COMMENT:

A BROAD LOOK AT THE RELATIONSHIP OF CULTURE AND LAW

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I. CULTURE DEFINED

> *"What the Greeks expressed by their paideia, the Romans by their humanitas, we less happily try to express by the more artificial word culture."*[1]

Culture is a word that does not admit of precise definition. It is used to signify so many things that the word appears inadequate to encompass all that it is meant to. This difficulty in arriving at one universally acceptable definition of the term "culture" is echoed by Patya Saihoo in these words:

> All popular meanings of the word "culture" have value connotation: as "cultivation," "educated refinement," "civilization," or "way of life." Discussion of "culture" in any of these senses involves value judgment by all parties in the discussion which may or may not be in agreement. Persons engaged in "cultural" activities likewise make their own value decisions which may or may not be in accord with those of their observers. A person speaking on the subject for a nation, or a region made up of several nations, takes a greater risk in assuming his own value judgments for others.

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[1] WEBSTERS' NEW INTERNATIONAL DICTIONARY 643 (2d. 1951).

> Even the seemingly most neutral and value-free meaning of the term as a "way of life" used by social scientists, in contradistinction to their colleagues in the humanities, which avoids their own value-judgments, must recognize that to the bearers of that culture their way of life is the aggregate of their value choices and decisions. When one discusses the development of one's own culture even as a social scientist one cannot entirely avoid this dilemma.[2]

Saihoo goes on to suggest four possible usages of the word "culture" which would, in turn, differently determine corresponding cultural development activities. They are the following:

(1) The idea of "culture" as "way of life."

(2) The idea of "culture" as "traditional heritage," such as when a people tries to find its identity in its traditional way of life, and seeks to preserve its "culture."

(3) The idea of "culture" as "creativities" of man.

(4) The idea of "culture" as "arts."[3]

Other definitions of "culture" have also been advanced. For one, culture may refer to a particular stage of achievement in civilization. It could also refer to the characteristic features of a civilization including its beliefs, its artistic and material products, and its social institutions.[4]

Culture has also been defined as the symbolic aspect of social life, including expressions of what is true, good, and beautiful. It includes ideas about the nature of reality (*e.g.* science, technology, religion, magic and folklore). It also includes conceptions of what ought to be, what is right and wrong, what is proper and improper — apart from the behavior of social control itself (*e.g.* values, ideology, morality, and *law).* Culture also includes aesthetic life (*e.g.* poetry, painting, clothing, architecture) (emphasis supplied)[5].

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[2]Patya Saihoo, *Problems in Cultural Development in ASEAN, in* ASEAN IDENTITY DEVELOPMENT AND CULTURE 110 (R.P. Anand and Purificacion V. Quisumbing eds., 1981).

[3]*Id.* at 111.

[4]'WEBSTERS' NEW IDEAL DICTIONARY 120 (1978).

[5]DONALD BLACK, THE BEHAVIOR OF LAW 61 (1976).

John E. Walsh broadly defines a culture as a group's consensus on opinion and behavior.[6] Prof. Perfecto V. Fernandez, on the other hand, states that, culture encompasses whatever is by reason of the intervention of Man. He defines culture thus:

> Culture then is the totality of human inventions, brought about by expenditure of human thought or effort or both. Embraced in culture are tools, instruments, devices and contrivances having physical form or expression, as well as intangible reflecting ideas, processes, methods or techniques, by which human action is to be guided and facilitated towards the attainment of human purposes.[7]

Consistent with the broad scope covered by his definition of the word culture, Fernandez attempts to delineate the domain of culture by presenting the following categories:

> (1) *Cognitive-technical Culture.* This aims at the understanding, control and use of nature to meet the needs of Man, and which embraces philosophy, the sciences, technology, the utilitarian arts, and the practical crafts.
>
> (2) *Normative Culture.* This aims at the control of Man and of Society, to enable human beings to live together in peace and harmony, through prevention and management of conflict. The main forms of Normative Culture are Dogma, Tradition, Custom, Morality and Law.
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> (3) *Instrumental Culture.* This consists of symbol systems, which are utilized for development, transmission, storage, and processing of meanings and ideas in the other categories of culture. Among the well-known symbol systems are the different alphabets, numerical systems, arithmetic, mathematics, musical notations, etc.
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> (4) *Aesthetic Culture.* This embraces different forms for the expression of Beauty, such as Poetry, the visual arts, the performing arts, etc.[8]

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[6]John Walsh, *Cultural Components of the Search for Social Justice in ASEAN: A Westerner's View*, *in* ASEAN IDENTITY, DEVELOPMENT AND CULTURE, *supra* note 2, at 173.

[7]Perfecto Fernandez, *Understanding Law as a Social Phenomenon*, 65 PHIL. L. J. 30, 34 (1990).

[8]*Id.* It is interesting to note that Law is one of the main forms of Normative Culture.

Of these four categories, normative culture and instrumental culture are deemed the most relevant in establishing the relationship between law and culture.

In Fernandez' words, Normative Culture possesses great significance in establishing law as a social phenomenon for the following reasons:

> *First*, in the inception of every legal order that is evolved over time, it is the Quasi-Norm of Tradition that underlies the sovereign authority for the enactment of law.
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> *Second*, the Quasi-Norms of Custom and Morality are usual sources for the enactment of law through legislation or adjudication.
>
> *Third*, the Regulations of the different social orders in society, with their underlying values, are likewise sources for the enactment of law in terms of direction of growth as well as specific content.[9]

With regard to Instrumental Culture, on the other hand, he writes:

> Likewise, Instrumental Culture in the form of spoken and written language is the very tissue of the Law. Every enactment takes on a linguistic form, and it is this form that conveys the Norm (*i.e.* the meaning of the enactment). The meaning of the language used, together with the applicable grammar and syntax, may affect the existence of the Norm, or the kind of Norm intended. In this way, the efficacy of Law is influenced in large measure by the culture medium of language.[10]

In providing an image of Philippine culture on the basis of prevailing patterns of relationships in various Philippine communities, Amaryllis T. Torres defined culture in this way: "Culture, therefore, is made up of the totality of tools, techniques, social institutions, attitudes, beliefs, motivations, and systems of values known to a social group."[11] For purposes of this paper, this definition shall be used.

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[9] *Id.* at 35.

[10] *Id.* at 35.

[11] Amaryllis Torres, *A Portrait of Filipino Culture*, 47 PHIL. SOCIAL SCIENCES AND HUMANITIES REV. 243 (1983).

II. LAW DEFINED

The word "law" partakes of the nature of the word "culture" in that it too, is susceptible of many meanings.

> The conflict of opinion on the meaning of law has been for centuries an object of raging definitional debate. In political theory, some define law as the minimal rules of conduct acknowledged by members of that society, while others would need the formal commands of a governing authority to identify it. Therefore, to Locke, there is law in primitive societies and to Hobbes, there is "no law without a political organization." Marx and Engels would admit that law does exist in primitive communities.[12]

According to Sanchez Roman, law is "a rule of conduct, just, obligatory, promulgated by legitimate authority, and of common observance and benefit."[13]

Morato, on the other hand, defines law as "a just precept promulgated by the competent authority for the common good of a people or nation, which constitutes an obligatory rule of conduct for all its members."[14]

Law may also be understood in two concepts namely:

(1) In the general or abstract sense; and

(2) In the specific or material sense.

In the general sense, law can be understood to mean the science of moral rules, founded on the rational nature of man, which govern his free activity, for the realization of the individual and social ends, of a nature both demandable and reciprocal. It is the mass of obligatory rules established for

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[12]Roberto Benedito, *Law and Nationhood: Transcending the Cracks in the Parchment Curtain*, 59 PHIL. L. J. 395 (1984).

[13]ARTURO TOLENTINO, 1 COMMENTARIES AND JURISPRUDENCE ON THE CIVIL CODE OF THE PHILIPPINES WITH THE FAMILY CODE OF THE PHILIPPINES 1 (1990).

[14]*Id.* at 2.

the purpose of governing the relations of persons in society.[15]

In a specific sense, law can be understood to signify a juridical proposition or an aggregate of juridical propositions, promulgated and published by the competent organs of the State in accordance with the Constitution. It is a norm of human conduct in social life established by a sovereign organization and imposed for the compulsory observance of all."[16]

Law is a specialized form of social control.[17] According to legal theorist Donald Black, law is governmental social control. He views law as the normative life of a state and its citizens, such as legislation, litigation, and adjudication.[18]

The word "law" may also refer to the legal order, which is the totality of the laws enacted in a specific society, or at a distinct period in such a society (*e.g.* Law of Indonesia, Law of postwar Japan).[19]

Law could also refer to the mass of concepts, precepts, doctrines, principles and prevailing standards, presented in a systematic manner, pertaining to a specific legal order, or to a branch of law in such legal order. Using this definition, law is synonymous with a particular jurisprudence, (*e.g.* Essentials of French Law, the Canadian Law of Civil Procedure).[20]

Law may also be regarded as synonymous with general jurisprudence. In this sense, it refers to a systematic statement of concepts and principles aimed at an adequate description of features and institutions that are universal, in the sense that they are common to all concrete legal orders.[21]

It could also refer to the field of data or raw material of general jurisprudence. In this case, law refers to the entire universe, or total mass, of

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[15] *Id.*
[16] *Id.*
[17] Jose Bengzon, *Law as a Function of the Social Order*, 43 PHIL. L. J. 699, 702 (1968).
[18] BLACK, *supra* note 5, at 2.
[19] Fernandez, *supra* note 7, at 32.
[20] *Id.*
[21] *Id.*

concrete legal orders in human experience, as field for research or investigation.[22]

For Fernandez, the core or minimum concept of law identifies a law as any enactment of a norm by the sovereign in a particular society. This enactment is expressed in language, generally in written form. It defines and conveys a norm as its meaning. It is for, and made in behalf of, a particular concrete society and takes the form of overt and visible behavior of an official or officials, amenable and subject to observation, recording and verification.[23]

In order to determine whether a particular enactment merits classification or identification as a "law," Fernandez requires the satisfaction of a three-fold test specified in the core or minimum concept of law.

The three-fold test is as follows:[24]

(1) The Cultural Form — the enactment must convey a norm;

(2) The Social Matrix — the enactment must be made in the exercise of official authority within a social order; and

(3) The Political Criterion — the enactment must be made in the exercise of official authority within a social order of a special kind, which is a society under a sovereign order.

As regards meeting the requirements of this test, Fernandez writes that "It is not enough for an enactment to meet or satisfy one or two of the foregoing three tests; there must be full satisfaction of all three."[25] Worthy of note is the fact that one of the tests for an enactment to be deemed a law is the Cultural Form.

For purposes of this paper, the definition given by Fernandez shall be used.

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[22] *Id.*
[23] *Id.* at 31.
[24] *Id.* at 33-34.
[25] *Id.* at 34.

III. RELATIONSHIP OF CULTURE AND LAW

As was illustrated earlier in this paper, culture and law are concepts broad enough by themselves. It is therefore no surprise that finding the relationship between them is not an easy task. As John E. Walsh points out: "There is no scientific way of establishing the connections between a particular law and its cultural principles or intellectual and emotional substratum. Judgments made about these connections will only be as accurate as the power of the observers to penetrate below the surface phenomena and on the quality of the evidence they are able to advance in support of their insights."[26]

Still, despite the difficulties and limitations, the task is still worth doing. Walsh writes: "The fact that different observers might well arrive at different conclusions does not diminish the importance of this mode of analysis as a means of culture learning; it only emphasizes the fact that in this area the complete truth — if indeed there is any such thing — lies in the putting together of partial truths or the best approximations."[27]

The relationship between culture and law can be viewed in two ways. These ways are:

A. Law as a key to the better understanding of a culture's "deep structure" or its essential characteristics;[28] and

B. The concept of cultural justice.[29]

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[26]John Walsh, Introduction to LAW AND SOCIETY, CULTURE LEARNING THROUGH THE LAW xi (Richard Vuylsteke ed., 1977). [Hereinafter LAW AND SOCIETY]

[27]*Id.*

[28]*Id.* at x.

[29]Wolfgang Fikentscher, *The Sense of Justice and the Concept of Cultural Justice: Legal Anthropology, in* THE SENSE OF JUSTICE BIOLOGICAL FOUNDATIONS OF LAW 106 (Roger D. Masters and Margaret Guten eds., 1992).

A. Law: A key to the better understanding of the deep structure or essential characteristics of a culture

The laws of a country or a culture are a key to the better understanding of that country's or that culture's basic opinions, attitudes, and values; that is, to what is sometimes called the culture's deep structure or its essential characteristics.[30]

Man, since time immemorial, has been engaged in a quest for his identity and he logically looked towards understanding the cultural context he was in — in order to gain a deeper understanding of himself. Amaryllis T. Torres writes: "Interest in examining the influence of the prevalent Filipino culture on behavior has been an inevitable offshoot of research efforts to amplify the configurations of Filipino psychology."[31]

That law should become a tool in unearthing truths about culture, interest in which is fueled by a search for the self, is but natural. The rationale for the assumption that the laws of a country are a key to the better understanding of that country's deep structure can be found in these words of John Walsh:

> Laws do not ordinarily come into force or effect in the first instance in ways that are completely random and arbitrary. That laws do sometimes come into force in this way, as for example in the edicts of a tyrannical despot or in the decisions handed down by a demented judge, only highlights the general expectation that the laws will be reasonable, that is, that they will be based on common sense, experience and good judgment. This is only another way of saying that the laws will follow some pattern of logic, that they will be consistent with one another, and that they will be validated or legitimated *by reference to prevailing beliefs and values.*
>
> Neither do laws already in existence change in purely chance or quixotic ways. Put differently, the laws, either as they are or as they will become, do not explain themselves. *The laws are a surface expression,*

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[30] This view of the relationship between culture and law was discussed by John Walsh in his Introduction to LAW AND SOCIETY. See note 26, at x.

[31] Torres, *supra* note 11.

> *in which they are rooted and out of which they take form and develop.* A major law that contradicted or violated one of the country's more basic perceptions or tenets would either be quickly changed, or it would be disregarded, or it would lead to a kind of cultural schizophrenia. (emphasis supplied)[32]

Law is indeed a mirror of the society it regulates and as that society changes, so do its laws. This idea is in agreement with Rostow's proposition regarding the functions of legal institutions in a society which seeks to govern itself through laws. According to Rostow, legal institutions have these three functions:

> (1) They must endlessly *adjust* the formal, stated rules of law to the pace of social and moral change.
>
> (2) They must seek to *raise the level* of social behavior, and of the law in practice, up to that of the accepted standards of laws.
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> (3) They must *strive*, through their own approved procedures, and according to their accepted rules, *to bring* the standards of the law *closer* to those of the ideal for law cherished by those with authority to speak for our culture in stating its law. (underscoring supplied)[33]

Law is shaped and developed in a framework and context that is social in character. Various legal scholars have recognized this malleable quality of law such that different stages of social and legal evolution have been identified. According to Kavelensky, these stages are: horde, gens, patriarchal nomadism, feudalism and democracy. For Pound, they are: primitive or archaic law, street law, equity (natural law), the maturity of law, and the socialization of law. Themistes (customs), unwritten core law interpreted by an elite, codification, fiction, equity and legislation were the stages identified by Sir Henry Maine.[34]

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[32]Walsh, *supra* note 26, at x.

[33]Bengzon, *supra* note 17, at 705-706.

[34]*Id.* at 706.

It is important to note however that the role of law is more than just responding to social and cultural facts. Law has cultural aspects of its own.[35] Law itself is a social and cultural force with a distinct positive role.[36] That role, according to Jose Bengzon, is to regulate and control social interaction in order to render the social existence tenable and successful. Two purposes are thus achieved through the social ordering done by law. These are: first, the survival and continuance of the social community; and second, the fulfillment of the social community's purposes and needs.[37]

From July 20 to August 11, 1977, the National Endowment for the Humanities and the East-West Culture Learning Institute sponsored a seminar on the subject of "Problems of Law and Society; Asia, the Pacific, and the United States." In that seminar, the East-West Culture Learning Institute sought to find out "whether and in what ways the study of major legislative enactments and landmark judicial decisions might lead to and illumine the deeper thought patterns and value systems of the cultures involved." The supposition was that an analysis of the laws obtaining in a given culture might be a richly fruitful source of culture learning.[38] That supposition was proven to be correct.

How law is a key to a better understanding of a culture's essential characteristics can be seen in a number of ways. In order to achieve a more organized approach, this relationship between culture and law can be illustrated by using the themes by which the papers of those who attended the above-mentioned seminar (some of which are featured below) were classified. The themes are: Law and Social Change, Cultural Values as Reflected in Legal Institutions, Conflict of Values: Customary vs. Contemporary Laws and Institutions, and Social Mores Viewed through the Law.

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[35]BLACK, *supra* note 5, at 62.
[36]Bengzon, *supra* note 17, at 709.
[37]Bengzon, *supra* note 33.
[38]Walsh, *supra* note 26, at x.

1. Law and social change

Legal machinery can be used to bring about changes in the social environment.

This was illustrated in Pakistan, where the Supreme Court played a role in establishing a "true theocratic state." In his paper entitled "The Content of Residuary Law in Pakistan," Syed Farooq A. Hassan discusses a case decided by the High Court of Lehore called *Nizam Khan v. Additional District Judge.* Through its decision in this monumental case, the Supreme Court of Pakistan laid down the doctrine that would produce a substantial effect on the cultural life of the people. In that case, the court laid down that in all cases concerning the civic, social, cultural and religious matters of the citizens of Pakistan, Muslim law was to be applied if the situation was not directly covered by existing statute law. Also, the Court held that within the body politic of the Pakistani nation governing the lives of its Muslim citizens, when forced with a choice of which rule of interpretation to apply that rule would be derived from the Muhammedan jurisprudence following the rules of *Istehsan* and *Istaslah.* The Court also issued a mandate to apply rules of "equity" and "good conscience" of Muhammedan jurisprudence whenever these words appeared in statutes instead of using rules of British common law.[39]

2. Cultural values as reflected in legal institutions

David H. Bayley, in his paper entitled "Modes and Mores of Policing the Community in Japan," paints a picture of the various social values of the community in Japan by analyzing police action on the local level. He points out the features of Japanese policing that "would strike the Westerner immediately and forcibly as being different." These are:

(1) Deployment of policemen in fixed posts and retention of foot patrols;

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[39]Syed Farooq Hassan, *The Content of Residury Law in Pakistan, in* LAW AND SOCIETY, *supra* note 26, at 23.

(2) Intrusion of police into community life in a manner that is routine and low-key rather than episodic and dramatic;

(3) Adaptation of police work to social surroundings based on a personal rather than impersonal police presence;

(4) Organizational acceptance and celebration of non-enforcement tasks in police work; and

(5) Active, organized sharing of responsibility for maintaining social order between the police and the public.

He traces these differences in the legal institution of police practice to several factors in Japanese history and culture. These factors are:

(1) The ecology of the Japanese city, especially congestion, absence of large thoroughfares, and disorderly spatial organization;

(2) An authoritarian political tradition with extensive bureaucratic control;

(3) Customary deference by the public to administrative officials possessing diffuse moral authority;

(4) Historical use of the police as an instrument of national development;

(5) Statist rather than contractarian philosophy of government; and

(6) Communitarian as opposed to individualistic orientation toward life.[40]

[40]David H. Bayley, *Modes and Mores of Policing the Community in Japan*, *in* LAW AND SOCIETY, *supra* note 26, at 80-81.

3. Conflict of values: Customary v. contemporary laws and institutions

Farideh Namazie discusses the conflict that arises between personal law and civil law regarding marriage in Singapore. In her article entitled "Marriage in Singapore: From Monogamous Marriage to Polygamous Union — a Recent Case," she asks whether one can rightfully say: "Although I married under a monogamous marriage law, I am Chinese, and, as my personal law is Chinese law and allows polygamy, I can marry a second wife."[41]

Namazie points out that Singaporeans, as a rule, have been made to choose between their personal law and civil law in the event of conflict. As regards marriage laws, this conflict is more pronounced. Since traditional Chinese law allowed polygamy, the institutionalization of monogamy in Singaporean statutes has created problems. On the issue of monogamy taking root in Singaporean thinking, Namazie writes:

> The Japanese occupation of Singapore from 1942 to 1945, the mass education of our womenfolk after the war, the massive propaganda of the one man and one wife theory propounded by the British colonialists and the widespread increase in the learning of the English language through the doors of English literature with its ideas of romantic love, faithfulness and Western social norms, inter alia, the social norm of monogamy, have radically altered the ways of thinking among Singaporeans and the concept of monogamy has already taken root. *This is so despite the fact that such a norm conflicts with the various personal laws of Singaporeans and not only because it has the sanction of law.* (emphasis supplied)[42]

The large and extended family unit of Asian society is in the process of breaking down as new Singaporean laws that go against the old established ways of thinking are enacted.[43]

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[41]Farideh Namazie, *Marriage in Singapore: From Monogamous Marriage to Polygamous Union*, *in* LAW AND SOCIETY, *supra* note 26, at 217, 223.

[42]*Id.* at 224.

[43]*Id.*

4. Social mores viewed through the law

Insights into the social mores of Korea can be found by an analysis of her laws. Yeon Chang Koo succeeds in finding these insights when she examines article 809 of the Korean Civil Code.

Article 809 of the Korean Civil Code prohibits marriage between parties whose surname and origin are the same.[44] This prohibition severely restricts marriage opportunities for Koreans particularly when considering the fact that 25% of all Koreans bear the surname "Kim," 20% the surname "Lee" and 16.3% the surname "Park."[45]

In discussing the socio-cultural background of article 809, she is able to trace the origins to China, with clan rules as its basis. The clan rules system creates such strong ties that members view each other as belonging to the same kinship and family, regardless of the degree of their relationship. With the adoption of Confucianism as the national ideology, this rule found support from the consciousness of the people and despite the passage of time, Koreans have stuck to the traditional view that this rule should be upheld.[46]

That Korean social mores find expression in article 809 is clearly reflected in these words of Koo:

> In a sense the law reflects the norm of actual life. Therefore, a statute which was enacted without respect to the actual norm of life has no realistic power. Consequently, it is necessary to take into consideration the view points of respecting reality or custom. In this sense, Art. 809

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[44]Art. 809 of the Korean Civil Code, enacted in 1958, reads as follows:

(1) A marriage shall not be allowed between the relatives by consanguinity, if both their surname and origin are the same to the parties.

(2) A marriage shall not be allowed between the parties if either of them is and was the spouse of a male-lineal relative by consanguinity, husbands relative by consanguinity and any other relative by consanguinity within the eighth degree of relationship.

[45]Yeon Chang Koo, *Restrictions on Marriage in Korea: The Impediments of the Same Surname and Origin*, *in* LAW AND SOCIETY, *supra* note 26, at 259.

[46]*Id.* at 265.

> was and is reflective of actual life of Koreans. For still the prohibition rule dominates the Korean way of thinking. In a sense, the prohibition rule has played a role of "living law" among people.[47]

B. The concept of cultural justice

From a perusal of literature regarding the models of law, (e.g. native law, legal positivist, legal realist, formalist), one cannot help but notice the ubiquitous presence of the concept of justice intermingled with that of law.

The demand for full justice, the demand for equal justice and the demand for exact justice are, as defined by Sir Frederick Pollack, the three reasons that compel law to take on a scientific character.[48]

According to one of our nation's foremost legal philosophers, Dr. Jose P. Laurel, the relation of law to justice lies in that the aim and purpose of law is justice. Law is that which differentiates between good and evil — between just and unjust.[49]

The concepts of law and justice are so inextricably linked that in discussing the relationship of law and culture that it is but inevitable to delve into the latter's relationship with justice.

According to Wolfgang Fikentscher, there is a "cultural justice."[50] In his article entitled "The Sense of Justice and the Concept of Cultural Justice: Legal Anthropology," he writes: "in regard to the earlier finding here that the sense of justice can be viewed anthropologically, it can be concluded that a place for *the sense of justice should be found in the anthropological theory of culture and cultures.*" (emphasis supplied)[51]

Fikentscher believes that a deduction from anthropological data of the human sense of justice is possible and makes sense. He recognizes the truism

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[47] *Id.* at 268.

[48] Roscoe Pound, *Mechanical Jurisprudence*, 8 COLUMBIA L. REV. 605 (1908).

[49] Arturo Balbastro, *The Legal Philosophy of Jose P. Laurel*, 37 PHIL. L. J. 728, 729 (1962).

[50] Fikentscher, *supra* note 29.

[51] *Id.*

that different laws may imply different senses of justice, and that different cultures may have different laws and for that reason have different senses of justice. To the question of whether there is a chaos of senses of justice, he provides, through the rules of synepeics, this answer:

> Every "culture" is to some degree, and should be, consequential of what concerns its dominant sense of justice. But here is more than one culture. On a metatheoretical level, common essentials of a sense of justice that is independent of culture can be established. This "metasense of justice" would serve as a common denominator for the identification and the comparison of the various senses of justice. *In this way, the sense of justice would become an instrument among many others for comparison of cultures.* The fact that it can serve this end is just another proof that the sense of justice in a metameaning, as we now see, is a human universal. (emphasis supplied)[52]

The sense of justice can be seen as a specific trait of a culture. On this point, Fikentscher states that upon accepting the sense of justice as a human universal, it necessarily follows that *the sense of justice is part of a human being's cultural identity.* (emphasis supplied)

There is definitely an interplay between the inherent sense of justice that an individual possesses and that of the culture to which the individual belongs. Fikentscher sums it up thus:

> Although each individual has his or her sense of justice as a token of human culture in general, the whole of the individual senses are tinted and molded by the specific culture that surrounds the individual. For that reason, the sense of justice belongs to both culture and the cultures. *As a consequence of culture per se, there is a sense of justice. The precise contents of the sense of justice are produced by the various cultures and are therefore specific for a culture, just as a certain law or legal system is specific for a certain culture.* (emphasis supplied)[53]

An affirmation of the existence of a cultural justice is provided by John E. Walsh who believes that "each culture has its own conception of what

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[52] *Id.*
[53] *Id.*

social justice is and some plan or set of rules for achieving it."[54]

While Walsh declines to give a general definition of social justice, he nonetheless postulates that three things can be said about social justice in general. They are:

> (1) *Every society or culture has some concept of social justice.*[55]
>
> (2) The essence of social justice, like all other forms of justice, is the exclusion of arbitrariness.
>
> (3) The concepts of social justice and of development, contrary to much popular opinion, are not synonymous. (emphasis supplied)[56]

Walsh goes on to identify major "cultural principles" which he sees as conditioning the nature of the search by the peoples of the ASEAN region (which includes the Philippines) for social justice. Included in this list of cultural principles are: (a) openness to pluralistic thinking; (b) desire for autonomy and indigenization; (c) readiness for development; (d) a tradition of sapiential concern; (e) collectivistic rather than individualistic orientation; and (f) spirit of cooperation.[57]

IV. RELATIONSHIP OF PHILIPPINE CULTURE TO PHILIPPINE LAW

A. Philippine law as a key to a better understanding of Philippine culture's deep structure or essential characteristics

Philippine law serves as a mirror to Philippine culture.

The Philippine legal system bears the characteristics of the culture which helped mold it. In this way, the former leads to a better understanding of the latter.

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[54] Walsh, *supra* note 6, at 174.

[55] *Id.*

[56] *Id.* at 174-175.

[57] *Id.* at 184.

Just as Philippine culture is a mixture of many influences, so is the legal system a blend of diverse cultures. The legal system of the Philippines today involves a combination of Malay customary laws, Spanish civil law and Anglo-American common law, with partial application of Muslim law to Filipino Muslims.[58]

The hybrid legal system of the Philippines is a testament to the mestizo character of Philippine culture. Even the Philippine Code Commission, responsible for drafting the New Civil Code, recognized the inseparability of the foreign element from Philippine cultural life. The Code Commission justified the adoption of provisions from other countries in the New Civil Code on the following grounds:

> (1) The Philippines, by its contact with Western culture for the last four centuries, is a rightful beneficiary of the Roman Law, which is a common heritage of civilization. For many generations, the legal system as developed in Spain has been the chief regulator of the juridical relations among Filipinos. It is but natural and fitting, therefore, that when the young Republic of the Philippines frames its new Civil Code, the main inspiration should be the Roman Law as unfolded and adopted in Spain, France, Argentina, Germany and other civil law countries.
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> (2) The selection of rules from the Anglo-American law is proper and advisable: (a) because of the element of American culture that has been incorporated into Filipino life during the nearly half a century of democratic apprenticeship under American auspices; (b) because in the foreseeable future, the economic relations between the two countries will continue; and (c) because the American and English courts have developed certain equitable rules that are not recognized in the Civil Code of 1889.

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[58]Cesar Villanueva, *Comparative Study of the Judicial Role and Its Effects on the Theory on Judicial Precedents in the Philippine Hybrid Legal System*, 65 PHIL. L. J. 42 (1990).

> (3) The concept of right and wrong are essentially the same throughout the civilized world. Provided the codifier exercises prudence in selection and bears in mind the peculiar conditions of his own country, he may safely draw rules from the codes and legal doctrines of other nations.[59]

The pervasiveness of the colonial influence in Philippine culture as reflected in our legal system can also be seen using Bohannan's "four square diagram" of the Legal Realm.[60]

The Legal Realm

	Unicentric Power	Bicentric (Multicentric) Power
One culture	Municipal Systems of "Law"	Law in Stateless Societies
Two (or more) Cultures	Colonial Law	International Law

According to Roberto M. Benedito, the Philippine legal situation falls within the legal realm of colonial law. He writes:

> As for colonial law, Bohannan says that it is marked by a unicentric power system with greater or lesser problems of conjoining the colonial government with the local government, and more and less overt theories (such as the British "indirect rule") of accomplishing the conjunction. All are marked, however, by two (or more) legal cultures. Sometimes this situation is recognized, as it was in pre-independence Kenya with its two hierarchies of courts, one for "European" law and the other for African law joined only at the top by the Supreme Court. The mark of a colonial situation might be said to be a systematic misunderstanding between the two cultures within the single power system, with constant revolutionary proclivities resulting from what is, at best a "working misunderstanding."
>
> Evidently, it is in this last analytic legal realm, where we can classify the Philippine legal situation. While there may no longer exist any

[59]TOLENTINO, *supra* note 13, at 13-14.
[60]BENEDITO, *supra* note 12, at 400-401.

> covert colonial influence, "revolutionary proclivities" due to a "working misunderstanding" continue to exist as the vestiges of Western European legal system are perpetuated and preferred by major interests in the Philippines over and above indigenous Philippine law systems. The reason for this is obvious: it serves the interests of neocolonialists and their ruling elite counterpart, as well as facilitate the exploitation of the country's natural resources.
>
> It cannot be denied that, to a certain extent, there is experimentation in the legal content of laws enacted and in the law-making process itself in the post colonial administration. However, there is very little indication that there is a conscious law-making process reflective of the changes in the indigenous economic and social order, there is rather a continuing internalization by the legal elite of the legal traditions of a former colonial power.[61]

The remnants of a borrowed legal system are preferred and perpetuated over indigenous Philippine law systems by major players in the Philippines in order to further their interests.[62]

It is to be noted that the ethnic diversity found in Philippine culture as well as its concomitant problems are shared by its closest neighbor-nations. Saihoo writes:

> In the ASEAN region, there is no nation which consists of only one ethnic group and in each nation can be found problems of ethnic identity which makes national unity less than perfect and national cultural identity an assorted picture with possible complaints at all times from some or all component ethnic groups about the unequitable share of their ethnic identity in the final picture of the national culture. Such complaints may or may not always appear in the national press but cases are familiar to close observers and students of the problem of nation-building, which requires the development of a national consciousness, identity and sense of community of which no nation can so far claim complete achievement.[63]

The neglect experienced by indigenous cultures is echoed in the state

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[61] *Id.*

[62] *Id.*

[63] Saihoo, *supra* note 2, at 113.

of Philippine indigenous law systems. Owen Lynch, Jr. laments how indigenous norms, laws and processes have been excluded from the national legal system. The gap between the national and indigenous legal systems is illustrated in the laws on land tenure. By restricting itself to individual ownership and the Torrens system, the national legal system fails to recognize the rights and restraints set up by indigenous communities over land.[64]

Fortunately, there is a growing effort to recognize the indigenous law system.[65] This change in attitude is merely reflective of the changing nature of all cultures, including Philippine culture. Time was when decisions such as that in the case of *Rubi v. Provincial Board of Mindoro*[66] dismissed indigenous culture. Now there are cases like *Pit-og v. People*[67] — where customary laws are recognized and upheld by the Supreme Court.

Philippine law does not behave as a mere follower of the changes that occur as a result of the evolution of Philippine culture. Philippine law has also been used as an instrument for social change. One such instance occurred in the 70s with regard to the Chinese population in the country. Irene R. Cortes relates:

> In 1974 when the decision to open formal relations with the People's Republic of China was being firmed up, there were 105,453 Chinese nationals registered in the Immigration Office and represented by the ambassador accredited to the Philippines by the Republic of China in Taiwan. The opening of diplomatic ties with the PRC would mean withdrawal of recognition of the Taiwan government and seriously affect these Chinese nationals. It was primarily for these aliens, many of whom were Philippine-born and sincerely desired to become citizens, that a review of the government policy on naturalization was made. This was by no means the first time this step was urged.[68]

In response to this looming social problem, President Ferdinand E.

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[64]Owen Lynch, Jr., *The Philippine Indigenous Law Collection: An Introduction and Preliminary Bibliography*, 58 PHIL. L. J. 457,458, 463 (1983).

[65]*Id.*

[66]39 Phil 660 (1919).

[67]G.R. No. 76539, 11 October 1990, 190 SCRA 386.

[68]Irene Cortes, *Mass Naturalization by Legislation and the Chinese in the Philippines*, *in* LAW AND SOCIETY, *supra* note 26, at 5.

Marcos issued, on April 11, 1975, Letter of Instruction No. 270, creating a special committee

> directed to take the preliminary steps needed for legislation 'in order that aliens permanently residing in this country who, having developed and demonstrated love for and loyalty to the Philippines and affinity to the customs, traditions, and ideals of the Filipino people, as well as contributed to the economic, social and cultural development of our country, may be integrated into the national fabric by the grant of Philippine citizenship.'[69]

Whereas, ordinarily, naturalization could be had only through judicial proceedings, at this particular point in Philippine history, the naturalization of Chinese nationals, who had been exercising substantial influence on Philippine life, was expedited through the issuance of Presidential Decrees granting them citizenship, upon the recommendation of the special committee created by Letter of Instruction No. 270.[70]

Given all of the above, it can be clearly seen how Philippine law is a key to a better understanding of Philippine culture. They are mirror images of each other.

B. Concept of Filipino justice

Philippine society today is bombarded with images and ideas foreign in origin. All around — from media, to music, to malls — the telltale signs of foreign dominance is perceptible. Even grabbing a bite in a fastfood center would mean being greeted by an English-speaking trainee and being served the all-American fare of hamburger, french fries and a sundae.

Amidst this environment reeking of Western domination, can the Filipinos find a Filipino concept of justice? Jose Diokno suggests another look at the Filipinos' language and history.[71]

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[69] *Id.*

[70] *Id.*

[71] Jose Diokno, *A Filipino Concept of Justice*, 3 SOLIDARITY 273 (1983).

1. The Filipino language

The Filipino language is but a logical starting point in the search for a Filipino concept of justice. In *The Future of Law in a Multicultural World*, Adda B. Bozeman discusses the importance of words and ideas in the development of the legal order, highlighting how law and language grew side by side. She writes:

> Words often assume an existence of their own, separate from the ideas in conjunction with which they first appeared. One particular term may come to stand for a variety of concepts, sometimes only loosely related to each other; it may shed a meaning with which it has long been closely associated; it may attract an idea formerly carried by a different term; or it may come to convey an entirely new intellectual construction. Some of these metamorphoses are barely perceptible while occurring; others by contrast are willful manipulations. For, whereas the development of the relation between thought and its expression is sometimes allowed to take place at random, it is at other times and in other places the object of watchful scrutiny.
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> For example, in the formative period of classical Roman jurisprudence, *law and Latin were cultivated in close alignment to each other* with the result that legally and politically crucial concepts were conveyed reliably to successive generations. The elaboration of theories of natural law and natural rights in the seventeenth and eighteenth centuries, on the other hand — admirable and fruitful as it may have been in the context of philosophy — impaired the integrity of "law" and "rights" as juristic concepts because the language of legal symbolization was permitted to move away from the meaning it had originally held. Furthermore, these two words, "law" and "rights," had at that time become particularly active precisely because they were being widely trusted in all sectors of Western civilization as summary symbols for major value orientations and in the light of this fact, their careers suggest that *culturally strategic terms* may also be particularly vulnerable terms. Every civilization or human grouping, unified by its own language and traditions and rallying around its own preferred concepts and symbols, must have had to face, at one time or another, similar problems in relation to the relevance of thought to word. But what in any case is clear from the records is that the integrity of the thinking process, and therefore also the integrity of the culture itself is

> greatly dependent upon the careful use of words. (emphasis supplied)[72]

Moreover, in illustrating the linkage between law and culture, Fernandez makes a reminder:

> Every enactment takes on a linguistic form, and it is this form that conveys the Norm (*i.e.* the meaning of the enactment). The meaning of the language used, together with the applicable grammar and syntax, may affect the existence of the Norm, or the kind of Norm intended. *In this way, the efficacy of Law is influenced in large measure by the culture medium of language.* (emphasis supplied)[73]

Finally, the significance of language as a medium for discovering and understanding the Filipino concept of justice was aptly summarized by Virgilio Enriques when he said:

> For language has its own logic, and we cannot afford to ignore such a rich resource. The use of the language of the masses in the writing and dissemination of scientific reports made socio-political sense but it is more important to recognize that in the language lies many of the precis of puzzle of the Filipino culture.[74]

The revelations provided by the following Filipino words attest to the value of language in finding a Filipino concept of justice:[75]

> *Katarungan* is the common word used by Tagalogs, Ilongos, Cebuanos, and Pampangos to denote justice. It is derived from the Visayan root *tarong* which means straight, upright, appropriate, correct. Justice, for Filipinos therefore, is rectitude or the morally right act. Katarungan is also used to denote fairness. This leads to the logical conclusion that fairness is the fundamental element in the Filipino concept of justice.
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> *Karapatan* is the Filipino word for "right" derived from *dapat*, which means fitting, appropriate, correct. From the similarity in meaning of the Filipino words for "right " and "justice," it can be concluded that for

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[72]ADDA BOZEMAN, THE FUTURE OF LAW IN A MULTICULTURAL WORLD 3 (1971).
[73]Fernandez, *supra* note 7, at 35.
[74]VIRGILIO ENRIQUEZ, INDIGENOUS PSYCHOLOGY AND NATIONAL CONSCIOUSNESS 48 (1989).
[75]Diokno, *supra* note 70, at 273-274.

Filipinos, justice and right are intimately related.

Batas is the Filipino word for "law." It is a root word signifying command, order or decree. It has a meaning different from that of the roots of *karapatan* and *katarungan*. This indicates that the Filipino language distinguishes clearly between law and justice. Filipinos recognize that law is not always just.

Kapangyarihan is the Filipino word for both "power" and "authority." It appears that the two concepts are synonymous. Of late, however, Filipinos have increasingly tended to distinguish the two by using *poder* (Spanish) or *lakas* (Tagalog) to denote naked power and *kapangyarihan* to denote authority.

Tuwid is a Tagalog root word that is a near exact equivalent of the Visayan root *tarong*. Yet Tagalogs opted to use the word *tarong* as the source of their word for justice, which is *katarungan*. *Tuwid* is what they use to form the word *katuwiran* meaning straightness and *katuwiran* or *katwiran* meaning reason or argument suggesting an excuse. It can thus be inferred that for Filipinos not every justification is just.

The Filipino language establishes that there is a Filipino concept of justice. From a study of it, the following conclusions can be derived:[76]

(1) It is a highly moral concept, intimately related to the concept of right;

(2) It is similar to, but broader than, western concepts of justice for it embraces the concept of equity;

(3) It is a discriminating concept, distinguishing between justice and right on the one hand, and law and argument on the other;

(4) Its fundamental element is fairness; and

(5) It eschews privilege and naked power.

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[76] *Id.*

2. Philippine History

To find clues regarding the Filipino concept of justice through Philippine history would mean viewing Philippine history in terms of its being "a continuous — and continuing struggle for a *just society.*" (emphasis supplied)[77]

A study of the words of Filipino national heroes: Andres Bonifacio, Emilio Jacinto, Apolinario Mabini, among others, would tell that the just society[78] envisioned by the Filipino people is:

(1) A society which is not only independent but in which the people are sovereign;

(2) A society which respects the freedom and the equal dignity of all;

(3) A society which protects workers and tenants, opposes oppression, exploitation and abuse, and seeks to eliminate poverty; and

(4) A society united in brotherhood and self-reliant.

The Filipinos therefore envision a "moral society rejecting vice and existing on ethical foundations."[79]

The Filipino concept of social justice can be broken down into three parts. According to Jose W. Diokno, the following set of standards constitutes the first part:

(1) The government or law-giver must be recognized by the majority of the people as legitimate, and must not exceed the limits of power imposed by the constitution or by the prevailing consensus;

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[77] *Id.*
[78] *Id.* at 275-277.
[79] *Id.* at 277.

(2) Laws must be published or made known to the persons who are to be affected by them;

(3) Laws must not be changed so often or so quickly that people can not reasonably base plans on them; and

(4) Laws must be understandable; not contradictory; and must not prescribe acts beyond the capacity of the people or against their conscience.[80]

The second part consists of the set of standards that would foster fairness or at least prevent unfairness in the enforcement of law. Diokno proposes that it incorporate standards to eliminate or at least drastically reduce "aleatory," "pusillanimous," "venal" and "asinine" court decisions and include standards to "infuse courage, competence and integrity into lawyers, and competence, industry and respect for the rights of suspects into policemen."[81]

The set of standards by which the control of laws, policies and institutions that seek justice in the Philippines may be judged constitutes the last part of a Filipino model of social justice. Diokno believes "that every law, policy and institution must respect, if it cannot promote, both the individual rights of man and the collective rights of the people." He, however, finds that this standard is not enough. Owing to the poverty and inequality that characterize Philippine society, Diokno realizes that in order to attain the Filipino concept of social justice, laws, policies and institutions must consciously strive, by effective means:

One, to eradicate poverty, at first in its most degrading forms and effects; and afterwards in all its forms.

Two, to select a means of developing and using our natural resources, our industries and our commerce to achieve a self-directed, self-generated, and self-sufficient economy, in order

[80] *Id.* at 278-279.
[81] *Id.*

> to produce enough to meet, at first, the basic material needs of all and, afterwards, to provide an increasingly higher standard of living for all, but particularly for those with lower-incomes, and to provide them with enough leisure to participate creatively in the development and enjoyment of our national culture, and
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> *Three*, to change those relations and structures of relation between man and man, between groups, and between communities that cause or perpetuate inequality, unless that inequality is necessary to improve the lot of the least favored among our people and its burden is borne by those who heretofore have been most favored.[82]

The three standards mentioned above embody two different principles. The first embodies a principle of reparation for injustice against the poor and the oppressed that society has inflicted. The second and third standards embody a principle of change and that which would effect internal and external revolution in Philippine society.[83]

Having considered the language, history and the standards set forth above, a Filipino concept of social justice can be summarized thus, in Diokno's words:

> Social justice, intelligible system of laws, made known to us, enacted by a legitimate government freely chosen by us, and enforced fairly and equitably by a courageous, honest, impartial and competent police force, legal profession and judiciary, that first, respect our rights and our freedom both as individuals and as a people; second, seek to repair the injustices that society has inflicted on the poor by eliminating poverty as rapidly as our resources and our ingenuity permit; third, develops a self-directed and self-sustaining economy that improving [sic] standard of living for all, but particularly for the lower income groups, with time enough and space to allow them to take part in and to enjoy our culture; fourth, changes our institutions and structures our ways of doing things and relating to each other, so that whatever inequalities

[82] *Id.*
[83] *Id.*

> remain are not caused by those institutions or structures, unless inequality is needed temporarily to favor the least favored among us and its cost is borne by the most favored; and fifth, adopts means and processes that are capable of attaining these objectives.[84]

This Filipino concept of social justice is best viewed in this light: "that most probably there will always be a gap between a culture's idealized version of what social justice is and the culture's ability to achieve it. But .... [it] also implies some plan for narrowing the gap between the ideal and the realistically achievable and some concentrated effort in that direction."[85]

V. CONCLUSION

Culture and law are two distinct concepts with a seeming gulf of other concepts between them. Searching for their relationship meant traversing that gulf. That search has yielded the unearthing not only the fact of the existence of a relationship between culture and law but that this connecting link can be viewed in two ways.

The first way is viewing law as a key to a better understanding of a culture's "deep structure" or its essential characteristics. Law draws life from culture and as naturally as any child would bear the marks of his heredity so does law exhibit the characteristics of the culture from which it took root. Aside from being a vessel for the expression of a people's culture, law has an existence of its own. It is a force for social control and as such affects culture as much as the latter affects it. The symbiosis between these two concepts clearly explains why culture and law are mirror images of one another. To see one would be to see the other — to understand one would be to understand the other.

The second way of viewing this relationship is through the concept of cultural justice. This concept arose from studies of anthropological data. Cultural justice, simply put, is that sense of justice that is unique to a specific culture. Recognizing the inextricable link between law and justice, this view

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[84] *Id.*

[85] Walsh, *supra* note 6, at 173.

lays stress on how law is tailor-suited to a culture as it concretizes that culture's sense of justice.

The Philippine experience is testament to the existence of the relationship between culture and law. The Philippines' hybrid legal system, foreign at its core, is reflective of Philippine culture's own saturation with foreign influence. And yet, the Filipino is able to make what is foreign his own. This outstanding Filipino cultural trait — the ability to indigenize — is also reflected in Philippine law. Though seemingly impervious to homegrown systems of justice, Philippine law is showing signs of incorporating indigenous law systems into its framework. On the other hand, the concept of cultural justice finds expression in the Filipino concept of justice. Filipino justice, in large part, takes on a social character, for the upliftment of the poor and the oppressed. It is the logical outflow of the ideals of a people whose present situation calls for that kind of justice.

The line defining the relationship between culture and law has thus been drawn. The link between Philippine culture and Philippine law is concrete proof that the line exists.

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