NEO-NATURALISM: TAILORING LEGAL PHILOSOPHY FOR CAPITALISM AND NEOCOLONIALISM

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INTRODUCTION

In recent times, bourgeois legal scholars have revived the natural law concepts of "justice", "reason" the idea of "natural law", "natural rights", etc., as the central tool of the general theory of law. This attempt to reinstate the natural law position is spear-headed by influential western jurists such as Hart, Bodenheimer, d'Entreves, Fuller, Ross and Rawls.[1] In Africa too, contemporary legal thought is dominated in some quarters by a heightened interest in natural law philosophy as a direct incidence of the imposition of the dominant capitalist mode of production introduced by colonialism. Evidence of this interest may be seen in the constitutions of many African countries; these are replete with natural law principles and concepts[2] and the acceptance of the views of the above authors as standard material for jurisprudence in law schools.

The fact that natrual law philosophy has survived so many centuries and continues to dominate legal thought in modern times has been attributed to many factors. Some ascribe the resurgence to the "obstinate vitality" and an "undying spirit" of natural law which can never be extinguished.[3] One author characteristically puts it thus: "If (natural law) is denied entry into the body of positive law, it flutters around the room like a ghost and threatens to turn into a vampire which sucks the blood from the body of law."[4] Other accounts refer to the "eternal" and universal applicability of the "absolute" principles of natural law.[5] Otherwise an appeal is made to the general "abstract" categories of natural law theories in rejection of the "Vienna School" brand of normativism which has failed to provide an adequate explanation of legal phenomena.[6]

It is very easy to think, and equally tempting to believe, that the resuregence of natural law philosophy can be accounted for in the above superficial terms. Of course, there is no doubt that the exposure of the defects of normativism and its scientific unfoundedness was one of the reasons for the departure of modern bourgeois legal thought from normativist positivism. But it would be wrong and likely to mystify reality to explain the essence of the revival of natural law in such facile idealist terms. Such an explanation fails to take account of the material and historical conditions that lead to legal change and development. More importantly, such an explanation would seem to suggest erroneously that law or legal theory can raise itself above social and economic forces by dictating its own notion and ideas through the mind of its proponents.[7]

A critical and scientific analysis of the material and historical conditions within which the rebirth of natural law occurred suggests that the essence or significance

of the rebirth is to be found not in the virtues of natural law philosophy or the deficiencies of positivism. On the contrary, it is to be found in the capitalist relations of production. To discover this essence, therefore, this paper intends to analyse the objective connection between the intellectual and material production at the various stages of capitalist development. In so doing, the aim will be to identify the objective factors that determined the change in legal ideas, culminating in the revival of natural law. This will enable us to demonstrate the main contention of the paper, that there is an intimate link between the history of colonialism and neocolonialism and the revival of natural law. Having done this, an attempt will also be made to closely examine the theoretical tenets and abstract legal categories of modern natural law in order to bring out its social and ideological content: for it is this content that exposes the ideological character of natural law, and reveals its essence as a tool of neocolonialism and the maintenance of our unjust *status quo*.

I. DEVELOPMENT OF LEGAL THOUGHT IN CAPITALIST SOCIETY

(a) NATURAL LAW AND THE RISE OF CAPITALISM

The material foundation for the development of capitalism may be traced to the great revolutions in Western Europe which took place in commerce in the sixteenth and seventeenth centuries. Concurrently with this, there were geographical discoveries which stimulated the development of increased commodity production and exchange, industrial activity, navigation, and commercial capital. These, among others, were the principal factors in the transition from feudal to capitalist production. [8] These early years of capitalism were marked by a demand for the creation of new social conditions that could encourage the concentration of means of production into a few hands, the organization of labour itself as social labour, savings and investment, and the creation of a world market as necessary factors in the development of a "free" market economy. [9]

This demand entailed, among other things, the gradual emancipation of autonomous social sphere where private individual effort in the ownership of land, organization of labour, commodity production, distribution, and exchange, payment of wage-labour, and all other commercial and financial ventures, would be recognized as a legitimate pursuit, unrestricted by "oppressive" religious or institutional tutelage. Historically, the creation of such a sphere of economic activity was part of the struggle by the European bourgeoisie against the boroughs and the latifundists to free themselves from the bonds of feudal subjugation. The essential social conditions considered necessary for their legal protection, therefore, were private individual property rights and a rgime of "freedom of contract" supported by the necessary provisions of tort and criminal law.

To this end, theories stressing the inviolability of private property rights, the fundamental rights of every individual to freedom, liberty, and equality, and the "natural law" ideas of Grotius and 18th-century philosophers like Hobbes, Locke, and Rousseau, all became the basic tools to ensure that the individual entrepre-

neur was subject to the minimum necessary restraint. Grotius, who revolutionised the idea of natural law by secularising it, asserted that human nature (no longer God, as claimed by the scholastics) was the mother of natural law, and that it would operate even if God did not exist. [10] Hobbes stressed the necessity for giving free reign to the individual will, both as an incidence of his natural right and as a basis for the concept of freedom of contract. [11]

Through his popular social contract theory, Locke endowed the emerging social scheme of private individual property rights (capitalist property relations) with a divine origin. He argued that "God and his reason commanded (man) to subdue the earth", "to lay out something upon it that was his own, his labour": "He who responded to this command", by cultivating the earth, "thereby annexed to it something that was his property, which another had no title to, nor could without injury take from him." [12] It is interesting to note how Lock frees the property of the individual entrepreneur from feudal bondage. By stressing the investment of one's labour in a product, he created the notion that the product becomes an extension of the individual self. The result is a postulated property right (Locke uses the term property to embrace one's own person as well as objects), an entitlement that precedes society and law, and which both must "preserve". Finally, Rousseau, also echoing the principles of freedom and liberty, stressed the liberty and equality of all men as an inalienable right inherent in human nature. [13]

It may be mentioned in parenthesis that this same tradition of thought was dominantly associated with the Rule of Law. The essentials of this doctrine are again expressed by Locke through his oft-repeated image of law as fences. Locke's fences marked out autonomous spheres of individual action, through "general, clear, and certain rules" which determine the rights and duties of individuals and the state. Significantly, the fences separate the property of individual subjects from each other, and also protect the individual from the soverign, itself subject to law. [14] It is instructive to note that this classic conception of the Rule of Law assumes an autonomous legal system, a kind of "neutral" framework which would ensure the necessary autonomous social sphere for the realization of the desires of the individual entrepreneur.

By secularising natural law and making it egalitarian, bourgeois jurists succeeded in converting it into a revolutionary philosophy upon which the bourgeoisie rode into power over the feudal class. With the collapse of feudal society, free competition and free market became the social and economic order of the day, with freedom of the individual and freedom of contract adapted to it as its legal form under the political sway of the bourgeois class.

(b) LEGAL POSITIVISM AND CAPITALIST LEGALITY

By the early 19th-century, under a flourishing capitalism, the ideas of freedom, liberty, equality, and justice proclaimed by the 18th century "natural law" philosophers turned out to be the domination of bourgeois orders. Capitalism then sought to perfect this domination, and to consolidate its material, intellectual, and

ideological dominance. Legal positivism responded to this need by reducing the ideals of freedom, justice, equality, etc., to their legal form through the positivist idea of a "legal state" which derived its power from the state, and was limited only by the power of the state. The state, then, which had derived its power from either the will of God or the "general will" of the people under natural law, became an end -in-itself, and absolutely sovereign under legal positivism. Austin, who gave this doctrine of state its classic expression in his imperative theory of law, asserted that the power of the state is soverign, and therefore incapable of legal limi tation. [15]

This positivist doctrine of state emasculated legal positivism itself as a legal theory by isolating law from actual social relations. The recognition of the rights of man under natural law considered individual will as the basis of law. This idea, which had been the legal foundation upon which the bourgeois state had been built, found social expression in the economic activity of the independent individual. The independence of the individual and the prevailing sphere of free economic activity provided the link between law and actual social relations. Legal positivism,however, replaced the will of the people with state force (compulsion) as the basis of law.

In historical fact, this change of idea marked the beginning of the imperialist stage of capitalism. The great success in revolutionising the instruments of production led to an enormous increase in economic activity. Commodity production, which had become the main economic activity, led to the accumulation of large amounts of financial capital, and an ever-growing demand for raw materials. This demand, coupled with the need to reinvest the finance capital, led to the expansion of capitalism to all the corners of the world in search for markets. [16] It is significant to note that the scramble for Africa and the Berlin Conference of 1884/85, which sanctioned the partition of Africa into economic spheres of European interest, occurred in this era. [17] The main characteristics of the imperialist era, therefore, may be summed up as the creation of colonies, which became commodity markets, spheres of capital investment, cheap labour markets and raw material reserves, and the enslavement and systematic plunder of the peoples living in the colonies. The creation of these colonies, it must be emphasised, was achieved through the sheer enormous political and military power of the Western Capitalist States. Force had thus become the mainstay and basis of the state. Cosequently, by making force the basis of law, legal positivism responded to the need to rationalise and validate the actions of the borgeois state.

The controlling influence of legal positivism, however, was shortlived. By the early 20th-century, it had started to lose its position of prominence, and the Austinian version had undergone an essential transformation by techno-jurists like Kelsen. Of course, positivism continues to survive in one form or other in the special branches of law, and in the general theory of law developed within the context of Kelsen's *Pure Theory of Law*. But this exclusively mormativist conception of law has been strongly criticised, even by Western bourgecis jurists, for its exceptional formalism and attempt to create an "algebra of law". [18]

(c) SOCIOLOGICAL JURISPRUDENCE AND THE IDEOLOGICAL CRISIS OF CAPITALISM

Sociological jurisprudence dates as far back as the middle of the 19th century, when writers like Weber, Durkheim and Enrlich attempted to explore the sociological foundations of law. [19] It was not, however, until the early 20th century that it became an influential legal theory in Western jurisprudence. This development is linked with the sociological and historical consequences of the expansion of capitalism into a universal empire. Surely, after the creation of the colonial empires, the architects of the colonial design were more interested in the plunder and exploitation of their colonies, and the repatriation of their booty, than in anything else. The mad rush to grab, and the ensuing cut-throat competition among the major capitalist countries for greater spheres of economic interest had plunged the world into a war of hitherto unknown proportions and brutality - The First World War. [20] The social consequences in the capitalist countries, and the problems of enforcing law and administering the colonies, stared the bourgeois states in the face. The positivist legal order, under which the empire had been created, had no room for such concerns, and could not accommodate such a new situation.

In reaction to these problems, sociological jurisprudence, on account of its concern for expounding the social basis of law, emerged as the dominant legal theory. [21] Roscoe Pound, one of the chief proponents of this school of thought, stressed the idea that law must be regarded more in terms of a legal order and process rather than in terms of "book law", that is, a collection of formulated results. According to this view, the legal order represents a regime upheld by the state's systematic application of force and compulsion, while the legal process refers to the process of administering justice and jurisdiction on the basis of statutes, and the law. [22] With this idea, sociological jurisprudence sought to preserve the imperialist gains of capitalism by providing a legal justification for the legality of capitalism (force), while at the same time providing a solution to the problem of enforcing law, maintaining order, and administering the colonies.

Sociological jurisprudence succeeded in de-emphasizing the absolute reliance on legal rules and statutes by pointing out the social problems that result from the isolation of law from social relations. Its attitude to legislation and the specific character of legal form, however, was nihilistic, and failed to remedy the defect of legal positivism. Alienation of the toiler, a direct consequence of the private appropriation of social production under the capitalist system, continued unabated as one of the most serious social problems. It must be pointed out that these problems were not restricted to the capitalist countries alone, but were felt even more brutally in the colonies. At one level, the practice of administering the colonies through "Orders in Council" passed by the Queen of England, the King of France, Germany, Portugal, etc. had only succeeded in aggravating the social problems that had been caused by the imposition of foreign rule. Sociological jurisprudence had no answer to the deepening gulf between such forms of legislation and the social relations in the colonies. But, more crucially, the attempt to

justify colonialism by reference to the state's systematic application of force and compulsion (legal order) had betrayed the uncomfortable fact that colonialism had less to do with the "civilizing mission" than with the economic exploitation of the colonies.

The failure of sociogical jurisprudence resulted from its self imposed limitation. Following Pound's view that law is not so much the result as an instrument of social engineering, [23] sociological jurisprudence considered law solely as a juristic technique, reposing not so much on statutes as on values reflecting the needs of the day. Sociological jurisprudence therefore denied the significance of analysing the structure of legal norms and the legal forms of social relations. Instead, it contented itself with a purely juristic construction of applied sociological data. By adopting a purely mechanical historical approach to law, however, sociological jurisprudence's functionalism ended at the other extreme of Kelsen's normativism; legal "reality" or "actuality" [24] was linked to static social relations devoid of the dialectics of change and development.

(d) NEO-NATURALISM AND THE TRANSNATIONAL STRATEGY OF CAPITALIST IMPERIALISM

The failure of sociological jurisprudence as a general theory of law capable of dealing with both the specific legal problems (e.g., the structure of legal norms, interpretation of the law, codification, etc.) and the more general, fundamental questions relating to the material, political and ethical premises of law (i.e, bringing out the essence of law), and its failure to provide a concrete justification for colonialism and capitalist legality, led to a philosophical and ideological crisis in the capitalist states. [25] Historically, this marked a critical period of capitalism - the beginning of its demise.

The break-up of the empires had started as early as the beginning of the 20th century, with the Great October Revolution of Russia. By the early 1940s, the bankruptcy of capitalist ideology had increased the tempo of the demise. This was characterised by the deepening contradictions within the capitalist systems, which resulted in the Second World War. The consequent social upheavals and political struggles in the colonies (e.g. Asia and Africa) compelled the imperialist power to grant political independence to many of their colonies. As a result of these events, there was a search for a "new" philosophy of law. This set the stage for the rever sion to natural law philosophy as the theoretical justification of the arbitrariness and lawlessness of capitalism.

Appealing to the old worn-out concepts of "equality" and "liberty", Bodenheimer tried to anchor the basis of law on "human nature", stressing that these values were inherent in the legal system. [26] The contradictions between the actual relations and legal reality which were manifested in the limited section of the society protected by the law, however, did not give much credence to such a theory.

Fuller, in his contribution, sketched an "inner morality" of law, that is, a body of moral procedural rules, as the minimum requirement to which every legal system

must conform. These requirements are as follows: generality; promulgation; prospective legal operation, i.e. a general prohibition of retroactive laws; intelligibility and clarity; avoidance of impossible demands; constancy of the law through time, i.e. avoidence of frequent changes; and congruence between official action and declared rule. According to Fuller, these requirements are based upon the interactional foundations of law, that is, upon human interactions to which law responds, and are necessary to ensure a reciprocity of human actions. [27]

This view is notable for its realistic admission of the fact that there is an interplay of moral considerations in the actual relations of human beings, and that the legal actuality reflects this morality in ideological form. The theory, however, is not fully developed. It is to the critics of Fuller that we have to turn for further development. Among the many critics of this approach, we may cite Hart, who ironically gives substance to Fuller's "procedural" theory. The irony of Hart's criticism consists in that, even though his "substantive" theory sets out to reject the interconnection between law and moral considerations, it ends up complementing Fuller's theory.

Hart and a group of other prominent Western bourgeois jurists tried hard to refute the notion that certain "legal" acts can be morally wrong, by insisting on a clear demarcation between law and morality. [28] Implicitly, this sought to nip in the bud the issue of the moral basis of colonialism. Adopting a semi-sociological approach, Hart linked the content of legal rules to "natural facts". According to him, there are certain "simple truisms" (viz. human vulnerablity, approximate equality, limited altruism, limited resources, and limited understanding and strength of will) which explain why, given survival as the goal of human society, legal rules should have a specific content. [29]

This content, the "minimum content of natural law", consists of "universally recognized principles of conduct which have a basis in elementary truths concerning human beings, their natural environment, and aims." [30] This means that, for Hart, the basis of legal rules is "natural law"; that is, human acts which are "naturally prohibited by law" because they are vital to the survival of human life [31] a classic example of the old natural law technique of smuggling moral values through the back-door into legal rules. For what is "naturally prohibited" is none other than those acts considered inimical to the survival of the capitalist order. In effect, this apology for capitalism enjoins us not only to limit our theoretical enquiries about law to rules which are deemed "legal" by the capitalist legal order, but also to desist from questioning the human acts (e.g. colonialism and other capitalist activity) which are "naturally prohibited byl aw" (i.e.the capitalist legal order).

A prominent contemporary companion theory in American jurisprudence that also has its roots in natural law is the liberal state theory which grew out of Locke. [32] Hart and Sacks, who are the leading proponents of the theory, developed the conception of law as a "facilitative framework", within which the individual would be free to pursue his interests and advance his welfare as he saw fit. [33] The jural postulates of this theory, which reflect the economics of "Free Trade" [34]

capitalism, stressed the interdependence of individuals or groups within society, and the importance of "general acceptance" as the constitutive and procedural "understandings" which form the core of a legal system. [35]

This theory is worth special mention, not because of its direct importance to neocolonialism (although an argument could be made for this proposition), but because its jural postulates have been transformed into powerful conceptual tools with which America has imposed its hegemony over the world. The economic substratum of this, of course, is the emergence of America from the Second World War as the most dominant economic and military power among the capitalist states. Historically, this represents America's bid to consolidate her dominance. To achieve this aim, it was necessary, among other things, to create free economic spheres all over the world (i.e. to break the monopoly of European imperialism). Secondly, it was important to gain access for American private corporations (the flagbearers of American imperalism) to the neocolonial markets of the European capitalist powers.

The essential legal fremework within which these objectives were realised is international law. With the aid of bourgeois jurists like Jessup, Friedmann, and McDougal, America spearheaded the widening and diversification of international law to accomodate the neocolonial Asian and African nations. The notion of in-'erdependence, for instance, was transformed into an international law principle - t'interdependence of nations" to embrace all nations of the world under the concept of a "world government" or "international government." [36] Ostensibly, this reinforced the independence and sovereignty of the new nations. But more significantly, it gave them the legal recognition to engage in international state transactions with states other than their former colonial masters, thus opening them up for universal exploitation. To enable the American multinational corporations to gain access to these neocolonial markets, the concept of "transnational law" developed by Jessup was used to break the former barrier between private and public law, thereby conferring legal recognition of private corporations as legal subjects of public international law. [37]

Another outgrowth of the liberel-state theory that has been transformed into an international law concept is the principle of "general acceptance." Briefly, the principle means that decisions "duly arrived at" within the legal framework should be accepted as binding until they are "duly changed."On the basis of this principle, the neocolonial Asian and African nations, on admission to the international community, were deemed to be automaticaly subject to the entire corpus of international law, including those that reflected and strengthened the system of national oppression, colonial plundering and imperialist robbery. [38] The application of this principle in international law was employed to support the *status quo* of international law and to advance the neocolonial interests of capitalism.

II. NEO-NATURALISM AND NEOCOLONIALISM

(a) OBJECTIVES AND METHODS OF NEOCOLONIALISM

One of the important results of the general crisis of capitalism was the beginning of the decline of the colonial empire. The nationalist struggles that had started at the beginning of the 20th century had gathered enough momentum after the Second World War to deal a fatal blow to the colonial domination by the major capitalist powers. These historic developments ensured the final collapse of colonialism (with the exception of South Africa and Namibia). The break-up of the colonial empire raised the question of the relationship between the former colonies and the metropolitan countries. In the wake of the current situation, the imperialist countries could no longer rely on the effectiveness of the old colonial methods of domination, which had been made possible because they wielded complete political and economic power over the colonies. Yet there was the need to maintain some form of relationship if the imperialist countries were to continue enjoying the advantages of cheap labour, material reserves, investment and commodity markets, and all the other benefits that accrued from colonialism. In response to this need the imperialist countries adapted to the new situation by disguising their colonial policy, codifying old methods and evolving new ones, and altering their strategy and tactics. The consequence of this change of the historical relations between the former colonies and their colonial overlords has given rise to a whole series of methods and manoeuvres that are described by the term "neocolonialism".

Neocolonialism has been defined as "the colonial policy of the era of the general crisis of capitalism, implemented by the imperialist powers in relation to the former and existing colonies by means of more subtle methods and manoeuvres so as to propagate and consolidate capitalism and impede the advance of the national-liberation movement, extract the largest possible profits and strengthen the economic, political, ideological, and military-strategic footholds of imperialism." [39] From this definition, the salient features of neocolonialism may be identified as the control, oppression, and systematic plunder of the former colonies through new forms which disguise the control and pillage. Hence, while there is a change in the methods and manoeuvre of neocolonialism, its aims and objectives remain the same as those of colonialism.

We have shown that the rebirth of natural law theories occurred during the period immediately following the Second World War - a period of general crisis of capitalism and intensive national-liberation movements activity. By the 1960s, when nationalist struggles had reached a climax with the subsequent grant of independence to many former colonies in Africa, it was possible to identify a marked proliferation of natural law ideas and theories. [40] Hence, not only did the rebirth of natural law coincide with the break-up of the colonial empire, but, as the disintegration of the empire intensified, so also did the appeal to natural law theories. Natural law therefore served the need to provide a "new" legal philosophy, within which the new relations between the former colonies and the metropolitan countries can be defined. Its historical role was to work out an agreeable arrange-

ment for the "peaceful coexistence" of the imperialist powers with their former colonies, in order to maintain the material benefits of colonialism. In effect, neo-naturalism became an ideological tool of neocolonialism, with which the capitalist powers sought to justify colonialism and capitalist legal actuality.

The attempts to explain the resurgence of natural law theories by reference to the "obstinate vitality," "undying spirit," "universal applicability" and "absoluteness" of natural law principles, or the inadequacy of legal positivism *per se*, therefore, represent bourgeois attempts to shroud colonialism in obscurity. This is necessary in order to insulate the natural law justification for capitalist legal actuality from scrutiny and criticism. We are thus mystified, trying to grasp the "justice" of colonialism. [41] However, we are impressed by the claim to "universalism" and "absolutism" and the appeal to "justice," "reason," and the ideas of "natural law" and "natural rights," and fail to see that all such concepts are ideological weapons in the arsenal of neocolonialism, deployed to maintain the dominance of capitalism both at the centre and the periphery.

In a rather revealing study of the digression from positivism to neo-naturalism in Western countries, Tunkin, uncovers the neocolonial underpinnings with characteristic clarity.According to him, confronted with the threat to its domination and eventual demise, the imperialists, in a frantic effort to save face and either stem the tide or soften the blow, rejected the legal bed-rock upon which the empire had been founded: 19th-century legal positivism, by which might was right. In its stead, they manipulated natural law into a handy tool that enabled them to repudiate the legality of colonialism. [42] In his words,

> In proclaiming "natural law" to be the basis of "positive law" and of international law in general, bourgeois jurists, willingly or not, give imperialism the opportunity to cite, in justification of its aggressive actions abstract, admittedly different, interpretations of "natural law," principles derived from the "nature of man", from the idea of justice, and so forth. [43]

Schwarzenberger also confirms this view, by remarking that the primary role of the natural law theories is "to justify action that by positive law is illegal.." [44]

(b) ADVANCING CAPITALIST IDEOLOGY THROUGH LEGAL ABSTRACTIONS

To illustrate this classic neocolonial method identified by Tunkin, let us look more closely and in some detail at the views of Hart, whose ingenious manipulation of natural law as the central tool of a general theory of law is simply unequalled. Hart's views are remarkable because they feature prominently all the necolonial tactics of craftiness and subtle disguise by camouflaging the essence of imperialist colonial policy with abstract legal categories. A striking example of this is Hart's attempt to disguise a natural law theory as a positivist one. The method he adopts and the relative suceess he attains are what single him out as the most ingenious of the modern bourgeois "natural" lawyers.

Hart insists that, even though he subscribes to some natural law position - "the minimum content of natural law," - his theory is nevertheless a positivist theory. By making "natural law" the basis of legal rules, Hart was able to smuggle in natural law concepts, such as "justice," "liberty," and "equality," as the object of positive law. With the obvious moral overtones of these concepts, Hart created the illusion that the "new" capitalist order is committed to justice, fairness, freedom, and equality. This, in effect, sought to dissociate the imperialist countries from their admittedly cruel acts of subjugation, plunder exploitation and genocide perpetrated against the ex-colonies, and sought to give the "new" capitalis ordr the opportunity to repudiate the legality of colonialism.

Hart laboured under considerable stress to prove that this method (his theory) of justifying colonialism and capitalist legal actuality is legal" (i.e. a positivist theory), and not merely "moral" (i.e. a natural law theory). [45] The proof, he contended, consists in that law may be viewed as an "orer" *simpliciter*, and must therefore be distinguished from morality [46] This argument, as we pointed out earlier, implies that all theoretical enquiries about law would be limited only to those deemed "legal" by the "new" capitalist order. With this demarcation between law and morlality, the issue of discussing, let alone declaring, those cruel acts of colonialism as criminal or illegal would, of course, not even arise. For those acts were not and have not been legally defined. [47] At best, therefore, they would remain moral issues with which the law does not concern itself. However, should anyone worry about the obvious contradiction between the commitment of law to justice and the law's refusal to concern itself with such cruel acts, the blame cannot be put at the door of the "new" capitalist order. It is the result of a cardinal principle of legal theory that law must be separated from morality.[48] With such ingenuity, Hart and his disciples in the neocolonies attemmted to close the ignominious chapter of colonialism, and give capitalism another lease of life under neocolonialism.

This method of justifying capitalist legality raised what Hart considered vital theoretical question, among which are the following: (i) What is the criterion for determining law and morality? (ii) What distinguishes a legal act from a moral one? The answers to these questions, it must be emphasized, have direct implications for capitalism. For not only would they determine the legal basis of the justification proferred for colonialism, but, also, they would determine the legal validity of the "new" capitalist order. Besides, the validity of Hart's own theory and the fundamental question of the adequacy of natural law as a general theory of law also depended on them.

In answer to these questions, Hart resorts to abstract categories and vague theoretical formulations which are intended to conceal the ideological content of his theory. The result is some rather banal assertions and contradictions which achieve little, apart from mystifying reality. Hart identifies the criterion for determining "law" and for distinguishing a "legal" from "moral" act as the "rule of recognition". This rule, according to him, is the criterion for "conclusive identification of primary rules of behaviour" and all other "legal" rules of a legal system. [49] This,

of course, means that the "legal" rules are already legally valid, and the "rule of recognition" merely assists us in identifying them. It does not infuse them with legal validity, and therefore cannot be the criterion for determining their legality. However, by some inexplicable logic, Hart would have us believe that legal rules derive their legal validity from the "rule of recongnition", [50] Assuming that this is so, how does the "rule of recognition" validate the rules of the legal system, and what is the source of this validating rule?

With regard to the former question, Hart provides absolutely no answer, not even a suggestion. As to the latter, he attempts an answer which is neither specific nor consistent. Asserting initially that no question can arise as to the validity or invalidity of the "rule of recognition", Hart insisted that the rule is simply accepted as appropriate for use. [51] Does mere acceptance then validate the rule? On one occasion, Hart argued that the assertion that a given rule of recognition exists can only be an external statement of fact, and admitted that the function of the rule is to specify "some feature or features, possession of which by a suggested rule is taken as a conclusive affirmative indication that it is a rule of the group". [52] What this "feature or features" are, is, again, not immediately made known. Finally, even when Hart concedes the importance of clarifying these issues and the source of the mysterious "rule of recongition", he stops short of giving a clear cohesive answer. All he tells us is, "The rule of recognition exists as a complex but normally concordant practice of the courts, officials and private persons in identifying the law by reference to certain criteria". [53]

This vague and evesive explanation, which essentially begs the question, takes us back to square one. For we are back at the point of trying to find out the "certain criteria" by reference to which the "law" is identified. Nevertheless, it may be observed that even if we accepted Hart's own position that the behaviour of the "officials" of the system constitutes the conditions for the existence of the "rule of recognition", it would still confirm our contention that what is "legal" is what is deemed so by the "new" capitalist order, or what Hart himself euphemistically refers to as "internal statements of law". Hart's contrivance to bury the source of the "rule of recognition" in obscurity is explained by Raz, who suggests that what Hart is trying to do is to avoid the acceptance of the point that the "rule of recognition" is a customary law rule, whose existence is a matter of fact and must consist in actual practice. [54] Why, we may ask, is Hart trying to avoid this? Raz attempts to answer this question, but does not go beyond logical inconsistencies. A deeper probe, however, reveals Hart's theory as a guise for the establishment of the hegemony of the legal culture of capitalism, and exposes the neocolonial character of the theory.

It may be recalled that the fundamental point of Hart's theory is an arbitrary non-historical division of human society into "pre-legal" and "legal" social structures. Of course, characteristically, no reasons are given for the basis of this division. Neither are we told what makes one society "legal" and the other "pre-legal", nor do we know how a society changes from one type to the other. All that Hart tells us is that "pre-legal" societies are those based upon a social structure of customs

and simple rules which tell people what to do and what not to do. The rules a of this type of social structure do not acquire the character of law, and are therefore classified as "primary rules of obligation". Such social structures may be found, according to Hart, only in "primitive" societies (a direct reference to colonial and excolonial societies). [55] "Legal" societies, however, have, in addition to "primary rules of obligation", advanced rules known as "secondary rules", within which there are secondary power-conferring rules which set up the legislature and other agencies of adjudication and rule enforcement. [56] These "secondary rules" combine with the pre-existing" primary rules of obligation to form law. [57] But - and this is important - the existence of the "secondary rules" can be found only in developed societies (an obvious reference to the imperialist countries). [58]

Hart's jurisprudential criterion of law is thus the union of primary and secondary rules. This, in essence, means that the distinction between a legal rule and a moral one turns on the particular type of society the rule emanates from and exposes the ideological content of Hart's theory. From the point of legal theory, this criterion is so ludicrous that it leaves no doubt about the bankruptcy of modern natural law as a general theory of law. Nevertheless, ludicrous and botched as it might seem, this criterion plays a rather significant role in Hart's theory and should therefore not simply be set aside.

In the first place, it is the strategic conceptual tool that Hart uses to mislead the world that his theory is positivist. In other words, it is the crucial conceptual apparatus which enables him to maintain the legal basis of his theory as well as his justification of colonialism and capitalist legal order. Secondly, and more significantly, this critarion provides the clue to understanding why Hart tried to resist calling the "rule of recognition" a customary law rule, and this revelation holds the key to the essence of Hart's theory.

From Hart's own analysis, the "rule of recognition", by definition, is a secondary power-conferring rule. Its existence therefore has to be confined only to "legal" societies. Otherwise it would be contradictory to admit that it can be found in "pre-legal" societies too. The logical requirement of consistency, therefore, may have operated as a constraint upon Hart's acceptance of reality. But conformity with reality was not the essence of Hart's theory: there were patent over-riding Eurocentric ideological concerns which made it imperative to confine the "rule of recognition" to "legal" societies only, even if at the risk of sacrificing reality.

To attain this ideological goal, it is noteworthy that Hart's theory attributes no power-conferring rules to the primitive societies. The reason for this, he says, is because the rules of such societies are too primitive to be called law. They may therefore be called "primary rules of obligation" or simply rules of custom. Obviously, by admitting that the "rule of recognition" is a customary law rule, Hart would thereby be investing the "primitive" colonial and excolonial societies with legal power with which their toiling masses could challenge the legality of capitalism. It was therefore of the utmost importance that the "rule of recognition" should remain, at all costs, a secondary power-conferring rule, out of reach of the "primi-

tive societies". It is for this reason - and this explains the essence of Hart's theory - that Hart avoids calling the "rule of recognition" a customery law rule For, by ensuring that the "rule of recognition" remained a "legal" rule, Hart, willy-nilly, ensured at the same time the exclusive legal domination and security of the "new" "capitalist order, and provided neocolonialism with a legal guarantee.

(c) INTERRELATIONSHIP BETWEEN NEO-NATURALISM AND NEOCOLONIALISM

It is important to stress that this analysis of the formation and realisation of law in the capitalist system and the legal mediation of natural law phisosophy should not be misunderstood as the result of the subjective or conscious effort of the Western jurists and philosophers. On the contrary, it should be understood as the consequence of the objective connection between intellectual and material production. [59] This means that the ideas, concepts, and theories expressed by the various jurists and ultimately the result of the objective needs of the capitalist system, and therefore reflect the capitalist relations of production.

Normally, these relations find expression in the ideas of the ruling classes of society, [60] but it is the jurists who, as a result of the division of labour, are assigned the cult of these ideas. The jurists then employ abstract ideas or "ideal formula" to give the ruling ideas the form of universality, and represent them as the only rational and absolutely valid ones. Objectively, however, the ideas, concepts and theories produced by these jurists are nothing more than the ideal expression of the dominant material relationships, grasped as ideas. Consequently, the ideas expressed in the dominant legal theories under capitalism necessarily seek to protect and maintain the capitalist relations of production and the dominance of capital. In this way the intellectual ideas expressed under capitalism objectively correspond with the capitalist mode of production.

Accordingly, the ideas of justice, liberty, equality, human rights, etc, expressed in neo-naturalism are not only determined, conditioned, and moulded by capitalist social relations, but are meant to serve the capitalist system. This explains, for instance, why the cruel acts of colonialism are not described as criminal: the juristic facts that entail the definition of what constitutes a crime are determined by what is considered inimical to the capitalist system. [61] It follows from this that when natural lawyers and neo-naturalists talk of justice, rule of law, fundamental human rights, and the establishment of a legal regime of equality, liberty, etc., it is pertinent, indeed imperative, for us to enquire about whose justice, equality, rights, etc., they are talking about.

The answer, in the light of our analysis, is that it is the justice, equality, and rights of the ruling classes in the imperialist countries and the exploiter classes in the neocolonial enclaves who consciously collaborate with imperialism and neocolonialism to protect the interests of foreign capital upon which their existence and essence hinges. The dominance of capital in the neocolonies, made possible through the dependence of the comprador bourgeoisie on and their active col-

laboration with foreign capital, is further entrenched by the most important superstructural institutions. Among such institutions are the schools, colleges and universities controlled by the conservative intellectuals whose activities are linked with, and to some extent determined by the classes they serve or are in collusion with. This group of the "elites", [62] addicted to overt and covert psycophancy, cooperate directly with the exploiter classes in the neococolonies to perpetuate capitalist and neocolonialist ideology, through a faithful reproduction of western ideas, concepts and theories. [63] It is this fact which makes it conclusively clear that neonaturalism is intimately linked wih the history of colonialism and neocolonialism - the former providing the legal and ideological justification for the latter.

CONCLUSION

Increasingly, the dominant legal thought in the Western capitalist nations and the emergent nations in Africa is being shaped and dominated by natural law philosophy. Many Western jurists, extolling the virtues of natural law, have attempted to shroud the objective reasons for this renewed interest in natural law in mysticism and obscurity. Rejecting their explanations as superficial and unrealistic, this paper has attempted to penetrate into the social content of the juridical form of capitalist social relations in order to analyse and bring out the essence and implications of the revival of natural law.

As our analysis reveals, after the collapse of the colonial empire of capitalism, although the essence of imperialist colonial policy remained unchanged, there was a need to disguise it in order to adapt to the change in the relations between the imperialist powers and their ex-colonies. This led to the modification of the old methods of colonialism, and the evolution of new strategy, tactics and manoeuvres to camouflage the old policy of enslavement and systematic plunder and pillage. The introduction of new forms for modern capitalism paved the way for and characterises the new era of capitalism - neocolonialism.

One of the mos important methods typical of neocolonialism is the creation of various new forms for the export of industrial and finance capital. Consequently, attention is continuously focussed on this or other economic aspects of neocolonialism, to the neglect of other aspects. Though such emphasis is supreme and understandable, it is our belief that it would be committing a grave error if we allowed the supremacy of economics to shadow or obscure the vital and decisive role that law or legal theory has played in justifying, consolidating,maintaining and preserving neocolonialism.

It should be understood that the dominance of foreign capital and the other forms of foreign control which have become so pervasive in our societies are carried out within a legal framework which reinforces capitalist dominance and control. Such a legal framework, we have shown, is fashioned out of and supported by neo-naturalism. Hart's theory, for example, significantly reveals that neonaturalism does not only reinforce a distorted, abbreviated and attenuated under-

standing of our colonial experience and heritage, but it also attempts to downgrade our legal culture and to impose the hegemony of Western capitalist legal culture upon us. Together with the active collaboration and collusion of the comprador bourgeoisie and the conservative elities in our societies, this ensures foreign legal control, which facilitates the dominance and control of capital in our neocolonial societies.

The neocolonial character of neo-naturalism is not only shrouded in mysticism and obscurities, but is subtly bedecked with abstract theoretical formulations. To discover the essence of such theories and expose the link between them and neocolonialism, we have to cut across the theoretical tenets and abstract legal categories. This calls for a critical and scientific analysis of law and the sociology of law; for, as a major step towards the total liberation of the toiling masses of the third world, it is important to understand the legal implications and to expose the legal as well as other methods of neocolonialism, so as to ensure that the struggle against foreign domination and control is waged from all possible angles.

FOOTNOTES

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1. The dominant influence of natural law in modern Western jurisprudence is discussed by Friedrich in *The Philosophy of Law in Historical Perspective*, 1963, pp. 178-9; see also Lord Morris of Borth-y-Gest, "Natural Justice", in (1975) *Current Legal Problems*, 1, and Lord Lloyd, *Introduction to Jurisprudence*, 4th edit., Stevens, London, pp. 86-7.

2. See, for example, the Independence Constitution of Zambia, Chapter III, titled "Protection of Fundamental Rights and Freedoms of the Individual"; the Independence Constitution of Ghana, Chapter 3, which provided for a bill of natural rights of the American constitutional type; the Third Republican Constitution of Ghana; the Second Republican Constitution of Nigeria, Chapter IV, titled "Fundamental Rights", etc. While the Preambles to these Constitutions and many other swear by the Almighty God that the constitutions are a framework of government which shall secure for the peoples the blessings of liberty and prosperity, equality, freedom, and justice, objectively the constitutions guarantee the dominance of the capitalist ruling classes. An interesting example of this contradiction is the Second Republican Constitution of Nigeria, which in S.16 enshrines the protection of private property and capital. For the background to this development, see *Proceedings of the Constituent Assembly*, Official Report, Vol. I., Federal Ministry of Information, Lagos, 1979.

3. Laski, H.J., *Holmes - Laski Letters*, Vol. I, 1924, p. 116.

4. Gierke, O., *Natural Law and the Theory of Society*, quoted in Christie, G.C., *Jurisprudence; Text and Readings on the Philosophy of Law*, West, Minnesota, 1973, p. 203.

5. Dabin, J., General Theory of Law, No. 110 in the *Legal Philosophies of Laski, Radbruch, and Dabin*, 328, trans. by Kurt, W., Harvard, 1950.

6. See Maritain, J., *The Rights of Man and Natural Law*, 1943; and his *Man and the State*, Chicago 1951.

7. This type of erroneous, mythical, and idealistic approach to the study of law is used by the conservative jurists and intellectuals in our societies to provide intellectual support for capitalism and neocolonialism, with which they not only sympathise but actively and consciously collaborate to maintain the *status quo*.

8. Marx, K. Capital, Vol. III, Progress, Moscow, pp. 295-6, 332-3; see also Sweezy, P.W., "The Transition to Socialism", in *Monthly Review*, New York, Vol. XXIII, No. 1 (May 1972) p.2.

9. Marx, K., Letter to Engels, F., 17 July 1854, in *Selected Correspondence*. Foreign Languages Publishing house, Moscow, 1955, pp. 105 - 8.

10. Grotius, H., *De Jure Belli ac Pacis*, trans. by Kelsey. F., Oceana, 1925.

11. Hobbes, T., Leviathan, Everyman edit., 1914; see also Varrender, *H., The Political Philosophy of Hobbes*, 1957, p. 299.

12. Lock, J., *Civil Government*, Second Treatise, Chapter V, Gough ed., 1946.

13. Rousseau, J.J., *The Social Contract, Everyman* edit., Book II, 1913; of Maritain's view, "The right to private ownership of material goods pertains to natural law", in *Man and The State*, University of Chicago, 1951, p. 91.

14. The root idea is also expressed in liberal-state theories and numerous familiar maxims, such as *Non sub homine seed sub deo et lege*.

15. Austin, J., *The Province of Jurisprudence Determined*, ed. Hart, 1954, pp. 253 - 9.

16. *Marx - Engels*, Vol. I, Progress, Moscow, pp. 526 - 8.

17. Although initial African contact with Europeans preceded this era, this period marked the introduction of colonialism into Africa and the beginning of formal economic and political relations. See Uzoigwe, G. N., *Britain and the conquest of Africa*, NOK, Enugu, 1983.

18. See Stone, J., *Legal System and Lawyers' Reasonings*, Stevens and Sons, 1964, p. 98; and Hall, J., *Studies in Jurisprudence and Criminal Theory*, 1958, p. 35.

19. See Waber, M., *Law and Economy in Society*, edit. Rheinstein, 1954, Chapters XII, and XIII; Alpert, *Emile Durkheim and His Sociology*, 1961; and Ehrlich, E., *Fundamental Principles of Sociology of Law*, trans. by Moll, L.W, Harvard, 1936.

20. See Kamenka, E., and Neale, R.S., eds. *Feudalism, Capitalism and Beyond*, Edward Arnolds, Berkshire, 1975.

21. A rival theory - Anglo-American Realism - which conceived of law as what the courts decided also emerged around the same time as Sociological Jurisprudence. Its influence, however, was limited to the U.S.A. and a few Scandinavian countries.
22. Pound, R., *Jurisprudence*, West, St. Paul, 1859.
23. Pound, R., *An Introduction to the Philosophy of Law*, Yale, 1961.
24. See Jawitsch, L. S., *The General Theory of Law*, Progress, Moscow, 1981. "Legal reality (actuality) constitutes one of the forms of social consciousness conditioned by social being, a legal superstructure on the economic basis", p. 10; i.e. an embodiment of the specific and general laws of existence that constitute legal phenomena.
25. For details of this crisis, see Tumanov, V.A., *Contemporary Bourgeois Legal Thought*, Progress, Moscow, 1974.
26. See Bodenheimer, E., "Philosophical Anthropology and the Law" (1971) *Cal. Law Review*, Vol. 59 No. 3, 653.
27. See Fuller, L. I., *The Morality of Law*, Yale, 1964.
28. See Hart, H.L.A., Book Review, 78 *Harvard Law Review* (1965) 1284, and Fuller, L.L., *The Morality of Law*, Yale, 1969, rev. edit., Chapter 5,
29. See Hart, H.L.A., The Concept of Law, Oxford, 1961, pp. 169-195,
30. Ibid.
31. Ibid. Of. Hart's theory of "legal paternalism", in which he argues that the laws prohibit certain acts or conduct, not because they are immoral *per se*, but because they are regarded as "offensive", is designed to protect the public from such acts. Hart, H.L.A., *Law, Liberty, and Morality* Oxford, 1963.
32. Locke regarded law as a neutral framework for social intercourse and production. The state, according to him, provides the necessary security (lacking in Hobbes's state of nature), but its function is to permit harmonic interaction whereby the individual entrepreneur will be able to maximise his welfare (i.e. his property); for the "chief end" of men's putting themselves under government "is the preservation of their property". Locke, J. *Civil Government*, Second Treatise Gough, ed. 1946, Chapter IX.
33. Hart and Sacks, *The Legal Process: Basic Problems in the Making and Application of Law*, Tent. ed., 1958, pp. 124 - 185.
34. By „Free Trade" is meant the unfettered movement of capital, freed from all political, national, and religious shackles and subject only to the "eternal laws of political economy," that is, the conditions under which capital produces and distributes. See Marx, K., "The Chartists", in *New York Daily Tribune*, 25 August, 1852.
35. This notion bears an evident similarity to - or it could be said, represents one possible elaboration of - the concept of the Rule of Law in American jurisprudence.
36. See Friedman, W., *Law in a Changing Society*, 2nd edit., Stevens and Sons, 1972, preface to second edition, p. 11; and McDougal, M., International Law, Power and Policy; a contemporary conception", 82 *Recueil des Cours*, 1953, p. 183.
37. See Jessup, P. C., *Transnational Law*, Yale, 1956, p. 51
38. Cf. The Soviet Union's argument for refusing to accept the reactionary norms of international law, in Tunkin, G. I., *Theory of International Law*, trans. by Butter, W.E., Harvard, 1974. Pt. I. Chapter 2.
39. Nakhrusher, V., *Neocolonialism: Methods and Manoeuvres*, Progress, Moscow, 1973, p. 47.
40. For a catalogue of natural law writers of this period, see *Encyclopedia of Philosophy*, ed. Edwards, P., MCMillan, 1976.
41. See Umozurike, U.O., *International Law and Colonialism in Africa*, Nwamife, Enugu, 1979, for problems relating to attempts to expose the injustice and "illegality" of colonialism.
42. See Tunkin, op. cit., Pt. III, Chapter 9.
43. Ibid., p. 264.
44. Schwarzenberger, G., *International Law*, Stavens, 3rd edit, 1957, p. 186.
45. This is a reaction to natural law. Positivism rejected natural law as a system of norms because, as Hume argued the validity of natural law rules cannot logically be treated as an objective fact, but depends on the relative viewpoint of those who apply them. See Hume, D., *A Treatise of Human Nature*, ed. Selby-Bigge, 1888, pp. 516-534. Positive law, on the other hand, is regard-

ed as ascertainable and valid without regard to subjective considerations. Hence positive law was regarded as separate from morality, which was equated with natural law.

46. Hart, H.L.A., "Positivism and the separation of law and Morals", (1958) 71 *Harfard Law Review*, 593.Cf. Fuller's reply that "good order" is that law which corresponds to the demands of justice, or morality, or men's notions of what ought to be, in Fuller, L.L., "Positivism and Fidelity to Law - A Reply to Professor Hart" (1958) 71 *Harvard Law Review*, 630.

47. A crime in Western legal thought is what is statutorily (legally) defined or prescribed as such, and is not necessarily concerned with the enormity of any evil act: Cf. the maxim "justice according to the Law", which justifies the exclusion of moral considerations in the dispensation of justice.

48. Hart, H.L.A., *The Concept of Law*, p. 92.

49. Ibid, Chapter VI.

50. Ibid., p. 105. It may be noted that this has influenced the definition of customary law in Africa as exemplified by the emphasis on acceptance as a requirement in some definitions. See Elias, T.O., *The Nature of African Customary Law*, Chapter II & V.

51. Hart, H.L.A., *The Concept of Law*, p. 107.

52. Ibid.

53. It is significant that Hart himself admits that there is no historical basis for describing these societies as "primitive" (p.16). The spurious reference to structural deficiencies (e.g. static) are not proven, either. This arbitrary division can therefore be only explained as an attempt to impose a Eurocentrically biased model of a primitive system on colonial neocolonial societies

54. Raz, J., "The Identity of Legal Systems", 59 *California Law Review* (1971) 795.

55. Hart, H.L. L. A., *The Concept of Law*, pp - 89-93.

56. Ibid., pp. 93 - 96.

57. Ibid., p. 96.

58. Ibid., p. 92. See also p. 3 where Hart obviously betrays his prejudice by referring to "legal" societies as "countries" (he mentions the countries by their specific names), while he grouped the "pre-legal" societies under the term "primitive communities", "primitive societies", "regime of primary rules", etc., without bothering to mention any of them by specific names. Incidentally, Hart may be right in reserving the term "countries" for "legal" societies only, because at the time he wrote most of the "pre-legal" societies were still colonies.

59. This is a scientific concept developed by Marx and Engels. "To understand the connection, it is important to conceive material production in its specific historical form and not as a general category; this will enable us to grasp the characterisations of the intellectual production which correspond to the material production and the reciprocal action between them," Marx-Engels, *German Ideology*, Progress, Moscow, 1845 - 46. Vol.5, Section I, pp.35-7.

60. This is based upon the real supposition that the class which is the dominat material force in the society is also at the same time its dominant intellectual force. See Marx-Engels, *German Ideology*, p.36.

61. This fact is amply demonstrated by Marx in his study of the role of slave labour in the origin and development of capitalism. As he pointed out, when slave labour was necessary for the development of the system, it was maintained and expressed as a legal form of property relationship. Consequently, the inhuman aspects of slavery were not made illegal. It was not until slave labour ceased to be suitable for further capitalist development (i.e. after the invention of machines, human labour became relatively inefficient, uneconomical, and unprofitable) that slavery was declared illegal. See Marx Engels, Vol. I, p. 485.

62. The term "elite" is used here in its Marxist sense. As such it does not denote a social class, since the members of the elite do not occupy an independent position in the system of social production but are linked with the interests of the classes they serve or are in collusion with.

63. In Nigeria, for instance, the proliferation of law text-books which to a large extent simply reproduce English law is a vivid example.