

## Concepts of Order

*Frank van Dun*

Anthony de Jasay stands out as one of today's major thinkers on questions of politics and society. Unabashedly theoretic, his work applies the paradigm of 'rational choice' to the choices of recognisably real people in recognisably real situations. They, and not the antics of a community of stylised utility functions in mathematical space, are always in the spotlight of his attention. From that sense of the real world, his arguments against the supposed necessity, inevitability, or desirability of the state derive much of their force. If De Jasay's analysis of the problems of conflict and order nevertheless has not received the recognition that it deserves, the reason may be that the entire classical liberal tradition, to which it so clearly belongs, has been sidelined in contemporary debates. To understand the pertinence of his arguments, one has to grasp the relevance of that tradition. That is no easy task for those—most of us—who have been educated by the state to look at the world as through the eyes of the state.

The purpose of this essay is to give a logical assessment of the classical liberal conception of law and order in the human world. The analytical framework is not defined by rational choice theory—such a definition clearly would load the dice—but by my interest in the philosophy of law and politics. Part I surveys the main positions on conflict and order in Western thought. Classical liberalism exemplifies one of those positions. Its key-concepts, as they emerge from the analysis in part II, are 'natural person', 'property' and what we shall call the 'convivial order' or 'natural law' of human affairs. The latter is an order of freedom among likes, a *ius*-based order. Hence the importance of justice, *i.e.* respect for that order, in classical liberal thought.<sup>1</sup> The liberal's opponents, primarily the philosophical socialists, assert that social order trumps the natural law of freedom among likes. They focus on social orders, which are *lex*-based orders, in which people occupy positions and perform roles and functions in the pursuit of some social goal. Consequently, efficiency in the pursuit of that goal trumps interpersonal justice, even—especially—if that goal is called 'social justice'. For a socialist, human individuals are socially constructed 'legal persons' with socially defined rights and duties. In contrast, for a classical liberal, societies are human constructs, and human nature and natural conviviality trump social order. However, his problem is the instability of the convivial order in the face of attempts to defend it no less than attempts to destroy it.

In part III, we shall look briefly at the Prisoner's dilemma, which continues to be used as if it were a source of insurmountable objections against the concept of a viable convivial order. Only two critical comments will be made here. Both support De Jasay's critique of that view and suggest that such 'dilemmas' are likely to be less frequent and intense in a convivial order than in a politically organised social order.

### I. Interpersonal Conflict

#### *Causes*

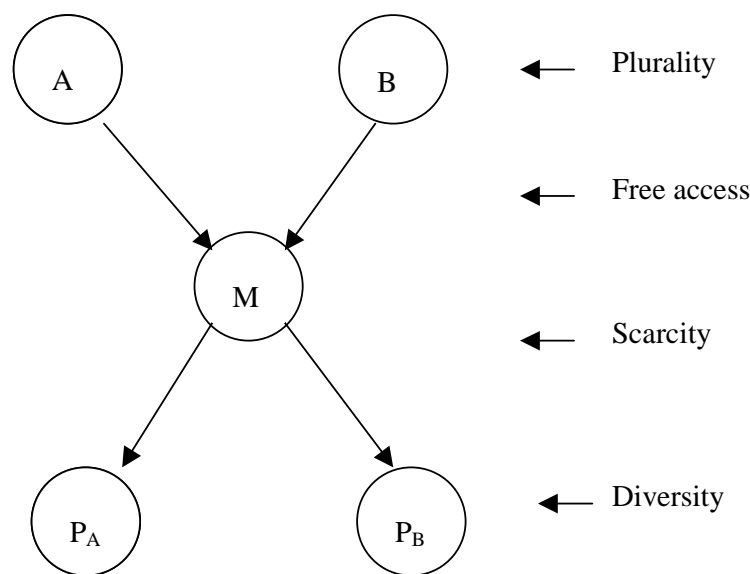
Let us consider the necessary and sufficient causes of interpersonal conflict as well its possible cures. We need not deal with any particular conflict but only with the notion of conflict itself. The benchmark for our investigation is a situation in which no interpersonal conflict is possible. We shall begin our inquiry on a faraway island. The

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<sup>1</sup> And perhaps also its appearance in the work of De Jasay. I write this in anticipation of reading his forthcoming book *Justice and Its Surroundings* (publication announced for the summer of 2002).

place is inhabited by only two persons, A and B. Because we are interested in interpersonal conflict, there have to be at least two persons. Evidently, this condition, which we shall refer to as ‘plurality’, is a necessary condition or cause of interpersonal conflict.

However, plurality is not a sufficient condition. A and B must exhibit some diversity in addition to plurality. They must have different opinions, values, expectations, preferences, purposes, or goals. If they were of one mind in all respects, in immediate agreement on all questions, there would be no possibility of conflict between them. Therefore, we should add diversity as a necessary cause of conflict.

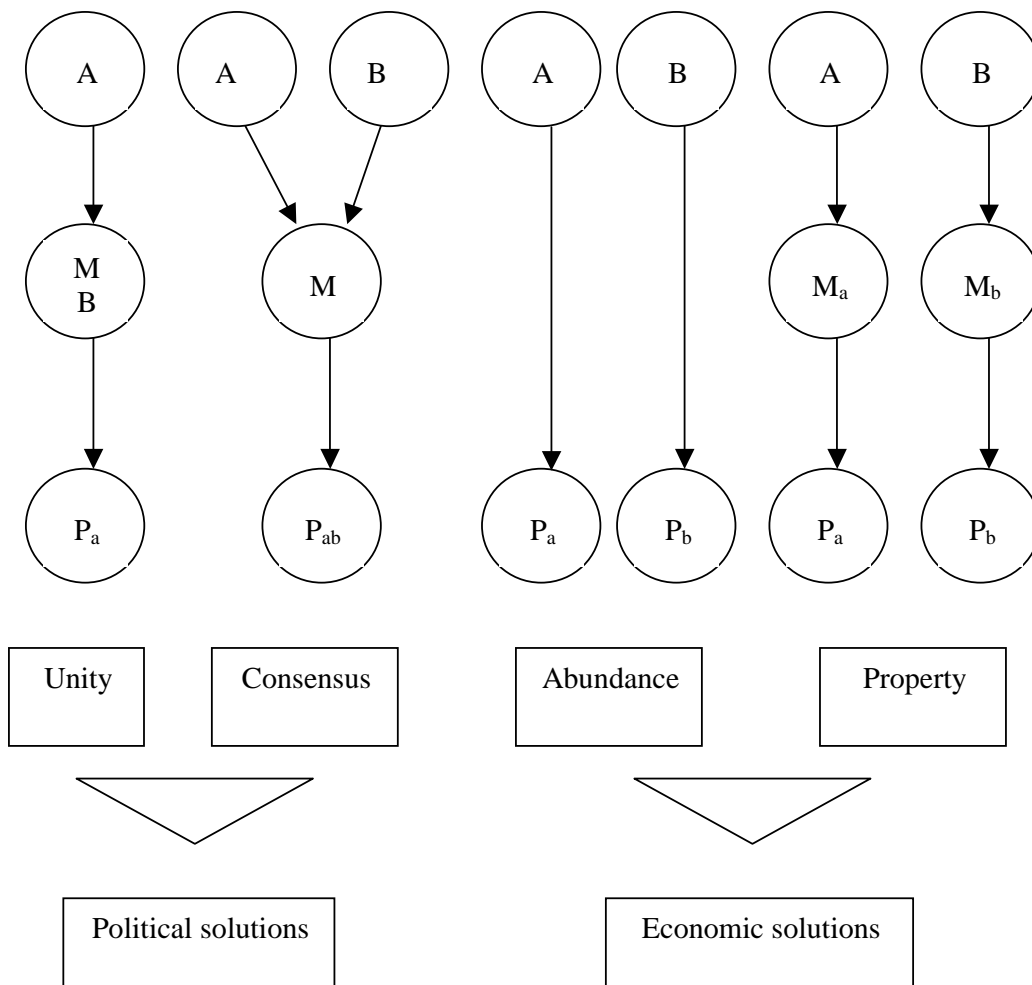


Plurality and diversity do not constitute a sufficient set to explain significant conflicts other than mere differences of opinion. If plurality and diversity were the only conditions that mattered, A and B could easily agree to disagree and that would be the end of the matter. Of course, agreeing to disagree is no solution if A and B have access to some object M that is scarce in the sense that it might serve the purpose of either but not simultaneously the purposes of both of them. If A succeeds in getting control of the object, then B must live at least temporarily with the frustration of not being able to get what he wants—and vice versa. There is at most one winner and at least one loser. Therefore, we must add free access to a single scarce means to the list of causes. However, as we shall see, we should decompose ‘free access to a single scarce resource’ into its constituent components: scarcity and free access. We can visualise the situation on the faraway island in the Conflict-diagram, which depicts the separately necessary and jointly sufficient causes of interpersonal conflict.

### *Cures*

Given that each of the causes is necessary, it is sufficient to eliminate only one of them to eliminate the possibility of interpersonal conflict between A and B. Let us assume that we can tackle each of the four causes independently. Then there are four pure strategies for eliminating the possibility of interpersonal conflict. The first involves replacing plurality with its opposite, unity; the second replaces diversity with uniformity or consensus; the third eliminates scarcity and gets us into a condition of

abundance; finally, the fourth introduces property, thereby getting rid of free access. Confining ourselves to a ‘binary’ classification that considers only two possible states for a cause (either it is there or it is not there), we see that there are also eleven mixed strategies. Obviously, such a binary classification is not adequate if we want to study the ‘dynamics’ of conflict and conflict-resolution, but for our analytic purpose it will do. Questions about weakening the causes to various degrees, about how much to invest in attempts to do that, about trade-offs between different solutions, and so on, are not on the agenda here.



Unity involves either the merger of A and B into a single person or else the reduction of a person (B) to the status of a mere means or an unconditionally loyal subject of the other (A). In any case, only one decision-maker or ruler remains. Consensus, on the other hand, requires that a set of opinions, valuations, preferences and the like is available in terms of which A and B can agree on the purpose for which and the manner in which M will be used. As the graphical representation makes clear, Unity and Consensus involve the replacement of a plurality of independently chosen actions to one common or collective action. They imply a subordination of the actions of many to what has been called a ‘thick ethics’, one that stipulates not just how but also which ends are to be pursued. In particular, they subordinate ‘law’ (which they typically in-

terpret as legislation or authoritative commands and regulations) to some ruling opinion about what is good and useful. In the case of Unity, that is the ruler's opinion. In the case of Consensus, it is some opinion shared by the people that matter. For this reason, we may label Unity and Consensus 'political solutions'.

Note the contrast with Abundance and Property. Neither of those eliminates the plurality of independent actions. There is no single 'thick ethics' that guides the actions of all concerned. Nevertheless, Abundance and Property are formulas of order. In that sense, they subordinate any person's ethics to the requirements of law, the latter defining the boundaries within which persons can seek to achieve their ends. Abundance and Property thus leave the plurality of persons and the diversity of their purposes intact. They only affect the scarce means. For that reason, we may label them 'economic solutions' of the conflict-situation. Abundance is a condition in which it is possible for every person to do and get whatever he wants, regardless of what anybody else might do and therefore also without having to rely on anybody else's co-operation or consent. Property is consistent with scarcity—which Abundance obviously is not. Property requires only that each person can know which parts of the set of scarce means are his and which are another's.

Each of the pure strategies has had its share of famous defenders in the history of Western philosophy. Plato<sup>2</sup> and Hobbes immediately come to mind as strong advocates of unity. Despite the fact that we commonly place them at the opposite poles of almost any dimension of philosophical thought and method, for both of them unity and only unity provides an adequate solution to the problem of interpersonal conflict. Like Plato's philosopher-king, Hobbes' Sovereign has the first and the last word on everything. Both argued forcefully that the slightest fissure in the structure of unity would lead to a breach of the political wall that protects the citizens from the ever-present threat of conflict and war.

Aristotle based his political thought firmly on the requirement of consensus. As he put it, political society (and its first imperfect manifestation, the family) demands a consensus on what is good and useful.<sup>3</sup> What he meant, obviously, was not the sort of ad hoc consensus that we find in transactions on a market. The latter require no more than a contingent agreement on such small things as a particular good, its price and time of delivery. Nor did Aristotle mean a consensus on the conditions that make such transactions possible.<sup>4</sup> While he agreed that justice in exchange is important, it was far from him to accept the notion that it might be a respectable solution to the problem

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<sup>2</sup> In his last work, *The Laws*, Plato still defended unity, even if he appeared to have given up the hope that it ever might be: "The first and highest form of the state and of the government and of the law is that in which there prevails most widely the ancient saying, that "Friends have all things in common." Whether there is anywhere now, or will ever be, this communion of women and children and of property, in which the private and individual is altogether banished from life, and things which are by nature private, such as eyes and ears and hands, have become common, and in some way see and hear and act in common, and all men express praise and blame and feel joy and sorrow on the same occasions, and whatever laws there are unite the city to the utmost—whether all this is possible or not, I say that no man, acting upon any other principle, will ever constitute a state which will be truer or better or more exalted in virtue. Whether such a state is governed by Gods or sons of Gods, one, or more than one, happy are the men who, living after this manner, dwell there; and therefore to this we are to look for the pattern of the state, and to cling to this, and to seek with all our might for one which is like this." (The Laws, Book 5, 739c,d)

<sup>3</sup> See T.A. Sinclair's translation of Aristotle's *Politics* (Book 1, section 2), 1253a16-18: '[H]umans alone have perception of good and evil, right and wrong, just and unjust. And it is the sharing of a common view in these matters that makes a household or a city.' B. Jowett gives a somewhat vaguer rendering, which seems less true to the spirit of Aristotle's political thought.

<sup>4</sup> Aristotle, *Politics* (Book III, section 9), 1280a31-1281a1.

of conflict. What he had in mind was a sort of ‘deep consensus’ to which the members of a political society<sup>5</sup> always could appeal to resolve their initial disagreements—a consensus on fundamental values and opinions that marked the very identities of the persons involved in it. Such a consensus could not take root except in the soil of shared experiences and longstanding affectionate and practical relationships. It required common history, tradition and custom to ensure that all the citizens would be educated to respect and esteem the same outlook on life in its theoretical, practical and above all moral aspects. Rousseau’s *Du Contrat Social* also exemplifies the consensus-solution. However, unlike Aristotle’s, his consensus could not be assumed to be historically given and transmitted almost as a matter of course from one generation to the next. It had to be created ex nihilo by skilful legislative and political manipulation on the basis of no more than a formal agreement to agree. It was, at least initially, an artificial construction of the sort that only an exceptional political genius, working on a ‘young, not yet corrupted people’, could hope to accomplish.

On a pedestrian level of understanding, ‘abundance’ merely involves a sort of equilibrium of ‘supply’ and ‘demand’ in the sense that resources are available in adequate quantities, so that everybody can satisfy his wants with ease and without detriment to anybody else. Before the technological and industrial revolutions of the nineteenth century, Abundance was associated mainly with asceticism. Regardless of changes on the supply-side, there would be plenty for everybody if only people would reduce their desires (‘demand’). Philosophies of asceticism stress control of desire and elimination of greed and covetousness. They look forward to a harmonious order of human affairs that should result from the general adoption of a ‘moral attitude’ of self-denial and contentment with a simple and natural life. The Cynics come to mind as proponents of this view, but we can give examples from more recent times as well (such as some of the more fundamentalist factions of today’s ‘Greens’). However, since the Enlightenment, the idea of abundance rests primarily on the prospect of an enormous increase in the productive powers of mankind. Thus, abundance or liberation from wants and frustration now is identified with satisfaction of all desires, regardless of their number, quality or intensity. Many early nineteenth century utopian socialists already fitted this description, but it was not until Marx had reinterpreted the old gnostic doctrine of total spiritual liberation in terms of ‘material and social conditions’ that Abundance came to mean the complete eradication of scarcity.<sup>6</sup>

‘Property’ rests on the idea that the physical, *i.e.* finite or bounded, nature of individual human beings, who are also rational agents and producers, is the primary fact that needs to be taken into account in any consideration of human affairs and relations. The objective or natural boundaries that separate one person from another also entail

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<sup>5</sup> At least its more notable members, those that fulfilled the rather stringent conditions of citizenship that made them fit to rule. Among the inhabitants of a city that did not qualify as citizens Aristotle also counted the free men that were engaged in manual labour, trade and making tools. Their part in the political consensus of the city was minimal. It consisted in no more than acknowledging the right to rule of the best citizens.

<sup>6</sup> In *The German Ideology, Part I*, there is the famous statement that, under communism, ‘I can do what I want, while society takes care of general production’. That might mean that human life is split up in an autonomous spiritual part (the gnostic’s divine self?) and a material social part without any autonomy at all, which Engels described in his essay ‘On Authority’ (1872). However, in his early manuscripts, Marx also hinted at true abundance with his vision of Man and Nature becoming truly One—the final realisation of the gnostic’s dream of recapturing the original status of the true God, who knows himself to be All and therefore wants nothing. “This communism [...] is the genuine resolution of the conflict between man and nature and between man and man—the true resolution of the strife between existence and essence [...], between freedom and necessity, between the individual and the species.” (From the essay ‘Private Property and Communism’ in the *Economic and Philosophical Manuscripts* of 1844)

objective boundaries that separate one person's words, actions and works from those of another. What lies within a person's boundaries is his property. In so far as people respect each other's property, there is order and justice; in so far as they do not respect it, there is disorder and injustice. Indeed, justice is respect for the natural order, *i.e.* the natural law,<sup>7</sup> of the human world. Thus, justice requires human persons not only to respect other human persons but also their rights to the extent that these do not upset the natural law nor result from an infringement of it. For any person, those respectable rights are the accomplishments of which he is the author—those things that come into being under his authority, as his property. Being the rights of natural persons acting within their natural boundaries, they properly are called 'natural rights'. In short, justice also requires restriction of access to scarce resources to those who are by right entitled to it.

In Antiquity, the idea of Property apparently was taken up only by some of the Sophists. Unfortunately, with few exceptions, their thoughts are nearly inaccessible except through secondary and often hostile accounts. Their better known opponents, Plato and Aristotle in particular, were concerned primarily with the socio-political ordering of the city—with the positions, roles and functions that define its organisation, and the selection of its officials. Thus, their city implied a radical division between insiders and outsiders as well as between the higher and lower orders of socio-political organisation. They paid little or no attention to human affairs and relations among persons in so far as they were not defined in terms of social positions and functions. For them, the city was the measure of the human person. In contrast, many of the Sophists apparently did develop a universalistic human perspective.<sup>8</sup> For them, the concrete, historical, particular, finite natural human beings are at any time and place the measure of all things, including the city. They saw cities and other conventional social organisations as no more than ripples or waves, continuously rising, falling, and disappearing, on the sea of human nature. As the sea rarely is without waves, so human history rarely is without social and political entities. However, just as no single wave is permanent and no wave is the fulfilment of the nature of the sea, no city or socio-political organisation is more than a transient phenomenon, shaped by a fleeting and contingent constellation of forces in human nature and its environment. Human beings may be sociable by nature, but they are not wedded by nature to any particular social order.<sup>9</sup> Thus, for the Sophists, it was imperative to pierce 'the corporate veil' of the city. They were interested in what people really did to one another, not in the self-serving conventional representation of their activities. For them, law was 'a surety to one another of justice', and societies were 'established for the prevention of mutual crime and for the sake of exchange'.<sup>10</sup> Distant precursors of classical liberalism, they were not prepared to sacrifice the law of natural persons on the altar of any political organisation, even one that was dedicated to the production of happiness and virtue. However, it was not until the spread of the Biblical religion that the idea of property acquired a fundamental significance. That religion presented the world as essentially an interpersonal affair founded on mutual respect and covenant. It posited a relationship between a personal God (whom orthodox Christian doctrine eventually construed as an interpersonal complex of three persons) and the human world (also an interpersonal complex involving many separate persons). According to its fundamental code,

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<sup>7</sup> On the interpretation of 'law' as order, see Frank van Dun, 'The Lawful and the Legal' (*Journal des économistes et des études humaines* VI, 4, 1996, 555 – 579).

<sup>8</sup> Eric Havelock, *The Liberal Temper in Greek Politics* (Yale University Press, New haven; 1957).

<sup>9</sup> Cf. their rational capacities may be natural but no particular language or theory is natural to them.

<sup>10</sup> Aristotle, *Politics* (Book III, section 9), 1280b11 and 1280b30.

the decalogue, the principal source of order in the relations between God and the world and in the relations among human beings is respect for the distinction between ‘thine’ and ‘mine’. By the end of the seventeenth century, Locke could give an account of order in human affairs that was entirely based on an appreciation of the human condition as an interpersonal complex, in which no person can claim any naturally given social position, rank or privilege. Understandably, a person’s property—the manifestation of his being, life or work in the natural order of the human world—was seen as his primary natural right, which reason could not but acknowledge as eminently respectable. ‘Property’ took on its classical liberal guise.

### *Ranking solutions*

As we have seen, Abundance and Property tackle scarcity in different ways. Abundance refers to the elimination of scarcity in the fundamental sense of *intrapersonal* scarcity. That sort of scarcity refers to the fact that one can and therefore has to make choices. One cannot eat an apple and use it to make an apple pie; therefore, one must choose what to do with it. Property leaves intrapersonal scarcity intact but removes free access and therefore *interpersonal* scarcity, which is the fact that one cannot have or use exactly the same thing that another person has or uses. Both sorts of scarcity imply the inevitable frustration of some wants, but only intrapersonal scarcity implies frustration for which one cannot blame another person. It depends solely on the variety of one’s goals and the limitations of one’s options. Even Robinson Crusoe, during the first lonely months on his island, had to face up to the intrapersonal scarcity of resources and to make choices about their most advantageous uses.

Intrapersonal scarcity confronts a person when he becomes aware that whatever choice he makes has opportunity costs. Either he does *a* and gets whatever the consequences of doing *a* are, but then he cannot do *b* and therefore must forego its consequences; or else he does *b* at the cost of giving up whatever benefits doing *a* might produce. Choice and opportunity costs are inextricably linked.<sup>11</sup> The cause of the inability to do *a* and *b* simultaneously may be in the nature of the person himself (his physical constitution) or in the nature of the external means at his disposal. The latter aspect—one cannot have one’s cake and eat it too—need no further comment. However, the physical constitution of the person, is equally relevant. Human persons are finite beings, not only because they are mortal but also because at any moment their capacity for consumption is limited just as their productive capacity is limited. Consequently, a person, even one with infinite productive powers, or with immediate access to boundless supplies of consumption goods, would have to make economic choices. Unless he was completely indifferent with respect to all possible sequential orderings of enjoyments, he still would face the risk of getting much less out of life by choosing the wrong sequence of acts of consumption. Apparently, only a person with infinite capacities of consumption in an environment of superabundant consumption goods of every kind would be free from want and frustration.

Now contemplate the idea of the co-existence of two or more persons, all of them with abundant material resources. Still, from any person’s point of view, all others are external resources that can be put to many uses. Therefore, to the extent that one has desires and ideals that can be satisfied or realised only if others are or do what one

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<sup>11</sup> Only he that has no choices faces no costs. No matter what he does, he spends his life in what for him is the best (because the only) possible world. For him, life (it life it be) is indeed a free lunch. Hence the Stoics’ prescription for happiness: Renounce the illusion of freedom of choice, accept whatever happens as what is inevitably fated to happen, and so eliminate the risk of frustration and disillusionment. That, of course, is a classic ascetic version of the abundance-solution.

requires of them, scarcity would persist despite the abundance of other, non-human resources. There still would be need to make others comply with one's desires or ideals, regardless of what they themselves or still others want them to be or do. True abundance, then, is a tall order. It implies the infinite capacity and desire to satisfy oneself as well as all others; full compatibility of wants; or else complete immunity from harm or frustration caused by others or total indifference to one another.<sup>12</sup> On the other hand, if true Abundance were possible, it would have nothing to fear from plurality, diversity or free access. The disappearance of intrapersonal scarcity takes the sting out of those other causes of conflict.

Compared to Abundance, the 'metaphysical demands' of Unity, Consensus or Property, are less fantastic. However, they are not equal. Unity seems to be a more demanding condition than Consensus and the latter a more demanding condition than Property. Unity, of course, implies that diversity and free access have been eliminated as causes of conflict. The single remaining decision-maker would have privileged access to all scarce resources and set priorities for their use. Unity, however, might break down under the stress of scarcity. The decision-maker still could make the wrong choices and thereby undermine his position, leaving him with too few resources to maintain his command amidst general dissatisfaction with his rule. On the other hand, if he could maintain unity, then, in a worst case scenario, all of his subjects would perish with him.

Consensus implies that scarce resources would not be accessed by anyone in a controversial way. In other words, it implies the elimination of free access. However, like Unity, it is vulnerable to the problem of intrapersonal scarcity. It could be a consensus on choices that are unsatisfactory in their effects and so provide incentives to defect to those people on whose consensus it relied. Alternatively, the consensus might hold but at the cost of collective disaster. Moreover, given that Consensus leaves plurality intact, it must invest in strategies that will ensure that the consensus does not become spurious. Thus, Consensus is always threatened by scarcity and by plurality.

Property, finally, only solves the problem of free access. Compared to Abundance, Unity and Consensus, Property is very nearly merely a technical matter. We may presume that most people will rise to the defence of their property as soon as they begin to understand how it can be taken away from them; and we may presume also that there is no Iron Law giving the advantage to the aggressors rather than the defenders. Thus, the property-solution appears to require no more than an adequate organisation of self-defence. However, Property is vulnerable to the forces of intrapersonal scarcity, plurality and diversity, which it does not eliminate but merely accommodates. Thus, Property may be upset by clusters of individual errors as well as attempts to provide defence in the form of social organisations based on Unity or Consensus.

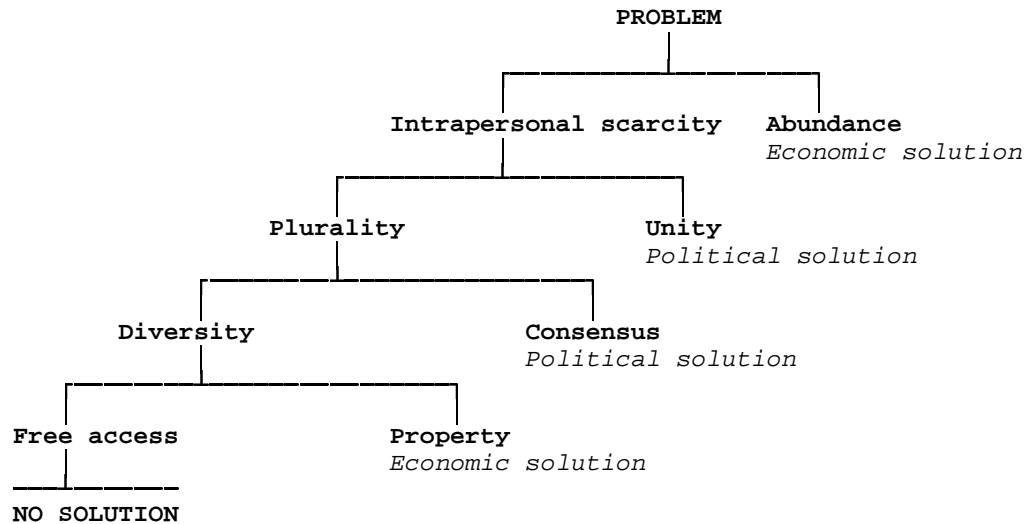
Because of such considerations, we can rank the different pure solutions on a single scale (see the figure). The ranking turns on the presumption that the causes listed below a given solution must be neutralised or eliminated if that solution is to be effective. On the other hand, the causes listed above a solution remain untouched by it—which is to say that it must find a way to accommodate them while remaining vulnerable to their effects. Thus, Abundance requires the neutralisation or elimination of all conditions under which Plurality, Diversity and Free Access might give problems. However, if it were possible, it would also be, for that very same reason, the most complete solution to the problem of interpersonal conflict. With Property, the reverse

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<sup>12</sup> Immunity and indifference are compatible with plurality and diversity, but only at the price of atomisation of the human world. In contrast, infinite mutual satisfaction and compatibility of wants require some sort of spontaneous or natural unity or at least consensus among all human persons.



is true. It requires little tampering with the conditions of human existence, but it is therefore also the most vulnerable solution.



Abundance and Unity are more likely to be referred to as ‘utopian solutions’ than either Consensus or Property. Certainly, Marxian communism, with its prospect of a radical liberation from scarcity, fits the utopian idea very well. So does Plato’s idea of Unity.<sup>13</sup> While Hobbes is rarely charged with utopianism, there is a strong utopian undertone in his work. His definition of war as consisting ‘not in actual fighting; but in the known disposition thereto, during all the time there is no assurance to the contrary’,<sup>14</sup> leaves us with a definition of peace that is distinctly utopian.<sup>15</sup> His Commonwealth—‘a real Unity of them all, in one and the same Person’<sup>16</sup>—is supposed to be the necessary and sufficient condition of that utopian peace.<sup>17</sup>

If Consensus in its classical Aristotelian version cannot be charged plausibly with utopianism, the modern version, epitomised by the writings of Rousseau and nineteenth century apologists for the sovereign republican State, does have a pronounced utopian streak. It derives from the idea—explicit in Rousseau, piously left implicit in most academic writings—that the republican state requires that human nature be changed. The actual transformation of human beings into ‘true citizens’ is necessary to produce a genuine political consensus without which the ‘general will’ cannot but remain a lifeless legal fiction (and an easy target for the analytical attacks of rational choice theorists). Of course, it was Plato who first adumbrated the theme of the transformation of human nature as a prerequisite of a just political order with his detailed

<sup>13</sup> See the quotation from *The Laws*, Book 5, in note 2 above.

<sup>14</sup> Hobbes, *Leviathan*, Part I, chapter 13.

<sup>15</sup> Leibniz noted this in his ‘Caesarinus Fürstenerius’, in Patrick Riley (ed.) *Leibniz, Political Writings* (Cambridge University Press, Cambridge, 1988). Against ‘the sharp-witted Englishman’, Leibniz argued that ‘no people in civilised Europe is ruled by the laws that he proposed; wherefore, if we listen to Hobbes, there will be nothing in our land but out-and-out anarchy....’ (p.118) According to Leibniz, Hobbes’ argument was a fallacy: ‘[H]e thinks things that can entail inconvenience should not be borne at all—which is foreign to the nature of human affairs... [E]xperience has shown that men usually hold to some middle road, so as not to commit everything to hazard by their obstinacy.’ (p.119)

<sup>16</sup> Hobbes, *Leviathan*, Part 2, chapter 17.

<sup>17</sup> Eric Voegelin, ‘The New Science of Politics’, M. Henningsen, *The Collected Works of Eric Voegelin*, Volume 5: *Modernity without Restraint* (University of Missouri Press, Columbia & London; 2000), p.218 also notes the gnostic-utopian theme in Hobbes’ argument.

description of the process by which natural human beings must be transformed into guardians of the city. Rousseau, an admirer of the Greek's theory of political education, also shared his notion that among human beings the state cannot be justified. That idea, that human nature rules out a justification of the state, is the foundation of individualist anarchism,<sup>18</sup> but Plato and Rousseau turned it into the proposition that to justify the state one should replace human nature with something that is by definition compatible with the state—'guardianship' or 'citizenship'. However, states did not begin to control formal education on a scale and with a determination approaching Plato's or Rousseau's program until the twentieth century.

Arguably, Property is immune to the charge of utopianism. Neither the Sophists nor those in the modern Lockean tradition are prominent figures in the literature on utopian thought. Descriptions of what a liberal or libertarian world might be under ideal conditions fail to give an impression of utopianism. Even with the problem of free access solved and property as secure as it can be, people still are left to their own resources—or to the charity of others—to make something of their life. Indeed, those 'ideal conditions' merely ensure that *nobody* has any guaranteed immunity from the slings and arrows of life.

## II. Types of Order

### *Social order*

Unity and Consensus, as political solutions, require social organisation: a social order or society<sup>19</sup>. At any rate, they involve a structure of command and obedience, and usually also a hierarchical stratification of rulers and subjects, leaders and followers, directors and members or employees. Abundance and Property, on the other hand, as economic solutions, require no such thing as a society in that sense. The order they constitute is what I call a convivial order,<sup>20</sup> in which many people live together regardless of their membership, status, position, role or function in any, let alone the same, society.

From the point of view of economic science, a society is an 'economy' in the classical sense of a household. It might be a family, a club, a ranch, a firm, a corporation, a city, or a state.<sup>21</sup> A convivial order, on the other hand, is a 'catallaxy', an order of friendly exchange among independent persons (or households).<sup>22</sup> From the point of view of political science, a society is a 'teleocracy' (a system of rule aiming to

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<sup>18</sup> Referring to the theory of rational choice, Anthony de Jasay's *The State* (Basil Blackwell, Oxford, 1985) and *Against Politics* (Routledge, London, 1997) offer many detailed arguments for that proposition. It has been a constant theme in the work of, among others, the late Murray N. Rothbard, e.g. *The Ethics of Liberty* (Atlantic Highlands, NJ: Humanities Press, 1982).

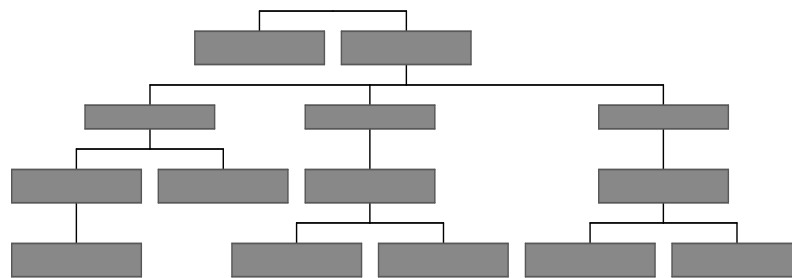
<sup>19</sup> Etymologically the word 'society' and its equivalents in other languages derives from the Latin 'societas'. A societas is composed of *socii* (plural of 'socius', partner, companion, follower, which is related to the Latin verb 'sequi', to follow, and the Greek 'ἄσσητήρ', assistant, guard, companion).

<sup>20</sup> From the Latin *convivere*, to live together. I use 'conviviality' primarily because its literal meaning is the same as that of the Dutch 'samenleving' (literally, living together), which stands in contrast to 'maatschappij' (the Dutch word for society). In Frank van Dun, 'The Lawful and the Legal' *op.cit.*, the terms 'inclusive society' and 'exclusive society' are used to make the distinction between convivial order and social order, suggesting, misleadingly, that 'society' rather than 'order' is the common genus.

<sup>21</sup> Interestingly, the Dutch word for 'economics' is a literal translation from the original Greek: 'huis-houdkunde' (i.e. the art of managing a household). In Dutch, we also have 'bedrijfhuishoudkunde' (the art of managing a firm or business) and 'staathuishoudkunde' (the art of managing the state, the 'economics of the public sector'). In those respects, the German 'Wirtschaft' is similar to the Dutch.

<sup>22</sup> On the distinction between 'economy' and 'catallaxy', see F.A. Hayek, 'The Confusion of Language in Political Thought' in F.A. Hayek, *New Studies in Philosophy, Politics, Economics, and the History of Ideas* (Routledge & Kegan Paul, London and Henley, 1978), p.90-92.

achieve a particular end). That term usually stands in contrast to ‘nomocracy’,<sup>23</sup> which denotes an order maintained by adherence to general rules of conduct. Although a convivial order is not a teleocracy and is an order maintained by adherence to general rules of conduct, it would be unwise to refer to it as a ‘nomocracy’. The latter term, like ‘autocracy’, ‘democracy’ and ‘aristocracy’, suggests a system of rule, government and administration, which does not apply to the convivial order. A simple example of a nomocracy would be a soccer game. It is played according to a set of rules that do not aim at a specific outcome of the game but nevertheless are eminently artificial and imposed legal rules. Similarly, a state-imposed nomocracy, for example in the form of ‘competition law’, is the implementation of a policy by the social authorities. Nomocracies are social constructs just as much as teleocracies are.<sup>24</sup> In contrast, conviviality is not ‘a game people play’ but a condition of interaction that is determined by objective facts about human nature. Consequently—to use what once was a commonplace among lawyers—the rules of conviviality must be discovered; they cannot be made.



*A social order or society*

To appreciate the categorical difference between a social and a convivial order, we can start by drawing a diagrammatic representation of a social order (see the figure). Students of legal systems, business administration, public administration, and social systems in general, are familiar with this type of ‘organogram’. From the family to the state, from the small entrepreneurial firm to the large corporation, the army or the church, every society can be represented by more or less complex variations of the above diagram. A society is, indeed, basically a system of social positions, each with its proper function, role, duties or entitlements—its proper ‘competence’. Natural persons participate in a society as occupiers of one or more social positions, as performers of one or more social functions or roles. Thus, societal organisers face the familiar problems of monitoring and controlling people to make them observe their ‘social responsibilities’. Apart from the societal organisers, people are no more than human resources, which—like other sorts of resources—have to be managed in the service of the goals set for the organisation. Indeed, in their endeavours to control the ‘human factor’, societal organisers may well try to eliminate it altogether, for example by training animals, introducing rigorous and easily monitored step-by-step procedures,

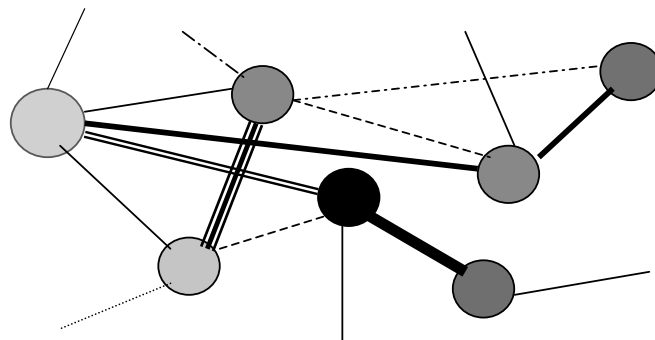
<sup>23</sup> As far as I know Michael Oakeshott (*Rationalism in Politics and Other Essays*, 1962) introduced the terms ‘teleocracy’ and ‘nomocracy’. Hayek (in ‘The Confusion of Language in Political Thought’, *op.cit.*) preferred ‘nomarchy’ to ‘nomocracy’. He also attempted to clarify Oakeshott’s distinction by introducing two more pairs of contrasting terms: ‘taxis’ and ‘cosmos’, and ‘thesis’ and ‘nomos’.

<sup>24</sup> The demise of teleocratic central planning merely left the field to the nomocratic socialisms of “the mixed economy”, the “third way” and the “active welfare state”.

ergonomic micro-management or machinery and computers. Caligula dramatically underscored the point that people merely fill social positions, when he made his horse a Consul of Rome. Undoubtedly, that was an act of mad arrogance, but it was no more inconsistent with the logic of social organisation than would be, say, reserving positions in society for gods, spirits, endangered species, legally recognised minorities and categories, and their priestly or bureaucratic attendants.

*Convivial order*

A representation of the convivial order differs markedly from a social organogram. The figure below gives us a snapshot of multifarious relations among many persons. Some of those interpersonal relations are affective, others professional or commercial. Some are co-operative, others competitive. Some are fleeting, others durable, and so on and so forth. In the convivial order there are no pre-defined positions, roles or functions, which people occupy or perform. People appear only as themselves, doing whatever they do under their own responsibility. There is nothing like a social responsibility in the convivial order. No society takes the blame or appropriates the praise



*The convivial order*

for any individual person's acts and no person can get away with any kind of mischief merely by noting that he is only doing his job. Many societies have systems for passing on social responsibility that lead to nowhere, for example by placing ultimate responsibility with an inaccessible deity or an anonymous 'public' or 'people'. Such arrangements are inconceivable in a convivial order, where responsibility is necessarily personal and not diluted by organisation. We can find examples of convivial order in daily life, especially in the relations among friends and neighbours, among travellers and local people, and among buyers and sellers on open markets. We find them, in fact, wherever people meet and mingle and do business in their own name, whether or not they belong to the same or any social organisation. There is no need for them to be aware of each other's social affiliation or position, or of any teleocratic or nomocratic regulations that might be imposed by some society or other.

Among other significant differences between a society and a convivial order, we note the conditions of 'membership'. A society necessarily has clear boundaries that separate its members from non-members because it is essentially a company or a corporation, usually comprising in addition to the ruling partners a possibly large number of followers, servants or employees. A society is an organisation of men and resources that aims at some unique common goal or set of goals, which it tries to achieve by suitably co-ordinated collective or common action. To reach those goals, a society

develops a strategy and allocates tasks and resources to its officers and members. It sets up a system of incentives, rewards and punishments, to provide motivation and to ensure efficiency. All societies must work out the problem of securing enough income to pay for their expenses, and many face the additional problem of distributing a part or the whole of the social income among the society itself, its ruling members and its 'rank and file'. A society does all of those things according to its customary, constitutional, statutory or legal rules, although contingency measures and the dictates of crisis management occasionally override their application. In any case, it must know who is a member of the society and who is not; what the members do and contribute and on what conditions they participate in social action. Formal and exclusive membership is a necessary condition of social existence.

A convivial order has no membership in that sense. It does not organise any collective or common action; it does not generate, let alone distribute, any social income. People can live convivially without being card-carrying members of the same club or association, without engaging in common pursuits or having a common leader, director, or governor. Whereas in a nomocracy such as soccer-game or a state's private sector, people need some sort of certificate of registration or licence to be permitted to play, they need no such thing in a convivial order. Conviviality requires no papers.

Because of their teleocratic structures and the unity of their planned collective actions, it makes sense to personify societies and to regard them as artificial or conventional persons defined by their social decision-rules. It does not make any more sense to personify a convivial order or to ascribe plans, opinions, values, decisions or actions to it than it does to ascribe such things to its opposite, war.<sup>25</sup> A convivial order conceivably may disappear when too many individuals start making war on one another, although it is difficult to see how such criminality could become infectious without becoming socially organised.<sup>26</sup> Of course, as the word is used at present, war is a social phenomenon in that it involves high degrees of social organisation and mobilisation. Indeed, societies may be outlaws from the point of view of conviviality because of the way in which they treat their members or outsiders or both. Many societies thrive by perfecting the art of disturbing the conditions of conviviality by invasive actions of lesser or greater magnitude, from occasional raids to making lawful activity illegal<sup>27</sup> to all-out war. Although societies can be formed on principles that are compatible with the convivial order, social orders are not necessarily compatible with the convivial order.<sup>28</sup> When they are not, we may ask which type of order is more basic or worthy of respect than the other is. With regard to those questions, classical liberals and philosophical socialists take radically opposed positions.

In a way, all societies put the convivial order at risk. They imply some degree of hierarchical organisation and mobilisation—a concentration of power over men and re-

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<sup>25</sup> Cf. Frank van Dun, 'The Lawful and the Legal' *op.cit.*

<sup>26</sup> For a short discussion, see Part III of this essay.

<sup>27</sup> Prominent examples are the 'underground economy' and 'victimless crimes'.

<sup>28</sup> 'Society' is not the same as 'community'. The latter term denotes a categorisation of people with some common property or relation: locality, nationality, language, occupation, religion, and so on. Thus we have local, national, linguistic, religious, artistic, cultural, academic, criminal and many other communities. There is even a human community, a community of the living and a community of the dead. Members of a society usually have a community of interests, but the community of people with a common interest need not be socially organised. Indeed, they may be only dimly aware of one another's existence. Community leaders typically are strong personalities, not occupiers of some predefined position—but many such leaders aspire to organise or 'socialise' their community. A community has no 'collective decision-rules'. It need be no more than a segment or aspect of the convivial order. It is not a type of order distinct from either the convivial or the social order.

sources that they can use for their particular social purposes. Moreover, societies tend to subvert the attitude of freedom among likes that characterises conviviality. They offer rewards not just in the form of the accomplishment of their purpose or an occasional bonus or token of appreciation. They offer also differentiated social positions, which carry different sets of powers, privileges, immunities and perks of office. Unlike the convivial order, where the concept does not even make sense, societies offer ‘career opportunities’ and feed particular ambitions and rivalries regarding social position and rank. On the other hand, societies may languish, even perish, when they cannot adequately control the human factor. An atmosphere of either conviviality or war may pervade the social structure; the members may deal with one another as ‘free and equal<sup>29</sup> persons’ or alternatively as enemies. The social enterprise becomes pointless as the convivial attitude of ‘live and let live’ or its warlike antithesis takes root to the detriment of ‘social efficiency’.

The convivial order requires no social organisation, only friendly, peaceful interpersonal relations. In that sense, it is a universal natural condition, the existence of which we can identify whenever and wherever there are contacts between people. In the same way we can identify its ‘negation’, which is war, or disorder or confusion in human affairs. Like that between life and death, the difference between convivial order and war comes, as it were, with the very nature of *homo sapiens* and his world. In contrast, societies are always local, temporary and contingent constructions.<sup>30</sup> There is no such thing as a natural society.

#### *Elements of order: lex and ius*

Societies or social orders and convivial orders differ in their constitutive relations of order. Social orders essentially are *lex*-based or *legal* orders, implying the existence of a system of customary or promulgated rules that define positions of ‘authority’ or ‘command’ to which other positions are subordinated.<sup>31</sup> In contrast, a convivial order is *ius*-based. It implies no positions of authority or command, but direct personal contacts resulting in agreements, covenants and contracts, in mutual commitments, obligations or *iura*.<sup>32</sup> Unlike the *lex*-relation, the *ius*-relation holds between persons who need not be members or subjects of the same society. It holds between persons who are independent of one another, at least in the sense of not being related to one an-

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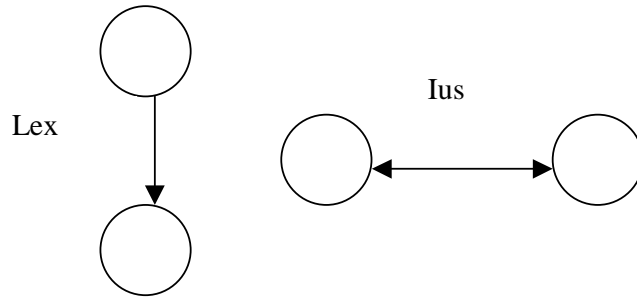
<sup>29</sup> For my reservations about the use of ‘equals’ in this context, see the paper cited in the previous note. On etymological grounds, ‘equality’ and ‘liberty’ belong to talk about social positions. The corresponding terms in the language of conviviality are ‘likeness’ and ‘freedom’. Human beings are all, in a straightforward sense, *alike* or of similar physical constitution (compared to other beings or things). Very few of them are *equal*, and then only with respect to one or a few measurable dimensions (colour of skin, kindness, skill, social rank). Similarly, human freedom has no nationality, no social position and no historical peculiarity, but the liberty of a French citizen differs from that of a ‘sans papiers’ residing in France as well as from that of an American citizen or a *civis Romanus*.

<sup>30</sup> The present shape of a society, like that of an old building, may be ‘the result of human action’, without ever having been ‘designed’ that way, but that does not make a society (or an old building) a ‘spontaneous order’. Piecemeal engineering still is engineering.

<sup>31</sup> The term ‘lex’ refers to the Latin verb ‘legere’ (to choose; to pick). It denotes a relationship in which a person holds a position that entitles him to choose or pick others to do what he commands them to do. Its original meaning was the act of calling men to arms or to report for military duty. (‘Lex’ is related to ‘dilectus’, [military] mobilisation—cf. the Roman ‘legions’.) Later, ‘lex’ came to denote any general command issued by a ‘political organisation’, one that is capable of enforcing obedience to its commands by military force. Eventually, the word acquired the meaning of a directive or rule of conduct that is generally accepted within a given society as being applicable and enforceable in some way by the social authorities, even if the society is not political.

<sup>32</sup> The word ‘ius’ refers to the Latin verb ‘iurare’ (to swear; to speak solemnly; to commit oneself toward others).

other as a superior to an inferior or as subjects of the same superior in any social organisation. In a more general sense, ‘ius’ (law) denotes precisely the condition of convivial order among ‘free and equal persons’—an order that is upset by any act that qualifies as *iniuria* (injury).



*Lex and ius: Elements of order*

In a degenerate form, the lex-relation may exist between two natural persons—as when a bully terrorises a weakling into submission and obedience—but typically it is a relation between social positions within a single social order. It is customary to personify such positions and to refer to them as to artificial persons, for example ‘ruler’, ‘legislator’, ‘director’, ‘rector’, ‘senate’, ‘general as-

sembly’, ‘secretary’, ‘subject’, ‘employee’, ‘servant’, ‘private citizen’. Obviously, it is no more a matter of empirical science to determine what those social personages can or cannot do than it is an empirical question what the King, the Queen or a Knight in chess can or cannot do. To answer such questions, one should consult the appropriate legal texts or rulebooks, or people (*legists*) that possess expert knowledge of the applicable rules. Of course, one should take care to consult the right books and experts. A Queen in chess is not the same thing as a Queen in bridge; a regional manager in company A need not have a ‘competence’ similar to that of his counterpart in company B. Similarly, the rules defining the French Presidency do not define the American Presidency; and what a Belgian citizen can or cannot do may differ widely from the legal competence of an Austrian citizen. Every society, whatever its size, form or function, has its own legal system.<sup>33</sup>

The *ius*-relation holds between two independent persons, regardless of their status in any social order. Those persons can be independent artificial persons (e.g. commercial or political corporations), but paradigmatically the *ius*-relation holds between natural persons. What the latter can or cannot do is of course not defined by any set of legal rules. It is defined by their nature, which we have to accept as ‘a given’ and to study accordingly. Moreover, we do not have to know any legal rules to determine which acts are injurious to natural persons or which acts are infringements of the order of conviviality among such persons. To make such determinations, we must study what really happened, what real people really did to one another, taking into account their mutual commitments and obligations—their *iura*. In short, we must study the world as *jurists*, not as *legists*, because the objective here is to determine not whether an act was legal or illegal in some society but whether it was just (in accordance with *ius*) or not. Admittedly, *iura* can be as varied and diverse as legal systems are, but, compared

<sup>33</sup> That truth has been obscured by the modern law schools’ obsessive focus on the legal systems of states, their subdivisions and treaty-based international commissions and bureaucracies. However, even when we confine our attention to state-dominated societies, we can see why legal positivists must end up with empty-shell characterisations of ‘law’. Examples are Kelsen’s ‘dynamic system of norms that derive their validity from a single presupposed merely formal Grundnorm’ and Hart’s ‘union of primary and secondary rules’. As for substance, ‘law can be anything’, ‘there is no logical connection between law and justice’, and so on. (Somehow ‘There is no logical connection between *lex* and justice’ sounds more plausible than ‘There is no logical connection between *ius* and justice’.)

to the myriad of forms, sizes and functions of social entities, human persons are remarkably similar beings.

The jurist as such is not concerned with legal rules but with rules of law. The latter, in the strict sense, are deductions from the conditions that constitute the convivial order of beings of the same natural kind. In a wider sense, rules of law are ‘technical determinations’ of just and efficient ways to maintain or to restore the convivial order within a given historical context where linguistic and other conventions enter into the understanding of human actions.

The study of ‘legal systems’ and the ‘legal persons’ they define is poles apart, with respect to its object as well as its methods, from the study of the ius-based convivial order among natural persons. The ‘law’ (leges) of the legal positivists can be anything whatsoever, but the jurists’ law, the ius-based order of conviviality, is in its principles the same always and everywhere. The same act may be legal in this society and illegal in another; but we need no legal reference to say that it is just, or unjust.<sup>34</sup>

#### *Relations of order in the context of conflict-solutions*

In the representation of the solutions of the problem of interpersonal conflict, we see the lex-relation most clearly in the unity-solution, where A occupies the position of the legislator and B the position of the subject. In the consensus-solution, both A and B occupy the legislative position but only in so far as they are representatives of the deep consensus that defines the social order. In other words, they hold the position in their capacity as ‘true citizens’. We also can discern something that is formally analogous to the lex-relation in the ‘economic solutions’. There, A and B are so to speak legislators, but each of them is so only with respect to himself and, in the case Property, with respect to his own means, his property.

The ius-relation most clearly finds a place in the property-solution. Neither A nor B having any say or authority over the other, any interaction between them must be justified in terms of their mutual consent and contractual obligations. There is no other lawful way in which either of them could gain access to the means controlled by the other to reach ends that are beyond the powers embodied in his own means. Theoretically, we also could subsume the relations between A and B in the abundance-solution under the ius-relation, but there would be no point in doing so. Neither A nor B could gain anything from taking on obligations in a world without scarcity.

Obviously, in the unity-solution there is no place for the ius-relation, unless of course we posit the co-existence of two ‘units’, such as two adjacent but mutually independent cities or states. In that case, the problem of conflict still subsists. Short of a take-over of one city by the other or of a consensual merger, only something like the property-solution can avoid conflict. In any case, the ius-relation applies only to the ‘external affairs’ of the city, to its international relations. The same is true with respect to the consensus-solution, where the ius-relation moreover may find a place at the constitutional level, as a sort of agreement to agree.<sup>35</sup> The idea of an order of *ius* underlying

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<sup>34</sup> The same is true for ‘distributive justice’. Literally, the term stands for a distribution according to principles on which the parties had agreed. It can then be interpreted without reference to any particular social setting. When used for distributions that are meant to serve some ‘social purpose’, the term stands for a distribution based on an appreciation of merit (which is necessarily relative to some task or purpose). ‘Social justice’—the equal satisfaction of everybody’s wants by society—is a distribution regardless of agreement or merit. It harks back to the Marxian illusion that we all can and are entitled to do what we want while society takes care of production (see note 6 above).

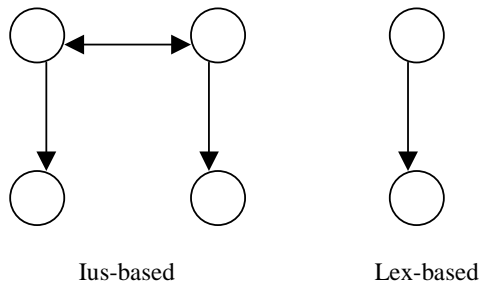
<sup>35</sup> Apparently, in Roman law, *ius* took precedence over *lex*. Cicero informs us that legislative proposals were submitted under the condition that the proposal was not contrary to *ius*: ‘Si quis ius non esset rogarier, evs ea lege nihilvm rogatvm.’ M.T.Cicero, *Pro Caecina* §95. The quotation can be found at



ing and constraining legislative power is essential to classical constitutional thought: some exercises of power are simply ‘not done’, regardless of the observance of formal and procedural niceties, because they fall outside the scope of the assumed agreement to agree. The ‘real’ constitutional consensus, as Rousseau pointed out, is ‘not graven on tablets of marble or brass, but on the hearts of the citizens’.<sup>36</sup> However, citizens as such—being no more than artificial persons defined by the legal and constitutional rules of society—have no heart. Human beings do, and they must be cajoled into identifying as perfectly as possible with the role of the citizen they are supposed to perform. Hence—and this was Rousseau’s substantial political point—either politics is successful indoctrination of the ideology of citizenship or it is no more than the usual clash of particular interests. That leaves us with the question: ‘Who is supposed to do the engraving?’ Where there is no consensus on the answer to that question, the ‘real constitutional power’ is probably the most obstinately contested scarce resource in the political arena. That is particularly true when the consensus is not the living soul of a homogeneous local community but some presumed thing that must again and again be discovered by the ritual of complex procedures of social decision-making with unpredictable outcomes. As De Jasay has argued, ‘It is a strange supposition that politics goes on within constitutional constraints, but that the constraints themselves are somehow above politics, determining it without being determined by it like any other product of collective decision-making.’<sup>37</sup>

*Natural law and its politically motivated denial*

From the above considerations, we can induce the basic structure of law. It is an interpersonal order that is ius-based, as shown in the figure. It comprises at least two



ius-related autonomous persons. They may be natural persons or non-natural persons, each of them exercising legislative power over his own property—the means of action, which may be material things or non-autonomous persons, that belong to him.<sup>38</sup> If we assume the existence of only one autonomous person, the formal structure of law is reduced to a lex-based order. Simple as

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www.TheLatinLibrary.com under Cicero > Orationes > Pro Caecina (March 27, 2002).

<sup>36</sup> J.-J.Rousseau, *The Social Contract* (1762), Book 2, chapter 12 (G.D.H.Cole’s translation for Everyman’s Library, E.P.Dutton & Co. Inc.). As Joseph Servan de Gerbey put it, ‘A imbecilic despot may be able to constrain slaves with chains of iron; but a true politician binds them more effectively with the chains of their own ideas... [T]he soft matter of their brains is the firm basis of the mightiest Empires.’ My translation from the quote in L. Jerphagnon, *Le divin César; Etude sur le pouvoir dans la Rome impériale* (Tallandier, Paris; 1991), p.1.

<sup>37</sup> Anthony de Jasay, ‘The rule of forces, the force of rules’ in his *Against Politics* (Routledge, London; 1997), p. 137

<sup>38</sup> Notice that we have generalised the lex-relation (‘legislative power’). It applies also between two positions one of which is occupied by a ‘person’ and the other by a material object, and not only between two positions, each of which is occupied by a ‘person’ (the one a ‘ruler’ and the other his ‘subject’ or even his ‘property’). Let us express that generalised relation by means of the formula ‘x belongs to p’ (where ‘x’ stands for a means or a person and ‘p’ for a person). We can then use it as a primitive expression to construct a basic formal language that is capable of describing all of the conflict-solution schemes discussed earlier in the paper.

it is, the schematic representation of the ius-based interpersonal order has many interesting properties, but this is not the place for the details of a formal analysis.<sup>39</sup>

From a philosophical point of view, the analysis is of interest primarily when we consider how human persons fit into the scheme, leaving aside all kinds of supernatural persons and piercing through the ‘corporate veil’ of social constructions. At least at the moment of first contact, before either one has had a chance to do anything to the other, a natural person can stand only in the ius-relation to another. They are, at that moment, two independent (free) persons of the same natural kind, neither one being subordinated to the other. Of course, in this case, *ex hypothesi*, there can be no subordination in consequence of some pre-existing iura or of some previous injustice committed by one of them against the other. They are in a Lockean ‘state of nature’, which is the convivial order by another name. Their relation is according to the natural law.<sup>40</sup> In terms of a once current definition of law, it is a relation characterised by freedom and equality.

A person’s freedom under the natural law comprises any action that is compatible with the natural law of conviviality. It includes taking on obligations towards other persons and by implication entering into society with them provided the society in question is itself compatible with natural law. It does not include coercing others into submission either to him or to a society of which he is a member. It does not include coercing other persons who are in society with him, except to enforce in the agreed manner the rules according to which they had consented to behave and to act. Nor does it include coercing others who are in society with him by taking anything from them that they had not agreed to invest in that society. In justice, withholding the benefits of membership is the only proper way in which to enforce social rules and regulations. The ultimate sanction is expulsion, if that option has not been foreclosed at the constitutional level. Most societies can live with those limitations, but political societies, states in particular, obviously do not. Consequently, there is the problem of justifying the very existence of such political societies.

Logically promising strategies for addressing that problem involve the rejection of freedom or equality, either of which is a necessary condition of natural law. Such rejections have been based on either one of two arguments: one is that the condition (freedom or equality) is a true but undesirable and possibly dangerous state of affairs; the other is that the condition is no more than an illusion. Thus, Plato insisted that politics must resort to what he called ‘a shameful lie’. All citizens must be taught that they are children of their country (and therefore brothers and sisters), but also that they are by divine ordinance destined individually for unequal social ranks.<sup>41</sup> That indoctrination is necessary to ensure that they remain unaware of their natural condition and to make them accept social inequality. Similarly, Hobbes argued that equality was the root of all the evils of the ‘natural condition of mankind’,<sup>42</sup> and that only an

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<sup>39</sup> The details can be found in ‘The Logic of Law’, <http://allserv.rug.ac.be/~frvandun/Texts/Articles/LogicOfLaw.djvu>. (The required Djvu plug-in can be downloaded from the same page). The essay is concerned mainly with formal analysis, which implies that the primitive terms of the language are left without a fully specified interpretation in terms of things and events in the empirically observable world. For example, the analysis concerns ‘persons’ but they are ‘persons of an unspecified nature’. However, as the essay demonstrates, it is possible to introduce the concept of a natural person in the formal analysis. We can then analyse ‘law’ as an order of natural persons or as an order of non-natural (artificial, ‘legal’, fictitious, imaginary or supernatural) persons.

<sup>40</sup> ‘Natural law’ in the sense of ‘natural order’ or ‘order among natural persons’, not in the Lockean sense of ‘Reason’ dictating respect for that order.

<sup>41</sup> Plato, *The Republic*, Book 3, 413c-415c.

<sup>42</sup> Hobbes, *Leviathan*, Part 1, chapter 13.

absolute political inequality<sup>43</sup> offered any hope of peaceful co-existence. Aristotle, on the other hand, went to great lengths to prove that social position is merely a reflection if not a fulfilment of natural endowment. The doctrine of ‘the slave by nature’ was only the most telling illustration of his belief in natural inequality. For Aristotle, the freedom of the elite of noble citizens rested on their command over the lesser breeds of men. The natural inequality among human beings was, therefore, his justifying ground of the socially necessary hierarchy and its division of human beings into free citizens and unfree subjects.

Until far into the eighteenth century, most attacks on natural law (in the sense of order among natural persons) were indeed attacks on ‘equality’. Later, the focus of the attacks shifted to ‘freedom’. Rousseau maintained that he could justify the fact that, although they are born free, people everywhere are in chains.<sup>44</sup> Natural freedom, though a fact, could be judged to be dangerous to human existence; if so then it should be replaced with civil liberty, which is obtained when every citizen becomes one with all the other citizens and therefore with the state. Civil liberty, then, required the transformation of the human being from a natural, independent person into an artificial or ‘moral’ person, the citizen. The latter is everything a natural human being is not. Above all, the citizen is only a part of a larger whole, and a part that is impotent without the assistance of the rest.<sup>45</sup> A person’s natural freedom, his capacity for independent action and thought, must be eliminated if a state is to be legitimate and equality is to be instituted. Of course, that equality is no longer a qualitative sameness or likeness of natural kind, but a quantitative equality of rank and power in political society. Karl Marx went one giant step further by arguing that the *particular* individual’s freedom is an illusion—a reflection of his false consciousness. It will remain so until that individual is transformed into a true species-being and as a *universal* individual absorbs in himself the whole of humanity. Only then human society will become a universal society without differentiation of class or rank—a society of equals.

The vigorous currents of egalitarian and collectivist thought in the twentieth century and the strident rhetoric of ‘solidarity’ indicate the enduring popularity of that mereological conception of the human person as an integral and dependent part of a larger whole.<sup>46</sup> So does the conception of his liberty as equal participation in the ‘democratic self-determination’ of that whole. It obviously does not bear any resemblance to a person’s freedom within the natural law. As far as a seemingly overwhelming majority of Western intellectuals is concerned, the idea of justice as freedom among likes holds no attraction at all. Even many ‘liberals’ cannot break free from the modern conception of liberty and equality as nomocratic legal constructs that must be democratically validated, regulated and enforced.

#### *Natural order, the problem of adequate defence*

The peculiar problem of the natural law theorist<sup>47</sup> is the vulnerability of the Property-solution that we noted earlier. To put it differently, it is the problem of the adequate

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<sup>43</sup> Hobbes, *op.cit.*, Part 2, chapter 17.

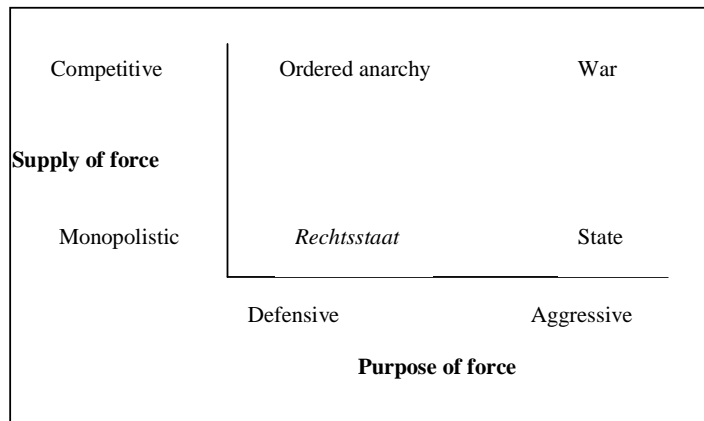
<sup>44</sup> Rousseau, *Du Contrat Social*, Book 1, chapter 1.

<sup>45</sup> Rousseau, *op.cit.*, Book 2, chapter 7.

<sup>46</sup> On the interpretation of those mereological ideas as reflecting a religious paradigm shift, see Frank van Dun, ‘Natural Law, Liberalism, and Christianity’, *Journal of Libertarian Studies*, Volume 15, 3, Summer 2001, p.1-36

<sup>47</sup> Unfortunately, the term ‘natural law’ tends to be associated with a number of meta-natural (‘meta-physical’) ethical or moral theories or even with particular authors. In modern times, many of those authors quickly passed from a perfunctory consideration of the natural convivial order to a theoretical exposition of an ideal social order. They more or less abandoned the classical understandings of justice

defence of every person against aggression and coercion—in particular against organised aggression and coercion, against aggressive and coercive societies. Statistically, in a man-to-man confrontation, the defender stands at least an equal chance against the attacker. Against an organised attack, he is nearly helpless unless he can organise an adequate force in defence of his property. However, it is in the nature of things that defensive force is reactive, organised to be effective against known threats. The initiative lies with the aggressors. Innovative aggressive techniques and organisations, against which no adequate defence has yet been developed, provide a window of opportunity for aggressors.<sup>48</sup>



We can approach the problem of the instability of the convivial order by considering a graph. It represents the types of outcome that we can expect from different regimes concerning the availability of organised force. Each regime is characterised by a position on the organisational dimension (from mono-

polistic to competitive supply of force) and by the prevalence of force used for either defensive or aggressive purposes. Under a regime where the defensive use of force prevails and where defensive force is supplied competitively (that is, where people actually can choose with whom they will contract for defence), the likely outcome is ordered anarchy. Such a regime is the individualist-anarchist's ideal of a pure rule of law. A competitive supply of adequate defensive force may give a person all the assurance he needs, but it is vulnerable to innovative aggression. Moreover, competitive rivalries among organised forces may degenerate into war, the same outcome as under a regime of competing suppliers of aggressive force.<sup>49</sup> In any case, it may not be easy for an individual to switch at short notice to another supplier of defensive force if he gets into a conflict with his current supplier and the latter does not want to let him go. Which other supplier will be willing to take on an organised force merely to gain a customer, who so far has not yet made a single payment or contribution?

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as 'what contributes to ius' or 'respect for ius'. In its place they ushered in the habit of interpreting 'justice' as the quality of their particular ideal, indeed often utopian, social order. The plethora of theories of the 'ideal social order' provided sceptics with an easy target for scathing criticism and ridicule. However, the idea that natural law can only be studied by reading the works of Aquinas, Pufendorf, Wolff or Finnis is as absurd as the idea that one can only study inorganic nature by reading Aristotle, Newton or Einstein. It may come naturally to legal positivists, for whom law is nothing but what the appropriate authorities, legislators and judges, declare to be laws; but it is nonetheless nonsensical.

<sup>48</sup> Politically noteworthy examples are the invention of fire-arms and the organisation of standing armies towards the end of the middle ages, and the development of powerful techniques of 'rational administration' and of vast public bureaucracies and police forces in the 19th and 20th centuries.

<sup>49</sup> Of course, just as there are individual rogues, so there may be rogues among the suppliers of organised force. If history shows one thing, it is that protection rackets can be very lucrative, durable and eventually successful in securing territorial monopolies of force. The development of a system of territorial monopolies may result in a sort of international ordered anarchy, in a war, or in the creation of a larger monopolistic political society. Most modern states are a 'unification' of diverse small, often non-political societies. The contemporary tendency towards interstate co-operation and the formation of supranational political entities (and pressure groups) moves in the same direction.

The logical opposite of the rule of law is the police state.<sup>50</sup> It is a monopoly of force engaging in organised aggression possibly against outsiders but in any case against its subjects to raise revenue and to force them to implement its policies (which to some degree may be paternalistic, ‘for the good of the subjects’). Defensive force supplied monopolistically incorporates its ‘clients’ willy-nilly into a single defensive organisation (as in a ‘*Rechtsstaat*’). However, if a person is dependent on one supplier of defensive force, he is virtually at the latter’s mercy and may end up as his subject. There is little he can do against that organisation, whether it sticks largely to a defensive function or—as according to De Jasay it is wont to do—proves itself a budding police state. In any case, the individual will find himself involved with an organised society specialising in the use of force and consequently with its political life.

In virtually every society there is a significant amount of politics. There are people jockeying for position, trying to make a career, quarrelling over rewards and disciplinary measures and the distribution of the social income. Almost everybody will use all sorts of pressure and influence (perhaps fraud and occasionally violence and force) to sway its officials’ decisions or to build coalitions. In societies specialising in the use of force, those activities are likely to be far more intense than in other social contexts. That is because in such political societies the stakes are not limited to what people are willing to pay but extend to what they can be made to pay, short of driving them to open revolt or illegal activity.

### III. The Prisoner’s dilemma in the convivial order and in society

*Which game shall we play?*

In a political society, individuals continually face the familiar dilemma of ‘asking what I can do for my country’ or ‘asking what my country can do for me’. We may expect that the second alternative would end up as the dominant strategy for most people. In a politically developed society, filled to the brim with vote-seeking politicians, pressure groups, lobby’s, consumer advocates and consultants, that expectation is eminently reasonable. The ‘good citizens’ are sure to get the ‘sucker’s payoff’. However, the outcome of almost everybody trying to become a rent-seeker and a tax-consumer is likely to be what De Jasay called ‘the churning society’.<sup>51</sup> The irony of this ‘game’ is that unless there are people choosing the second strategy, the others will get no answer to the question, what they can do for their country. The country asks nothing but what it is made to ask by those who are in charge of its vocal organs.<sup>52</sup>

Do individuals prefer living in a country that asks nothing to living in a churning society? If they do, political society puts them in a classic Prisoner’s dilemma. However, it is one that is likely to maintain its character even if it is played an indefinite number of times. Indeed, the benefits generated by those who do not ask what their country can do for them often can be appropriated by those who are continuously looking for new answers to that question. It is not part of the game that the ‘good citizens’ can securely accumulate the gains (if any) from their public-spirited actions in any round. On the contrary, those gains become part of the stakes in the next round. That is why in politics the key-players never tire of exhorting their less sophisticated fellows to ever-higher degrees of good citizenship. Indeed, the ‘good citizen’ must be thoroughly naïve if he believes that his politically active fellow-citizens will leave

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<sup>50</sup> I use the term ‘police state’ here in its original meaning of a state organised to mobilise men and resources for the purpose of implementing its external and internal (social) policies.

<sup>51</sup> Anthony de Jasay, *The State*, op. cit., p.232

<sup>52</sup> One way in which to interpret J.F.Kennedy’s call ‘Ask not what your country can do for you, ask what you can do for your country’ is ‘Don’t tell us what to do, we’ll tell you’.

him free to invest his resources, which he did not spend on rent-seeking, and to walk away with the payoff. The same is true if he believes that the politically active citizens will solve the political Prisoner's dilemma by enforcing 'good citizen' behaviour on themselves. Their role in public life precisely is to translate into policy what they and their clients ask their country to do for them.

There is, then, a significant difference between Prisoner's dilemmas in a convivial order and in a political society. In a convivial order, the co-operative strategy in a game G that prima facie looks like a Prisoner's dilemma usually has opportunity costs in the form of benefits forgone by not participating in other games. The co-operative option may imply making a contribution to the production of a particular 'public good'. However, making that contribution entails that fewer resources are available for investment in the production of other goods, be they private or public. On the other hand, the option of not contributing to the public good that is at stake in G keeps those resources available for other uses. When the benefits forgone are entered, as they should be, in the calculation of the payoffs for co-operative action, then G may turn out not to be a dilemma of any kind. 'Non-co-operation in G' often is a misnomer for co-operation in any number of other games. Looking at G as if it were the only game in town misses the point of living in a convivial order, where people usually can choose which games they will play. It follows that there may be far less Prisoner's dilemmas in a convivial order than the literature suggests. It also follows that enforcing co-operation in a game such as G, on the hypothesis that it is a Prisoner's dilemma, may result in a significant loss of utility—even if the subjects are indifferent between being coerced and being asked politely to contribute. In a political society, on the other hand, the games of politics are not optional. The benefits forgone by adopting the 'co-operative' strategy of asking what you can do for your country are the benefits that come from asking what it can do for you. If such a game looks like a Prisoner's dilemma, it does so because it probably is one. Eventually, even the 'good citizens' will become wise to the realities of politics.

Of course, the standard application of the Prisoner's dilemma in political theory is to prove that people in a convivial order cannot solve the problem of the production of public goods. Anthony de Jasay has done more to dispel that myth than anybody else has. Organised societies, in particular political societies, produce their own Prisoner's dilemmas. If the argument above is sound, they are of a more perverse character than such dilemmas are likely to be in a convivial order.

#### *An encounter in the woods*

De Jasay also has pointed out, pertinently, that we often have reason to rejoice when some groups do not succeed in solving their public goods problem either through 'rational negotiation' or because they understand the benefits of co-operation in an indefinitely repeated Prisoner's dilemma super-game.<sup>53</sup> For themselves, rival gangs could probably reach a Pareto-superior outcome, relative to the usual gang war, by co-operating in setting up and maintaining a consensus-based syndicate or uniting into a

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<sup>53</sup> Or because they are 'constrained maximisers', as David Gauthier, *Morals by Agreement* (Clarendon, Oxford, 1986) would have it. On the fallacy involved in that 'solution' of the Prisoner's dilemma, see De Jasay, *Against Politics*, op. cit., p.26-27. Michael Taylor, *Anarchy and Cooperation* (Wiley, New York; 1976) introduced the Prisoner's dilemma supergame. However, it is a completely static analysis. Before the first round starts, each player is supposed to choose a strategy that will determine his move in every succeeding round (no matter what his circumstances may be in a particular round, no matter which other 'games' might come to his attention in the mean time). That is perfect for playing computer tournaments (Robert Axelrod, *The Evolution of Co-operation* (Basic Books, New York; 1984)), but not particularly illuminating for analysing the historical existence of the species.

single commonwealth of gangsters. The question is, do we want them to succeed and to become more efficient in looting us? Hobbes’ answer, of course, was that we should want that commonwealth if we did not have it already. That answer still carries enormous prestige, especially among those who have noticed that the Hobbesian Sovereign might be a democratic parliament as well as an absolute monarch.

Underlying Hobbes’ answer, there is the assumption that if there might be one real psychopath at loose in the world, the rational course for every other person would be to act like a psychopath. After all, he might be the next person coming up the road—so better beat him at his own game by striking first. In any case, the next person coming up the road is likely to think that you are that psychopath—and that again is reason enough to strike him down first. If we pursue that kind of reasoning, we get a good view of the sort of world Hobbes held to be inevitable if there were no state, but also of what Leibniz referred to as Hobbes’ fundamental fallacy.<sup>54</sup>

Let us simply ask, what will happen if two strangers, each of them carrying a sword and some valuables, meet on a narrow path in the middle of a dense forest? Put the question to a dozen novelists, and you will get at least twelve different stories. However, when we put it to an American social scientist of the twentieth century, he is likely to insist that the scene be interpreted as a Prisoner’s Dilemma illustrating life in Hobbes’ ‘Naturall Condition of Mankind’.

|          |               |                   |                   |
|----------|---------------|-------------------|-------------------|
|          | <b>B</b>      |                   |                   |
| <b>A</b> |               | <b>Disarm</b>     | <b>Attack</b>     |
|          | <b>Disarm</b> | Guaranteed Peace  | Defeat<br>Victory |
|          | <b>Attack</b> | Victory<br>Defeat | Battle            |

*Hobbesian encounters*

A conventional representation of the scene as such a dilemma is given in the figure above. The Hobbesian thesis is that the men have no rational option but to attack one another, given that there is no effective police power to safeguard each traveller from an attack by the other. For each of them, the dominant ‘strategy’ is to attack the other, no matter what the other’s intentions might be. A battle between them is then the inevitable outcome—the equilibrium-solution<sup>55</sup> of the game-theoretical representation of their encounter. It is, of course, a Pareto-inferior outcome relative to the outcome that would have resulted if each of them had laid down his sword. That we are dealing with a dilemma becomes clear once we note the assumed (and indeed reasonable) preference orderings of the travellers:

$$Victory > Guaranteed\ Peace > Battle > Defeat.$$

Lest we think that this story has an unavoidably bloody outcome, we should note that Hobbes himself pointed the way out of the dilemma—indeed, out of the misery of the natural condition of mankind. A ‘nice’ bloodless solution is likely when one of the travellers realises in time that he is no match for the other, throws his weapons down and offers to become the other’s faithful servant. He thereby puts himself at the mercy of the stronger one, but then he has at least a chance that the other accepts his offer and, being able to enforce his will, agrees to let him live. Let us assume that the other

<sup>54</sup> See note 15.

<sup>55</sup> Never mind the implausibility of referring to a battle as an ‘equilibrium’ or a solution, let alone an equilibrium-solution.

does not disappoint him. The scene ends with both of them walking away as a small company, their forces united. The next man they meet sees that he is no match for the two of them and joins their little band. Before long, not only no solitary traveller but also no small company of travellers will dare to resist the group. All will make haste to join it, flattering its leader with the solemn declaration that they have no trust in those that do not trust him. The virgin forest gives birth to a sovereign and his state. The rest is politics and, as Hobbes would have it, comfort, convenience, and commodious living for all.<sup>56</sup>

Let us return to our question. ‘What will the travellers do?’ This time we put it, say, to a seasoned trapper who has had many encounters with strangers in the woods. ‘What normally happens when I run into a stranger in the woods,’ he answers, ‘is that we approach one another, watching the other’s every move, holding one hand close to our weapon but taking good care not to do anything provocative. In short, we are on our guard. That’s how we survive.’

Each traveller now has three strategies: ‘Disarm’, ‘Be vigilant’, and ‘Attack’. We must consider, therefore, nine possible combinations of strategies. In addition to the four outcomes that we know already from the Hobbesian interpretation, there are five new ones of three different types. 1) One traveller is vigilant while the other disarms—the result being that one is strong and the other weak. 2) One of them attacks while the other remains vigilant—the encounter turns into a confrontation between an aggressor and a defender. 3) Both remain vigilant, making as it were an armed peace as they walk by each other. That is a far more complicated scheme than the social scientist put before us. We may think of it as depicting encounters in the Lockean ‘state of nature’ where every person ‘hath a Right to punish the Offender, and be Executioner of the Law of Nature’.<sup>57</sup>

| A      | B           | Disarm               | Be vigilant           | Attack                |
|--------|-------------|----------------------|-----------------------|-----------------------|
| Disarm | Disarm      | Guaranteed Peace     | Strength<br>Weakness  | Victory<br>Defeat     |
| Disarm | Be vigilant | Weakness<br>Strength | Armed Peace           | Aggression<br>Defence |
| Disarm | Attack      | Defeat               | Defence<br>Aggression | Battle                |

*Lockean encounters*

There is no obviously reasonable order of preference among the various possible outcomes, even if we leave the preference ranking of the outcomes of the first Hobbesian representation as they were. However, there are preference rankings that do not affect the Hobbesian outcome. For example, any ranking that satisfies the following conditions leaves us with ‘Battle’ as the equilibrium outcome:

- Victory > Strength > Guaranteed Peace*
- Aggression > Armed peace > Weakness*
- Battle > Defence > Defeat*

Assuming, reasonably, that ‘Guaranteed Peace’ or even ‘Armed peace’ is preferred to

<sup>56</sup> The same outcome could be assured even when the parties are approximately equal in strength prior to the battle. It is in the nature of combat that a single blow can upset that balance and force one party unconditional surrender and submission. (Hobbes, *Leviathan*, Part 2, chapter 20)

<sup>57</sup> Locke, *Second Treatise of Government*, Chapter II, par. 8, in fine. Locke’s state of nature was not a ‘state of war’. It was, arguably, something very close to the middle road of ‘Armed peace’.



‘Battle’, the equilibrium-outcome is still Pareto-inferior—no escape from the Hobbesian dilemma here! Note, however, that it is not evidently reasonable to prefer being an aggressor to enjoying an armed peace. Nor is it evidently reasonable to prefer to rush into an open battle rather than to take a defensive position and try to hold it.<sup>58</sup> Let us suppose that the preference rankings satisfy the following conditions

*Victory > Strength > Guaranteed Peace*  
*Armed peace > Aggression > Weakness*  
*Defence > Battle > Defeat*

Then the equilibrium-outcome is ‘Armed peace’ (exactly as the trapper told us to expect). We still might have a dilemma if ‘Guaranteed Peace’ is preferred to ‘Armed peace’—but that would be a dilemma of an entirely different sort than the Hobbesian one. In fact, in the setting of our story, there is no obvious reason to prefer ‘Guaranteed Peace’ to ‘Armed peace’ since the former involves losing one’s weapons. Thus, there are no a priori reasons why ‘Armed peace’ should be Pareto-inferior. Hobbes, not one to let facts get in the way of theory, circumvented this result by defining ‘Armed peace’ to be a manifestation of war.<sup>59</sup> With no more to go on than one of his innovative definitions, Hobbes made it appear as if life under an armed peace is just as ‘solitary, poore, nasty, brutish and short’ as it is in an actual war-zone. No wonder Leibniz was unimpressed.<sup>60</sup>

Of course, we should not attach too much weight to game-theoretical models. ‘Modelling’ the human world is a tricky business. Moreover, models are cheap. With a little ingenuity we can make them produce any desired result. In any case, real situations do not come with labels like ‘This is a Prisoner’s dilemma’ attached to them. The mere fact that one does not see people in a convivial order produce what one has determined for oneself to be a public good, is no indication that those people are trapped in such a dilemma. They may have other priorities. What else can we expect in a world of endemic plurality, diversity and scarcity?

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<sup>58</sup> It might be rational to act as an aggressor, if there were some assurance that aggression pays, but that it does is no law of nature. See Anthony de Jasay, *Against Politics*, Routledge, London & New York, 1997, p.199.

<sup>59</sup> See his definition of war (quoted in the text to note 14). Hobbes assumed that ‘Attack’ in any case dominates ‘Be vigilant’: ‘there is no way for any man to secure himself, so reasonable, as Anticipation; that is... to master the persons of all men he can.’ (*Leviathan*, Part I, chapter 13).

<sup>60</sup> Locke also was unimpressed. Hobbes had maintained that only a fully assured peace is not a state of war. However, he also had maintained that the *pax victoris* that results from the unconditional submission of many to one is really the only way to achieve a *victoria pacis*. However, as Locke noted, the *pax victoris* need mean no more than the end of actual fighting; in other respects, it still is war by another name. Locke, *Second Treatise of Government*, e.g. chapter 11, par. 137.