes in the formal colonial society. The expansion of production without a corresponding expansion of consumption in the metropolitan economy set the stage for the limited industrialization of the former colonies. This limited industrialization of the former colonies. This limited industrialization, the development of contemporary underdevelopment, is reinforced and facilitated by the following factors: First, there has been an inexorable ideology of

(6) Having failed in finding a more suitable word, I reluctantly use the term, “metropolis”, which may appear worn-out to some and unfamiliar to others.
development after political decolonization manifested in economic planning for industrialization and in the justification of power. On the economic level there has been the need to fill the domestic consumer market vacated by the metropolitan economy. Secondly, as a consequence of the transformation of the early classical liberal capitalist economy into the corporate form with the corresponding rise in wages certain sectors of labour-intensive light industry become obsolete, and the capital and and production facilities must seek for cheap labour markets. This is also the case with the production of spare parts of other commodities relatively unsuitable for automation. The exchange value of the local products is determined by this vertical international market system. There is no escape for the underdeveloped economy form the chronic foreign exchange shortage in this trade structure. The political autonomy of the underdeveloped society is consistent with this form of economic organization: the social and political consequences of industrialization in the underdeveloped society are left to the local ruling groups to be dealt with. The metropolitan state is spared from the kind of problems of the industrial economic order which it has faced at home in the course of the incorporation of the working groups into the social system. The problems of social order are presented in police terms, not in a welfaristic fashion. And there are always enough labour markets which offer more favourable terms and investment “climate” as the competition among the underdeveloped economies for the foreign capital become intensified by industrialization policies.

The economic planning of underdevelopment is composed of the introduction of foreign capital and investment with a corresponding mobilization of domestic capital and organization of labour. When there are no significant minerals and crude petroleum to be extracted or other raw materials to be exploited, the marketability of labour becomes the single most important resource for economic growth. The investment in labour requires cheap wages, labour discipline and social tranquility. Foreign loans also demand political guarantee for the repayment of the principal and interests because the borrowers usually cannot offer collateral or other means of repayment guarantee. The government, having guaranteed the repayment of foreign loans with its general revenue or through the banks under its control and having placed the national economy in the hands of business groups initiated with or enlarged with the borrowed capital, must support them with banking, tax, tariff and other preferential treatment. Consequently, the economic well-being of the
nation comes to depend upon the profit-making and foreign exchange-earning capacity of these instant oligopolies.

The development of oligopolistic interests radically alters the market structure. The market is monopolized and small and middle manufacturers and wholesale and retail merchants are vertically integrated to the oligopolies, or otherwise are swept away. It also fundamentally transforms the price system. The price of commodities is largely determined by the cost of the export-oriented industries such as the repayment of the borrowed capital, its interests, the price of raw materials in the international markets, the loss incurred from export, political and other manipulation cost, a safety reserve in real estate and other forms, etc. The monopolization of the market is reinforced by import-substitution policies consisting of establishing industries which manufacture, sometimes nominally, the commodities which have been hitherto imported.

There is also the ever increasing need for foreign exchange for the repayment of foreign loans, for the remittance of the foreign capital and profits, for the importation of the raw materials and for the further purchase of production facilities. Then exporting becomes selling everything that has exchange value in the world markets; profitability is secondary. The cost of the pyrrhic exports must be recovered in the monopolized domestic market and in wages. This form of economic organization determines to a large extent the whole of economic life in terms of division of labour, resource allocation, social stratification and value-orientation.

The general features of the underdeveloped economic structure may be recapitulated in terms of its internal and external aspects: (1) The degree and intensity of interdependence among the different segments of the economy is low, both in absolute terms and relative to the relationships between a segment of the local economy and its metropolitan counterpart. This characterization points to the randomness of the division of labour among the main domestic industrial sectors. It must not be understood as obscuring the relationships among various social strata or between the rural and industrial economy.

(2) The vertical integration between a local segment and its metropolitan counterpart is central to the major thrusts of the economic change. The division of labour takes place along these exogenous lines in which the local segments serve more as appendages to their metropolitan counterparts and less as compliments within the national economy. Economic growth consists largely of the enlargement and intensification of these relation-
ships. The interexchange among the underdeveloped economies remains peripheral.

(3) The persistence of trade imbalance and the structural demand for ever more imports create a continuous crisis of foreign exchange. This may be eased by drastic curbs on imports resulting in depression and/or measures such as more private capital inflow, foreign aid and commercial credit which deepens the economic dependency. The value of the local currency goes continuously going downhill vis à vis international means of payment. All these factors work toward the inherent instability of the price system, which becomes more a function of the external relationships than of local demand and supply.

The net gain of foreign exchange from exports is marginal due to the heavy dependence on imports for raw material, the remittance of profits and interests, and the high cost of exports. Since import substitution consists of business operations financed by foreign capital and often involves only assembly of imported finished components into final products, it saves little foreign exchange.

(1) The stability of the economic order at home partly depends upon the industrial capacity to absorb the growing population in the urban areas and to meet the rising material expectations. To a certain extent, the middle class absorbed by the oligopolies, and, to a lesser extent the industrial workers as well constitute the ambivalent stabilizing forces of this form of economic organization. However, the capacity of the economic system is limited by the underdeveloped pattern of division of labour. In the age of secularism the normative justification of the social order must be presented in terms of general rights. In so far as the preferential treatment of the oligopolies renders this untenable it must be asserted that such particularism is necessary and, indeed, justifiable for the long term interests of all. The efficacy of this sort of the normative structure is dependent upon the assessment of the present projected into future. Thus the maintenance of the appearance of the continuous economic growth and the diffusion of its benefits is imperative.

My present concern is more with an interpretation of the relationships between law and economy in the course of capital accumulation, economic expansion and the transformation of the exchange system than with economy as such. The above summarization of the underdeveloped economy is preliminary for this purpose. It admittedly leaves many important questions untouched or oversimplified, and yet I argue that it catches the central
dynamics of the economic change in a cursory fashion.

The economic counterpart to the universalistic autonomous legal system is the free-market. Liberal capitalist development may be seen as the history of the emergence of an integrated national market in which economic actors enlist the labour and resources of others for their economic ends (maximization of profits) through exchange. In the course of the integration of the scattered segments of economic life into a national economy, a system of unified division of labour developed. The congruence between the nation state organized on the basis of a universalistic legal system and the national economy lies in the fact that the former provides the general framework for economic life and at the same time guarantees the autonomy of market processes.

The forms of economic organization and the characteristics of the pattern of division of labour in the underdeveloped society is incongruent to the formal legal system. Nor does it correspond to the wellaristic administrative and legal order. I have raised this question partly because it is commonly held that the problems of the underdeveloped social order grow out of a historical context in which timeless tradition, classic liberal society and the corporate state coexist and somehow incongruently mixed.

(1) The metaphysical presuppositions, concepts and propositions of the "autonomous" legal system seem to correspond more to the ideology and social life of the rising mercantile groups than to an industrial financial economy. The conception of the legal person abstracted and generalized from the political, social and moral setting is the counterpart to the that of the economic actor whose bargaining power is relatively equal with others in the market place. The idea of a free market system, the seperation of economic rationality from politics and morals reflects, and distorts, the historical conditions of the civil society. Economic conduct is rational to the same degree as the market is autonomous; the predictability and calculability of economic life can be rendered if "extra-economic" factors are excluded from the market place. The exchange value consists in the form of private property guaranteed by the general legal rules and the exchange value is traded in the free market through contractual transactions. The formal equality embodied in the universalistic legal rules favours the third estate vis a vis the landed gentry and status and ecclesiastical groups on the one hand and the labourers and the farmers on the other.

The rationality of the underdeveloped economy is derived from the interdependence of
business groups and political power. As is suggested before the very emergence of the oligopolistic economy is possible because of the preferential treatment of certain groups embodied in particularistic plans and policies. The oligopolies of metropolitan capitalism develop first through the free market and the formal legal instrumentalities, and then transform and destroy the very market system and the legal forms which have given rise to them. In the underdeveloped context the oligopolies and corresponding forms of economic organization emerge through the symbiotic interdependence between politics and economy. The market is primarily a distributive system for monopolized commodities, not an open bargaining place for the economic actors of relatively equal size. It is a central contradiction of the oligopolistic rationality that economic operation becomes "calculable" because of the political and international factors, and yet, the intervention of these factors renders the market system inherently unstable. In the face of the perennial dilemma between runaway inflation and depression the government must resort increasingly to ad hoc improvisatory measures, which in turn tends to result in stagflation.

The general legal rules such as the compulsory and optional provisions of contract law are relevant only to the extent that they do not impede the main thrusts of economic change. They are applicable in the realm of exchange among the "middle" merchants on the horizontal level, so to speak. This statement must also be qualified by the primacy of the role of commercial customs and trust in these mercantile and small industrial groups. It is characteristic of their commercial activities that exchange is intra-segmental as contrasted with inter-segmental and tends to be based on traditional ties among close confidants.

The peripherality of the formal legal system to the main streams of economic change is a corollary of the contradiction between political sovereignty and the economic order. The authoritarian state and oligopolistic economy rise on the foundation of the symbiosis between political power and economic pursuits, and yet, the consciously designed particularism vitiates the normative structure of the social order.

(2) The predominance of political decrees and economic regulations may give the impression that underdeveloped legal order approximates more to welfaristic corporate legal

(7) Some theorists of law and development proceed on the assumptions of the combined model of classical liberalism and corporate welfarism only to find the compatability, if not a correspondence, between the "aplaralistic" trend and the expansion of the capital market. Cf. D. Trubek, J. Gouveia Vieira & P. Sa, O Mercado De Capitais E Os Incentivos Fiscais, 23-92(1971).
system than to the classical liberal model. I have dealt with this question in the course of my discussion of legitimacy. Here I shall explicate further the earlier themes with reference to economy.

The liberal state deduces its claim to political sovereignty from its universality, treating members of civil society as equals. The ideology of formal equality contains the ambiguity of liberalism as to who are these equals: whether men enter civil society to preserve the "property" of "lives, liberties and estates" or only the "property" of goods and land. (8) The exclusion of those who are not men of estate, those who are both inside and outside of the civil society, from the political processes reflects the incongruence between the bourgeoisie as the revolutionary third estate and as the ruling class of the liberal capitalist state. (9) Hence the historical conditions of the liberal capitalist society anticipated its passage to welfaristic corporate state or revolutionary transformation. The thrust of my argument is to point to the very historicity of the welfare state: the constellation of the extraordinary factors which have given rise to the welfare corporate state was conceived in the "womb" of the liberal capitalist society. Again, this is not a retrospective determinisitic interpretation of the historical change. The reference is rather to the social conditions in the underdeveloped context parallel to the distinctive features of the transformation of the liberal capitalist society to the welfare corporate variety. It is first of all marked by the predominance of social institutions such as corporations, labour unions and other interests groups which mediate between individual and state. The ideological notion of representative democracy as a process of cultured debates among the deputies of men of education and property gives way to the conception of political process as the arena of conflicts and compromises of the organized pluralistic interests groups. Similarly, the market is viewed as the bargaining table of the oligopolistic groups in which the state intervenes for various purposes ranging from restoration of market equilibrium to economic stimulation. The economic ideology passes from the equality of the economic actor in the autonomous market place to the ideal of "consumer sovereignty". The autonomy of the legal order declines to the extent that it is comingleed with the administrative order of the welfare

(8) Locke's conception of the two meanings of "property" reflects this ambiguity. Second Treaties, Sect. 124, 138-40, 193.

(9) An emergent class must represent its interests as the common interests of the members of society. Both the profound strength and the ambivalence of liberalism consist in its claim to generality and universality.
corporate state.

The incorporation of the labouring classes into the social system, or rather the very development of the welfare corporate state, presupposes the following factors: (i) The accumulation of the national wealth to the extent that the economic system is capable of expanding material benefits to the lower strata of society. This, in turn, is rendered possible by the expansion and domination of the overseas markets which absorb the industrial surplus during the rapid economic growth. The ideology of “social imperialism” catches the central features of the historical change. (ii) The shift of the thrusts of economic production from consumer goods to capital goods and durable commodities renders obsolete the industrial sectors which derive profits mainly from labour surplus. (iii) There must be relatively open political processes which tolerate to a relatively great extent and gradually legalize the organized activities of the labour groups.

On the other hand, the underdeveloped economy is founded upon a characteristic vertical pattern of division of labour, the exogenous pipelines to the metropolitan economy and planned special treatment of oligopolies. The structural characteristics of the economy set limits on the capacity of the economic system to absorb the population and diffuse benefits to wider social strata. The interdependence between particular economic groups and the authoritarian power virtually eliminates the possibility of the development of autonomous intermediary social institutions. As ideologues of economic growth argue, they are detrimental to development and social tranquility. This not very unique attitude is reinforced by the critical role of labour in the underdeveloped economy as discussed earlier.

The regulation of labour comes to have constitutional significance: the employees of the corporations or business entities relevant to national economy must not engage in collective activities. And above all, there is the structural and psychological repulsion against any horizontal grouping of scattered masses.

The hovering sense of ephemerality deepens the obsession with hoarding and pleasure. The inexorable, if episodic and lackadaisical, concern with distributive justice of the welfare state has no place in the oligarchical consciousness.

Legal formalism and economic rationality converge only in the market paradigm. The legal profession, trained in the Continental dogmatic tradition, is likely to view the predominance of regulatory laws and decrees as alien and threat to the body legal. Administrative decisions, business deals and disputes are rarely translated into the language-
of legal rights and obligations.

It is characteristic of the administrative ordering of the oligopolistic economy that normative considerations remain always at the abstract level; the application of formalistic impartiality to concrete decisions or the individualized compromise between economic ends and normative standards has virtually no place therein. The non-specificity of the normative structure of the economic order is congruent to the oligarchical purposiveness, but raise the normative evaluation of concrete conduct to the same level of abstraction. Hence normative judgement becomes inevitably generalized; unable to materialize itself in concrete contexts it lies amorphously in the moral consciousness of the society.