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THE LAWS OF A NATION: THE ESSENTIAL FORMULA FOR A LIBERAL AND DEMOCRATIC STATE

by Yasutomo Morigiwa*

I. CONDITIONS FOR A LIBERAL DEMOCRACY

Yes, the “winds of change [are] swirling across the globe, restless winds of democracy, self-determination, and openness.”¹ The winds have brought new hope to many who were in despair, their aspirations having been stifled by political powers that just two years ago seemed as if they would exist for eternity.

However, we have also witnessed the hardship involved in the actual building of a new social framework, fit for a revived or newborn aspiration to be politically free, morally autonomous, and economically prosperous. The process has been more than challenging, almost daunting — much more so than was foreseen or feared. It is therefore both opportune and essential that we now take an inventory of the material that goes into building a free society.

Another name for a free society is “a system of liberal democracy” or “a liberal democratic state.” Democracy by itself is not enough: it is only a name for a form of government where the people, rather than an elite few, are in power. The people of a democratic state are free to choose to be free or to be totalitarian. Therefore, democracy needs to be animated by the spirit of liberalism, the spirit that cherishes the basic, mutual freedom of the individual to choose a way of life. However, liberalism by itself is also not enough for a free society to exist: it needs institutional embodiment. Both the liberal ideal and a democratic government are needed for a free society.

We shall look into the concepts of democracy, liberalism, and the liberal democratic state or free society in more detail, but let the above description suffice for the moment. What then are the social and historical conditions necessary for a liberal democratic state? According to the recent views of the political theorist, John Rawls:

[A]s a practical political matter no general moral conception can provide a publicly recognized basis for a conception of justice in a modern democratic state. The social and historical conditions of such a state have their origins in the Wars of Religion following the Reformation and the subsequent development of the principle of toleration, and in the growth of constitutional government and the institutions of large industrial market economies. These conditions profoundly affect the requirements of a workable conception of political justice: such a conception must allow for a diversity of doctrines and the plurality of conflicting, and indeed

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¹ Rodney A. Smolla & Darlene P. Bradberry, *Winds of Change: Perspectives on the World's Search for Stable Democracy*, 1 WM. & MARY BILL OF RTS. J. 177, 177 (1992).

incommensurable, conceptions of the good affirmed by the members of existing democratic societies.²

From this statement, we can glean the following as the social and historical conditions necessary, if not sufficient, for a modern democracy:

- (1) the experience of the Wars of Religion following the Reformation and the development of the principle of toleration;
- (2) the growth of constitutional government; and,
- (3) the growth of institutions of large industrial market economies.

What Rawls identifies as products of the above conditions are actually the most important elements of a modern democracy:

- (4) a nation — a group of people who consider themselves members of the same state;
- (5) who have diverse conceptions of the good; and,
- (6) the existence of a workable public conception of justice in the state, which can accommodate these sometimes incommensurable views.

Let us study some of these conditions.

A. The Experience of the Wars of Religion and the Development of Toleration

On the face of what is said, it seems that any country that was not involved in the Wars of Religion and the resulting development of toleration would seem to lack one of the essential social and historical conditions necessary for a modern democratic state. If so, only certain countries in Western Europe would be capable of supporting democracy. However, because Rawls assumes that the United States is a democracy, we should not take this statement literally. A national heritage of toleration is necessary for democracy. The developments following the Wars of Religion are paradigmatic of the historical conditions necessary for such a social attitude to develop.

Toleration in the political sense does not mean the magnanimous, condescending attitude of allowing differing opinions as long as they are not too powerful or heretical. Instead, it signifies the attitude of allowing those with whom one does not see eye to eye to take power and govern the state of which you are a member. It signifies the open attitude of allowing the expression and implementation of ideas in which you could never share as a guide to living a life. Toleration here means to "allow for a diversity of doctrines and the plurality of conflicting, and indeed incommensurable, conceptions of the good"³ to flourish in one's nation.

"The good" refers to a conception of a way of life that claims universal validity. A society is free if and only if it can allow diverse ideas of the good to coexist. How can conflicting claims to universal validity coexist in a single state? This is the fundamental theoretical problem of liberal democracy. Because a free society is a society where diverse and conflicting ideas of the good may coexist, liberal democracy professes that social cohesion of a state will not and should not be brought about by the regimented adoption of a single idea of the good, no matter how sublime and morally impeccable it may be. Justice is the concept that coordinates conflicting and sometimes incommensurable conceptions of the good. This relationship between universal claims was sometimes called the problem of "the right and the good."⁴ Although both claim universal validity, the concerns of the right override that of the good. The justification for this was that "right" enjoyed public status, or, put in another way, it was endowed with the function of

² John Rawls, *Justice as Fairness: Political Not Metaphysical*, 14 PHIL. & PUB. AFF. 223, 225 (1985).

³ *Id.*

⁴ JOHN RAWLS, A THEORY OF JUSTICE 447 (Harvard University Press, 1971).

reconciling conflicting conceptions of the good so that the good could be realized within the limits possible in an actual nation-state.

"Toleration" is a name for the virtue that upholds such a public conception of justice. Toleration is not a private virtue; it is a public virtue which must be nurtured in order for a democratic society to thrive. Toleration is necessary for "a workable conception of political justice"⁵ to subsist. It is obvious that, for Rawls, this element of public morality, though intangible, constitutes the most important condition for a "modern democracy," or "liberal democracy," in our terminology.

We may agree with Rawls thus far. However, as I hope to show below, there exists a lacuna in his discourse that needs to be filled. Let us discuss conditions (4) unification as a nation, (5) diversity of conceptions of the good, and (6) a public conception of justice in this context.

B. *Unification as a Nation*

It is not a coincidence that absolute monarchies, once they succeed in unifying a group of people, a territory, and a political power into a nation, are eventually superseded by popular sovereignty in one form or another. A society unified into a nation, fortified by a belief in common ethnicity, through its internal systems of interaction, forms an identity of its own which would not necessarily perceive the monarch as an essential part of itself.

How, then, would a nation keep itself together? What principles of social cohesion would be in the interest of popular sovereignty, but not so for other forms of rule?

C. *Diverse Conceptions of the Good*

If each conception of the good claims universal validity, how can such incommensurable claims coexist peacefully in society? Compromise and arbitration are necessary but never sufficient. What is also necessary is the fierce and relentless competition of these conceptions. That is, there must be an arrangement for competition, a fair and worthwhile race deciding which currents in society may have their conception of the good prevail for the moment. This does not mean that violence and other methods alien to rational debate and discourse are tolerated. The contestants must abide by the rules of rational and free discourse.

Toleration in the political sense, as we saw above, is toleration of fierce competition for legitimacy within the state. As will be discussed shortly, only democracies, or to be exact, only states that enjoy popular sovereignty, are fit for toleration in this sense. This is because it is only in the interest of a popular sovereignty that a fierce but peaceful competition for power should exist. Other forms of sovereignty have as their primary mandate that they remain in power; whereas, in a popular sovereignty, those who possess political power hold only the governmental powers entrusted to them by the sovereign people, whose interest it is to have the very best individuals in office. Competition is the most effective way to come up with the best leaders; the fiercer the competition, the better the results. Therefore, toleration is not only a condition but also an element of democracy.

⁵ Rawls, *supra* note 2.

D. The Public Conception of Justice

The essential political morality that allows a nation-state system to exist must give direction to norms governing the new relationship between the government and the governed, as well as that between the citizens as members of a public decision-making system. It consists of two fundamental concepts, which are structured to accommodate each other — the concepts of justice and the good. Justice in a democratic society is an essential element of the social system; it is the one concept that can coordinate and override conceptions of the good, the existence of which is the hallmark of a free society. The proponents of conceptions of the good, claiming the universal application of their conceptions, cannot by themselves come to the negotiating table unless there is a mutual interest in doing so. This common interest is easy for the parties to recognize; it coincides with the private interest of maintaining the stability of a free society.

In conflicts of value systems and ways of life, there is often little room for compromise. The conflicts tend to be wars of the gods, of never-ending strife, characteristic of the human condition. It is only when we become sober and humane, when we find ourselves back in our own size, that we tend to acknowledge the mutual interest in upkeeping this regime of free choice.

For an efficient system that actually enhances freedom of deliberation, contemplation, and the choice of the good without bursting into a war among gods, a division of matters into those issues that need to be decided publicly and those that we are free to decide on our own is essential. The former category comprises the jurisdiction of the political morality of justice, the latter that of the good. It is only when we acknowledge such a two-tier system of political morality that a liberal democratic society can exist. Only then may we answer affirmatively the fundamental question of whether a free society is possible.

A citizen who can conceptualize the framework of political morality in such a way that she is willing to yield to the demands of justice for the sake of freedom possesses the virtue that Rawls calls "toleration." This calls for restraint, but, less conspicuously, it also calls for participation. Toleration calls for the restraint from asserting one's conception of the good as being a part of the conception of social justice. Toleration also calls for active participation in the interpretation of the concept of social justice. As a citizen, a person should be interested in matters requiring public decision-making: in the United States, abortion and domestic economic policy are examples. However, this does not mean a person should be morally reprehended for not having an interest in the current topics of a political and legal nature. One is free to spend her time and energy as she sees fit. Because the options of political deliberation and participation are open to the individual citizen in a democracy, the consequences of non-activism in this sphere fall squarely on her shoulders.

If an attitude of distinguishing between matters of social justice and the good is not developed, the usual result is continuous political strife from competing groups attempting to enforce their conception of the good as the correct conception of justice and to mandate a certain way of life in society. In societies where the concepts of justice and the good are not distinguished, liberal democracy does not exist. The conception of democracy advocated here demands that the parties tolerate the existence, hence, the coming into power, of proponents of conceptions of the good inimical to them. This toleration will exist as long as the procedure of coming into power was legitimate, meaning that it followed the arrangement chosen, in theory, by all the members of society, and that other parties, including themselves,

have the chance of coming into power through this process. These elements of inclusion and competition are the essential elements of democracy.⁶

Toleration is toleration of public competition; it is the toleration of the concept of justice as being primordial. It is brought about, as Robert Dahl would put it, when there is consensus that the costs of oppression exceed that of toleration, or, in terms more in concert with the present discourse, when a shared conception of justice rather than a monopolizing conception of the good is recognized as the regulative principle and authority for life in society.⁷

Toleration is granted to all, but only if they abide by the rules of this competition. Serious as it is, it is, in a sense, a game when compared to those types of polity that do not presuppose a peaceful change of government. It is a game in the sense of game theory as well: it must be more costly to achieve political power through the abdication of the game itself rather than by playing the game. In other words, those in competition must find it more rational to say "right precedes good" rather than "my good should be the right."

This is giving a public choice-type reason for the conditional phrase attached to the term "the good" in Rawls' quotation: "conceptions of the good affirmed by the members of existing democratic societies."⁸ Not all conceptions of the good are tolerated, but only those recognized as being within the ambit of conceptions that can be chosen by "members of existing democratic societies." For those with conceptions that have little chance of being so chosen, it would of course be much less costly to simply do away with the game than to play by the rules. Hence, it would be quite rational for such parties to choose to overthrow the democratic system of government — a choice that is intolerable to those playing the game. Toleration, then, is a toleration with bounds.

Who, then, or what defines the bounds? Who enumerates the rules of the game? Who officially interprets a rule when it is contested? The short answer to the three questions is: the system of law and justice. A slightly more informative answer would be, in order of the issues: the sovereign people, and the sovereign will of the people as expressed in their constitution; in a representative democracy, the representatives of the people; and the courts given the power of judicial review.

E. The Growth of Constitutional Government

This last point connects the argument to the second of Rawls' conditions, the existence of a constitutional government. Sovereignty in a democratic state means more than just having the political legitimacy and power to rule in a society. If it meant no more, the difference between a democracy and an oligarchy or monarchy would be no more than the absolute number of people with political authority. In democracies, sovereignty also means having the authority to set the rules of competition for entitlement to govern. That is why a democracy needs to be a "constitutional" government. Whereas a monarchy was typically considered to be a legitimate form of government through God's will, not human consensus, a constitution, written or unwritten, establishes the rules

⁶ See ROBERT A. DAHL, *POLYARCHY* 8 (1971). Dahl calls societies which meet the conditions of popularization and liberalization (in the sense of public contestation) a "polyarchy," because a full-fledged democracy may have to meet more requirements. In this paper, I would like to explore the conditions concerning political morality and other normative matters that allow for the existence of a democracy. However, because I am not claiming a complete enumeration of the conditions for a democracy, use of the word "democracy" in the sense of polyarchy will suffice for my arguments.

⁷ *Id.*

⁸ Rawls, *supra* note 2.

for the legitimacy of government. A constitutional monarchy is therefore in substance a democracy, not a monarchy.

Sovereignty means further that the power of government is limited so that it would be legitimate only if organized and exercised in accordance with the basic rules of a popular government. In large-scale democracies, where non-representative, direct democracy is not possible given the present level of technology in telecommunications, the government is entrusted only to those who would abide by such rules.⁹ This applies to all the branches of government.

The short answer of “the system of law and justice” can be correct because a popular sovereignty that has chosen liberal democracy may be defined as a community where justice has become the basic public value and the laws of the nation ensure the realization of this value. At the least, such a nation tries its best to deter injustice, and, failing this, tries to reinstate the equilibrium. It will not allow conceptions of the good to govern the interpretation of justice: it will have a legal and political mode of thought especially for this process. This is thinking in terms of rights. Further, it will not allow certain conceptions of justice to govern the individual’s interpretation of the good: as a rule, infringement of privacy and individual rights in the name of the common good, or even the commonwealth, will not be tolerated. This is a community where justice is sought in public decisions, including the decision as to what should belong in the realm of privacy. It is a community where those who interpret the law are called “justices” for a good reason — to uphold the right, rather than the good.

The three branches of the government, authorized by the sovereign people and the rule of law, cooperate to manage a system of justice that coordinates the many different conceptions of the good in society into a workable social system. In a “constitutional government,” all the branches of government are obligated to abide not only by the letter but by the spirit of the constitution, be it interpreted as original intent or otherwise. This platitude obscures an important truth: there is no better public value than justice to guide the interpretation of the constitution of a nation. The text of a constitution by itself does not give sense and direction to interpretation of the law: that is why the legal profession of the United Kingdom, which does not have a written constitution, has no difficulty interpreting the law in spite of the lack of a written text. It is the conception of justice embodied in the constitution which gives the feel and tenor for a good interpretation of the law.

Another point that must be stressed here is that the three branches of government do not exhaust the official organs of the state. Even in a representative democracy, the sovereign people have a role not only when they vote, but also in the everyday life of the society. They are obligated as a state organ to keep up the tradition of interpreting the concept of justice for society.¹⁰

The above should suffice as a preliminary explanation of the primacy of justice and why it makes sense to utilize the concept of justice not only to explain the legitimacy and structure of a liberal democracy, but also in the context of power politics.

⁹ In a direct democracy, all the constituents of the polity would need to train themselves to abide by such rules — another reason why direct democracy is impossible in large-scale societies.

¹⁰ This does not mean each individual citizen has such an obligation. The citizens are obligated as a whole, not individually. If continuous participation by all is not necessary for keeping up the tradition of interpretation, not every citizen would need to engage in the activity, and none would need to be active all the time.

F. The Development of Large Market Economies

We come now to the last of the conditions Rawls names, that of the development of large industrial market economies. What we need to note first is the fact that there never has been a serious call for democratization, much less a revolutionary attempt for a liberal democracy, that called for democracy and liberty but did not promise a way out of economic misery. Although the French Revolution called for "liberty, equality, and fraternity," it was the cries for bread that culminated in the march to the Bastille and the revolutionary movement itself. No advocate of democracy has called for perseverance of poverty in exchange for freedom.

Granted, there were and always will be many whose lot is great poverty in a free market society. However, there always exists a class or subsection of society that finds it in its economic interest to democratize. Unless the political power of this stratum is strong enough to support the transition, democratization will not succeed. In other words, if the leaders of democracy asked the middle class to endure poverty for the sake of liberty, a political movement toward democracy would be hard to come by.

Some have asked for death if they could not have liberty. This seemingly flies in the face of the assertion that economic interest was always a motivating factor toward democracy. However, we know that such proclamations presuppose the prosperity of the coming generations, and that the sacrifice of one's life would not be fully redeemed if freedom was begotten at the price of prosperity.

What are some of the elements necessary to bring about prosperity? History points to the free market economy. We know what is needed to construct a market economy, but we do not know how to attain it. That is the problem many of the former socialist republics now face. The obvious elements are entities described in economic terms: capital, goods, producers, consumers, market, and, most importantly, the creation of credit. A less obvious, but just as important, element is a system of rights that makes private property possible. This entails a system of rules that makes clear which legal person owns what and stipulates how sales, loans, and other transactions may be consummated. It is also often remarked that what the former socialist republics seem to lack the most is "the spirit of capitalism": the respect for the principle that merit and desert should go together, the respect for innovation, improvisation, and the enterprising spirit.

What we do not know are such things as how in fact markets are formed, what really goes into a credit-generating structure, and how one builds the spirit of capitalism inside oneself. The reason we do not really know how to answer these questions is because, with few exceptions, we have never really faced them before because they were never asked.¹¹ It was not necessary to answer these questions in order to have a market economy. This is because the social structure and mental attitudes that make up a market economy are not inventions, but discoveries. They are the products of social evolution. We did not have to make them, nor did they come into being by design and implementation. The mental element, especially the entrepreneurial outlook, which is simple enough to grasp but complicated and deep for an Artificial Intelligence scientist, plays a very large part in such social structures. Many other parts of these social systems are still in a black box, despite the simplicity of the functional description of the structure.

While social sciences have come great lengths since the days of Adam Smith and classical economic theory, we cannot yet say without hesitation that, for example, the "God's invisible hand" aspects of the market have been explained to our satisfaction.

¹¹ The few exceptions being the non-Western countries that had successfully transformed themselves into modern nation-states with market economies in the nineteenth century when the West had come to them to evangelize, trade, and colonize.

Yes, we have our textbook competitive equilibrium model, but we also know that the conditions for a perfectly competitive market do not obtain in the real world. Does this lack of knowledge impair performance in the market? It should not if the market is not something we have to make; like the skill of riding a bicycle, one does not have to know the workings of the market mechanism in this sense to do well in the market. Reflecting on the situation, one finds that not only knowledge of how the market works, but the concept of knowledge itself, is something we know very little about. However, because we now face the situation where we must strive to make a market economy, we need to address these questions of implementation.

What little we do know comes from a field not usually included among the social sciences, a field many regard as belonging more to art rather than science: the field of legal studies. Looking at market transactions from the legal point of view, one understands many aspects of the phenomenon usually abstracted from the social scientific viewpoint. Those involved in law look at the transaction from the normative point of view, and the behavior of the agents can be fully described and predicted only from this perspective. In order to understand the meaning of the social actions taken by the agents in market transactions, one must understand the basic concepts and precepts of what is sometimes called private law, in contrast to public law. Further, techniques of administration of the market, which is the step we need to take to go from a bartering economy to a market one, can be implemented only by policy measures, which need legal authorization and legitimacy.

This point makes it very clear that Rawls' concept of the function of law needs supplementation. As we saw above, the only reference to law Rawls made was in mentioning the need for a constitutional government. This indirectly refers to the laws of a nation, with an emphasis on public constitutional law. Neither the variety of laws that exist nor the importance of private law is emphasized in Rawls' quotation. A judiciary that can effectively judge matters of private, as well as public, law is a necessary and often under-emphasized element of liberal democracy.

The market, as pointed out above, is a product of social evolution. It is the product of certain modes of transaction between individuals that grew from a simple barter system into trade, not between agents in face-to-face contact, but between those remote in place and time. This was possible because of the currency of money, the existence of a price for the product, and an enforcement mechanism for promises to pay or to deliver goods, which sanctioned the use of credit. For all three of these conditions, the existence of law regarding trade and market administration and the legal rules and institutions that can resolve conflicts in this sphere are essential elements of a market economy.

At the base of this is a system of private property that makes it clear who owns what, and hence, who may sell or lease what. If a citizen of a liberal democracy is an enterprising person, a secure grounding of her possessions is a primary condition for her willingness to make whatever she wishes to sell and to produce more efficiently through innovation. The secure grounding of the possessions of others is a primary condition of her willingness to buy the necessary capital goods for production and to produce more efficiently through wise investment.

So far, I have not questioned the thesis that the existence of a market economy is a necessary condition for the existence of democracy. Is this true? The answer depends on one's conception of democracy. There have always been two sometimes conflicting ideals involved in democracy — liberty and equality.¹² If democracy is conceived as a regime conducive to equality, then democracy and market economy do not go together.

¹² While, as I pointed out above, the element of fraternity, or national identity, is also essential, we may leave this aside for the moment.

Market economy usually brings about economic inequality as a consequence of efficient resource allocation. On the other hand, if democracy is conceived primarily as a regime conducive to freedom of the individual, even at the cost of equality, then the two may go together. The difference here is brought into our interpretation of liberty.

Compare the conceptions of liberty espoused by the advocates of liberalism against those espoused by the proponents of libertarianism. Under the liberal conception of freedom, equality and freedom do not contradict each other; equality is a necessary condition for freedom. However, under the libertarian conception, there is a trade off relationship between equality and freedom. In so far as the political conditions for democracy bring increased participation in the political process, the demand for equality would also tend to increase. Does this mean the liberal conception of liberty is the only legitimate choice? Not necessarily. If equality only implies equality of opportunity but not of outcome, then the libertarian tendency would be the trend.

Historically, democracy and economic growth, through the powers of a market economy, go hand in hand. In so far as building a social safety net, or a social security and health care system, requires the modification of pure market principles, chances are that building such a safety net would slow the rate of growth. The price of outcome equality in a market economy is a decrease in the rate of growth. Hence, the choice open to democracies is whether to become more liberal with a corresponding slowdown in growth, or to become more libertarian with the possibility of greater growth but less outcome equality.¹³

II. TRIBALISM AND CITIZENSHIP

The social and historic conditions of modern democracy that Rawls gives, except that of toleration, are commonplace. We have seen from the above examination that, although Rawls' conditions may be necessary for democracy, they are not sufficient. One can certainly add to this list such often cited conditions as a multi-party system, free press, and civilian control of the military. However, the one condition that I have found to be sorely missing, and will discuss below, is that of the existence of a modern legal system. I shall now explain in more detail, why and how a modern legal system, with its particular mode of thought and discourse using the terminology of "rights," is essential for a liberal democracy. I shall begin with the question: Why is an open and free society a good thing? I will show that the typical institutional form of a free society is a liberal democracy. Then, I will attempt to make clear that an essential element of a liberal democracy is its system of law.

A. *What Good is an Open Society?*

One cannot say without sarcasm that there is precious little difference between being a tribesman and being a citizen of a modern state. There are rules one must abide by in both the tribe and the modern state. However, the rules and the way they work are so different in the two types of communities that one may regard them as being literally from two different worlds.

In the typical tribal society, the code of the clan or tribe must be upheld without questioning the purpose of the rules; changing the rules through mutual discussion and

¹³ Or so it was thought. The incoming United States Democratic administration seems to promise both greater growth and a social safety net at the same time: the former, through more spending and trimming down of individual overhead costs, the latter involving the building of a national health care system.

resolve is impossible. If there is a conflict, the elders intervene and mediate. Resorting to the judicial system and arguing the case in a court of law is similarly not an option; neither the concept of law nor the judicial system necessary for implementing law exists in this society. A society based on and embodying the rule of law must exist for such a legal system to function therein. The tribal society as we perceive it is anything but such a society.

In a tribal society, sanctions against deviant behavior may be cruel and extreme; family members and relatives may also be punished for one's wrongdoing. There is no meaningful difference between law and morality; crimes are always sinful, and all sinful acts and attempts, often even thoughts, are crimes. Further, persons who have engaged in behavior deemed to be evil by the society are thereby considered sinful and should be reproached, punished, and despised.

There is no meaningful division between the actions and the personality of a person. If such a division is ever acknowledged in the tribal society, then the wrongdoer would be punished for being the person that she is, rather than for her actions. The person punished is usually seen as belonging to a certain class whose mores she must abide by, not as a sovereign individual with inherent principles of action of her own. She is punished for being the sort of person who would break the rules of the tribe. The person has broken the rules and is thereby sinful.

Even when the norms broken are not the commands and edicts of the ruler, disobedience is seen as being inherently corrosive of the ongoing order of society, as well as being morally reprehensible. One obvious function of the rules is to keep the people from deviating from the social order, usually to the benefit of those in power.

The concept of right is alien to this framework for understanding a person and her place in society. The purpose of keeping order in a tribal society cannot be that of upholding the rights of the individual. This society lacks enforceable laws of contract, torts, commerce, and other laws governing the relationship between private persons; a criminal law in the modern sense, where *nulla poena sine lege, nullum crimen sine lege*¹⁴ is the inviolable rule; and, most prominently, the protections given by a constitutional law that defines the rights of the citizen. What exists in its stead is what would be best conceived of as the sacred code of a clan, consisting mainly of norms of obligation prescribing strict adherence to the standing norms of the society as well as to the directives of those higher than oneself in the hierarchy.

Only in contrast to such a tribal society can the blessings of a typical liberal and democratic society be appreciated. What then are the essential ingredients of a liberal and democratic society? I have gone over some of the elements in the former section. Here, I want to emphasize the element of law: a free and democratic society can exist in substance only if the society has a system of law in the modern sense. This means that the existence of a modern legal system is necessary for the existence of an "open society," a term I use interchangeably with a "liberal and democratic state." It does not mean that the existence of such a system by itself signifies that the society is free and democratic.

Whether it is really impossible for a free society to exist without a modern legal system depends upon what we conceive a free society and a modern legal system to be. In order to substantiate the claim that it is indeed impossible, I want first to make clear what I mean by a "liberal and democratic state" and "a modern legal system," then go on to explain why a modern legal system is essential to the structure of this type of society.

¹⁴ No punishment without law, no crime without law.

Before we do that, let us answer a question many may have: why not just a democracy instead of a liberal democracy? Is not democracy enough for a free society? Also, many may wonder why I am referring to a free society instead of a democracy. Is not democracy enough for upholding a system of rights to be free? The answer is no. True, democracy may be interpreted in several distinctly different ways. Democracy may, as suggested above, mean a form of government, in contrast to monarchy and oligarchy: the rule of the people, by the people. If taken in this sense, democracy is not enough for a society to be free. The people of a nation may choose to form and operate a tyrannical and intolerant government oppressing all rights to be free on the grounds that it would be in the "true" interests of the people, similar to Rousseau's justification of "coercion to be free."¹⁵ There is nothing in this conception of democracy to prevent this.

Democracy may be taken, in another sense, as a political ideology expressing the political ideal of power residing in the people and the ethical ideal of the free and independent person. The problem then becomes how a democratic system can guarantee and uphold such ideals. The political conception of democracy does not by itself contain such an encompassing power. It needs the political philosophy of what is usually called liberalism to reinforce this political ideal and to substantiate the ethical ideal.

B. *What is a Liberal Democratic State?*

The conception of a free or open society put forward here upholds the principle that each member of the society has an equal right to live according to his or her values, hence, choice. An open society runs smoothly when the maximum liberty to think, express, and realize one's idea of a good life is secured and guaranteed. The conception assumes a person's capacity and desire to think for oneself without being told by others — however sacred or powerful — how one should organize and live a good life. The complex activity of thinking, planning, and living out a life that one may truly call one's own is the basic right and responsibility of a citizen of an open society.

A society that upholds the right and responsibility to be free in this sense and whose government values and protects freedom is a free society. A person may not be free even though she may feel that she is; she must have rights that are enforced by the government and respected by its citizens that would allow her to decide and act on her own, even when her decision may not be favored by the majority. Having a right is the legal expression of being free, and freedom that does not enjoy legal protection is not bona fide freedom.

The greatest virtue and appeal of the modern state is its capability to realize and secure a social system which upholds such a system of rights. I shall therefore examine the modern state from this point of view. This should bring out aspects of the modern state that are not customarily stressed, and, if successful, should provide a positive outlook on the modern state. I shall denote a modern state that does have the characteristics I enumerate as a "liberal democratic state" or a "free state" for short.

A free state is an association of members of a society that enables the existence and development of freedom in that society. The association consists of distinctive political, social, and economic systems which have, besides their proper functions of maintaining governmental, communal, and economic order, the ultimate function of upholding a free society. The association has a political system that both authorizes and

¹⁵ The idea that in order to be truly enlightened of one's own best interest, voluntary education alone may not always be enough; the use of coercion to learn might be justified. See JEAN-JACQUES ROUSSEAU, *DU CONTRAT SOCIAL, OU PRINCIPES DU DROIT POLITIQUE* [THE SOCIAL CONTRACT OR PRINCIPLES OF POLITICAL RIGHT] (C.M. Sherover trans., New American Library, 1974) (1762).

limits the power of the government to acquire and maintain public goods, including the services of the judicial system and the market mechanism. The role of the government is constrained by the ideal of popular sovereignty; the government exists only to serve the people.

A free state has a social system that materializes the freedom, heritage, and security necessary for individual moral development. It also has a market economy that frees the government from the fruitless and often detrimental task of distributing resources efficiently.

Contrary to other existing models of the state, the government of the free state depicted here does not monopolize the public mandate. The public agents of a free state are constituted not only of the government institutions but also of the agents in the free market as well as the individual in her capacity as a citizen or as an agent in an informal public decision-making process. The free state is comprised of public decision-making systems usually designated as government, market, and the formal and informal popular decision-making processes. The market, though not intentionally, but knowingly,¹⁶ makes public decisions concerning the allocation of resources. While no one knows what the consequences of the accumulated microdecisions are at a given time, everyone knows that as long as the market is not failing, the allocation pattern will turn out to be more or less closer to Pareto-optimal¹⁷ than when compared with, say, a centralized economy. It is not an intentional public decision, but it is a public decision nevertheless; the decision affects the whole of the community and is sanctioned by state law and power in case of non-compliance.

The free state is so constituted that the right of an individual to be free can be exercised to the greatest degree possible without infringing the equal right of others to do the same. The free state is constantly being molded and developed in such a way that upholding, clarifying, and advancing the respect for this right may be seen as the purpose for the state's existence.

Citizens of a liberal democratic state have the right to disobey any edict in the form of law which does not serve the state's purpose of safeguarding this fundamental right of the citizen. The basic right of the citizen to disobey a particular edict of the state, then, is based on the citizen's right to challenge the state when she believes it has stepped beyond its legitimate powers. The citizen would, of course, be at risk of being wrong in her decision, with the final say on the legality of her actions determined by the courts.

C. What Constitutes a Modern Legal System?

The social institution that is most fit for protecting the rights of its citizens is the modern legal system, such as that of the United States or Western Europe. The governments of these states have in common an independent judiciary, as well as a legislative and an executive branch. The term "legal system" in these states is often taken to denote the judiciary and policing systems. I would like to stipulate a different definition that clarifies the relation of law to freedom in a society. I would like to call a "legal system" all subsystems of a state that are authorized and restricted under the rule of law. This would include not only the judiciary and its implementing organs, but also the legislative and the executive branches as well as the citizen as a political organ. In

¹⁶ See JOHN L. AUSTIN, *Three Ways of Spilling Ink*, in *PHILOSOPHICAL PAPERS* (J.O. Urmson & G.J. Warnock eds., 3d ed. 1979).

¹⁷ An allocation of resources that cannot be made better in terms of social utility without making the welfare of any single individual in the society worse off.

addition, the legal system in this sense comprises all systems of public decision-making that refer to the law in their procedures and transactions.

Such legal systems have not been built from design; rather, they were the products of what one might call social evolution. However, once the distinct form of a legal system had been developed, it was to some extent possible to build on it or even export it and modify it to implement such a system of liberty by design. The resulting form is the modern liberal democratic nation-state.

D. Is Liberal Democracy Perfect?

I have contended that a liberal democratic state is a state with a modern legal system that upholds the rights, hence freedom, of its citizens. Can there be a free state without law? Hardly. The rights of a person cannot be defined and protected without a modern legal system. Then, is any society with law a free state? Hardly. There are conceptions of law, especially those that originated in the Orient, that are alien to the concept of rights. Here, the law is the command of the sovereign, or Emperor. The purpose of law enforcement is not to uphold the rights of the citizen, but to uphold the social order and the command of the sovereign. Whole civilizations have flourished under such tribal principles of social cohesion. The free state is to be distinguished from these: it is an open society with a modern legal system where the purpose of law is to protect the rights of its citizens to plan and realize a good life for themselves.

Is the free state then perfect? We are still much too ignorant to be in a position to answer this question. One issue — the identity and fraternity of the people of a nation — has yet to be squarely faced by the proponents of a free state. For people to live happy lives, not only do the rights of the individual need to be fully protected, but the identity and self-respect of the individual as a member of her society must be fully established. Thinking solely in terms of rights, that is, regarding social interaction as essentially an exercise in the transaction of rights, may well enhance the protection of rights in the short run. However, we do not yet know whether such an attitude would affect one's national identity, or identity as a member of a nation, in a positive manner. Participation in politics through the public decision-making process is especially important, not only for the straightforward political purpose it serves, but also as an avenue of self-expression of the national identity of the person. The social value of fraternity, as well as liberty and equality, must be given due weight. We do not yet know whether a suitably interpreted version of a free state could take on this issue.

There are basically two ways of approaching the problem. One is to define national identity solely in terms of the state apparatus and to eschew any and all references to ethnicity, religion, and other traits and creeds that cannot claim universality at the national level. This is the path that the United States of America has seemingly taken: its citizens pledge their allegiance to their flag and to those symbols and institutions that belong to the nation as a whole. The other path is to define national identity not only in terms of the state apparatus, but also in terms of some of those traits and creeds that the majority of the nation share and regard as part of the national identity. This is the path that the Western European states took in the eighteenth and nineteenth centuries, when the nation-state first became a historical reality. France is the country of the French. Germany is the land of the German Volk.

The concept of the nation-state itself is ambiguous on this point. Officially and theoretically, the former definition probably would be dominant. However, in actual practice, the latter definition seems to have the upper hand. Just looking at a coin in America would suggest this. The term "God" in "In God we trust" certainly is not usually interpreted as the God worshiped by, say, the Muslims.

Americans often discuss the possibility of a black president in the future. This presupposes that such a possibility is very small in the present, suggesting that the presidency is not open to all racial and ethnic groups to an equal degree. If this is the case even in America, it is very difficult to refute the thesis that all societies are tribal in some ways.

We do not yet know if this is a condition we must overcome in order to realize a free state in its pure form. It may well be that this phenomenon is due to an inherent imperfection in the concept of a free state: the demands for a stable social cohesion cannot be based solely upon mutual trust and respect. The communitarians have accused the liberals of espousing this type of political philosophy, and the debate is still on.

E. The Legal System Must Fit the Political System

What must be stressed in this context is the fact that the legal system is only one subsystem among others in a nation-state. There are certain types of political grievances that make it quite clear that the problems that the legal system can solve constitute only a portion of the manifold political issues that must be addressed for an open society to be a happy one. The recent Rodney King affair is a case in point.¹⁸ This was a case where criminal procedures could not accommodate the consensus on the political morality of police behavior. When the legal system does not accommodate the demands of society, one must find a different social mechanism that could give expression to public sentiment. In Japan and most nations with a long history, social norms and structures usually have developed which cater to this type of dissatisfaction, with the effect of venting steam. These structures can be regarded as both a merit and a demerit for the entire system. On one hand, it stabilizes and satisfies, while on the other, it gives extra years to a corrupt regime and undermines the development of a legal system.

A great contrast to this is America, a nation that loves the law. Befitting for a nation of the New World, it has so far tried, when it could, to squarely face such divisive issues by revising the legal procedures to accommodate them. Such has not been the case in the greater part of the world.

One reason the power and swirl of the winds of democracy seem now to bring about more destruction than construction may be this difference in attitude and tradition. A nation in its stage of metamorphosis towards democracy and market economy needs a modern legal system, including personnel who can competently run the system. Only then would a nation be able to experience change on a larger scale, the gradual social change in attitude toward standing social norms and the rising institution of modern law. Without it, the winds of change can easily develop into an uncontrollable tornado.

¹⁸ Rodney King was a black motorist who was physically assaulted by members of the mostly white Los Angeles police department. The incident of brutality was captured on film by a Los Angeles resident and shown on national television. Public outrage brought the most culpable officers to trial. Venue for the trial was transferred from the largely minority Los Angeles to the white suburb of Simi Valley. There, an all-white jury acquitted the defendants.

Immediately upon release of the verdict, members of the Los Angeles community erupted into several days of riots, looting stores, and burning buildings. The national guard was called in to restore order. Sensing a powder keg of racial tension, the federal government has chosen to retry the police officers under several civil rights statutes.

III. FREEDOM, DEMOCRACY, AND AFFLUENCE IN JAPAN

A. *An Outline of the Modernization of Japan*

Japan began its process of becoming a full-fledged liberal democratic nation-state in the middle of the nineteenth century when the Western powers appeared with a fleet of battleships “proposing” an opening of trade relations. Though problems with logistics made it impossible for the British and, later, the Americans to wage war, it was a sufficient demonstration of military might to coax the then ruling government to open the doors of Japan to trade. The turn of events also added great impetus to the movement to Westernize and modernize Japan. At that time, both the ruling government and the political forces soon to establish the Meiji government believed that Japan had to attain sufficient military strength in order to fend off a Western military invasion and to avoid being pressured into agreeing to pacts and treaties that were against its national interests. The leaders also decided that the modernization of the government and the construction of modern industries were urgently necessary for the purpose of accumulating the wealth of the nation, if only to keep a relatively competitive position in trade talks and other negotiations.

As far as this initial incident was concerned, the Japanese government was taken by surprise and forced into agreeing to an inequitable trade treaty with America and the major Western European nations. The latter half of the nineteenth century and the beginning decade of the twentieth century was, for Japan, a period of repeated and often degrading negotiations to rectify the inequitable treaties. In order to be taken seriously and to sit at the negotiating table, Japan had to attain wealth and military power, implement a Western type of legal and political system, and profess respect for human rights. Otherwise, the treaties would have remained inequitable. Needless to say, with one false move, such as failing to counter a maneuver by one of the factions ambitious for domestic power in conspiracy with a foreign power, the fate of its neighboring Asian countries would have been assigned to Japan — colonization by the imperialist powers.

Of the many inequities in the treaties, the greatest issue for the Japanese government was the right of the foreign powers to try their own citizens for crimes committed in Japan. The justification for this arrangement was that since Japan did not have modern criminal laws and a modern legal system with an independent judiciary, it could not be trusted to try the defendant in a civilized manner respectful of the rights of the accused. In practice, those foreigners that committed atrocities such as murder, rape, and other brutal crimes were acquitted or sent back to their countries of origin to be set free. It was not until 1894, forty years after the first treaty, that Japan was finally able to do away with this clause. It took until 1911, another seventeen years, to negotiate Japan's independent right to place levies on its imports.

It was under such circumstances that Japan had to modernize its laws and transform itself into a modern nation-state.¹⁹ Obviously, neither the general welfare of its citizens nor their opinions were the primary concern of the Japanese government in modernizing its legal system and other institutions of the state. From this perspective, the

¹⁹ There were some comical episodes in the process of Westernization. The politicians, high officials, and their wives were encouraged to wear Western clothes and learn ballroom dancing; diplomatic balls were held continuously, just so that the foreign diplomats in Japan would feel that Japan was becoming “civilized.”

There were also more tragic methods that Japan believed it had to use to prove itself. Japan waged wars against countries many times its size to demonstrate its military power and the nation's determination to become a full-fledged nation-state. The war against China in 1894 and the war against Russia in 1904 were of this type.

high officials in government were seriously contemplating the drafting of a constitution, the mainstay of a respectable government under law.

However, at the same time, those not involved in the government but who were fervent believers in the rights of man formed groups in the most remote places in Japan, and, one after another, proposed their own versions of the Japanese constitution, crying loudly both in press and in person for "freedom and civil rights." These grass-root democrats came up with the most radical drafts, proclaiming that Japan should become a republic and abdicate imperial rule.²⁰

Thus, those in power in Japan had the dual objective of appeasing the Western powers and placating the domestic democratic movement by drafting a constitution. It came in 1889, based on the Prussian model with the Tenno, or Emperor, in place of the Kaiser.²¹ The Meiji Constitution, as it is now called, of course, did not please the democrats, but the government divided and suppressed them into reluctant recognition of the Constitution. The same Constitution was found to be acceptable by the foreign powers, which forfeited the immunity of their citizens five years later.

The world of the latter half of the nineteenth century is known as the age of imperialism. A full-fledged nation-state found itself pressured to assume an imperialist foreign policy for its own survival. Unless a nation-state itself was large enough to have a domestic market comparable to the world market of, say, the British Empire, a nation desiring to be an independent state had very little choice but to round up a dominion of its own. For Japan, the choice was a bleak one: it was either to become a colony of one of these powers or to become an imperialist state itself.

The imperialist international order had the most unhappy consequences not only for those outside these imperialist countries, but also for those involved in the domestic political movements towards democracy and liberalism within them. It was especially so for the "late comer" nations such as Germany and Japan. The Weimar Republic was one of the most liberal nations that mankind knew, and we know what happened to it.

In Asia, although obliterated from Western history books through the war effort, Japan had a similarly liberal democratic period from the second decade of this century into the mid-twenties, known as the era of "Taisho Democracy." At that time, Japan was finally recognized as an equal trading partner by the Western powers and had the fortune of siding with the victors during World War I. The nation attained self-respect, wealth, and a viable constitutional government with a great many politically enthusiastic, democratic citizens. The arts, literature, and cinema thrived. Additionally, during this period, Japan realized many of the other fruits of a liberal democracy, especially a competitive economy.

Of course, the darker side of the same movement was gathering momentum at the same time. Because of the form of the initial impetus towards modernization, strong military power was always an imperative in pre-war Japan. Also, if free enterprise allows the rich to become wealthier and forces the indigent to become poorer, it is not unnatural for those hungry and suffering to long for justice and a master solution to their troubles. The Emperor in Japan was the perfect embodiment of their perceived savior. The rest is history, which I shall not go into.

²⁰ The thoughts of these individuals were greatly influenced by the works of Jean-Jacques Rousseau, John Stuart Mill, and others. Mill's works in political theory were translated into Japanese only a few years after their initial publication in England.

²¹ This, incidentally, was the year Britain colonized South Rhodesia and the works of Frederic William Maitland and Albert Venn Dicey were translated into Japanese.

B. *Japan, the Land of the Middle Class*

It is well known that after World War II, Japan, like Germany, successfully transformed itself into a liberal democracy. The constitution adopted in post-war Japan is marked by significant change from the pre-war constitution. The Emperor is deprived of all substantial political power. The cabinet now answers to the people rather than to the Emperor. The use of force has been foresworn as a method for resolving international conflict.²² In spite of such fundamental changes in its constitution, Japan's drive toward becoming an independent, respectable nation-state was fueled by essentially the same forces that first gave it the initiative to modernize. Hence, the element of law and respect for the rights of its citizens never really came to the foreground.

Many now consider the democratization of Japan, despite its affluence in terms of gross national product and gross domestic product, to be deeply problematic. Because of the historical circumstances that brought about a political tradition wanting in respect for modern law and the rights of the citizens, the citizens in turn fostered an attitude wanting in respect for politics and the sense of citizenship. As a result, the democratic process in Japan often lacks popular support. This has caused corruption to be structured into the political process.²³

On the other hand, Japan has been remarkably successful in the redistribution of income: about eighty-five percent of the population believe they belong to the middle class. In any free state, the middle class is the mainstay of a liberal democracy. In Japan, what is needed is a more responsible middle class, who would spend a portion of its income to support the party of its choice. Instead, the mass media chide and criticize the politicians for their lack of moral integrity, to which the television viewer and the newspaper reader passively nod in agreement.

There is amazing passivity in the Japanese citizen's attitude toward politics. A portion of the taxes paid by such Japanese citizens will help finance the reconstruction of the national economy and the construction of democratic political processes in the former socialist republics and the developing nations.²⁴ More Japanese citizens should become aware of how these funds are being used, but while very few are interested, still fewer would try to do anything about it. This is just one example of the Japanese citizens' attitude toward politics. There should be more "civilian" control over the public decision-making process in Japan, which more and more affects the state of the world.

In Japan, toleration is not an issue; there is too much of it. Or, to be precise, there is too much of what passes off for toleration: namely, apathy towards politics. Political apathy and lack of dependence on the rule of law is the mark of a modest and ineffectual empire of law. If this is one side of the coin, the other side manifests itself in the subsistence of a powerful realm of the rule of social, non-legal norms and the tribal mentality supporting the regime. What needs to be done? The restraining of the tribal mentality, whether the object of allegiance is the family or the firm, and the boosting of the citizenship mindset in its stead. However, many who have opted for the latter have found themselves abandoned by the courts. Hence, an initiative for a stronger and more

²² Many, especially the liberals in Japan, thought this to be wonderful progress, finally breaking off from that *idée fixe* that an independent nation must have military as well as political and economic power.

²³ For instance, because the most influential political parties have not settled in deeply enough into the community to be able to ask for donations to cover the costs of the very expensive elections, politicians have often no choice but to accept funds from dubious sources. In the case of the Liberal Democratic Party, where the leaders of the factions do provide funds to its members, the leaders themselves must look for funding outside the party system. The economic community, especially the up-and-coming enterprises, often respond to this need in exchange for influence, sometimes favors, resulting in large-scale corruption.

²⁴ Japan is now the world's largest donor of Official Development Assistance (ODA).

rights-conscious judiciary may be a good place to start for a new phase of democratization of Japan. But, this again needs popular support.

IV. CONCLUSION

Yes, the winds of change are swirling across the globe, and, as inhabitants of this planet at this moment in history, we may feel that we are all on the way, if rocky, to an open society. However, even if there is truth in this perception, I do not feel that we are at the end of history; the problems connected with ethnic and racial identity loom too large for any sort of optimism. In fact, I feel that we are now evolving into a new stage in history, that we are in the midst of a process where the very concept of a nation-state and the rules of behavior based upon the concept are undergoing change. If, as I had contended, a society needs a modern system of law to become an open society, insofar as a modern legal system presupposes a nation-state as the political framework in which it exists, this process involves the development of a new conception of an open society.

Whatever this new conception turns out to be, an essential ingredient in the making of a free and open society will be an attitude by the peoples of this planet which is an extension of the spirit of toleration. It must be a moral attitude which will allow peoples to help those in need in some aspects, while being helped in turn in different aspects; none purely the benefactor, none purely the beneficiary. Whether the political morality of liberal democracy has the capability to nurture peoples who can see the relationship between themselves and others in this way, peoples both proud and humble of being who they are, is yet to be seen. We, as members of this global society, should strive to bring out the best in liberal democracy and see if it is indeed possible. We should at the same time be searching for any new concept of a free political community which may supercede that of liberal democracy.