# LAW IN THE KIBBUTZ: A REAPPRAISAL*

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The relationship between social structure and the development of legal institutions is the central theme in the classic study by Richard Schwartz, now more than two decades old, "Social Factors in the Development of Legal Control: A Case Study of Two Israeli Settlements" (1954). The article is based on an examination of the systems of control developed in two rural communities, one a *kibbutz* (or *kvutza*), based on social and economic collectivism; the other a *moshav*, a cooperative settlement with private property and social life geared to the nuclear family. Internal controls in both communities were exercised through a General Assembly, composed of all members, and by a number of specialized committees. In contrast to the *moshav*, which had a Judicial Committee performing an adjudicatory function, Schwartz found that the *kibbutz* "had no distinctly legal institution" and that its control system "must be considered informal rather than legal" since public opinion constituted its sole sanction (Schwartz, 1954: 471, 476).

Schwartz (1954:473) defines legal control as "that which is carried out by specialized functionaries who are socially delegated the task of intra-group control. . . ." Law develops, he concludes, where disturbing behavior is not as adequately controlled informally as it could be with the aid of legal controls. The *kibbutz*, in his view, was characterized by a number of conditions which facilitated the development of informal controls, whose effectiveness explained the failure of the *kibbutz* to develop legal institutions.

These conditions may be divided into those facilitating the implementation of the sanction of public opinion and those insuring the effectiveness of its impact. The former are inherent in the communal life of the *kibbutz*, "a large primary group whose members engage in continuous face-to-face interaction" (1954: 477). Schwartz notes that, in the *kibbutz* he investigated, mem-

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bers worked in the presence of others, ate all meals in a communal dining room, shared washing and shower facilities, and were housed in a manner that minimized privacy. Even parent-child relationships and leisure-time activities were subject to public view. Thus, perfect information, instantaneously communicated by constant interaction, permitted the potential sanctioners, the general *kibbutz* public, to learn quickly of the occurrence of disturbing behavior, to react immediately, and to communicate their reaction to the deviant member without delay.

Public opinion can provide an effective sanction in the *kibbutz*, in Schwartz's opinion, because members see themselves as others see them. This is a result of self-selection in the decision to join a *kibbutz*, the selection process of the *kibbutz* in admitting candidates to membership, and learning experiences in the course of life in the *kibbutz*. The children born in the *kibbutz*, while they will never—except in a formal sense—make a decision to join the *kibbutz* of their birth or face the possibility that they will be found unsuitable for membership, their acceptance being generally considered automatic, are socialized to communal life through *kibbutz* educational methods, which sensitize the *kibbutz* youth to the opinions of their peers, a preparation for their role as adult members. These conditions of selection and socialization maximize the impact of the sanction, as public opinion, thus internalized, can result in gain or loss to the *kibbutz* member sufficient to control his behavior. Moreover, this "other-directedness," combined with a strong feeling of identification with the *kibbutz* and the similarity of life conditions, actual and perceived, creates a capacity and an inclination to learn not only from personal experience but also to learn vicariously from the experience of others the distinction between acceptable and non-acceptable behavior.

This distinction is simple and unambiguous in the *kibbutz*, Schwartz maintains. This is primarily the result of the sharply limited range of behavioral alternatives. Norms, therefore, are pervasive, explicit and well known to members, strengthening the system of informal controls. Members are expected to work in the job assigned them, to perform to their maximum ability, to eat and dress according to accepted standards, and to live in the accommodation allocated them. The explicit norms provide constant guides classifying behavior with reference to desirability, covering every area of *kibbutz* life. Marginal cases of differential application of the norms can be rationalized in terms of the norms themselves and their accepted exceptions.

Schwartz's esssay was based on field work conducted in 1949-

1950. Since then, almost all of those conditions which facilitated the development of informal controls, whose effectiveness, in Schwartz's view, explained the absence of legal institutions, have changed drastically. Some *kibbutzim* have reached considerable size, with over a thousand members and a total population of over fifteen hundred. The development of social differentiation and the increased privatization of life in the *kibbutz* have rendered perfect information doubtful at best and have set limits to the interaction of members. Centers of information and interaction, described by Schwartz, have either been eliminated completely or have become limited in scope and influence. The communal shower ceased to exist in most *kibbutzim* about twenty years ago (except for transients—youth groups, temporary residents, etc.). The communal dining room has declined as the social center of *kibbutz* life, with the development of alternatives, such as more spacious and comfortable housing, in which a kitchenette has become a standard feature. In a large *kibbutz* size itself becomes a qualitative factor, restricting or eliminating the communal dining room as a focus for the observation of individual conduct or the effective expression of public opinion to sanction deviant conduct. Similarly, the growth of *kibbutz* industry and the mechanization of agriculture, eliminating mass labor by large numbers working in observable proximity, have reduced the work area as an arena in which behavior can be controlled by the informal sanctions of public opinion directly applied to immediately detected deviant behavior.

The change in the conditions facilitating informal controls has not resulted in the development of legal controls, at least in Schwartz's sense of the term. The *kibbutz* still lacks a structurally differentiated court. Sanctions have not changed significantly, nor has there been any drastic alteration in the way they are applied. If the Schwartz thesis may be regarded as grounds for predicting that the decline of informal controls would result in the development of formal controls, through structurally differentiated institutions applying formal sanctions, that prediction remains unfulfilled. A better case might be made for the proposition that behavior is less controlled today in the *kibbutz* than it once was, but changes in this area appear to be marginal, with essentials unaffected.

Developments in the *moshav*, the cooperative village, have also not borne out the proposition that Schwartz appears to champion. Where cooperation is strong, there is a great reluctance to use formal sanctions, either those imposed by the *moshav* or by the general society. Elaine Baldwin concludes (1972: 201)

that a "stricter adherence to formal rules . . . would negate the voluntary aspect of co-operation and disrupt the community." Significantly, her comprehensive discussion of social control and social sanctions in a veteran *moshav* (1972: 180-201) makes no mention of the Judicial Committee; although in her discussion of village administration, she notes (1972: 143) the existence of a special committee dealing with personal difficulties between members. In fact, out of a total of more than four hundred *moshavim*, the structurally differentiated court-like Judicial Committee described by Schwartz exists today in only four.[1]

*Moshav* members ascribe the virtual disappearance of the Judicial Committee to the growing lack of intimacy between members. Typically, there is a general decline in the activity of *moshav* committees. Some, including the Judicial Committee, cease to function and eventually cease to exist. In time the Executive Committee of the *moshav* comes to exercise plenary authority in all administrative matters, including the determination of disputes involving *moshav* affairs and the imposition of sanctions.[2] In disputes not directly related to the administration of the *moshav*, such as that involving damages as the result of joy-riding, which Schwartz (1954: 475) describes as a case of adjudication by the *moshav* Judicial Committee, the accepted procedure in the vast majority of *moshavim* would be application to the police or to other non-*moshav* institutions, as circumstances might require.

In one reported case, frequent appeals for police intervention by *moshav* members were regarded as a cause of embittered relations within the villlage. In order to promote comradely intimacy it was decided to elect a Judicial Committee and to obligate all members to apply to it for the adjudication of disputes with other members. Despite this decision, one *moshav* member filed a complaint with the police in a dispute with another member. For violating the decision of the *moshav* to settle disputes internally the offending member was fined by the *moshav* Executive Committee, not by the Judicial Committee. On appeal to the Moshav Movement the decision was reversed, not because the fine had been levied by the Executive Committee instead of the Judicial Committee, but rather because it was considered an infringement

1. Statements with regard to the *moshav* are based on correspondence and interviews with a number of knowledgeable *moshav* informants, verified in some instances by direct mail inquiries to veteran *moshavim*.
2. For a legal opinion upholding the right of the Executive Committee of the *moshav* to impose sanctions on *moshav* members, even when the *moshav* is a party to the dispute, see Ofer (1971).

of the rights of the *moshav* member to deny him access to the police.[3]

Thus, changes in both the *kibbutz* and the *moshav* have not had the effects on the development of legal institutions that would be anticipated from Schwartz's observations of twenty-five years ago. This suggests both the propriety and the timeliness of reexamining Schwartz's data and conclusions. These will be analyzed in the light of additional empirical evidence drawn from a *kibbutz* of which I have been a member since 1955.

Degania was founded in 1910, the first settlement of the *kvutza* form in what is today Israel. It is located in the Jordan Valley, south of Tiberias, at the point at which the Jordan River flows out of the Sea of Galilee, an area with abundant water resources (by Israeli standards) and, therefore, thickly settled by a continuous belt of agricultural villages. The original settlers came from Eastern Europe, as did those in Schwartz's *kvutza*. They and the present members share with the members of Schwartz's *kvutza* the social-democratic political philosophy of the former *Mapai* party, now the key element in the present day Israel Labor Party. A desire to prevent an increase in the population of the community beyond limits deemed necessary for the preservation of the family-like intimacy led to a division of the land in 1921 between two *kvotzot*, Degania Aleph and Degania Beth. Degania Aleph is the successor of the original Degania, while a new group of settlers formed the nucleus of Degania Beth. Our *kibbutz*, Degania Aleph, is comparable in size to that described by Schwartz, the last published report to the Registrar of Cooperatives (1973) listing the total population as 498, of whom 265 are adult members and candidates.

## I. INITIAL IDEAS CONCERNING LEGAL CONTROL

Schwartz states (1954: 474) that "[a]s far as could be ascertained, there were no initial differences in specific ideas concerning legal control" in the *kibbutz* and the *moshav*. Differences, if they existed, would be of obvious significance in evaluating later developments.

During the years following World War I, the question of law and legal control was a matter of considerable concern both in the *kibbutzim* and in the *moshavim*. In part, this was due to the impetus to institutionalization and organization provided by the initiation of the British Mandate in Palestine. But no less it was a result of the founding of the first *moshavim* in 1921, as a conscious rejection of the *kibbutz*. The area of social con-

3. The case is reported in Ofer (1972).

trol was an important element of the decision by a group of members of Degania to leave the *kibbutz* and found the first *moshav*.

In 1925 the Cultural Committtee of the Histadrut, the General Federation of Jewish Workers, published a slim volume, entitled *HaKvutza* (The Kvutza), containing protocols of meetings of representatives of the *kvutzot* and articles written by members on matters of current interest. Substantial attention is given the subject of legal control, which was debated in a meeting at Degania in 1923 (1925: 15-43). In 1924 at a meeting at Tel Yosef a draft of proposed Articles of Association was presented by one of the recognized leaders, Berl Katznelson. It is printed at the end of the *HaKvutza* volume as an appendix, with the suggested amendments of the *kvutza* representatives appearing as footnotes to the text (pp. 157-165). The book concludes with a first draft of a proposed *Kvutza* Constitution, prepared by an anonymous group of members for study by the *kvutzot* (1925: 166-174). Many articles in the volume deal with the question of law in the *kvutza*.

These sources reveal a difference of opinion at that time regarding legal control. An anti-law norm was the dominant attitude. It was expressed most consistently by the representatives of the small *kvutzot*, who were in a decisive majority. Thus, the representative of Degania Aleph (p. 41):

> The matter of the Constitution is opposed to our entire outlook with regard to the *kvutza*.

One of the proponents of the proposal for a formal legal framework summarizes the prevailing attitude of the majority (p. 101):

> We have a certain natural opposition to law. Our taste is to be beyond the framework of laws, and it is pleasant for us; for strong in us is the impression of law in capitalistic society, law that exists in absolute contradiction to the feeling of justice we have inside us. And through opposition to the existing society we have transferred part of our hatred to law as such as well. Many of the values most precious to us we acquired only because we threw off the yoke of the accepted law; and with this we forgot that law as such in the role of an instrument for the organization of a society and the existence of its members, is a good and necessary thing without which no society could exist. All depends on the content of the laws, their intention, and the way of realizing them in life.

Archival data from Degania Aleph further document this attitude. The Day of Atonement, Yom Kippur, is a time of soul-searching in Jewish tradition. In the secular *kibbutz* this tradition is preserved. The meeting of the *kibbutz* General Assembly, comprising all members, is devoted to communal spiritual renewal. It is denoted the Annual Assembly and often continues nightly for a week.

The protocol of the Annual Assembly of 1923 in Degania

Aleph, dated "the Days of Awe", states the matter on the agenda as follows: "The question is—what is the cause of the general distress?" It must be recalled that the discussion in which the following excerpts appear took place thirteen years after the founding of the *kibbutz*:

> Tanhum: . . . I feel that sometimes the relations between the new members and the old ones do not stand on an acceptable level, and that is all the distress.
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> Ben-Yaacov: In recent years people were accepted only because of lack of hands to do the work in the fields. I deny the possibility of a small *kvutza* being a family, since then life would be harder than now. It is impossible to go against nature. It is enough that in work we are a family. In order to remove the distress about which Tanhum spoke, I would not be afraid of adopting certain laws with the approval of all of us.
>
> Smetterling: I see that we are moving and approaching a large *kvutza*, in that during the last year we added not individuals, but rather a whole group. Also, we are not being as strict now in the reception of people as we were accustomed to be in past years. . . . If we received two people every year through necessity (since after all relatives also come to us who remain with us), there would be no possibility of the creation of rules. However, if we go and add people in a group, there is no alternative to the creation of laws.

The discussions in this period are summarized in a volume commemorating the 25th anniversary of Degania (Dayan, 1935: 175-176), as follows:

> Meanwhile the farm grew, and the work increased; and the family spirit diminished. Proposals are made to adopt rules for the society, for the *kvutza*. The idea does not sink in. Is the *kvutza* a limited joint stock company? No, the *kvutza* is spiritually healthy, and external rules do not work in it and are unlikely other than to introduce into it the spirit of a commercial corporation.

As these sources indicate, the initial ideal of social control in Degania was definitely anti-legal. Law was perceived as alien to the familial intimacy of the *kibbutz*. In cases of disagreement, the approved procedure was frank and intimate discussion of differences. The norm of social conduct was deference. Through deference came self-purification and total identification with the community, the ultimate objective. Dayan observes (1935: 102-103) that in cases of personal dispute there would be a "clarification" in the General Assembly, sometimes initiated by reciprocal letters of resignation, proferred by the parties involved for the sake of harmony.

The role of the General Assembly in the settlement of disputes was recognized in the proposed Articles of Association, proposed in 1924 (see above at 420). Article 12, entitled "Comrades' Law", provided for the resolution of disputes in the

*kibbutz* between members or between a member and the *kibbutz* in the General Assembly of the *kibbutz* (or a committee of arbitration designated by it), with appeal to the judicial organs of the labor movement.

Here the contrast with the initial attitude to legal control in the *moshav* is clear. The *moshav* consciously rejected the *kvutza* ideal of familial intimacy as a basis for social organization and deference as a norm of social conduct. Articles of Association were adopted even before the first *moshav* had been founded; and in 1926 formal dispute-setttling procedures were adopted, providing for local adjudication with appeal to a judicial body of the Moshav Movement (Harouvi, 1962: 40). Adjudication at the local level was assigned to the Judicial Committee or the *moshav* Executive Committee. The functionally undifferentiated General Assembly, central to dispute-settlement in the *kvutza*, was left out of the scheme of local adjudication in the *moshav*.

Schwartz labels as his "thesis" (1954: 473) that "the presence of legal controls in the *moshav*, the semi-private property settlement, but not in the *kvutza*, the collective settlement, is to be understood primarily in terms of the fact that informal controls did not operate as effectively in the *moshav* as in the *kvutza*." It is submitted that initial differences in specific ideas concerning legal control seriously disturb this thesis. They mar the symmetry of the comparison of the two communities, the *moshav* and the *kibbutz*, in a matter of basic relevance to his argument. They suggest not only an alternative characterization of control system in the *kibbutz*, but also a different explanation of how it operates.

Consistent with the initial anti-law ideal, *kibbutz* members would undoubtedly agree with Schwartz that the *kibbutz* lacks a system of legal control. However, the attitude to law cannot be the determinative element. It is an impediment to, rather than a substitute for, an empirical examination of the legal reality in the *kibbutz*.

## II. LEGAL CONTROL IN THE KIBBUTZ

Schwartz's finding that the *kibbutz* lacks legal institutions comprises elements that are structural, functional, and normative. To examine this finding we must attempt to answer three distinct, although interrelated questions: (1) Does the *kibbutz* have legal "institutions"? (2) Do the institutions of the *kibbutz* authoritatively allocate values in a manner that can be consid-

ered "legal"? (3) Does the institutional rule-making process in the *kibbutz* enunciate "legal norms"?

### A. Legal "Institutions"

We must first face a fundamental ambiguity in Schwartz's position. In his landmark article, he states (1954: 471) that the *kibbutz* had no distinctly legal institution. But in another paper, based on the same field work, he reveals a different assessment when he summarizes the difference between the *moshav*, the cooperative community, in which he found a system of legal control, and the *kibbutz*, in which it was allegedly absent (1957: 1459:

> For instance, the Judiciary Committee of the moshav, a panel of seven, is entrusted with *enunciating the local law and passing judgment on offenders, a function reserved for the Assembly in the kvutza.* (Emphasis supplied.)

Rosner (1973: 184) concurs:

> The *judiciary function* of the General Meeting is expressed primarily in the circumstantial consideration of each case under discussion and also in the interpretation of previous decisions and of accepted codes in each case under consideration. (Emphasis in the original.)

Thus, both Schwartz and Rosner agree that a judicial function is performed by the General Meeting (or Assembly) of the *kibbutz*, if "enunciating the local law and passing judgment on offenders" can be taken as a fair definition of that function.

However, Schwartz is of the opinion that not the institutionalized decision, but rather the force of public opinion, is the determinative element in the *kibbutz* control system. Thus, he describes the case of a member who, contrary to a decision of the *kibbutz* (designed to prevent socially divisive private get-togethers, as well as for reasons of economy and material equality) against supplying each room with a teakettle, had received one as a gift. The Assembly decided that he could not retain it. "Confronted with this decision, the owner bowed to the general will. . . . No organized decision was threatened, but had he disregarded the expressed will of the community, his life in the *kvutza* would have been made intolerable by the antagonism of public opinion" (1954: 475). Schwartz concludes from this that public opinion may be focused by an Assembly decision, but "(s)ince public opinion is the sanction for the entire *kvutza* control system, that system must be considered informal rather than legal" (1954: 476).

This is more than a definition of the line separating the informal and the legal. It also implies a prediction that the insti-

tutional decision is dispensable. But what if the member had been subject to the pressure of public opinion without a prior institutionalized decision? In other words, what happens in the non-case?

Every *kibbutz* had its first teakettle. In Degania Aleph the matter was not referred to the General Assembly for decision. Public opinion was aroused by the member's clearly deviant behavior, and ostracism was subtly but openly employed against the offender. Even her husband joined in the campaign and refused to permit their children to enter the family quarters during tea-time, lest they be tainted by the anti-social conduct of their mother.

Why the matter was not brought before the Assembly must remain a matter of speculation, as non-cases leave no written record. However, interview data indicate that the *kibbutz* leadership saw that it was fighting a losing battle against an inevitable technological innovation. Other teakettles were either on hand or in the offing as the fight progressed. The leadership may have correctly perceived (in advance of members generally) that the norm was changing.

Moreover, there was a reluctance to bring the matter to a head, involving as it did the spouse of a valued and respected member. In addition, it was felt that the wife, who was very much an outsider, both by social origins and personal disposition, could not be held to the same standard of conduct as other members. Also, the fact that she had a profession that could be practiced outside of the *kibbutz* enhanced her mobility. In any event, only informal controls were employed, and the matter was not brought for decision before the General Assembly.

Under these circumstances, the deviant member held her ground. Whether or not public opinion makes life intolerable is, after all, decided by the person who does the tolerating. Had there been an authoritative decision of the Assembly, however, the member would have been forced to decide between her teakettle and her *kibbutz* membership (and perhaps her husband). Ostracism is, or can be, an informal sanction, and can be imposed through an implicit judgmental process; but expulsion is a formal sanction which can only be imposed after an explicit decision by the General Assembly. In the roughly analogous case of the first unauthorized "private" television set in our *kibbutz*, which was the subject of prolonged discussion in the General Assembly, it was clear to all concerned that an adverse decision would require the offending family either to "draw the conclusions" and

leave voluntarily or face expulsion. While there is only one case of formal expulsion of a member in this *kibbutz*, there are many cases of members who resigned voluntarily after an adverse decision of the General Assembly. The institutional decision does make a difference.

Nor is the General Assembly the only institution in the *kibbutz* performing a "judicial" function. Schwartz illustrates the operation of the *moshav* system of legal control with the example of the youth who went joy-riding in the neighbor's jeep without the latter's permission, causing damage to the vehicle. The Judicial Committee of the *moshav* awarded damages to the owner, which were subsequently discharged by the boy's parents. Schwartz concludes (1954: 475):

> By contrast the kvutza has not delegated sanctioning responsibility to any special unit.

The kibbutz has not developed a structurally differentiated court, but it most certainly has its joy-riding youth, and they sometimes cause damage. What happens?

The most recent case in our *kibbutz* involved extensive damage to the tractor used by the *kibbutz* silo, caused by a number of teenagers in the course of an April Fool's prank. They were summoned before a representative of the Education Committee, who invited the Farm Manager to be present. The object of the hearing in the *kibbutz* situation is, indeeed, quite distinct from that in the *moshav* case. The tractor is *kibbutz* property. The damage is sustained by the *kibbutz* as a whole. The cost of the required repairs could not be placed on the youths involved nor on their parents. Neither would have assets from which a judgment could be satisfied.[4]

The nature of the *kibbutz* hearing can be adduced by the result in the instant case: The youths acknowledged their guilt and expressed repentance for their conduct. By their own decision, they took it upon themselves to help the silo manager in their free time. True to the familial nature of *kibbutz* law, this was neither punishment to "pay a debt" to society nor compensation to the injured party. Essentially, it was their penance; although the fact that they chose to donate services to the *kibbutz*

4. It would not be accurate to conclude that what would be civil law in the *moshav* is by definition criminal law in the *kibbutz*, since all significant property is owned collectively. True, all property in the *kibbutz* is affected with a public interest. However, in the anarchistic version of socialist legal philosophy, rooted in the ideology of the organic community and in the tradition of the Russian *mir*, the dichotomous distinctions between public and private and criminal and civil law, lose relevance, as pointed out by Kamenka and Tay (1971).

branch that had sustained the damage—even if no attempt was made to equate the value of their services with the injury sustained—shows that a compensatory principle was operative. The presence of the Farm Manager, an innovation of recent years in cases in which there is economic loss as a result of delinquent behavior, is another indication that the "cash nexus" was not entirely absent.

However, for present purposes, the important point is that the matter was dealt with by a *kibbutz* institution delegated responsibility and authority to act for the community. Not only was public opinion, focused or diffused, inoperative, but the entire proceeding was carefully isolated from public view. A similar procedure obtains in hearings involving deviant behavior of adult members before the Members' Committeee.

Another *kibbutz* institution performing an adjudicative function, the Housing Committtee, is mentioned by Schwartz in his discussion of norms (1954: 486):

> In housing, correct behavior is even less complicated: one is expected to live in the room assigned by the Housing Committee, whose discretion is limited by policies established in the General Assembly.

That housing law in the *kibbutz* is not free from complication can be seen in Schwart's example of the improved housing units assigned on the basis of seniority rather than need. That is, nonsenior inhabitants of advancing age were ineligible, in apparent contradiction to the general *kibbutz* norm of "equal or according to need."

As we shall see, this case is illustrative of a major category of *kibbutz* law, in which the institutions of the *kibbutz* perform, either by rule-making, adjudication, or (typically) both, what is essentially an allocative function. How, it may be asked, is the *kibbutz* Housing Committee distinguishable from any public housing authority with respect to the functions it performs? To bring in irrelevant "criminal law" notions of deviant behavior and sanctions (1954: 487), as Schwartz does in this case, breeds confusion. In any event, Schwartz appears to accept that what is involved here is the institutional determination and application of norms.

### B. "Legal" Institutions

The discussion of *kibbutz* institutions has necessarily anticipated many aspects of the problem of sanctions. The fact that the implementation of sanctions requires institutional action negates the notion that they are informal in nature. The ultimate

sanction of expulsion from the *kibbutz* satisfies the most demanding requisite for the use of authoritative force as the basis for legal control.

There is a striking parallel between the sanction machinery of the *kibbutz* and that of the *sthtetl*, the Jewish small town in Eastern Europe from which the founders of the *kibbutz* came. Zborowski and Herzog (1952: 219-220) describe the enforcement of the decisions of the rabbi, the highest legal authority in the *shtetl*, as follows:

> The rabbi's decision will be enforced only by the pressure of public opinion. A salient feature of the civil machinery is the lack of enforcing power for the functions that are delegated to the shtetl. There are no police to implement the verdict of the rabbi or the decisions of other officials. Enforcement is solely by the combined authority of God and of man. . . .
>
> It is taken for granted that the rabbi's judgments are not backed up by physical force. . . .
>
> More severe is the penalty of boycott or ostracism and public shaming, for offense and penalty will be announced in the synagogue. . . .
>
> The most extreme form of punishment is almost never inflicted and operates more as a threat, or even as a remote fear, than as a fact. This is excommunication. . . .

The anti-law norm in the *kibbutz* may be considered as one aspect of the rejection of the religious tradition. Rejection of law was a rejection of the Law. However, as Diamond has demonstrated (1957), with the reaction against *shtetl* values there were many areas of continuity.

As previously noted, there is only one case in the history of Degania Aleph in which a member has been formally expelled. An unfavorable decision of the General Assembly, however, may be tantamount to expulsion, if it is in a matter of vital importance to the individual involved. Thus, in cases in which members had already made arrangements for an extended stay outside the *kibbutz* and applied for a leave of absence, the failure to grant the request was equivalent to a decision of expulsion and was so interpreted both by the *kibbutz* and by the individuals involved. Similarly, a decision refusing a request to study, while it necessarily involves the deprivation of a benefit, as does every negative decision of an allocative nature, may also imply expulsion, if the member has indicated that he will pursue his plans regardless of the *kibbutz* decision.

Milder than expulsion but also infrequent in practice is denunciation of deviant behavior in the General Assembly, calling to order, etc. While this involves the application of public opin-

ion, rather than physical force, as the instrumentality of control, it is nevertheless formal and institutionalized.

In their contacts with the outside world, *kibbutz* members may be penalized for deviant conduct, in the same manner as others. This is a border area, in which the *kibbutz* system of social control collides with that of the broader society. A typical problem is that of responsibility for fines. The liability of the *kibbutz* for fines levied on its members is *ex gratis*. However, the *kibbutz* would not ordinarily place the propertyless member in the position of either going to jail or leaving the *kibbutz* in order to earn money to satisfy the fine.

An area of frequent concern is that of traffic violations. It is likely that in the years in which Schwartz did his field work the only motor vehicles in his *kibbutz* were commercial, and all driving was done as a part of the work or other duties of the driver.[5] Those days have long since passed. Today, every veteran *kibbutz* owns a number of non-commercial motor vehicles. Some are used primarily in the course of work, but are available for private use of members as well. Others are acquired by the *kibbutz* primarily for private (that is, non-work connected) trips of members.

Elaborate rules have been adopted with regard to the allocation of automobiles for private use. The provision adopted in our *kibbutz* with regard to fines is as follows:

> In every traffic report with the alternative of a fine in which the driver is guilty, the member will pay 30% of the fine levied, on a fine of £ 100. In the case of a fine above £ 100, the member will pay £ 30, and the excess will be paid by the *kvutza*.

In at least one other *kibbutz* fines for speeding violations are at the expense of the member, while minor traffic violations are reimbursed by the *kibbutz*.

This distinction is significant. It is explained not as an imposition of a fine by the *kibbutz* but rather as a refusal of the *kibbutz* to intervene in what is regarded as action by the member beyond the scope of his membership in the *kibbutz*. Thus, in one case in our *kibbutz* (not a motor vehicles matter), in which

5. Schwartz (1957:141) reports the discussion in the General Assembly regarding a proposal that *kibbutz* truck drivers be obilged to pay the fines imposed as a result of their negligence, a proposal which was rejected. "Although the issue is phrased in economic terms, budgetary considerations appeared far less important than the problem of translating ideological principles into a cultural norm," Schwartz informs us. The purpose of this example, we are told, is "to illustrate the scope of *kvutza* political activity." It is submitted that the norm is as legal as it is cultural, while the activity referred to is, as is all legislative activity, as legal as it is political.

the Members' Committee and the Secretariat regarded the matter as involving moral turpitude, the amount of the substantial fine, which was paid in the first instance by the *kibbutz*, was deducted from the member's personal pocket money allowance over a period of years. Within the limits indicated, the sanction mechanism of the general society is used to control the activity of the *kibbutz* member.

The role of the police in the control system of the *kibbutz* cannot be ignored. The "shielding" of members from the courts of both the British Mandatory regime and of the State of Israel, reported by Schwartz (1954: 474) probably has its origins in the reluctance to resort to the machinery of an alien regime in the pre-State period, which would have smacked of "treason," as Weisman suggests (1966: 122). However this may be, the possibility that the *kibbutz* will not prevent the initiation of police action or will not act to abort it once it has commenced has a subtle influence in strengthening internal controls in the *kibbutz*. This parallels, in a sense, the way in which tribal societies use the colonial power to strengthen traditional leaders. Youth are particularly affected in this regard, as it is widely believed that an arrest record will result in disqualification for enlistment in one of the elite units of the Israel Defense Forces, which is a universal aspiration of the pre-military age group in the *kibbutz*.

The *kibbutz* institutions make every effort to preserve for themselves a monopoly on contacts with the police. According to custom, only the Secretary or another *kibbutz* functionary is entitled to apply to the police for assistance. The importance of this custom can be surmised from an instance in which it was violated. This was a case of petty vandalism in the regional elementary school, located adjacent to our *kibbutz*. The school is an independent institution, but the administrative director at the time was a member of our *kibbutz*. He applied, at his own initiative, for police intervention. Their investigation pointed to *kibbutz* youths. The youths' parents petitioned to the Members' Committee with a request that the school director be summoned for "clarification" and suitable rebuke. The matter was brought to the General Assembly, which reaffirmed by formal decision the customary rule. However, as the discussion in the General Assembly in this case showed, there is a greater readiness, particularly amongst mature second-generation members, to have the *kibbutz* apply to the police in a proper case. This is a matter of dispute, and actual practice is likely to vary greatly from *kibbutz* to *kibbutz*.

## C. Legal Norms

Schwartz contends that *kibbutz* norms are "unambiguous and simple because behavioral alternatives and variations are sharply limited." Thus, the effectiveness of informal controls is enhanced, as the system of norms "provides consistent guides for the application of sanction and at the same time forewarns potential sanctionees of the consequences of their acts." This extends to consumption activities in the *kibbutz*, which are "also controlled with the aid of explicit general norms" (1954: 487, 485).

This fails to take into account important distinctions in normative levels and is contradicted by the actual case situations which Schwartz describes. The abstract norm of "to each according to his need" proves to be highly ambiguous when applied to concrete situations. Thus, Schwartz describes the change from "an early norm (that) permitted each member to take as much money from a common fund as he felt he needed for personal expenses" to a decision of the General Assembly that "modified the norm to stipulate a yearly amount for each member's personal use." Schwartz views this as "clarification of the distinction between acceptable and disturbing behavior," thus "increasing the effectivenesss of informal sanction rather than substituting legal controls for them" (1954: 489).

Actually, this change from subjective to objective determination of need was not a clarification of the original norm but its reversal. Both standards are permissible interpretations of the basic norm of "to each according to his need," although they are clearly contradictory interpretations. This points up the distinction between an ultimate and an instrumental norm, an ideal and an operative rule. As Sally Moore points out (1969: 345), imprecision increases the higher up the hierarchy of legal principles one goes. The *kibbutz* ideal of "to each according to his need" has remained constant, but it has been variously interpreted at different periods and in different areas of consumption in terms of the subjectively felt need of the member, in terms of a set standard (or norm) of goods or services, and in terms of fixed budgets against which the member draws, the latter arrangement policed in many *kibbutzim* by the simple expedient of distributing to members internal vouchers in the amount of the budgetary allowance. The change to a budget, which Schwartz relates, is a shift to such allocative controls. Reference to sanctions, formal or informal, is simply irrelevant.

However, the determination of need in terms of a budget does not eliminate ambiguity. The budgeting of need fulfills the

ideal of equality in a mechanistic sense, but does not answer the requirements of "true" equality, for differential need, while difficult to ascertain, is recognized to exist. Thus, alongside the determination of an equal budget for pocket money, there are additional rules, relating to recognized categories of special needs. For special needs not covered by any codified exception to the rule of equality, there is the possibility of applying to the Members' Committee, which decides questions of differential need requiring the exercise of discretion. As Schwartz informs us (although not in the context of his discussion of norms in *kibbutz* consumption): "The Members' Committee is concerned with problems of individual needs, material and social" (1957: 144). The fact that there are indeed "problems of individual needs" and that they are dealt with authoritatively by an institution negates the idea of the ambiguous norms and their enforcement by informal controls based on the sanction of public opinion.

Actually, there are two ultimate norms controlling consumption in the *kibbutz*—need and equality. Each is ambiguous, and in combination the ambiguity is compounded. Thus, there are a wide variety of operative norms interpreting these ultimate ideals in concrete situations. These operative norms, generally expressed in decisions of the General Assembly, require interpretation and application. Provision must be made for differential needs and for "special" cases. The operative norms change over time, in the light of accumulated experience and as a result of longer-term social changes in the *kibbutz*. When the "special" case becomes a recognized category, either by adjudication or by legislative action of the General Assembly in the adoption of a new rule or by-law, then the operative norm has changed.

Behavioral alternatives and variations were probably never as limited as Schwartz indicates; certainly, over time, they have become ever broader. Rules become more complex, and criteria change. However, there was never a time in which rules were entirely unambiguous, nor when their interpretation and application did not require the institutionalized weighing of competing principles.

## III. LEGALITY IN THE KIBBUTZ

In a socialist model of an organic community, as Kamenka and Tay (1973: 11-12) have emphasized, justice is "substantive, directed to a particular case in a particular context, and not to the establishing of a general rule or precedent." During the earlier years in our *kibbutz*, until a mature second generation

made its appearance, precedent was clearly a danger to be avoided. Where acknowledged to exist, it was rarely controlling.

Thus, it is common practice to accept automatically to candidacy the spouse of a member. However, what if the spouse is already well known to the membership and considered undesirable? The following excerpts are from the protocol of the General Assembly in Degania Aleph, dated September 14, 1928:

> Y. I can't grasp the difference between accepting a member that is known and a member that is known (unfavorably). . . . But precisely here we are frightened, and in this case our views diverge because of precedent. Everyone understands the precedent according to his outlook. This must be determined by the consensus in the Assembly. . . Each and every question will be solved by us according to the consensus and not according to principles. . .
>
> M. We never had a case in exactly this form in our *kvutza*, and this is a first precedent and special of its kind. . .
>
> A. . . . Y. was right that this should not be spoken of from precedents in the *kvutza*. Every case is itself a very large tangle of problems. . .

The objectionable spouse was not accepted as a candidate, despite the precedent.

However, there is an increasing insistence, dating from after Israel's independence in 1948, on the formulation of generalized norms, to be applied with a high degree of individuation in concrete cases. An examination of protocols of the General Assembly in Degania Aleph demonstrates conclusively that the demand for formal rule-making comes primarily from mature second-generation members. In a previous paper (Rothman and Shapiro: 1974) we examined the process of rule-application in a number of "trouble" cases and noted the trend to the formal adoption of by-laws or regulations. In some *kibbutzim* these rules have been collated and distributed to members. The letter of transmittal to members of one such collection of rules is appended.

This letter sets forth what may be regarded as the emerging legal ideal in the *kibbutz*. On the one hand, it reflects the passing of the anti-legal ideal in the very fact of the transmittal of a collection of rules. More specifically, the author recounts the weakness of "ad hoc" determinations and the importance of consistency in the decision-making process. At the same time, the letter reaffirms the need for individualized rule-application, "considerations to the substance of the matter that are not according to the dead letter of the regulation."

If individualized generality may be regarded as the emerging legal ideal in the *kibbutz*, why was it not so acknowledged earlier? The initial attitude to legal control, which regarded law as alien to the familial intimacy of the *kibbutz* and to its prop-

ertyless collectivism, reflected an ideological commitment that shaped the perception of reality. Declining intimacy and increasing affluence have weakened the commitment. They have not fundamentally altered the reality.

Individualized generality is a necessary attribute of a legal system whose major area of activity is the performance of an allocative function. In the *kibbutz* model of collectivism, all individual property is the grant of a dispensation on the part of the community. For example, one does not have title to particular real property; rather, one has a license from the appropriate *kibbutz* institution to occupy a particular dwelling. There is a rough correspondence to Charles Reich's "new property," that is, government largess. As he points out (Reich: 1966), the increasing importance of government employment, subsidies, franchises, etc., in a developing public-interest economy has created a new form of wealth, for which legal principles based on a right-privilege dichotomy are ill-equipped to deal. In the *kibbutz*, all property is Reich's "new property," a species of largess on the part of the community.

This gratuity principle implies an absence of indefeasible rights. However, the allocative function of the *kibbutz* as the definer of property relationships comes up against the principle of "to each according to his needs." The right of the member in Degania Aleph to receive the newspaper of his choice, regardless of his party affiliation, was justified on this basis, overcoming the contention that the distribution of newspapers was an allocative function of the *kibbutz*, to be performed according to criteria determined by it (Rothman and Shapiro, 1974: 35-36).

One can discern the gradual creation of personal rights securing the interest of the individual in property. Thus, it is well established that an individual (or a family) cannot be moved from his (its) assigned housing unit without its consent. It is recognized that continued residence in a given dwelling creates ties to neighbors and surroundings, in whose perpetuation the member has a legitimate interest. Similarly, there is a recognized property interest in one's place of work. In a formal sense, the *kibbutz* has complete control over the allocation of its available manpower. As Schwartz might have it, correct work behavior is without complications: one is expected to work in the job assigned by the Work Committee. However, it is probably more difficult to "discharge" a *kibbutz* member, that is, to transfer him to another post without his consent, than it is to fire a hired worker. Indeed, one finds a recognition of rights in the allocation of work, such as the right to a job in which the mem-

ber realizes his potentialities and finds satisfaction, which may involve the *kibbutz* in major investments.

Determination of the right to use public resources in a public-interest economy often involves judgments about individual characteristics that are far removed from the activity under consideration. The right to practice a profession or to manage a given type of business affected with a public interest may require a finding with regard to moral character; the granting of a television channel may involve a complex judgment about the worth, standing, and influence of the applicant. Similarly, the allocative function of the *kibbutz*, in which all property is the conferring of a public benefit, involves a judgment with respect to the total personality of the individual involved.

Naturally, this involves a high degree of discretion and flexibility in rule-application. However, as Bickel points out in a radically different connection, the antithesis of principle is not whim or even expediency, but prudence (1962: 133). Thus, judgments "to the substance of the matter," as it is usually phrased in *kibbutz* rules and discussions, the differential application of general rules, need not necessarily involve discretion that is "unchanneled, undirected, uncharted" (Bickel, 1962: 132).

Generality and individuation in rule-application are not polar opposites. Rather they are the two axes defining the matrix within which the decisional process operates. "For many circumstances the mechanical application of a rule means injustice; what is needed is individualized justice, that is, justice which to the appropriate extent is tailored to the needs of the individual case." (Davis, 1972: 23.) The mechanical application of a rule is the limiting case in which generalized rule-application reaches infinity and individuation is zero. The opposite occurs in the *kibbutz* in extreme cases in which the keeping of a member within the family outweighs all other considerations. The decision-making process then becomes one of bargaining between independent centers of power. This may be thought of as the limiting case, in which generalized rule-application is zero and individuation reaches infinity.

It is well recognized (Fuller, 1964: 170-177) that an allocative function is imperfectly performed by the adjudicative process. The public-interest state, in which property is a dispensation of the community, leans to administrative, rather than judicial, decision-making (Reich, 1966: 67). If one conceives of the General Assembly or any other *kibbutz* legal institution as an administrative agency, many of its characteristics become familiar. In

the *kibbutz*, as in the administrative process, there is the combination within one body of powers of rule-making and adjudication and the constant dilemma with regard to the appropriate method of policy-making.

If the test for the existence of legal control is the existence of a structurally differentiated court, then clearly the *kibbutz* is excluded. This is what Schwartz implies (1954: 471) in his statement that the *kibbutz* "had no distinctly legal institution," while acknowledging that the General Assembly "is entrusted with enunciating the local law and passing judgment on offenders" (1957: 145). Such a test, however, would be little more than a restatement of the separation of powers norm, excluding more than most would be willing to concede (Pospisil, 1971: 14-15).

## APPENDIX

The following is the full text of the letter of transmittal to members of a compilation of regulations. The *kibbutz* is comparable in size, ideological orientation, political affiliation, etc., to Degania Aleph.[6]

* * * * * * * * *

Presented with this to members is a collection of regulations—the fruit of many hours of committees and Assemblies in the course of years—decisions in whose light the daily life of the *kibbutz* is conducted.

It is characteristic of the internal legislative process in the *kibbutz* that it is initiated as the result of pressures. Every *kibbutz*, in encountering questions and problems that are continually recurring and as to which there is no self-evident answer directly issuing forth from *kibbutz* values and norms or as to which there are several conflicting answers, is obliged to determine its own practices.

I believe that it is becoming more and more clear to members that "ad hoc" determinations and solutions "to the substance of the matter" when they occur are not untainted by personal preferences, by random and personal pressures, and that *in toto* the solutions obtained this way are less principled and not always congruent with the values accepted by the *kibbutz*.

Such solutions do not free the *kibbutz* from the tension involved in adopting a similar decision on the next occasion that the question arises; and to the extent that the new determination differs from its predecessor, there is no better reason than this for new tensions. Therefore, it appears that the logical conclusion demanded is that in such questions it is necessary to determine rules that will be independent of transitory pressures and of personal considerations; that is to say, a regulation.

The Social Committee, which deals with the formulation of regulations, requires a number of guide-lines in my opinion; and it seems to me that such guide-lines did, indeed, serve the Social Committee in years past.

### A. *Flexibility*

Leaving an opening for change in accordance with the will of the majority and especially leaving an opening for considerations to the substance of the matter that are not according to the dead letter of the regulation.

### B. *Abstention from the Imposition of Sanctions*

There will not be sanctions that involve the negation of rights, but rather denunciation, calling to order, etc.

One might say that the regulation is a sign of the changing of the guard in the *kvutza*; it serves as a main preserver of ways of life without which the *kvutza* is not a *kvutza*.

6. The letter of transmittal is undated. However, it may be safely dated as late 1969. The various regulations and decisions are dated, and there are none later than that period.

a. The regulation will serve as a pattern of stable principles for the direction of public opinion formulated in the Assembly of the *kvutza* in its judicial function and as a compass and focus for personal and emotional attachments to the institutions and the social norms.

b. The regulation will fence off the *kvutza* from negative influences and isolate marginal cases.

c. The regulation will ensure the rights of the individual also when his social situation in the *kvutza* is bad, preventing arbitrariness and discrimination on the part of the institutions of the Asssembly.

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